UNIVERSITY of STIRLING

The Compatibility of Anti-Dumping and Safeguard Laws of the Cooperation Council for the Arab States of the Gulf with WTO Law: A Critical Analysis

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Abstract

The World Trade Organisation (WTO) does not oblige its members to develop their own provisions and legislations to impose AD and SGM or to carry out investigations. When WTO members adopt such laws, however, they must be compatible with WTO rules, as stipulated in Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organisation (i.e., the WTO Agreement). The objective of this study is to assess the compatibility of the Cooperation Council for the Arab States of the Gulf (GCC) AD and safeguard laws with the relevant WTO rules. A doctrinal approach was applied to critically analyse and assess the compatibility of the text of the GCC Common Law on AD and Safeguards with their relevant WTO rules. Generally, the results indicated that a few areas of incompatibility exist between GCC Common Law on AD and the WTO AD Agreement (ADA), primarily in relation to those Articles governing the transparency of investigations and announcing final conclusions. Many of these incompatibilities arise from the sheer fact that the GCC's investigating authorities interpret their own regulations, for example those that define GCC domestic industry and determine causal links between dumping and injury and non-attribution analyses. The text of the GCC Common Law on Safeguards is fully compatible with the WTO Agreement on Safeguards (SA), except for the Articles governing the transparency of investigations and public notice of final conclusions. The XX text, however, is incompatible with the legal requirements under Article XIX of GATT 1994. There are other significant areas of incompatibility between the WTO safeguard system and the GCC's safeguard practices due to how the GCC investigating authority interprets and implements the definitions of terms such as 'like product' or 'product under investigation' for the GCC's domestic industry, and due to principles of transparency in receiving complaints and initiating investigations. The results suggest that GCC Members may need to reform their AD and safeguard laws to align with WTO laws. The project provides some recommendations to guide these changes.

Author’s Declaration

I declare that I wrote this report using my own words, and that all materials from other sources, such as books, articles, and thesiss, are clearly quoted, paraphrased, and acknowledged. This thesis has not been previously submitted for a degree or examination at the University of Stirling or any other university.

Dedication

This thesis is dedicated to my father, who untimely passed away on 18 January 2019. His blessing, inspiration, and motivation have been key forces behind my efforts to pursue this academic study.

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List of Abbreviations

ACP	African, Caribbean and Pacific
ACWL	Advisory Centre on WTO Law
AD	Anti-Dumping
ADA	Anti-Dumping Agreement
ADP	Anti-Dumping Practices
CLAD	Common Law on Anti-Dumping
CLADCSM	Common Law on AD, Countervailing, and Safety Measures
CLSM	Common Law on Safety Measures
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Commission
EPAs	Economic Partnership Agreements
EU	European Union
GATS	General Agreement of Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC-TSAIP	GCC Bureau of Technical Secretariat for Anti-Injurious Practices in International Trade
GCC	Cooperation Council for the Arab States of the Gulf
ITO	International Trade Organisation
MFN	Most-Favoured Nation
NME	Non-Market Economy
NTBs	Non-Tariff Barriers
PMS	Particular Market Situation
POI	Period of Investigation
RoI	Rules of Implementation
SA	Safeguard Agreement

SCMA	Subsidies and Countervailing Measures Agreement
SG&A	Selling, General, and Administration
SMST	Salzgitter Mannesmann Stainless Tubes
TPRM	Trade Policy Review Mechanism
TRIMs	Agreement on Trade-Related Investment Measures
TRQ	Tariff-Rate Quotas
UAE	United Arab Emirates
USA or US	United States of America or United States
WTO	World Trade Organization
Committee on ADP	Committee on AD
FANs	Friends of AD Negotiations
DSU	Dispute Settlement Understanding
NGO	Non-Governmental Organization
ACWL	Advisory Center on WTO Law
SGM	Safeguard Measures

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Chapter 1: Introduction

1.1 Background

The World Trade Organisation (WTO) is an international organisation that develops and applies global trade rules with the aim of enhancing trade flow between its member nations. It simultaneously provides these states with the right to protect their domestic industries and markets from the effect of such unfair trade practices as dumping and increased imports and promotes fairer trade by establishing legal frameworks to govern such practices. The main goal of the World Trade Organization (WTO) is to promote international trade and encourage economic liberalisation among its members in order to increase imports among WTO Members.[1] General trade treaty practices recognise, however, that where import liberalisation is difficult to sustain, the presence of certain circumstances tends to impact negatively the functioning of such WTO agreements.[2] One of such agreements is the AD, countervailing and safeguard agreement.

Anti-dumping AD (AD) laws and safeguard measures (SGM) are simultaneously regulated by domestic and international controls under the supervision of the WTO. WTO members develop their own local measures, but these may result in a discrepancy with international obligations under WTO law.[3] WTO law on AD and SGM restrict members from developing domestic versions contrary to the agreements already in place, requiring them instead to ensure that their laws and regulations are consistent with WTO international standards.[4]

WTO does not mandate its members to develop and implement AD or safeguard provisions and legislation, but if one adopts such laws that impact other Members, the organisation requires them to be wholly compatible with WTO framework provisions. This condition is stated in Article XVI: 4 of the WTO Agreement. Thus, the failure of any WTO member to adhere to this article renders the Members at risk of violating its obligations under Article

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[2] United Nations (UN), 'SGM' in Nations U (ed) *United Nations Conference on Trade and Development Dispute* (UN 2003)

[3] S Khanderia, 'The Compatibility of South African AD Laws with WTO Disciplines' (2017) 25(3) African Journal of International and Comparative Law 347.

[4] M Zanardi, 'AD Law as a Collusive Device' (2004) 37(1) Canadian Journal of Economics/Revue canadienne d'économique 95.

XVI.[5] The only possible way for a member country to protect its domestic market, therefore, is to adhere to the WTO framework. The WTO Agreement and its annexes were mainly the result of negotiation between most countries worldwide, and they then signed the documents. These signed legal documents serve as the source of the legal framework for conducting trade between countries.

Dumping, i.e., introducing a product of country A into the commerce of the country B at less than its normal value to gain and grow influence in the country B,[6] is a centuries-old tactic.[7] Global industrialisation during the nineteenth century increased dumping, and in an attempt to combat the harmful effects of this practice and protect their domestic market and industry, trading countries often resorted to creating general and permanent tariff walls.[8] These protective measures were nevertheless insufficient to deal with special and temporary dumping cases, and an urgent need arose for a new instrument to control certain products at particular times.[9] Developed countries such as Canada, Australia, the United States of America (USA, or US), New Zealand, and European nations, began implementing AD laws in the early 20th century, with developing countries follow suit in the 1950s.[10]

During the 1920s, the League of Nations debated a paper on the effects of price discrimination and unfair competition.[11] Dumping becomes price discrimination when the exporting countries sells their products at low price in the importing country, and domestic industry revenues decreases. If the exporting country reduced the price very low, even below their cost of production, then it takes the form of predatory pricing, and shuts down the local

[5] Article XVI:4 of the WTO Agreement states that 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements. (emphasis added). AD Agreement (ADA) located in Annex 1A of the WTO Agreement.'

[6] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994, art 2.1; A Lukauskas and others, *Handbook of Trade Policy for Development* (OUP 2013).

[7] N Grimwade, *Antidumping Policy: An Overview of the Research* (Centre for International Business Studies 2009).

[8] For example, in the United States, the Wilson Tariff of 1894 made it unlawful for foreign producers to combine or conspire to monopolise the domestic market. D Irwin, 'The Rise of US AD Activity in Historical Perspective' (2005) 28(5) The World Economy 651, 668.

[9] RAA Raslan, *AD: A Developing Country Perspective* (vol 21, Kluwer Law International BV 2009).

[10] AD law was introduced in Canada in 1904, in Australia in 1906, in the USA in 1916, in New Zealand in 1921, and in the European Community in 1968. M Zanardi, 'Antidumping: What are the Numbers to Discuss at Doha?' (2004) 27(3) The World Economy 403; R Krishna, 'AD in Law and Practice' Policy Research Working Paper (World Bank Group 1999).

[11] TP Stewart, *The GATT Uruguay Round: A Negotiating History, 1986-1992* (vol II, Kluwer Law and Taxation Publishers 1993).

businesses, and hold the monopoly in the market of local industry. This reduces the competition, that is why dumping is anti-competitive and price discrimination strategy[12].

The debate failed to yield any tangible results, however, and it was not until the 1940s that earnest efforts were made to tackle the problem.[13] The United Kingdom (UK) and the USA proposed to establish the International Trade Organisation (ITO) to regulate international trade. One of the major duties of the proposed ITO was to develop AD measures.[14] The US assumed the responsibility of drafting an ITO charter that included provisions on AD and proposed the General Agreement on Tariffs and Trade (GATT). At the time, GATT was made operational until the changes in the ITO Charter was finalised and endorsed.

As posited by Milner, the USA played a leading role in international trade at that time, and it was expected that ratification of the ITO's charter by other signatories would begin soon after the US Congress ratified the ITO. However, it did not happen due to the isolationist and protectionist position taken by the Republican Party.[15] The influence of other interests including trade unions and peak farm associations on the Republican Party was high, and they opposed the ratification of the ITO's charter. Secondly there was weak communication between the American public and the trade policy makers, as the latter could not educate the the US Congressmen about the importance of having unified trade charter under ITO. The American public thought that adoption of the ITO would do little to change their living standards. This drove the ITO's charter off the US political agenda gradually, thereby causing the failure of the ITO to prevail over the trade horizon of the world.[16]

After attempts to establish the ITO failed, GATT provisions were brought into force in 1947,[17] and American suggestions regarding dumping were incorporated into GATT in the form of Article VI.[18] According to the first paragraph of Article VI of GATT 1947, dumping occurs when the 'products of one country are introduced into the commerce of another

[12] Kerr, William A, 'Dumping-One of those economic myths' (2001) 2(1753-2016-141106) Estey Journal of International Law and Trade Policy

[13] ibid 22-23.

[14] ibid.

[15] HV Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* (Princeton UP 1997) 139-141.

[16] ID Trofimov, 'The Failure of the International Trade Organization (ITO): A Policy Entrepreneurship Perspective' (2012) 5(1) Journal of Politics & Law 56.

[17] P van den Bossche, The Law and Policy of the World Trade Organisation: Text, Cases, and Materials (2nd edn, CUP 2008); S Lacey, Guide to International AD Practice (Wolters Kluwer Law & Business 2013), ch 3.

[18] H Andersen, *EU Dumping Determinations and WTO Law* (Kluwer Law BV 2009) 33.

country at less than the normal value of the products'.[19] Article VI further notes that if dumping occurs, the 'contracting parties' have the right to levy AD duties, the value of which should not be greater than the difference between the price in the importing country and the normal trading price of the product of the exporting country.[20] Nevertheless, Article VI remained vague and unclear, and it also failed to provide rules on how to investigate occurrences of dumping.[21] To correct the opacities and unclarities in AD laws, several rounds aimed at improving the contents and bringing more clarity into the rules and laws enshrined in AD took place, such as Kennedy (1962-1967), Tokyo (1973-1979), and Uruguay (1986-1989).

, As a result of the Kennedy Round, AD Code was generated, which entered into force in 1967. The Antidumping Code was never signed by the USA, which reduced its practical and legal significance. Briefly, Kennedy Round provided precise definitions, procedures, and rules of evidence for AD investigative processes[22]. A negative outcome is that the Kennedy Round AD Code was binding only on the contracting parties who signed it.[23] The Kennedy Round did not cover trade issues faced by developing countries with the developed countries, so another round, known as the Tokyo Round, launched in Japan, and was marked by the presence by developing countries[24]. It entered into force in 1980, however, only 27 Parties accepted to fulfil the requirements mentioned in the Code. The Code just served as a general framework for countries to follow in carrying out the investigations and imposing duties, and AD determining what constitutes 'material injury' and 'price undercutting', procedures pertaining to AD investigations[25].

[19] GATT 1947, Art VI.

[20] Stewart (n 10) supra note 15, 13.

[21] ibid 22-26.

[22] World Trade Organization, 'Pre-WTO legal texts' (World Trade Organization, 2023) < https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm> Accessed 07 Feb 2023

[23] JB Rehm, 'Developments in the Law and Institutions of International Economic Relations: The Kennedy Round of Trade Negotiations' (1968) 62(2) American Journal of International Law 403.

[24] World Trade Law, 'Agreement on implementation of article VI of the general agreement on tariffs and trade: Tokyo Round AD Code' (World Trade Law Net 12 Feb 2023) <https://www.worldtradelaw.net/document.php?id=tokyoround/antidumpingcode.pdf&mode=download> accessed on 12 Feb 2023.

[25] WTO, 'Technical information on AD' (World Trade Organization, 2023) <https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm> Accessed 12 Feb 2023.

Despite reforms of AD laws during the Tokyo Round, it was subject to criticisms from Members and legal experts for lacking the important instruments for enforcement of trade laws internationally in the Members; this resulted in the organization of the Uruguay Round. This round gave birth to the regulatory and monitoring structures within the WTO designed to enforce compliance of Members with trade remedies including AD laws, which involved adoption of General Agreement of Trade in Services (GATS); imposition of weighted tariffs mainly on the agriculture/forest products; Trade-Related Aspects of Intellectual Property Rights (TRIPS); Trade-Related Investment Measures (TRIMs); the Trade Policy Review Mechanism (TPRM); and a unified and predictable dispute settlement mechanism (Dispute Settlement Body (DSB)). The bodies developed in the Uruguay Round were assigned duties to review the compliance of Members at different intervals, and resolve the trade disputes on AD among Members.[26] Moreover, for the first time, agricultural products were brought under the multilateral trade disciplines.[27]

In addition to its AD laws, the WTO also tackled the issue of increased imports causing injury to the domestic markets. For this, it developed rules for Members to apply SGM which are part of the WTO's AD and Safeguard Agreement (ADA and SA). The Safeguard Agreement (SA) provides rules for applying SGM and establishing a new balance of rights and obligations between importing and exporting countries.[28] The main goal of these measures was to avoid circumstances in which the contracting parties suffered from disruption to their domestic market or an enforced withdrawal from their agreements, thus decreasing the overall level of liberalisation.[29]

However, it was discovered that contracting parties address injuries and increased imports by measures other than Article XIX SGM;[30] these were called grey area measures.[31] The reasons for shifting to grey area measures include difficulties in dealing with compensation requests from the remaining contracting parties in accordance with Article XIX. Moreover, difficulties arise in imposing SGM only against the main exporting countries (known as the "selective" application of SGM), which gave rise to the phenomenon of imposing bilateral voluntary export restraints (VERs). The problems inherent in bilateral VERs, such as

[26] JM Finger, F Ng and S Wangchuk, 'AD as Safeguard Policy' in RM Stern (ed), *Issues and Options for US-Japan Trade Policies* (U of Michigan Press 2002).

[27] DE Hathaway and MD Ingco, *Agricultural Liberalization and the Uruguay Round* (World Bank 1995).

[28] A MacGregor, 'The Unforeseen Developments Claim in WTO Safeguards Cases and the Pending Panel against United States Measures on Steel: An Easy Win for the EU?' (2002) 8 International Trade Law and Regulation 154.

[29] ibid.

[30] P Nicolaides, 'AD Measures as Safeguards: The Case of the EC' (1990) 25(6) Intereconomics 273.

[31] GD Holliday, 'The Uruguay Round's Agreement on Safeguards' (1995) 29(3) Journal of World Trade 155.

selectivity, orderly or alternative marketing arrangements and similar measures promote unfair trade practices and limits the imports of certain products which were otherwise allowed under Article XIX of GATT 1994.[32] Many attempts to supplement and update the safeguard rules took place during the Tokyo Round of multilateral trade negotiations. However, these attempts did not succeed and no "Safeguard Code" was implemented until the Uruguay Round and the establishment of the WTO. Therefore, the SA represents the first supplement for safeguard practices since 1947.[33]

Moreover, it prohibited the aforementioned grey area measures from establishing control over safeguarding practices in order to promote the balance of rights among the contracting parties.[34] Nonetheless, the so-called control on the grey area measures could not be maintained due to some inherent faults in the SGM in relation to not targeting unfair trade effectively in the multilateral trade disciplines, such as the pricing behaviours of exporting countries (i.e., dumping). Instead, they addressed so-called fair trade imports that 'take place under certain special circumstances, and exports that take place in normal competitive conditions'.[35] Many academics have indicated that these SGM actually offer an inefficient protectionism system: mainly, they discourage the conversion of non-competitive resources/entities from relevant industries in WTO Members to competitive ones.[36] This means that SA does not promote competitiveness of local products in the markets despite the SGM are applied. By contrast, SGM also promote trade liberalisation, in the sense that they provide political cover for some of the burdens that result from liberalisation,[37] even while the risk of abuse is still present.[38]

A similar note was passed by Richard Boltuck and Robert Litan on US trade remedies, including SGM, as follows:

> At bottom, the imperfect success with which domestic interests have pursued unfair trade remedies suggests perhaps the only principled reason for the statutes: as a legal 'safety valve'

[32] WTO, 'Agreement on Safeguards' (2022) <www.wto.org/english/tratop_e/safeg_e/safeint.htm> accessed 02 January 2016.

[33] F Piérola, *The Challenge of Safeguards in the WTO* (CUP 2014), 'History of the Safeguard Mechanism'; P Kleen, 'The Safeguard Issue in the Uruguay Round – A Comprehensive Approach' (1989) 23(5) Journal of World Trade 73.

[34] S Yazdani, 'Emergency Safeguard: WTO and the Feasibility of Emergency SGM under the General Agreement on Trade in Services' (PhD thesis, London School of Economic and Political Science 2012).

[35] Appellate Body Report*, Argentina Footwear (EC)*, WT/DS121/AB/R [94]; S Parikh and M Sidhpuria, 'A Study of the Pattern of AD Activities: A Comparison of India, China and the US' (2018) 8(2) Global Journal of Research in Management 35.

[36] AO Sykes, 'The Persistent Puzzles of Safeguards: Lessons from The Steel Dispute' (2004) 7(3) Journal of International Economic Law 523.

[37] AO Sykes, 'The Safeguards Mess: A Critique of WTO Jurisprudence' (2003) 2 World Trade Review 261.

[38] Sykes, 'The Persistent Puzzles of Safeguards' (n 31).

> for channelling the strongest claimants for protection away from overtly supporting more transparent forms of protection. Thus, the overall effort to enforce the unfair trade practice program can be rationalized to the extent it successfully prevents more unjustified protection than it hands out.[39]

As is evident from the above-quoted reasoning, SGM are so restrictive that they cannot be operational as a 'safety valve' against the unjustified protectionism and gradual negotiated trade liberalisation which lie beyond the boundary of the trade liberalisation promoted by the WTO's AD and safeguard agreements. Moreover, Lewis E. Leibowitz argued that safeguard provisions in the WTO's AD and safeguard agreements in developed countries like the USA serve as an instrument to produce the politically negotiated open market; which means that political system in WTO Members can easily manipulate the SGM to create markets of interest whenever and wherever possible. Even traders championing the SA regime in the first place in the USA admit that SA provisions are unable to hold the violators of SA among WTO members accountable effectively for their unfair trade practices.[40]

1.2 Overview of the GCC Common Law

Since this thesis examines the compatibility of the national law of Gulf Cooperation Council (GCC) Members with the WTO law regarding such unfair trade practices as dumping and increased imports, it is important to introduce the GCC's arrangements in terms of the implementation of trade remedies with a focus on AD and SGM.

The GCC began its journey of formulating trade policies by adopting Article XXIV, paragraph 8, of GATT 1994. Accordingly, the GCC Members have established a comprehensive framework and approach for joint economic activity, starting with the Unified Economic Agreement in 1981, and reaching the Economic Agreement among the GCC Members in 2002. In 1983, the GCC Members were able to establish a free trade zone between them, whereby products of national origin became exempt from customs and other, similar duties in the process of economic integration.[41]

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[39] LE Leibowtiz, 'Safety Valve or Flash Point? The Worsening Conflict Between US Trade Laws and WTO Rules' Trade Policy Analysis No. 17 (Cato Institute, 6 November 2001) 2.

[40] Sykes, 'The Persistent Puzzles of Safeguards' (n 31) 2.

[41] L Low and LC Salazar, *The Gulf Cooperation Council: A Rising Power and Lessons for ASEAN* (ISEAS Publishing 2010); S Ovchinnikov, 'Customs Regulation in the Cooperation Council for the Arab States of the Gulf' (2013) 14(7) Middle East Journal of Scientific Research 892.

The GCC Members agreed to establish the GCC Customs Union, which came into force in January 2003.[42] The establishment of the GCC was an important achievement for various fields in the history of the GCC Member States. Within the framework of joint GCC action and under this Agreement, the unified tariff is set at 5% on all foreign goods imported from outside the Customs Union, and exceptions to this tariff are specified in the Customs Union Law list. Furthermore, several procedural measures were taken to facilitate the movement of goods within the Union market, including facilities to certify the origin of national goods. Two lists were established: firstly, a unified list of goods that are prohibited from imports and secondly, a list of restricted goods in GCC Members.[43] The Agreement also cancelled requirements to obtain import licenses for foreign goods prior to their import, forming a practical step towards economic integration.[44] Notably, although the GCC aimed to develop a common currency, the initiative failed in 2009 due to disagreements between Saudi Arabia and United Arab Emirates over where to locate the GCC central bank.[45]

In 2003, the GCC developed the Common Customs Law, which allowed the GCC's market based on the common external tariff, followed by construction of the common market in 2008. With the formation of the common market, unified trade policy was structured, resulting in the accrual of many benefits such as stimulation of trade exchange and investment on the global and regional level, and an expansion of the trade activities of the GCC at the regional and global level, thereby inducing investments from local and regional investors and providing them protection from foreign imports, facilitating the movement of goods and services across the GCC countries, and encouraging a competitive environment in the local markets in the GCC.[46]

Different Member States of the GCC began joining the WTO AD and safeguard agreements (ADA and SA) from 1995 to 2005 in order to attract foreign investments and has become the most accomplished economic integration model in the Arab world. The first two

[42] RE Looney, 'The Gulf Co-Operation Council's Cautious Approach to Economic Integration' (2003) 24(2) Journal of Economic Cooperation 137; H Kazzi, 'Is the Gulf Cooperation Council (GCC) Customs Union a Myth?' (2017) 5(5) Asian Journal of Business and Management 150.

[43] U Fasano-Filho and A Schaechter, 'Monetary Union among Member Countries of the Gulf Cooperation Council' (2003) International Monetary Fund Occasional Paper No 2003/006 <www.imf.org/en/Publications/Occasional-Papers/Issues/2016/12/30/Monetary-Union-Among-Member-Countries-of-the-Gulf-Cooperation-Council-16394> accessed 03 August 2022.

[44] AE Appleton and MG Plummer, The World Trade Organization: Legal, Economic and Political Analysis (Springer 2007).

[45] S Takagi, 'Establishing Monetary Union in the Gulf Cooperation Council: What Lessons for Regional Cooperation?' (2012) ADBI Working Paper Series No 390 <www.adb.org/sites/default/files/publication/156245/adbi-wp390.pdf > accessed 03 August 2022.

[46] H Kazzi, 'GCC Member States and Trade Remedies: Between Benefits and Challenges' (2014) 1(2) European Law and Politics 10.

countries to join the WTO were Kuwait and Bahrain on 1 January 1995, followed by Qatar on 13 January 1996, the United Arab Emirates on 10 April 1996, and Oman on 9 January 2000. Saudi Arabia, the last GCC country, acceded to the WTO in 2005 (see Table 1).

Table 1: WTO Accession Dates of GCC Members[47]

GCC Member States	Accession Date
Bahrain	1 January 1995
Kuwait	1 January 1995
Qatar	13 January 1996
United Arab Emirates	10 April 1996
Oman	9 November 2000
Saudi Arabia	11 November 2005

As shown in Table 1, until 2005, all Members within the GCC achieved accession to the WTO-ADA and SA. Thereafter, they began procedures for developing AD and safeguard-related laws and policies in line with the WTO-ADA and SA as part of their commitments as WTO Members. This led to the formulation of the first draft of the GCC Common Law on AD, Countervailing and SGM (GCC-CLADCSM) and related rules of implementation (RoI) in 2009.

In 2009, the GCC-CLADCSM and RoI was submitted for review and feedback to the WTO, and after the necessary amendments, the GCC began implementation of the GCC-CLADCSM in 2011.[48] The GCC-CLADCSM aims to enable GCC Member States to take necessary measures against dumping, subsidy, and increased imports that would damage any Gulf industry.[49] Its provisions apply to harmful practices in international trade directed at

[47] WTO, 'Members and Observers' <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 17 November.

[48] CP Bown and B Hoekman, 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough' (2007) World Bank Development Research Group Policy Research Working Paper 4450 <https://openknowledge.worldbank.org/handle/10986/7525> accessed 03 August 2022.

[49] GCC Common Law, art 1.

non-Members of the Council.[50] The GCC-CLADCSM consists of two major sections: the first contains the GCC Common Law per se, while the second outlines this RoI.

The first section of GCC-CLADSCM sets forth the general principles of the AD and SGM framework in the GCC. It outlines the objective of the Common Law, which enables GCC Member States to take measures against dumping and increased imports that can injure GCC industry.[51] The first part defines the scope of applying the GCC Common Law. Specifically, it provides provisions in relation to the application of the GCC Common Law to injurious practices adopted by non-GCC Member States.[52] Moreover, the first part contains the core definitions of terms.[53] The first section also defines two cases in which AD and SGM can proceed:

(1) If an investigation finds that dumped imported products have caused or have threatened material injury to an established GCC industry, or materially retarded establishing a GCC industry, with the proviso that there is a causal link;

(2) If an investigation finds that a product is being imported in absolute or relative quantities under such conditions as to cause or threaten serious injury to a GCC industry that produces a similar or directly competitive product. There must be a causal link here, too.[54] The section also defines AD and SGM involving various forms such as custom duties, price undertakings, security by cash deposit, and bonds and tariff increases.[55]

The first section further contains provisions determining the GCC Common Law's principle of implementation and administration. There are three bodies responsible for this: The Competences of the Ministerial Committee, which consists of Industrial Ministers of Members (the Ministerial Committee); the Committee on Anti-Injurious Practices in International Trade of Members (the Permanent Committee); and the GCC Technical Secretariat for Anti-Injurious Practices in International Trade (the GCC-TSAIP).[56]

The Ministerial Committee approves the imposition of definitive AD measures and decides upon their extension, suspension, termination, increase, or reduction.[57] It decides upon, and

[50] ibid, art 3.

[51] ibid, art 1.

[52] ibid, art 2.

[53] ibid, art 3.

[54] ibid, art 5.

[55] ibid, arts 6.1, 6.2 and 6.3.

[56] ibid, art 7.

[57] ibid, art 8.1.

carries out, the administrative review regarding definitive decisions and determinations made in the process of implementing the GCC Common Law.[58] The Ministerial Committee is charged with promulgating the RoI of the GCC Common Law.[59] Also, it adopts internal regulations governing the operation of the GCC-TSAIP and appoints its director,[60] and settles disputes that may arise from interpreting and implementing the GCC Common Law.[61]

The Permanent Committee consists of undersecretaries of the Industrial Ministers.[62] The Permanent Committee carries out the following tasks: It imposes provisional measures and accepts price undertakings; advises the Ministerial Committee on imposing AD measures; sets up committees and units in the GCC-TSAIP secretariat; adopts working strategies for the GCC-TSAIP; advises the Ministerial Committee on settling disputes that arise out of the GCC Common Law; proposes amendments to the GCC Common Law; proposes amendments to the internal regulations of the GCC-TSAIP; approves and amends its own internal rules; approves the budget of the Bureau of the TSAIP; adopts financial, administrative, and other regulations of the GCC-TSAIP; and nominates the Director of the GCC-TSAIP.[63]

The GCC-TSAIP is part of the General Secretariat of the GCC.[64] It carries out the following functions: It organises the activities of the Permanent Committee (prepares meetings, agendas, draft decisions, etc); follows up on implementations of Ministerial Committee and the Permanent Committee decisions; provides consultancy and TSAIP support to GCC producers and exporters facing dumping; takes part in activities of relevant organisations and international forums; provides quarterly reports to the Permanent Committee; receives dumping complaints; conducts AD investigations; prepares its annual budget; and raises awareness of the concept of dumping.[65]

From the above discussion, it is evident that the GCC has made a serious effort in structuring the CLADCSM; however, it is not clear that as a developing Member States, whether the GCC-CLAD and SA have fulfilled its obligations in drafting and implementing the provisions of the GCC-CLAD and SA in line with WTO-ADA and SA. GCC countries are

[58] ibid, art 8. 4.

[59] ibid, art 8.3.

[60] ibid, arts 8. 5 and 6.

[61] ibid, art 8.2.

[62] ibid, art 9.1.

[63] ibid, art 9.2.

[64] ibid, art 10.1.

[65] ibid, art 10.2.

developing Members of WTO. However, there is no classification in the WTO for developing or developed countries, the country itself will decide the status in the WTO by the self-selection method which was informed by the criteria set out by the United Nations and World Bank. The World Bank in conjunction with United Nations has classified the countries into the low-income countries, middle-income countries and the high-income countries based on the gross national income per capita. Countries having $1035-$4085 gross national income per capita are classified as low-income or least developing countries. The countries with gross national per capita income in the range of $4085-$12615 are categorized as developing countries. Similarly, the countries with more than $12615 gross national income per capita are called developed countries. Based on this criteria, GCC Member States have the gross national income per capita in the range of $4085-$12615, accordingly, they are classified as the developing Members of WTO by World Bank and United Nations[66].

The next section presents the motivation of the research.

1.3 Motivation for the Research

Both developing and developed countries extensively use AD and SGM, laws, and procedures to protect their national industries from injuries resulting from dumped imports and increased imports since 1995.[67] There is an abundant literature about developed countries' AD and SGM, laws, and policies,; however, there is a scarcity of research on developing countries such as those of the GCC, which includes the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom of Saudi Arabia, and the United Arab Emirates. Furthermore, numerous studies which analysed and discussed

[66] World Economic Situation and Prospects Report, 'Country Classification: Data sources, country classifications and aggregation methodology' (United Nations, 2014) Available at <https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf> accessed on 14 Feb 2023.

[67] WTO, *A Handbook on the WTO Dispute Settlement System* (2nd edn, CUP 2017); WTO, 'AD Sectoral Distribution of Initiations: By Reporting Member' (2016) <www.wto.org/english/tratop_e/adp_e/AD_Sectoral_InitiationsByRepMem.pdf> accessed 06 May 2018; WTO, 'AD Sectoral Distribution of Measures: By Reporting Member' (2016) <www.wto.org/english/tratop_e/adp_e/AD_Sectoral_MeasuresByRepMem.pdf> accessed 06 May 2018; WTO, 'SGM Initiations: By Reporting Member' (2017) <www.wto.org/english/tratop_e/safeg_e/SG-InitiationsByRepMember.pdf> accessed 31 December 2018; WTO, 'SGM: By Reporting Member' (2017) <www.wto.org/english/tratop_e/safeg_e/SG-MeasuresByRepMember.pdf> accessed 31 December 2018.

the AD and safeguard laws of the European Union (EU)[68] and the USA.[69] Nonetheless, similar studies on the laws and regulations of developing countries are scarce. Furthermore, research that addresses the compatibility of WTO AD and safeguard laws within the GCC[70] has never been attempted.[71]

This study focuses on GCC Common Laws on AD and SGM for the following reasons: firstly, the laws were established in 2009 and came into force after all GCC Members had become WTO Members (see Table 1). Since 2009, no attempt has been made by the TPRM of the WTO to review the GCC-CLAD CLSM and RoI in terms of its compatibility or compliance with the WTO-ADA and SA during assessment stage of dumping cases, conduct of AD investigations and application of SA measures. As Bown and Hoekman reported, developing countries like GCC receive little attention from the TPRM. Review of AD and safeguard laws is usually conducted by the TPRM bi-annually for the developed countries, whereas it is planned after ten years for the developing countries.[72] Between 1998 and 2005, the TPRM reviewed only 23 developing countries out of 100 eligible countries for their

[68] P Brenton, 'Antidumping Policies in the EU and Trade Diversion' (2001) 17(3) European Journal of Political Economy 593; H Kazzi, 'GCC Member States and Trade Remedies' (n 41); S Noël and W Zhou, 'Replacing the Non-Market Economy Methodology: Is the European Union's Alternative Approach Justified Under the World Trade Organisation AD Agreement?' (2016) 11(11/12) Global Trade and Customs Law 559; PKM Tharakan, 'The Political Economy of Antidumping Undertakings in the European Communities' (1991) 35(6) European Economic Review 1341; WJ Davey, 'Compliance Problems in WTO Dispute Settlement' (2009) 42(1) Cornell International Law Journal 119; E-U Petersmann, 'Grey Area Policy and the Rule of Law' (1988) 22(2) Journal of World Trade 23; B Steunenberg and A Dimitrova, 'Compliance in the EU Enlargement Process: The Limits of Conditionality' (2007) 1 European Integration Online Papers <http://eiop.or.at/eiop/pdf/2007-005.pdf> accessed 18 April 2018; S Stolz and M Wedow, 'Extraordinary Measures in Extraordinary Times: Public Measures in Support of the Financial Sector in the EU and the United States' (2010) <https://ideas.repec.org/p/zbw/bubdp1/201013.html> accessed 18 July 2018.

[69] Irwin (n 7); C Gao, 'China, US Fight Over China's Market Economy Status'' (*The Diplomat*, 2 December 2017) <https://thediplomat.com/2017/12/china-us-fight-over-chinas-market-economy-status/> accessed 03 November 2018; RE Litan, 'Measuring Industry-Specific Protection: AD in the United States: Comment on RW Staiger and FA Wolak' (1994) Brookings Papers on Economic Activity 104; DM Lopez, 'The Continued Dumping and Subsidy Offset Act of 2000: Relief for the US Steel Industry; Trouble for the United States in the WTO' (2002) 23(2) University of Pennsylvania Journal of International Law 415; GM Grossman and AO Sykes, 'WTO Case Law: The American Law Institute Reporter's Studies United States—Definitive SGM on Imports of Certain Steel Products' (2007) 6(1) World Trade Review 89; H Horn and PC Mavroidis, 'US Lamb: United States SGM on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: What Should Be Required of a Safeguard Investigation?' (2003) 2(S1) World Trade Review 72; Y-S Lee, 'SGM: Why Are They Not Applied Consistently with the Rules?' (2002) 36 Journal of World Trade 641; E Lissel, 'Regional SGM: An Incentive to Sign Regional Trade Agreements Without Taking into Consideration the Special Needs for Developing Countries' (PhD thesis, Lund University 2011); R Read, 'The Political Economy of Trade Protection: The Determinants and Welfare Impact of the 2002 US Emergency Steel SGM' (2005) 28(8) The World Economy 1119.

[70] The law known as the GCC Common Law on Law on Antidumping, Countervailing Measures and SGM and its RoI.

[71] The Cooperation Council for the Arab States of the Gulf, originally (and still colloquially) known as the Gulf Cooperation Council (GCC), is a regional intergovernmental political and economic union consisting of all Arab states of the Arabian Gulf except Iraq, namely Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. The Charter of the GCC was signed on 25 May 1981, formally establishing the institution. For further details, see Chapter 2.

[72] Bown and Hoekman (n 43).

mechanism of enforcing the WTO's ADA and SA in the local markets[73]. This shows that the TPRM is quite slack in assessing the compatibility of the trade remedies, including the AD and safeguard laws developed by developing countries, with the WTO's ADA and SA, which might be due to their novice status in relation to the WTO's ADA and SA or their lack of experience, knowledge of trade policies and expertise in international trade policies recommended by the WTO for their Members.[74]

If the compatibility of the trade policies pursued by developed and developing countries such as those of the GCC with WTO-ADA and SA is not assessed, the DSB or Appellate Body may be burdened with an increase in the number of appeals and challenges made by third parties against the GCC for not deciding upon AD cases upon the merit approved in the WTO-ADA and SA. This may risk the credibility of the WTO Member in meeting its international obligations towards implementing the WTO-ADA and SA.[75]

It is worth mentioning here about the current issues with dispute settlement system. Appellate Body had stopped functioning in December 2019 due to the expired tenure of two of its members, and re-election of the members could not take place since then due to some serious concerns raised by the USA over the judicial overreach[76]. Until now, several consultation rounds have taken place in order to restore the function of Appellate Body, but the USA is adamant to reform the dispute settlement system of WTO, though it is yet to offer any proposal to reform the dispute settlement mechanism within the WTO[77]. The function of negotiation and monitoring have not been activated properly between WTO Members to decide the fate of the Appellate Body. Using the Article 25 of Dispute Settlement

[73] World Trade Organization, 'How the WTO deals with special needs of a increasingly important group' (WTO, date of publication unknown) < https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap6_e.pdf> Accessed on 28 Jan 2023).

[74] ibid 54, p 25.

[75] Kazzi, 'Is the Gulf Cooperation Council (GCC) Customs Union a Myth?' (n 37).

[76] Lester, Simon, 'Ending the WTO Dispute Settlement Crisis: Where to from here' (International Institute for Sustainable development, 2022) < https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis> Accessed 11 Feb 2023

[77] Aditya Rathore and Ashutosh Bajpai, 'The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?' (JURIST – Student Commentary, April 14, 2020) https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/> Accessed on 08 Feb 2023.

Understanding (DSU), the EU made some serious efforts to set up an alternative mechanism for hearing appeals, which was called Multi-Party Interim Arbitration' mechanism, which did not hear any appeals until now[78]. Moreover, it is not signed by several prominent WTO Members including the GCC Member States. This means that status of MPIA is controversial and cannot serve as an effective alternative to the Appellate Body without the presence and support of the USA and many other prominent WTO members. Several authors have suggested and optimistic about the restoration of the Appellate Body' s function after the reforms desired by the USA and other Members of WTO in the near future[79]. Therefore, this study will continue to the use the reference to Appellate Body in the contexts of debates relating to compliance issues with ADA and SA as part of fulfilment of obligations of WTO Members. Hence, any reference to the function of Appellate Body in the later parts of this thesis should be taken as tantamount to the fully functional Appeal Body itself if it starts working in the future, or any alternative appeal system such as MPIA Arrangement if it is approved by all WTO Members in future for resolution of disputes and improvement in the non-compliance issues in the context of Member of WTO.

Kazzi argues that the GCC is the economic integration model of the Arab world, which regulates trade of services and goods in the region and attracts international investments, thereby causing tremendous growth and continuous economic progress.[80] In the event of poor compatibility between the GCC-CLADCLSM and the WTO-ADA and SA, it may lose its status as a hub of international trade. Therefore, it is vital to review, assess and suggest corrective measures for increasing the compatibility of the GCC-CLADCLSM with the WTO-ADA and SA, so that GCC countries continue to be an important gateway to international trade with Asian, Gulf and Middle Eastern countries.[81]

[78] Lester, Simon, 'Ending the WTO Dispute Settlement Crisis: Where to from here' (International Institute for Sustainable development, 2022) < https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis> Accessed 11 Feb 2023

[79] Linklaters Trade Practice, 'Appellate Body in Crisis' (Linklaters Trade Practice, Not known (publication date)) < https://www.linklaters.com/en/insights/blogs/tradelinks/the-appellate-body-in-crisis> Accessed on 08 Feb 2023.

[80] H Kazzi, 'Arab Countries and the Doha Round: Between Ambitions and Realities' (2014) 10(22) European Scientific Journal <https://doi.org/10.19044/esj.2014.v10n22p%25p> accessed 03 August 2022.

[81] H Kazzi, 'GCC Member States and Trade Remedies' (n 41).

In addition, the GCC reiterated its firm commitment to fulfil its obligations as Member of WTO and to fully comply with the letter and spirit of the WTO-ADA and SA, and has offered its commitment to the international community in acting anti-protectionist, supporting the multilateral trade system, expanding global competition in the GCC markets, and promoting the growth of domestic firms. These commitments underscore the aspiration of the GCC to become an international trade hub in the Arab world.[82]

1.4 Aims of the Study

This thesis aims to:

- Conduct an extensive legal analysis and discussion regarding the GCC's AD and safeguard measure systems and to determine the level of compatibility between these systems and relevant WTO law.
- Provide a description of the investigative mechanisms established in the GCC's AD and SGM, and the way the GCC's investigating authority, the Bureau of Technical Secretariat for Anti-Injurious Practices in International Trade (GCC-TSAIP), interprets and applies these measures. The study will indicate whether or not the investigation mechanism and how it is applied and interpreted are consistent with WTO laws.
- Propose recommendations and solutions to improve or amend the GCC's AD and SGM systems and the practices of the GCC-TSAIP to align them with WTO law.

1.5 Significance of the Research

This research incorporates several novel features:

- It aims to contribute to the literature on WTO law as the first study to assess the compatibility between WTO regulations and the GCC-CLAD and Common Law on Safety Measures (CLSM) and their RoI.
- It hopes to provide GCC decision makers, negotiators, and influencers with a fuller understanding of how they may use their domestic laws to effectively protect the GCC domestic market from injurious practices (e.g., dumping and increased imports) without conflicting with their WTO obligations.

[82] KH Lee and others, 'Economic Policies of GCC Countries in the Era of Low Oil Prices and Their Policy Implications for Korea' (2021) KIEP Research Paper, World Economy Brief 21-03 <https://ssrn.com/abstract=3817132> accessed 03 August 2022.

- It will offer recommendations on how to improve the GCC's AD and safeguard laws systems, their interpretations, and applications.
- It seeks to establish a good example of how compatibility studies of domestic laws can be carried out in consort with international laws and obligations.
- The findings of this research work may be useful for those developing countries and least developing countries that are trying to improve their compliance with the WTO-ADA and SA.
    - The outcomes of this research work connect the GCC common Law in terms of their compatibility with WTO ADA and SA, which offers an opportunity to the GCC to revise the validity of the Common Law in the light of international trade policies and whether it fulfils its obligations to international trade treaties as a WTO Member.
    - As this research also offers critical analysis to the WTO-ADA and SA based on the issues of non-compatibility of GCC with ADA and SA regulations; this provides a useful avenue to relevant panels in WTO such as WTO Secretariate, TPRIM and DSB to consider more negotiation rounds for reforming the existing laws and regulation in domain of ADA and SA, so that compliance of Member States can be increased.
    - This research also adds value to the developing countries which are endeavouring to comply with the WTO-ADA and SA. The developing countries like GCC can use the outcomes of this study to improve upon their compliance and takes support of the avenues recommended in this study to address their concerns about their compliance with and transparency of the investigations of cases in domain of ADA and SA.
    - This research work also carries a great deal of significance to the future researcher, as they can find the recommendations to plan the future research activities in the domain of ADA and SA.
    - This research work contributes by adding an additional layer of application of WTO-approved trade treaties as a protectionist weapon or a tool for trade liberalization in real sense and simultaneously highlighting the non-compliant behaviour of the WTO Members towards the implementation of international trade treaties under umbrella of WTO.
    - The outcomes of this study also serve as a point of reference for the internal legal experts and consultants as to how to deal with the compliance or non-compliance of

Member of WTO with the WTO-approved trade treaties by taking into account interpretations of wordings of laws in both domestic/regional and international contexts.

1.6 Main Research Question (RQ)

To what extent are the GCC-TSAIP's provisions, interpretations, and applications of the GCC-CLAD and CLSM consistent with WTO laws?

1.6.1 Research Sub-Questions (SRQ)

SRQI: Are the GCC-CLAD and its RoI compatible with the provisions of the Agreement of Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('GATT 1994', the WTO AD Agreement)?

SRQII: How has the GCC-TSAIP interpreted and implemented the GCC-CLAD and its RoI?

SRQIII: Are the GCC's CLSM and its RoI compatible with the provisions of the WTO's SA and Article XIX of GATT 1994?

SRQIV: How has the GCC-TSAIP interpreted and implemented the GCC's CLSM and its RoI?

1.7 Scope of the Research

This study focuses on AD and safeguards and does not analyse or discuss the compliance of GCC countries in the area of countervailing measures with respect to the WTO's countervailing measures. The reason for excluding countervailing measures from the aim and objectives of this study is that since GCC countries became members of the WTO's AD and safeguards law and countervailing measures in 2009, not a single case of countervailing has been reported or published in the Official Gazette of the GCC or on the official site where the WTO reports cases involving AD, safeguards and countervailing measures.[83]

Therefore, this will be counterproductive to assess the compliance of the GCC-CLAD with the WTO's countervailing measures. However, the reason for focusing solely on AD and

[83] WTO, 'Countervailing Measures by Reporting Member 01/01/1995 - 31/12/2021' <www.wto.org/english/tratop_e/scm_e/CV_MeasuresByRepMem.pdf> accessed 03 August 2022.

safeguards laws is that the WTO's official statistics and the GCC's Official Gazette show that there are many cases which have been reported in the area of AD and safeguards, which inspired the researcher to look into the compliance of the GCC-CLAD with the WTO's AD and SGM.[84]

This study does not compare either the compliance of GCC countries with the WTO's AD and safeguard laws in relation to individual GCC Member States or compliance between GCC countries and other countries. The absolute focus of this study is on the compatibility of the GCC-CLAD and SA with the WTO's AD and safeguard laws and analysis of any compliance issues resulting from the incompatibility between GCC countries and these laws.

Notably, although this research project does not aim to examine or analyse the weaknesses of the WTO's AD and safeguard laws in depth, however, by reporting the compliance or non-compliance of the GCC-CLAD and CLSM with the WTO's AD and safeguard laws, this thesis will highlight the weaknesses of the WTO when discussing its results. On that basis, recommendations may be suggested for reforming or improving the WTO's AD and safeguard laws with a view to enhance the consistent compliance of Members with those laws. This will generate a balanced view of the compatibility of the GCC-CLAD and CLSM with AD and safeguard laws and vice versa.

1.8 Research Methodology

1.8.1 Initial Plan: application of fieldwork as part of non-doctrinal methodology

Fieldwork is defined as a practice of the researcher to explore about the law and its implications within the social settings, and is restricted to the non-doctrinal research such as socio-legal research or 'law in context' research.[85] City University of Law School defines fieldwork as an activity of "gathering information through direct interaction with people and

[84] WTO, 'SGM' <https://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm> accessed 03 August 2022 [statistics on SGM]; WTO, 'AD Measures by Reporting Member 01/01/1995 - 31/12/2021' <https://www.wto.org/english/tratop_e/adp_e/adp_e.htm> accessed 03 August 2022 [used for justification of antidumping); WTO 'Countervailing Measures by Reporting Member 01/01/1995 - 31/12/2021' (n 71) [used for the justification of antidumping].

[85] Panades-Estruch, Laura, 'Note-taking and notability: How to succeed at legal doctoral fieldwork' (University of Cambridge, 2018)

processes such as interviews, questionnaires or court observation".[86] It serves as a bridge between the academia and practice, and carries an added value to the research. Fieldwork provided an opportunity to researchers to test the theoretical knowledge in a real-life setting. Researchers 'decision to undertake fieldwork is affected by several trade-offs which must be considered at the planning and execution stages of the fieldwork[87].

The advantages accrued by the fieldwork revolve around the desire of increasing the impact of the research by seeking justifications and utilities of particular laws within the context, investigation of the academic ideas and collection of new information.[88] In contrast, some of disadvantages of fieldwork involves the consumption of time and stretching of research budget and risking the failure of research activities in the event of refusal of participants to release data which is intended to be collected. Therefore, Panades-Estruch advised researchers to weigh the pros and cons of fieldwork, and select the right methodologies to maximize the chances of success in the research. He further classified the fieldwork under the domain of non-doctrinal research[89].

Based on the benefits of fieldwork, the author of this piece of work initially adopted non-doctrinal research and started planning the collection of data from the real-time setting (GCC headquarters) using interviews with competent authorities in international trade-related issues. However, the author of this thesis struggled to obtain consent of the desired participants to participate in this study due to their personal and professional concerns about the confidentiality and privacy of the data. This led the author of this thesis to follow the advice of Panades-Estruch to 'select the right methodologies to maximize the chances of success in the research', which resulted in the change of methodology from the non-doctrinal to doctrinal methodology to ensure the success of the research endeavour[90].

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[86] City University Law School, 'Writing a Successful PhD Proposal, City University Law School' <https://www.city.ac.uk/__data/assets/pdf_file/0007/87820/ 122 Croatian International Relations Review — CIRR — XXIV (83) 2018, 104-123 Writing-a-Successful-PhD-Proposal-Guidance-Notes.pdf> Accessed 28 Jan 2023)

[87] Panades-Estruch, Laura, 'Note-taking and notability: How to succeed at legal doctoral fieldwork' (University of Cambridge, 2018)

[88] Bickman, L. and Rog, D.J, 'Applied Research Design: A Practical Approach. In: Bickman, L. and Rog, D.J., eds' (The SAGE Handbook of Applied Social Research Methods. 2nd ed. London: Sage, 2009).

[89] Panades-Estruch, Laura, 'Note-taking and notability: How to succeed at legal doctoral fieldwork' (University of Cambridge, 2018).

[90] Ibid

1.8.2 Alternative Plan: Application of doctrinal research approach

Scholars define doctrinal research as an investigation which examines legal doctrines through analysis of statutory provisions and cases by the application of reason[91]. Hence, a research project which aims to analyse statutory provisions, legal rules and practices is classed as doctrinal legal research.

However, doctrinal legal research can be differentiated from the non-doctrinal research such as social-legal research by considering their focus on the law. The non-doctrinal research employs qualitative and quantitative methods from other disciplines such as anthropology and sociology as its focus on determination of the relation of the law with issues related to different social and communal groups[92]. However, doctrinal research places an emphasis on the provisions and doctrines of law in action, and endeavours to answer the question relating to nature and meanings of laws exclusively in a particular context. Moreover, the non-doctrinal research involves the fieldwork which requires researchers to conduct surveys and interviews to provide empirical evidence from the primary data[93]. Contrastingly, the doctrinal research is desktop-based or library-based research that requires researchers to collect the relevant evidence through collection of secondary sources (e.g., documents, articles, books, legal commentaries, and legal cases) about the law without involving any fieldwork. Furthermore, doctrinal research examines the issues relating to the practical implementation of laws in certain areas, while non-doctrinal research addressed the wider social issues and their impact on the implantation of law[94].

This thesis employs the doctrinal method to answer the following research question: To what extent are the GCC-TSAIP's provisions, interpretations, and applications of the GCC's AD and SGM consistent with WTO laws? To address this question, the doctrinal method offers a legal analysis of WTO law governing AD measures (i.e., the ADA, case law) and SGM

[91] Hutchinson T, Duncan N, 'Defining and describing what we do: doctrinal legal research' (2012) 17(1) Deakin Law Review.

[92] Ali, Salim Ibrahim and Mohamed Yusoff, Zuryati and Ayub, Zainal Amin, 'Legal Research of Doctrinal and Non-Doctrinal' (2017) 4(1) International Journal of Trend in Research and Development.

[93] Ibid 79

[94] Deplano R, *Pluralising International Legal Scholarship: The Promise and Perils of Non-doctrinal Research Methods* (Edward Elgar Publishing; 2019).

(i.e., Agreement on Safeguard, IXI of GATT 1994, and relevant WTO case law), and the GCC-CLAD and CLSM and their RoI.

Doctrinal studies in law focus on certain areas to offer deep analysis of judicial reasoning and legislation.[95] The process of doctrinal research begins by developing a research question or proposition, followed by location of the legal provisions and doctrines in question by looking into the relevant textbooks, debates and commentaries in the specific area. The next step was to analyse the searched materials holistically and critically depending on the research questions.[96] All the aforementioned processes were implemented in this thesis as described below.

The first step involved development of a hypothesis or research question in the relevant area, which is implemented in Section 1.4. The second step involved locating sources useful for this study, including the GATT treaties and protocols; WTO law, reports, and web pages; the Charter of the GCC; the Economic Agreement between the GCC Members; the GCC Common Customs Law; the GCC-CLAD and CLSM and their RoIs; journal articles and books; and issues of the GCC's Official Gazette.

The third step involved deep legal analysis of the WTO provisions governing the imposition of AD and SGM, processes which located the main legal objectives and substantial legal requirements when imposing such measures. Subsequently, legal analysis was conducted on the text of the GCC-CLADCSM provisions to locate the objective and legal requirements for such measures. Furthermore, the project assessed the manner in which the GCC-TSAIP interpreted and analysed the GCC's AD and safeguard rules to determine whether the GCC-TSAIP actually fulfilled the context of GCC law.

In examining relevant Articles and provisions, the thesis applied the 'golden' and 'literal' rules of statutory interpretation including the judgements served on AD and safeguard cases and WTO jurisprudence depending on the contexts of the legal provisions under discussion. For example, the literal rule applied when the text of the statute, regulations, and provisions were clear. Lord Diplock, in the *Duport Steel v Sirs* case (1980), defined the rule as follows:

> Where the meaning of the statutory words is plain and unambiguous it is not then for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain

[95] I Dobinson and F Johns, 'Qualitative Legal Research' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh UP 2007) 16; P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (John Wiley and Sons 2009).

[96] T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 83.

> meaning because they consider the consequences for doing so would be inexpedient, or even unjust or immoral.[97]

If the text was unclear, the golden rule of thinking and reasoning based on the context of the text provided meaning was applied.[98] Lord Wensleydale, in the case of *Grey v Pearson* (1857), defined this rule as follows:

> The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no farther.[99]

For example, where the text of the GCC Common Law on AD was unclear, the thesis applied Saudi Arabia's third-party submission in the Dispute Settlement Body (DSB) to assess the GCC meaning. Supplemented by the DSB as an interpretative mechanism, the thesis was able to access more fully the main objectives of the GCC's CLAD. Moreover, where there was lacking or ambiguous information in the GCC CLAD or CLSM, the study applied their counterpart Articles in the ADA and SA under permission of Article 85 of the Rules of Implementation (RoI) on AD and SGM. RoI refers to the set of legal provisions which aim to protect the economies of the GCC from the injurious practices in international trade that cause or threaten material injury to an established GCC industry or retard the establishment of such industries, which can be achieved by taking appropriate GCC measures against such practices, i.e., dumping, subsidy, and unjustified increase in imports.[100]

Furthermore, this thesis employed decisions of DSB and Appellate Body for interpretation of the ADA/SA provisions and Common Law in GCC, as they interpret the AD & SA provisions based on their ordinary meanings, contexts and object and purpose of the legal provisions. All panels including DSB and Appellate Body rely on Article 31 and Article 32

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[97] RC Simpson, 'NWL Ltd v Woods' (1980) 43(3) The Modern Law Review 327.

[98] RR Kelso, 'Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making' (1997) 25(1) Pepperdine Law Review 37; 16 Can B Rev 1; TW Merrill, 'Golden Rules for Transboundary Pollution' (1997) 46(5) Duke Law Journal 931.

[99] As cited by P Butt, Modern Legal Drafting: A Guide to Using Clearer Language (CUP 2013).

[100] The Supreme Council, at its 24th session held at Kuwait (21-22 December 2003), adopted the GCC Common Law on AD, Countervailing Measures and Safeguards as binding law from 1 January 2004. To that effect, the Supreme Council has instructed the Industrial Cooperation Committee (ICC) to prepare the relevant RoI within the first six months of 2004, provided that such law shall come into force after thirty days following the adoption of the said RoI by the ICC. Accordingly, the ICC adopted the said RoI at its 23rd meeting held at Kuwait on 11 October 2004. <http://nshr.org.sa/en/wp-content/uploads/2014/01/1274262295>.

of Vienna Convention on Law Treaty (VCLT) to give interpretation, meaning and effects to words in the provisions of AD&SA in relation to the specific contexts of disputes[101].

Article 31.1 of VCLT states[102]:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

While, Article 32 of VCLT states[103]:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: a. leaves the meaning ambiguous or obscure; or b. leads to a result which is manifestly absurd or unreasonable.

From Article 31 and 32, it is evident that VCLT emphasizes the panels of WTO to decide the disputes in respect of the meanings and interpretations of AD & SA provisions and laws in line with context of the disputes, object and purpose of the relevant provisions and their ordinary meanings[104]. For example, Appellate Body has clearly given verdict that Article 31 of VCLT expresses the general rule for interpreting the trade agreements such as AD & SA, and therefore it is tantamount to the status of customary international law[105]. WTO-based dispute settlement bodies have applied both Article 31 and Article 32 to aid interpretations of laws and provisions in several of their cases, such as United States: Import Prohibition of

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[101] WTO, 'Introduction to WTO dispute settlement system: Dispute settlement system training module' (World Trade Organization, 2023) < https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p2_e.htm#fnt1> Accessed on 14 Feb 2023).

[102] United Nations, 'Vienna Convention on the law of Treaties' (United Nations, 2005) < https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> Accessed on 14 FEB 2023).

[103] Ibid 90.

[104] Dörr O, Schmalenbach K. Vienna convention on the law of treaties. Berlin: Springer; 2011

[105] White, Gillian , 'Treaty Interpretation: The Vienna Convention 'Code' as Applied by the World Trade Organisation Judiciary' (Australian Year Book of International Law 319, 1999).

Certain Shrimp and Shrimp Products[106], and United States: Gasoline[107]. In both cases, Appellate Body resolved the issue of interpretation of GATT 1994 Article XX in the highly sensitive areas of environmental protection.

Taken together, I have employed decisions from DSB and Appellate Body as mode of addressing ambiguities and obscurities in the meanings and interpretations of ADA & SA provisions; both of them (DSB and Appellate Body) recourse to the Article 31 and 32 of VCLT for giving decisions on the WTO disputes. Accordingly, I did not state separately the methodology of this thesis the use of VCLT as a mode of interpretation, as it is already being implemented by the dispute settlement bodies in WTO for weighing interpretation submitted by the contending parties in the cases of ADA and SA. Furthermore, VCLT only provides the customary rules of interpretation to the public international trade laws for WTO judiciary[108]; whilst this study seeks the support from the legal cases and disputes settlement system being implemented within the WTO to clarify the meanings, effects, objects and purpose of the laws of AD & SA.

There is another approach for interpretation of laws, which is called purposive approach to statutory interpretation. This approach is often used by the domestic or international courts to infer the purpose of the law within a particular context, so that law can be applied with its intended purpose in the context[109]. Contrastingly, this is a mere research activity to interpret the relevant laws with focus on inferring the compatibility of GCC Common Law with WTO-ADA and SA rather than a court-exercise. Furthermore, this approach places tremendous focus on the purpose rather than literal meanings of the laws[110]; whilst the current research adopts the literal rule as a first step to infer the meanings and interpretations of the WTO-ADA and SA and GCC-Common Law.

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[106] Appellate Body Report WT/DS 58/AB/R, 12 October 1998.

[107] WT/DS2/AB/R, adopted 20 May 1996

[108] Fitzmaurice M, Elias OA, Merkouris P, editors. Treaty interpretation and the Vienna Convention on the Law of Treaties: 30 years on. Brill; 2010.

[109] Law Resources, 'The purposive approach to statutory interpretation' (E-Law Resources, date of publication unknown) <https://e-lawresources.co.uk/Purposive-approach.php> Accessed on 15 Feb 2023.

[110] Ibid

The applicators of this approach are more interested in developing laws in line with what they perceive to be intention and purpose of domestic laws[111]. The current research neither intends to determine the real scope and purpose of the GCC Common Law and WTO-ADA and SA due the lack of access to mentalities of legislators; nor it plan to execute the development of laws without having any authority to impose the outcomes of this research on the legislators in WTO and GCC. The purposive approach to statutory interpretation

The purposive approach to statutory interpretation is a subjective methodology, which may set the mind of researcher or judge to a particular purpose, thereby narrowing down the true meanings of the laws[112]. This may increase the biasedness in interpretation of statutes, resulting in reducing the validity of the findings. This research work avoided the application of purposive approach as a lens to statutory interpretation of WTO-ADA and SA and GCC Common Law in order to minimize the biasedness on behalf of researcher and increase the validity of findings.

1.9 Limitations of the Research

The author has faced difficulty in carrying out this study. First, there are few publications regarding the laws and regulations of developing countries for combating unfair trade practices, such as injurious dumping and increasing imports. This is especially the case with studies looking at the GCC's rules and regulations to control such unfair practices in the GCC market, given that GCC Members only began to develop and implement their laws in 2009. At the time this thesis was concluded, only three studies have been carried out in this field:

1. 'Examination of the Obstacles to Apply the GCC Common Law of AD, Countervailing and SGM and its Role of Implementations'[113]
2. 'AD and Anti-Subsidy on Saudi's Petrochemicals Products'[114]

[111] Styles, Scott C., 'The Rule of Parliament: Statutory Interpretation After Pepper v Hart' (1994 5(14) (Oxford J. Legal Stud).

[112] Law Resources, 'The purposive approach to statutory interpretation' (E-Law Resources, date of publication unknown) <https://e-lawresources.co.uk/Purposive-approach.php> Accessed on 15 Feb 2023.

[113] M Al-Raqqadi, 'Examination of the Obstacles to Apply the GCC Common Law of AD, Countervailing and SGM and Its Role of Implementations' (Master's thesis, Open University of Malaysia 2014) 51.

[114] AM Mattar, 'AD and Anti-Subsidy on Saudi's Petrochemicals Products' (PhD thesis, Brunel Law School 2014) 18.

3. ‘AD Measures in Regional Trade Agreements: The Case of Gulf Cooperation Council’.[115]

What made the situation more challenging was that the GCC’s Official Gazette contains little of its supposedly required information. The GCC-TSAIP never answered the author’s emails. Unfortunately, I have not even been able to have free access to the Official Gazette since May 2019 and therefore had to subscribe by paying roughly £100 per year to retain access (see Appendix 5).

Another limitation of this study is that it does not provide an in-depth insight into the modalities used by GCC for interpreting and implementing the GCC-Common Law on AD and SA due to the lack of interview data in this study. Interviews are usually conducted as part of the non-doctrinal method. The surveys and interviews are adopted by researchers in the event of performing the non-doctrinal thesis. Interviews are useful tool in gaining an in-depth insight into the issues encountered by the GCC in complying with or implementing the ADA or SA regulations or GCC Common Law. Should I have conducted the interviews with GCC officials working in competent body dedicated for ADA and SA investigations. I would have found the causes of the areas of non-compliance; then more robust recommendations could have been put forth for increasing the compliance and transparency; and it could have added more value to the findings of this thesis. Nevertheless, despite of my several attempts to approach them in GCC headquarters based in Riyadh, I was not successful in arranging interviews with them. They provided the reason of not being available for interviews due to the highly confidential matters in relation to international trade matters, and their busy schedule.

I have recommended the use of interviews for future studies wherever possible to infer the causes of the lack of transparency and non-compliance in the areas of ADA and SA as found in this study. This recommendation is provided in the ‘future research directions’ section of the Conclusion Chapter 7 as well.

[115] ASR Al Bulushi, ‘AD Measures in Regional Trade Agreements: The Case of the Gulf Cooperation Council’ (Master’s thesis, University of Hertfordshire 2018) 64.

1.9.1 Objective limitations

This study adopted the doctrinal approach to show non-compliance or the lack of transparency in the domain of ADA and SA laws implemented by GCC. However, it does claim the mechanisms or modes of implementations pursued by the competent authorities. They might have their own views regarding the implementation of ADA and SA laws in the real-world scenarios.

Hennink argued that qualitative methodologies are specific to the phenomenon under investigation, and the lacks of the generalizability to other phenomena with similar characteristics[116]. One of limitations of this study is the lack of generalizability of the findings drawn from this case of GCC to other developing countries, which is due to the fact that it adopted the qualitative approach (doctrinal method).

The author of this thesis made all efforts during the research activities to collect all relevant resources, and cases from DSB and Appellate Body and GCC to interpret the laws of ADA, SA and GCC Common Law from the available resources. However, the published data from and data published later on after the write-up of this piece of work may affect the outcomes presented in this study. Therefore, one should consider all relevant resources of laws, amendments in laws, latest cases for interpreting the compatibility of GCC Common Law with the WTO-ADA and SA.

This research work may have neglected some factors outside of the laws and regulation of ADA and SA and GCC-Common Law which have a bearing on the interpretation and implementation of these laws, such as political factors which pushed the developments in GCC Common Law in/out of line with the WTO-ADA and SA.

1.10 Literature Review

Scholars argue that much economic progress is due to the fact that states are WTO Members, and have claimed to reform their trade policies in line with the WTO-ADA and SA through adoption of an open tariff regime, implementation of common external tariffs, and allowing free trade in services and goods through harmonization of its trade policies in line with the

[116] Hennink, Monique, Inge Hutter, and Ajay Bailey, 'Qualitative research methods' (Sage, 2020).

WTO-ADA and SA.[117] These claims still need to be examined through empirical study with a focus on analysis of the compliance of the GCC-CLAD and SA with the WTO-ADA and SA in order to determine the alignment of legal reforms in the former with the those in the latter. Such analytical studies have the potential to reveal the caveats in both the GCC-CLAD and SA and the WTO-ADA and SA.[118]

The GCC is still facing economic and trade policy challenges in the area of understanding and interpreting the WTO-ADA and SA regulations enshrined in the GCC-CLAD and SA, which may pose a risk to the realisation of its ambition to thrive as an international trade player in the Arab world. Of note, GCC countries heavily rely on the export performance of one sector (oil and gas), while dependent upon foreign trade for fulfilment of consumer need for public goods and services in their local markets. The total imports and exports (merchandise, services, and goods) constituted 90% of the GDP among GCC members, which again emphasises the status of the GCC as an international trade hub.[119]

As a hub of international trade among Arab countries, the GCC is expected to be the top user of the WTO-ADA and SA among the developing Members of the WTO in the future. The Official Gazette of the GCC showed initiation of five cases of dumping and five cases involving an increase in imports between 2009-2019, which clearly reflects the tendency of GCC members to become active users of AD and SGM against the importers. In 2009, one case on increased imports was initiated, after a gap of four years, two AD cases were launched by the GCC in 2015. Two cases on SGM (increased imports) were lodged by the GCC in 2016, followed by two cases of AD and one case on SGM were confirmed by the GCC's Official Gazette in 2017 (see Table 2).

This again reinforces the need for an in-depth insight into the compatibility and compliance of the GCC-CLAD and SA with the WTO-ADA and SA, which will subsequently provide an assessment of the GCC's capability to reform its trade policies in accordance with international trade laws. It also will highlight potential areas of the GCC-CLAD and SA for further reform with a view to the effective implementation of the WTO-ADA and SA in the GCC's regional context for the promotion of healthy trade activities under the wider context of the free and open trade regime promoted by the WTO. Therefore, the hands-on empirical evidence regarding the potential of the GCC-CLAD and SA to realise the WTO-ADA and SA is an important step towards helping the GCC to diversify the economies of its members,

[117] ibid 57, p 2.

[118] ibid 56, p 4.

[119] ibid 58, p 3.

paving the path for legal reforms and the development of legal structures for an effective implementation of their international trade obligations as WTO Members.[120]

Table 2: AD and Safeguard Investigations and Determinations Recorded in GCC Members States 2008–2022

Product/s Under Investigation	Type of Complaint	Country Involved	Complaint Initiation Year	Investigation Results
Angles, channels and beams	Increase in imports	All exporting countries	2009	The investigation was terminated without imposing any duties due to the absence of serious injury.[121]
Uncoated paperboard in rolls or sheets	Increase in imports	All exporting countries	2009	The investigation was terminated without imposing any duties due to the absence of serious injury.[122]
Automotive batteries	Dumping	South Korea	2015	The investigation was terminated, imposing definitive AD duties for five years.[123]
Ferro-silico-manganese	Increase in imports	All exporting countries	2016	The investigation was terminated without imposing definitive measures and refunding provisional duties due to the absence of a causal

[120] ibid 57, 2.

[121] GCC-TSAIP, No (2/2009) 'Initiation of a Safeguard Investigation Against Increased Imports of Angles, Channels and Beams into GCC Market" (2009) Official Gazette, V2, adopted 7 November 2009; GCC-TSAIP, No (2/2010), 'Termination of a Safeguard Investigation Against Increased Imports of Angles, Channels and Beams into GCC Market" (2010) Official Gazette, V2, adopted 31 May 2010.

[122] GCC-TSAIP, No (1/2009) 'Initation of a Safeguard Investigation Against Increased Imports of Other Uncoated Paper and Paperboard in Rolls or Sheets into GCC Market" (2009) Official Gazette, V2, adopted 7 November 2009; GCC-TSAIP, No (1/2010) 'Termination of a Safeguard Investigation Against Increased Imports of Other Uncoated Paper and Paperboard in Rolls or Sheets into GCC Market" (2010) Official Gazette, V3, adopted 31 May 2010.

[123] GCC-TSAIP, 'Concerning the Initiation of an AD Investigation Against the Import of Electric Lead-Acid Accumulators of Capacity of 35 up to 115 Amp-Hours, Whether or Not Rectangular (Including Square) of a Kind Used for Starting Piston Engines (Automotive Batteries)' (2015) Official Gazette, V5, adopted 31 December 2015; GCC-TSAIP, No (5/1 AD/2016) 'Imposition of Definitive AD in Duties Against the GCC Imports of Electric Lead-Acid Accumulators of Capacity of 35 up to 115 Amp-Hours, Whether or Not Rectangular (Including Square) of a Kind Used for Starting Piston Engines (Automotive Batteries)' (2017) Official Gazette, V10, adopted 23 April 2017.

Product/s Under Investigation	Type of Complaint	Country Involved	Complaint Initiation Year	Investigation Results
				link between the increase in imports and the serious injury.[124]
Pre-painted flat steel	Increase in imports	All exporting countries	2016	The investigation was terminated, imposing definitive safeguard measure duties for three years.[125]
Iron or steel pipes for transporting oil and gas	Dumping	China	2017	The investigation was terminated without imposing any duties due to the absence of material injury.[126]
Uncoated paperboard in rolls or sheets	Dumping	Spain, Italy and Poland	2017	The investigation was terminated, imposing definitive AD duties for five years.[127]
Chemical plasticizers	Increase in imports	All exporting countries	2017	The investigation was terminated, imposing definitive safeguard

[124] GCC-TSAIP, No (2/2S/2016) 'Concerning the Initation of Safeguard Investigation Against Use of Ferro Silico Manganese' (2016) Official Gazette, V8, adopted 3 October 2016; GCC-TSAIP, No (3/2S/2016) 'Imposition of a Provisional Safeguard Measure Against the GCC Imports of Ferro Silico Manganese' (2016) Official Gazette, V9, adopted 17 October 2016; GCC-TSAIP, No (8/2S/2016) 'Termination of the Safeguard Investigation Against the GCC Imports of Ferro Silico Manganese Without Imposition of Definitive Measures and Refunding of Provisional Duties' (2017) Official Gazette, V12, adopted 3 May 2017.

[125] GCC-TSAIP, 'Concerning the Initation Of SGM Against the GCC Imports of Rolled Iron or Steel, 600mm Width or More, Painted, Varnished or Plastic Coated and Other (Pre-Painted Flat Steel)' (2016) Official Gazette, V7, adopted 19 June 2016; GCC-TSAIP, No (9/1S/2017) 'Imposition of Definitive SGM Against the GCC Imports of Rolled Iron or Steel, 600mm Width or More, Painted, Varnished or Plastic Coated and Other (Pre-Painted Flat Steel)' (2018) Official Gazette, V15, adopted 19 April 2018.

[126] GCC-TSAIP, No (2017/AD2/7) 'Concerning the Initiation of an AD Investigation Against Imports of Seamless Pipes and Tubes of Iron or Steel of a Kind Used for Oil or Gas Pipelines and Drilling of Circular Cross-Section of an External Diameter Not Exceeding 16 Inches (406.4mm) Orginating in the People's Rebublic of China' (2017) Official Gazette, V11, adopted 25 April 2017; GCC-TSAIP, No (18/2D/2018) 'Concerning the Termination of the AD Proceeding against the GCC Imports of Seamless Pipes and Tubes of Iron or Steel of a Kind Used for Oil or Gas Pipelines and Drilling Orginating in the People's Rebublic of China' (2018) Official Gazette, V16, adopted 1 November 2018.

[127] GCC-TSAIP, No (10/AD3/2017) 'Concerning the Initation of AD Investigation Against Imports of Uncoated Paper and Paperboard (Kraft Liner or Fluting or Test) in Rolls or Sheets, Other than that of Heading 4802 or 4803 (Cotainer Board) Originating in Spain, Italy, and Poland' (2017) Official Gazette, V13, adopted 25-31 July 2017; GCC-TSAIP, No (21/3AD/2018) 'Concerning the Initation of AD Investigation Against Imports of Uncoated Paper and Paperboard (Kraft Liner or Fluting or Test) in Rolls or Sheets, Other than that of Heading 4802 or 4803 (Cotainer Board) Originating in Spain, and Poland' (2019) Official Gazette, V20, adopted 31 March 2019.

Product/s Under Investigation	Type of Complaint	Country Involved	Complaint Initiation Year	Investigation Results
				measure duties for three years.[128]
Ceramic tiles	Dumping	India, Spain and China	2018	The investigation was terminated, imposing definitive AD duties on China and India.[129]
All water cement products	Dumping	Iran	2019	The investigation was terminated, imposing definitive AD duties.[130]
Super absorbent polymer	Dumping	Japan and Taiwan	2019	The investigation was terminated as the complainant withdrew its complaint.[131]
Certain steel products	Increase in imports	All exporting countries	2019	The investigation was terminated without approving the imposition of definitive SA measures against the GCC imports of certain steel products.[132]
Steel products	Increase in imports	All exporting countries	2021	The investigation was terminated without approving the imposition of definitive SA measures against the GCC imports

[128] GCC-TSAIP, No (11/3S/2017) 'Initiation of Safeguard Investigation Against the GCC Imports of Prepared Additives for Cements, Mortars, or Concretes (Chemical Plasticizers)' (2017) Official Gazette, V14, adopted 20 September 2017; GCC-TSAIP, No (20/3S/2018) 'Imposition of Definitive SGM Against the GCC Imports of Prepared Additives for Cements, Mortars, or Concretes (Chemical Plasticizers)' (2019) Official Gazette, V21, adopted 15 May 2019.

[129] GCC-TSAIP, 'Imposing Final AD Fees on Ceramic and Porcelain Imports of Origin or Export from China and India' (2020) Official Gazette, V27, adopted 30 April 2020.

[130] GCC-TSAIP, No (14/AD5/2020) 'The Imposition of Definitive AD Duties on Imports of Portland Cement, Aluminous Cement, Slag Cement, Super Sulphate Cement, and Similar Hydraulic Cement, Whether or not Coloured or in the Form of Clinkers (Originating in or Exported from the Islamic Republic of Iran)' (2020) Official Gazette, V28.

[131] GCC-TSAIP, No (28/11AD/2019) 'Initiation of AD Investigation Against Imports of Super Absorbent Polymer Originating from Japan and Taiwan" (2019) Official Gazette, V24, adopted 28 November 2019.

[132] GCC-TSAIP, No (02/9SA/2021) 'Rejection of the Imposition of Definitive SA Measures against the GCC Imports of Certain Steel Products' (2021) Official Gazette, V34, adopted 2 September 2021.

Product/s Under Investigation	Type of Complaint	Country Involved	Complaint Initiation Year	Investigation Results
				of certain steel products.[133]
Aluminum-alloy sheets, plates and strips	Dumping	China	2020	The investigation was terminated, imposing definitive AD duties.[134]
Piston engine batteries	Dumping	Spain, China and India	2021	The investigation is in progress.[135]
Half fluting paper chemical, fluting paper and test liner from recycled fibres (cardboard)	Dumping	Germany, India and France	2021	The investigation is in progress.[136]
Super absorbent polymer	Dumping	China, Japan, Belgium, Singapore. South Korea and France	2021	The investigation is in progress.[137]
Electric lead-acid accumulators	Dumping	South Korea	2022	The investigation is in progress.[138]

Despite an increase in the number of cases involving AD and SGM, there is no empirical study reported in the existing literature that may have looked into the ways the GCC applies,

[133] ibid.

[134] GCC-TSAIP, 'Imposing Definitive AD Duties on Aluminum-Alloy Sheets, Plates and Strips from China" (2021) Official Gazette, V32, adopted 15 June 2021.

[135] GCC-TSAIP, No (27/4AD/2021) 'Initiation of AD Investigation against Imports of Batteries for Piston Engines with a Capacity of 32 up to amp from Spain, China and India' (2021) Official Gazette, V31, adopted 27 April 2021.

[136] GCC-TSAIP, No (12/8AD/2021) 'Initiation of AD Investigation Against Imports of Half Fluting Paper Chemical, Fluting Paper and Test Liner from Recycled Fibres (Cardboard) from Germany, India and France' (2021) Official Gazette, V33, adopted 12 August 2021.

[137] GCC-TSAIP, No (4/11AD/2021) 'Initiation of AD Investigation against Imports of Super Absorbent Polymer from China, Japan, Belgium, Singapore, South Korea and France' (2021) Official Gazette, V35, adopted 4 November 2021.

[138] GCC-TSAIP, No (23/3AD/2022) 'Initiation of AD Investigation against Imports of Electric lead Acid Accumulators of Capacity of 35 up to 115 Amperes, Whether or Not Rectangular (including Square) of a Kind Used for Starting Piston Engines (Automotive Batteries) Originating in or Exported from the Republic of Korea" (2022) Official Gazette, V37, adopted 23 March 2022.

interprets and implements the WTO-ADA and SA provisions. Additionally, examining recent academic publications on the GCC-CLAD and SM individually or together reveals a predominantly economic perspective, with scant attention paid to legal aspects. Mattar generally addressed whether Saudi Arabia's policies and regulations for exporting petrochemical products are compatible with WTO guidelines and questioned how Saudi Arabia would respond to the AD cases brought against its petrochemical sector.[139] Al-Raqqadi reviewed the economic and legislative obstacles that hinder GCC Members from implementing the GCC's own AD and SGM, laws, and policies.[140]

Furthermore, there has been no attempt on behalf of the WTO as per the literature to assess these laws since the accession of GCC Members.[141] The GCC also delayed for about five years after the laws were amended in 2011 before implementing them. These delays might be due to number of legal obstacles, which might have prevented the GCC regime from being in line with relevant WTO-ADA and SA regulations.[142] That is why it is important to assess the compliance of the GCC with the WTO-ADA and SA provisions while deciding on AD and safeguard cases in the territories of the GCC. Without examining the methods and procedures behind the implementation and interpretation of the WTO-ADA and SA by the GCC, the GCC cannot realise its ambition of playing a leading role in the economic development of the Arab world, as any non-compliance issues with the internationally recommended trade remedies of the WTO may jeopardise the free and fair-trade initiatives championed by the WTO and the GCC itself. Hence, it is vitally important to examine the level of compliance by the GCC with the provisions of the WTO-ADA and SA to determine the GCC's level of commitment to the promotion of free and fair-trade policies under the wider umbrella of the WTO's trade remedies, including AD and SGM.

The use of AD and SGM has become rampant, and indeed is threatening to limit the market access achieved under the GATT/WTO trade negotiations over the last fifty years or so. Bhat concludes that there is a need to contain and drastically modify ADA to combat this menace.[143] However, this raises the question of why considering legal reform is not the only important issue, but also the consideration of changing WTO law to prompts the further need to explore AD/SG measures in the WTO context.

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[139] Mattar, 'AD and Anti-Subsidy' (n 81).

[140] Al-Raqqadi (n 80).

[141] A Parenti, 'The Accession to the World Trade Organisation: A Legal Analysis' (2000) 27(2) Legal Issues of Economic Integration 141.

[142] Al-Raqqadi (n 80).

[143] ibid.

Alavi examined the WTO's trade protectionism and the impact on Muslim countries, arguing that many issues were brought under its jurisdiction after the WTO was established (compared to the GATT) and that 'these active developments created fear and bitterness among many Muslim countries because they felt excluded, oppressed and pressured'.[144] Alavi argues that the WTO agreements are advertised as a tool for liberalising trading systems, but they are actually a protectionist tool. This helps to explain the GCC/WTO divergence in matters of AD and safeguarding measures because, as Qian and Wu argue, the 'Islamic cultural exception' is the principled position,[145] to which the GCC countries adhere in the WTO negotiations.

Qian and Wu refer to a country's 'cultural exception' policy as defending its culture in order not to be violated by others.[146] The GCC is one of the Middle East's most powerful economies, and the "Islamic cultural exception" is the principal stance adopted by the GCC countries in the WTO or FTA negotiations. For 18 years (1990-2008), negotiations over the Free Trade Agreement (FTA) which was meant for progressive and reciprocal liberalization of trade of goods/services between GCC and EU failed to produce any concrete agreement due several disagreements on behalf of GCC countries to the flow of goods between EU and GCC[147]. GCC countries cannot make real progress on the liberalization of trade unless it shows flexibility in accepting the terms of mutual interests between transacting parties. The authors agree that GCC countries should have made some compromises in the EU-GCC negotiations and actively cooperated for the success of talks on the FTA[148].

There have also been FTA talks between China and the GCC for ten years, although China has not fully utilised its power to launch a more versatile economic and trade cooperation policy to cope with the 'Islamic cultural exception' of the GCC countries, in conjunction with the country's "One Belt One Road" strategy. A similar situation has arisen in terms of the impact of Kuwait's membership in the WTO.

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[144] R Alavi, 'Trade Protectionism Under the WTO: The Impact on Muslim Countries' (2002) 23(4) Journal of Economic Cooperation 1.

[145] X Qian and Y Wu, 'The "Islamic Cultural Exception" of GCC Countries' (2015) 9(1) Journal of Middle Eastern and Islamic Studies 54.

[146] ibid.

[147] European Commission, 'Guld Region: EU trade relations with Gulf region. Facts, figures and latest developments' (EU, 2022) < https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/gulf-region_en#:~:text=EU%2DGulf%20Cooperation%20Council%20trade,trade%20in%20goods%20and%20services.> Accessed 14 Feb 2023.

[148] Ibid 128.

The main contribution of Faras was to analytically measure the economic impact of Kuwait's membership of the WTO on the supply, demand, welfare and trade conditions.[149] The authors utilised the general equilibrium model of international trade which is a simulation model that simulates economic effects. The results of this model are threefold. First, the Tariff Reduction Agreement had a very small but positive effect on Kuwait given the existing low tariff rates; second, the negative impact of the AD agreement is greater since this leads to a higher increase in the price of imported goods; and third, the inconsistencies between the global application of WTO agreements leading to a price reduction of importable and the AD deal. Finally, the government procurement agreement has the least effect, as it only raises exports. This research resonates with Bhat's research on the globalisation of AD and its impact owing to specific findings in relation to AD impacting the achievements of the WTO, such as improving market access.[150]

Voon discussed the exclusion of trade remedies from the WTO and the lessons learned from regional trade agreements.[151] The economic irrationality of dumping and global safeguards (so-called 'trade remedies') was highlighted by the author as a heightened concern to the representatives of the WTO as the global financial crisis threatens to manifest itself in increased protectionism. The abolition of trade remedies, long accepted under WTO agreements and perhaps a necessary evil to promote multilateral trade liberalisation, is far from the agenda of the WTO negotiators, but is something that should be argued, as remedies are not the only answer to overcoming the trade agreement issue.

Kazzi emphasises the vague status of the GCC Members with regard to the application of the rules on trade remedies set out in the WTO agreements and enforced by the GCC's CLADCLSM.[152] These countries understand the effectiveness of the rules applied in the event of difficulties arising from the liberalisation of trade, in particular by ensuring that WTO members protect their legitimate economic interests when they are the victims of unfair practices or are obliged to take emergency measures in the event of market disruption. The GCC also points out that contingency action is an important instrument for the progress of the decade-long process of regional integration and diversification policies initiated by their national economies. The reality remains that, unexpectedly, these countries are

[149] RY Faras, 'Quantifying the Impact of the WTO on Kuwait' (PhD thesis, Chambers College of Business and Economics 2002).

[150] TP Bhat, 'Globalisation of AD and its Impact' (2003) 38(1-2) Foreign Trade Review 54.

[151] T Voon, 'Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements' (2010) 59 International and Comparative Law Quarterly 625.

[152] Kazzi (n 3) 10.

reluctant to use these remedial tools at regional and multilateral level. Very few investigations have been conducted thus far and no contingency action has yet been taken.

Mattar noted that the large number of AD cases filed worldwide against Saudi Arabia's petrochemical products indicates a need to strengthen Saudi Arabia's domestic laws and dumping regulations.[153] It is argued that certain elements of the WTO-ADA need to be reconsidered by the contracting parties in light of the current context in which trade between the contracting parties takes place. The aspects to be re-examined include, for example, protocols for dispute resolution. In this regard, Mattar argues that certain aspects of the WTO-AD should be subject to further negotiations between the WTO's contracting parties in order to make the necessary changes. Mattar, as expressed in the WTO Agreement, also examined AD legislation. Mattar's research investigated the compatibility of Islamic values and Saudi Arabian law with the ADA.

For many countries, recent theory suggests that dumping, which is a form of price discrimination or differential pricing of different units of the same products sold in different markets at different prices, remains an ongoing issue.[154] WTO members have access to the imposition of AD duties or levies on the domestic industry for the effects of dumped goods, and determining whether this is consistent with the WTO AD Agreement is an important consideration. Scholars argue that, in areas such as the measurement of the constructed export price, the assessment of material injury and causal relationship, the imposition of provisional and definitive AD duties and the review process, AD legislation and practice are incompatible with WTO obligations.[155]

This thesis assesses the compatibility between the provisions of the GCC-CLAD and SGM and the corresponding provisions of the WTO-ADA and SA. It intends to provide guidelines to reform and bring the GCC laws in line with the WTO's ADA and SA, and Article XIX of GATT 1994 as models, for, as Article XVI:4 of the WTO Agreement established. Also, it intends to critically discuss the WTO's AD and safeguard laws in the light of outcomes to be reported in this study. 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.'[156]

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[153] A Mattar, 'Legal Analysis of AD Cases Raised against Saudi Arabia's Petrochemical Products' (2014) 14(2) Global Journal of Human-Social Science 17.

[154] OS Sibanda Sr, 'Procedural Requirements of the South African AD Law and Practice Prior to Imposition of AD Duties: Are They Really WTO-Inconsistent?' (2020) 55 Foreign Trade Review 216.

[155] ibid.

[156] WTO Agreement, art XVI:4.

1.11 The Compliance Controversies to WTO

Promotion of international trade requires the concession of states to various trade-offs that may limit in some respect their self-interests while in the broader context advancing gains derived from trading with other countries. The challenge posed by such concessions can be deduced from China's joining of the WTO in 2016 after arduous negotiations. China, which at the time was ranked as the world's leading exporter and the second-largest importer, took 15 years to attain membership of the WTO. While other countries have not undergone such arduous negotiations to join the body, compliance with and abidance by the rules set by the WTO present a conundrum that necessitates an examination of how countries in the broader context concede some of their sovereignty to maintain a balance and the efficiency of the WTO, given the absence of an international policing body. In other words, it is essential to consider the motivation behind a country's compliance with the treaties and conventions of WTO. The justification of the behaviour of countries under international law presents a need to evaluate the reasons states comply under international law. However, studies have also suggested compliance based on interests, perception of power, and customary international law. The concept of a legal obligation appears undisputed and, as such, presents an avenue for interrogating the motivation behind the legal obligation.

Henkin's argument on compliance all the time with WTO treaties and laws is not possible, and it takes time and requires negotiation between WTO and Members.[157] Vorderbruggen states that international law is primarily a result of careful negotiations that lead to the formulation or codification of treaties and conventions.[158] The treaties and conventions under the WTO are primarily motivated by self-interest, which Vorderbruggen argues is distinct from an obligation. Vordebruggen notes that obligations to comply with international law presume the existence of social relationships. In augmenting the distinctiveness of obligation compared to self-interest, Vorerbruggen argues that obligation can be deduced from a state's feeling that it must act in a given way. As such, there are developing states within the WTO that may feel an obligation to act in a particular way which may conflict with their self-interest, which would complement and concur with Henkin's viewpoint.[159] Pickering augments the argument by observing that customary international law, which is developed by way of widely accepted norms, has over the past 400 years

[157] L Henkin, *International Law: Politics and Values* (Springer 1995).

[158] K Vorderbruggen, 'A Rules-Based System? Compliance and Obligation in International Law' (*E-International Relations*, 9 October 2018) <https://www.e-ir.info/2018/10/09/a-rules-based-system-compliance-and-obligation-in-international-law/> accessed 03 August 2022.

[159] ibid 1.

guided states to act in a way that is deemed to be presumably acceptable.[160] The argument is furthered by Vorderbruggen, who observes that in the international law legal framework, legitimate institutions are used to make historically and socially grounded norms. However, Vorderbruggen cautions against reducing international law to history or economics.

The obligation is further derived from the reasoning that states have consented to treaties and conventions. For instance, China's entry to the WTO was based on a negotiated scheme that allowed it to give its consent to be bound by the decisions of the WTO. Developing nations are thus likely to be bound by the decisions of the WTO because they have consented to the treaties and norms of the WTO.

Whereas Henkin argues that states will comply almost all the time, Pickering observes that states can have different degrees of compliance. Using the UK and Italy as examples, Pickering furthers his argument by evaluating the degree to which both the UK (then a member of the EU) and Italy complied with EU rules. According to Pickering, both of them complied differently, with Italy up to three times more likely to depart from EU norms. The reasoning advanced by Pickering is that countries are more likely to comply with international obligations if they have elaborated legal systems and are less corrupt. With most developing countries primarily considered corrupt and lacking advanced legal systems, domestic institutions are likely to increase or decrease the extent of compliance. To this end, it would appear that developing countries in the WTO are less likely to comply with the set norms due to inefficient domestic legal systems.

A similar finding on the ability of countries to comply with international laws depending on the level of domestic institutions is evident amongst the East African countries of Kenya, Tanzania, and Uganda.[161] However, it is essential to consider whether developing states may forego compliance out of self-interest. Pickering observes that developing countries will place self-interests first at the expense of other considerations to answer this question. For instance, Pickering observes that the East African countries previously mentioned were more likely to comply with international laws to get foreign aid, which may be viewed as a form of self-interest. However, for compliance to be high there, must be convergent interests between developing countries and developed interests. The absence of convergent interests would thus appear to negate Henkin's theory that states comply almost all the time with

[160] H Pickering, 'Why Do States Mostly Obey International Law?' *(E-International Relations,* 4 February 2014) <https://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/> accessed 03 August 2022.

[161] ibid 2.

WTO obligations. For instance, if the East African countries were devoid of a motivating factor to comply, chances were that their compliance would be minimal or absent.[162]

The realism school of thought argues that self-interest explains where a high degree of self-interest is the primary motivating factor for developing countries to comply with international law.[163] Apart from convergent interests, power relations may explain why a developing country is more likely to relate to or trade with a particular region over the other. For instance, China's growing influence in Africa may indicate power relations between developing and developed countries.

Whereas Henkin argues that compliance by states with the international legal obligations between developed and developing countries within an international framework can be primarily attributed to the self-interests of a developing country. Whereas different studies have indicated the possibility of developing countries complying with international law due to weak domestic institutions, they are also likely to comply due to self-interests. However, apart from self-interests, power relations are a valuable tool in evaluating states' compliance with international law.

In addition, Henkin's argument has been disputed by sceptics who hold the view that the principles of international law will not be respected most of the time because it disadvantages the Members in certain ways. The argument is that the principles of international law are not appropriate for everyone as they disadvantage certain members due to ambiguity and unfairness.[164] The element of ambiguity arises as a result of complexities in the framing of international laws which makes accurate interpretation of them quite challenging. Worse still, treaties are faulted for favouring developed nations at the expense of their underdeveloped and developing counterparts. This is the same argument that can be used to fault the application of the WTO. Researchers have established that the principles of the WTO tend to disadvantage developing nations like the GCC Members in many ways.[165] In the first place, the WTO has favoured developed countries by giving them a long period of tariff protection. This conferred undue advantage over developing countries like those of the

[162] A Chilton and K Linos, 'Preferences and Compliance with International Law' (2021) 22(2) Theoretical Inquiries in Law 252.

[163] ZI Búzás, 'Evading International Law: How Agents Comply with the Letter of the Law but Violate Its Purpose' (2017) 23(4) European Journal of International Relations 859.

[164] M Ovádek and I Willemyns, 'International Law of Customs Unions: Conceptual Variety, Legal Ambiguity and Diverse Practice' (2019) 30(2) European Journal of International Law 361.

[165] I Kumar, 'Making WTO Dispute Settlement System Useful for LDCs' (2018) 6 Kathmandu School of Law Review 117.

GCC.[166] In addition, the principles of the WTO makes it a bit difficult for GCC Members to stabilise and develop their infant industries. Such industries often find it difficult to compete with those of developed countries unless they get some protections.[167]

1.12 Structure of the Thesis

This thesis consists of seven chapters. This chapter (Chapter 1), introduces the study, providing a brief background to the topic, an outline of the study's aims and research questions, and a brief discussion of their significance. It also explains the research methodologies, identifies the gap in existing literature, and explains how this study will fill it.

Chapter 2 presents legal and compatibility analyses to examine the compatibility of the text of the GCC CLAD and its RoI with WTO law, especially the ADA. This chapter will particularly address the Articles that define essential terms such as 'dumping', 'material injury', and 'domestic industry' and those that determine the requirements for imposing AD measures, and the various forms that such measures may take.

Chapter 3 will focus on Articles that govern the AD investigation process and the requirements for transparency during such investigations.

Chapter 4 will examine how and whether the GCC-TSAIP interpreted and implemented the GCC AD provisions consistently with WTO law. This evaluation emerges out of a legal analysis of three of the GCC's AD cases.

Chapter 5 will present a legal and compatibility analysis to test the compatibility of the text of the GCC's CLSM and its RoI with WTO law, the SA, and Article XIX of GATT 1994.

Chapter 6 will clarify how the GCC-TSAIP handled, interpreted, and implemented the GCC's CLSM and its RoI in practice by analysing three GCC safeguard cases with reference to WTO law.

Finally, Chapter 7 will conclude the study by outlining the primary findings and the study's limitations, and by offering recommendations. These proposals seek to develop a reasonable approach to reforming or redrafting the GCC-CLAD and CLSM and their RoIs to bring them into compliance with WTO law governing AD and SGM.

[166] IOC Igwe, 'WTO, A Multilateral Trade Institution or a Parallel Organisation: Reform Initiatives Addressing the WTO Agricultural Trade Distortions to Developing Countries' (2021) 7(1) Athens Journal of Law 65.

[167] S Yan, 'The EU's Push for WTO Reform: Proposals, Paths and Impacts' (2019) 76 China International Studies 60.

Chapter 2: Compatibility Analysis of the GCC-CLAD and RoI with the WTO-ADA in relation to the Acceptance Criteria and Conditions for AD Investigations

2.1 Introduction

This chapter answers SRQI: Are the provisions relating to the determination of AD (AD) practices in the GCC Common Law on AD (GCC-CLAD) and its Rules of Implementation (RoI) compatible with the relevant provisions of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994, the WTO AD Agreement (ADA)? This chapter presents an extensive legal evaluation of the compatibility of the GCC-CLAD and its RoI governing the determination of dumping, injury analysis, and causal links.

This chapter is divided into three main sections. The general conditions for imposing AD duties are discussed in Section 2.2, followed by analysis of results concerning AD practices (ADP) within the GCC-CLAD in comparison with the WTO-ADA. Section 2.3 reports results on various provisions within the GCC-CLAD with WTO-ADA in the areas of like product, determining the normal value of the dumped products and comparable price, determining export prices, comparing export and normal values, converting currency, calculating the dumping margin, determining material injury and assessing causal link. Section 2.4 concludes the chapter.

2.2 Legal Analysis of the GCC's CLAD, its RoI and their Compatibility with the WTO-ADA

2.2.1 General Conditions for Imposing AD Duties

Dumping is unfair competition, whereby a product is sold in a foreign market for a price that is lower than its domestic market price. It must be noted that the ADA does not prohibit dumping as a practice, nor does it seek to control such practices because both export and normal prices of products are set by private companies and manufacturers in the exporting nation.[168]

[168] Van den Bossche and Zdouc (n 115)

Therefore, to identify such activity requires incorporating different procedures and instruments that demonstrate that dumping occurred or is occurring, and to what extent it has impacted the domestic industry. The process requires cooperation and information from public and private sectors to be able to identify the dumping activities fully and to clearly measure their consequences.[169]

Article 2 of the ADA defines dumping as a product

> introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[170]

If the dumping activity is not sufficiently evident to allow the GCC or other WTO members to levy AD duties, the investigating authorities may consider the following factors to determine future measures:

- the existence of dumping;
- the presence of injury to the like product industry in the importing countries;
- the presence of a causal link between dumping and the injury.[171]

Depending on the results of such an investigation, the member may be eligible to impose AD measures. Articles 7, 8 and 9 of the ADA restrict these actions to the following:

- provisional measures;
- price undertaking;
- definitive AD duties.[172]

These are the only possible measures in accordance with Article 18.1 of the ADA, which states that '[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of the ADA'.[173]

[169] W Müller, N Khan and T Scharf, *EC and WTO Antidumping Law: A Handbook* (OUP 2009).

[170] ADA, art 2.1.

[171] ibid, art 1.

[172] ibid, arts 7-9.

[173] ibid, art 18.1.

2.2.2 The Determination of Dumping Practices

The GCC-CLAD starts by determining the presence of dumping practices. Article 3 defines dumping as 'exporting a product to Members at less than its normal value in the ordinary course of trade for the like product in the exporting countries'.[174] Dumping is therefore determined by directly comparing the domestic value of a product in the exporting country with its exported price. A straightforward price-to-price comparison is not always a fair way to determine the presence of dumping, however, WTO Members may resort to these methods.[175] Thus, the GCC-CLAD is consistent with the ADA[176] in providing alternate ways by which to determine if dumping exists. This thesis conducted a thorough review of these Articles, including 27, 28, 29 and 30 of the RoI on AD Measures, and identified the methodology by which this determination takes place. The GCC Technical Secretariat for Anti-Injurious Practices in International Trade (GCC-TSAIP) must proceed as follows:

1. determine the normal value;
2. determine the export price;
3. compare the two prices;
4. calculate the dumping margin.[177]

The next sections explain these steps more fully.

2.2.3 Determining Normal Value

Like Article 2.1 of the ADA,[178] the RoI on AD Measures define the normal value of a product as the price paid or payable for a like product in the ordinary course of trade when it is destined for consumption in the exporting countries.[179] Simply stated, the normal value is the price of the like product in the exporting country's market.

The RoI on AD Measures determine the bases for evaluation of the normal price, as per Article 27.1, which states: 'The normal value shall normally be based on the comparable

[174] GCC Common Law on AD Measures, art 3.

[175] Van den Bossche and Zdouc (n 115).

[176] ADA, art 2.

[177] RoI of the on AD Measures, arts 27-30.

[178] Article 2.1 states that, for the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

[179] RoI on AD Measures, art 1, para 1.

price paid or payable, in the ordinary course of trade, for sales of like product by independent customers in the domestic market of the exporting country.'[180] These bases of evaluation can be summarised as follows:

1. like products;
2. destined for consumption in the exporting country;
3. in the ordinary course of trade;
4. at a comparable price.

2.2.3.1 Like products

One of the substantial normal bases of the law is that the sale should be of a 'like product'. In accordance with Article 2.6 of the ADA,[181] Article 1 of the RoI on AD Measures defines 'like products' as

> GCC products which are identical or alike in all respects to the product under investigation, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under investigation.[182]

To ensure these requirements are met, the GCC-TSAIP initiates an AD investigation only after receiving 'a full description of the product under investigation […] including its uses, technical characteristics, and its current tariff classification number,' and 'a full description [of] [...] like GCC product(s)'.[183]

The same legal behaviour with respect to determining like products has been noted by GCC Members in the DSB, with Saudi Arabia acting as a third party[184] in the case concerning

[180] ibid, art 27.1.

[181] 'Throughout this Agreement the term 'like product' ('product similar') shall be interpreted to mean a product, which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product; another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.' ADA, art 2.6.

[182] RoI on AD Measures, art 1.

[183] GCC Office for Anti-Injurious Practices in International Trade (GCC-TSAIP), 'Notice: Concerning the Initiation of an Antidumping Investigation Against the Imports of Electric Lead-Acid Accumulators of Capacity of 35 up to 115 Amp-Hours, Whether or Not Rectangular (Including Square) of a Kind Used for Starting Piston Engines (Automotive Batteries)' Official Gazette (2015) 3 1; RoI of the GCC Common Law on AD, art 9.

[184] The third party to a WTO dispute is a Member that is neither the complainant or the respondent to a dispute, but rather a Member that has a 'substantial interest' in the matter at issue and wishes to comment on the factual claims or legal arguments made by the parties to the dispute. They have an interest in gaining experience through participation as a third party, thereby gaining access to the disputants' submission (enhancing internal transparency); ML Busch and E Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement' (2006) 58(3) World Politics 446; F Al Bashar, 'The WTO Dispute Settlement Mechanism and the Reform of Third-Party Rights: A Study from the Perspective of Developing Countries' (PhD thesis, U of Portsmouth 2009).

China—HP-SSST (Japan) / China—HP-SSST (EU) (2015).[185] The EU claimed that China acted in a manner that was inconsistent with Article 2.4 due to its failure to consider the physical property differences between the grade C of primary boiler tube exported to China and the grade C sold on the EU market.[186] Salzgitter Mannesmann Stainless Tubes (SMST) requested China to consider the difference and adjust its normal value accordingly, but China refused, which resulted in unfair comparison between the exported and normal values. In response to this legal issue impacting how to determine dumping, Saudi Arabia made a legal submission based on Article 2.4 of the ADA that argued that 'the comparison in Article 2.4 refers to two interrelated values and does not permit an investigating authority to ignore any similarity or difference that might affect "comparability"'.[187]

The Panel's evaluation of this legal issue turned down Saudi Arabia's argument in relation to determination of the comparison of physical properties of the dumped products for 'comparability' purposes, and it upheld the EU's claims for the following reason:

> In light of the foregoing, we uphold the European Union's claim that China acted inconsistently with Article 2.4 of the AD Agreement by failing to address SMST's adjustment request under this provision with a view to determining the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value for Grade C.[188]

These data suggest that the affected party may ask the third party to use the comparative method involving the physical properties of products for determination of the likeness of the products with the dumped products. This is quite complicated, as there is no clear definition of 'like product' based on their physical properties, which probably is feasible due to the massive variations in products in the international products. This again leaves the gap for WTO Members to manipulate the WTO-ADA to protect their domestic markets. Further reforms on the side of providing clear definitions and methodologies are required in order to increase compliance by WTO Members with the WTO-ADA. Furthermore, WTO Members

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[185] Panel Reports, 'China—HP-SSST (Japan) / China—HP-SSST (EU)', WT/DS454/R and Add 1/WT/DS460/R, Add 1 and Corr 1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R and WT/DS460/AB/R, DSR 2015:IX, 4789.

[186] 'A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of the sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.' ADA, art 2.4.

[187] Panel Reports, 'China—HP-SSST (Japan) / China—HP-SSST (EU)' (n 149) para 7.73.

[188] ibid, para 7.86.

may look into the DSB and/or Appellate Body rulings in relation to the interpretation of the methods suitable for determination of 'like product'. This will help WTO member countries to identify the AD practices with more accuracy in accordance with the rulings of DSB. The cases in which such rulings or explanatory notes from the DSB are not available, the opinions from TPRM on the differences in interpretational of ADA clauses can come in handy for member of WTO.

2.2.3.2 Destined for consumption in the exporting country

To determine the normal value of a like product, the product must be one that the exporting country consumes. Moreover, it does not matter whether the like product is consumed in either its final form or as an intermediate product in other processes, as both Articles 2.1 and 27.1 of the RoI on AD Measures explain.[189] Hence the GCC CLAD and RoI comply with the WTO-ADA in defining the like product and its consumption in the exporting country.

2.2.3.3 In the ordinary course of trade

The sales transactions used to determine the normal value should be conducted 'in the ordinary course of trade'. Any sale made under other conditions must be excluded when determining this normal value, as noted in Article 27.6 of the RoI on AD Measures, and as the Appellate Body in *US—Hot-Rolled Steel (2001)* indicated in its interpretation of Article 2.1 of the ADA:

> Article 2.1 requires investigating authorities to exclude sales not made in the ordinary course of trade from calculation of normal value, precisely to ensure that normal value is, indeed, the normal price of like product, in the home market of exporter.[190]

Interestingly, neither the ADA nor the RoI have provided a clear definition of 'ordinary course of trade' but have instead outlined situations in which sales are outside of the ordinary course of trade. These occur when prices are below the per-unit costs of production (1) over an extended period of time, (2) in large quantities and (3) at prices which do not provide opportunities for the timely recovery of all costs. Moreover, the RoI on AD Measures acknowledges that sales should be transacted between independent customers, and that sales

[189] ADA, art 2.1; RoI on AD Measures, art 27.1.

[190] Appellate Body Report, 'United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan' WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para 140.

that have taken place between affiliated parties should be treated as 'outside of the ordinary course of trade'.[191] As Article 27.3 of the RoI on AD Measures states,

> In the case of association, partnership agreements, or a compensatory arrangement or other related arrangement form of compensatory arrangement among interested parties, prices among them may be considered to be not in the ordinary course of trade and may not be used to establish normal value.[192]

In addition to sales made below cost and to affiliated parties, the GCC-TSAIP considers abnormally high- or low-priced sales as outside 'the ordinary course of trade', thereby avoiding distortion in calculating the normal value.[193] Evidently the RoI on AD Measures provides legal methods consistent with the ADA's that ensure that the normal value of a like product is not impacted by product sales that occur outside the ordinary course of trade. This process is consistent with the Appellate Body's interpretation of Article 2.1 of the ADA in *US—Hot-Rolled Steel (2001)*.

2.2.3.4 Comparable price

Both Article 2.1 of the ADA and Article 27.1 of the RoI on AD Measures require that the normal value of the dumped product should be comparable to its export price. However, the exact definition of the comparable price was not provided by either the WTO or the GCC-TSAIP. Nevertheless, the Appellate Body in *US—Hot-Rolled Steel (2001)* concluded that sufficient factual record was necessary for making fair comparison of normal and export prices of the goods. This only mentioned the 'factual record' for fair comparison but failed to provide the details of factual record which should be considered sufficient for comparison of the normal price and the export price of goods.

As far as the ADA is concerned, the language of the provision in Article 2.4 is not clear either; for example, it 'allows investigating authorities to take full account of the fact, as appropriate'.[194] Article 2.4 of the ADA states:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in

[191] ADA, art 2.2.1. Note that pricing below cost alone is not sufficient. Such sales must be made within an extended period of time, in substantial quantities and at a price that does not provide for recovery costs within a reasonable period of time.

[192] RoI on AD Measures, art 27.3.

[193] Appellate Body Report, 'United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan' (n 154) para 148.

[194] ibid, para 167.

each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price or shall make do allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.[195]

The concept of fair comparison is discussed in more detail later in this chapter; however, it can be concluded that if the fair comparison provision of the RoI on AD Measures was consistent with that of the ADA, it would provide a definition of the comparable term which is also consistent with that of Article 2.4 of the ADA.

2.2.3.5 Alternative methods of determining normal value

The RoI on AD Measures acknowledge that, in certain situations, using the domestic price of a like product in the exporting country does not result in an appropriate normal value to compare with the export price. Consistent with Article 2.2 of the ADA,[196] Article 27.5 of the RoI on AD Measures states that,

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, or when such sales do not permit a proper comparison because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, the normal value of the like product shall be established on the basis of the cost of production in the country of origin plus a reasonable amount for administrative selling and general costs as well as for profit margin, or on the basis of export price, in the ordinary course of trade, to an appropriate third country, provided that this price is reasonable.[197]

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[195] ADA, art 2.4.

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

[197] RoI on AD, art 27.5.

Therefore, the RoI on AD Measures provides two alternatives method to determine the comparable normal value. These methods apply only in the following circumstances: firstly, when there are no sales of the like product made in the ordinary course of trade in the domestic market of the exporting country, and secondly, when such sales do not permit a proper comparison because of the particular market situation or the low volume of sales conducted in the domestic market of the exporting country.

The RoI on AD Measures also refer to an additional situation in which the GCC-TSAIP could use alternative methods to determine the normal value where necessary. However, neither the ADA nor the RoI on AD Measures establish which particular market situation would allow investigating authorities to use these alternative methods.

Two such alternative methods for establishing normal value are:

1. Factoring in the cost of production in the country of origin plus a reasonable amount for administrative selling and general costs for the profit margin.
2. Comparing with an appropriate third country to which the product is sold in the ordinary course of trade, provided that this price is reasonable.

It should be noted that the investigating authorities are free to choose either of these alternative methods to establish the constructed normal value.

2.2.3.5.1 Constructing normal value

Interestingly, the RoI on AD Measures do not provide any information on how to calculate this normal value. Nevertheless, the relevant part of Article 2.2.2 of the ADA provides the types and sources of information to consult in determining this value. The amounts of administrative, selling, general cost, and profits emerge by considering

1. actual data,
2. production and sales costs in the ordinary course of trade,
3. like products, and
4. the exporter or producer under investigation.[198]

Under Article 2.2.1.1, the ADA further clarifies how investigating authorities should gather such information:

[198] ADA, art 2.2.2.

> The costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.[199]

The GCC-TSAIP seems to adhere to two considerations when constructing the normal value. The first emerges out of Article 85 the RoI on AD Measures, which states: 'The provisions of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 shall be applied on matters which are not stated in these RoIs.' The second stems from Saudi Arabia's legal behaviour in the DSB in *HP—SSST (2015)*.[200] The EU argued that China did not act in a manner consistent with Articles 2.2.2[201] and 2.2.1.1[202] of the ADA because the data used to determine the normal value was not actual data due to the following reasons:

- It contained selling and general administration (SG&A) expenses calculated from planned rates—that is, the hypothetical projected administrative expense—and not the actual expenses.[203]
- It employed an abnormally high production cost because the shipment to China contained two free samples that were unrepresentative and could not be used to construct the normal value.[204]

Saudi Arabia participated as a third party in this case by submitting an argument consistent with that of the EU and Article 2.2.1.1. It stated that the authority should only use the exporter's records when they agree with General Accepted Accounting Principles (GAAP) and when they reflect the actual relationship between the actual production cost of the product under consideration and its sale price.

> Saudi Arabia submits that Article 2.2.1.1 of the AD Agreement imposes an obligation on investigating authorities to use an exporter's records when such records (i) are in accordance with GAAP, and (ii) reasonably reflect the costs associated with the production and sale of

[199] ibid, art 2.2.2.1.

[200] Panel Reports, 'China—HP-SSST (Japan) / China—HP-SSST (EU)' (n 149) para 7.61.

[201] 'For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.' ADA, art 2.2.2.

[202] 'For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.' ADA, art 2.2.1.1.

[203] Panel Reports, 'China – HP-SSST (Japan) / China – HP-SSST (EU)', para 7.55.

[204] ibid, para 7.57.

> the product under consideration. Saudi Arabia contends that the second condition is met where there is a sufficiently close relationship between the recorded cost and the actual cost to the company for the production and sale of the product at issue.[205]

The Panel upheld the EU claim and Saudi submission, as stated in its report:

> In light of the foregoing, we uphold the European Union's claim that China acted inconsistently with Article 2.2.2 of the AD Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.[206]

The third party, in this case Saudi Arabia, may have reflected the method that the GCC-TSAIP used to calculate the constructed normal value. It is advisable, however, for GCC Members to amend the RoI on AD Measures to include articles that clearly describe how the constructed normal value would be determined in light of their obligations toward the WTO.

2.2.3.5.2 Third-country price method

Like the ADA, the RoI on AD Measures do not define or outline any criteria for how to select the third country that might be used to calculate the normal value. This means that the GCC-TSAIP complies with the WTO's ADA in the area of construction of normal value.

In line with GCC's approach for determining the normal value using alternative methods, the UK government also emphasises the dependence on alternative methods for assessment of the normal value of the goods under investigation rather than the application of the comparable price. Furthermore, the investigating authorities in the UK construed the use of constructed normal value or representative export sales prices to an appropriate third country as some alternative methods for determining the normal value of the dumped products.[207] A similar stance has been taken by the European Commission (EC), which states that since 2017 it has had in place alternative methodologies for the calculation of dumping practice if the dumped product is found to significantly distort the market of the EU. They have used 'undistorted benchmarks' – parameters for determining the level of economic distortion

[205] Panel Reports, 'China—HP-SSST (Japan) / China—HP-SSST (EU)' (n 149) para 7.61.

[206] ibid, para 7.66.

[207] Trade Remedy Authority UK, 'How We Carry Out Safeguard Investigations' (*GOV.UK*, 20 June 2022) <www.gov.uk/government/publications/the-uk-trade-remedies-investigations-process/how-we-carry-out-a-safeguards-investigation> accessed 20 March 2022.

caused by the dumped product – for calculating the normal value of the dumped product under investigation in the cases of dumped products from China and Russia.[208]

2.2.4 Determining the Export Price

To determine the dumping margin, it is necessary to establish the export price of the product under investigation in the importing country. On the one hand, the RoI on AD Measures determines the export price based on what the GCC constituent actually paid for the product under investigation.[209] On the other hand, the ADA neither defines nor recommends a way to calculate the export price. Rather, it only indicates cases where no appropriate export price exists and provides an alternative way to calculate the constructed export price.[210]

The RoI on AD Measures provide details on different cases in which the export price is not valid for calculating the dumping margin. These are:

- Cases in which there is no export price for the product under investigation, such as when the transaction contains internal transfer, or barter, fees;
- Cases in which the export price is not valid anymore for comparison purposes because of an association or compensatory arrangement between the exporter and the importer or a third party.

Under these conditions, the constructed export price is calculated based on the price at which the imported products were resold to the first independent buyer. If this product was not resold to an independent buyer, or not resold in its imported condition, the GCC-TSAIP could determine the export price based on any reasonable basis.[211]

Other than this advice, neither the RoI on AD Measures nor the WTO-ADA recommend how to calculate a constructed export value, nor how to gather data. They leave these practicalities for the investigating bodies to determine. Since it is difficult to access the GCC's investigation—for reasons that will be discussed in Chapter 5—to assess how they determine these values, another question arises here about the legality, efficiency, and compatibility of the method that the GCC-TSAIP uses to determine the constructed export value.

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[208] European Commission, 'AD Measures' <https://policy.trade.ec.europa.eu/enforcement-and-protection/trade-defence/AD-measures_en> accessed 01 January 2022.

[209] RoI on AD Measures, art 28.1.

[210] ADA, art 2.3.

[211] RoI on AD Measures, art 28.2.

To sum up, there is no evidence of non-compliance by the GCC-TSAIP with the provisions of WTO-ADA on the calculation of the constructed export value, because the WTO-ADA does not bind Members to the use of any specific methodology for calculating the constructed export price. From this we can infer that the GCC-TSAIP complies with the requirement to apply some method of calculating the constructed export price. The question remains unanswered about the legality and suitability of methods employed by the GCC-TSAIP to calculate constructed export prices. This is one of the drawbacks of the WTO-ADA, as Members use any fair or unfair means at their disposal to calculate the constructed export price for banning particular foreign items to be sold in their local markets[212]. This again reflects the protectionist theory which states that gaps and leeway in the WTO-ADA may lead to exploitation of its provisions for the promotion of vested interests of certain favourite businesses and markets within the Members[213]. This may again be an obstacle to the implementation of the fair-trade concept, which is very much touted under the umbrella of WTO-ADA.[214]

2.2.5 Comparing the Export Price to the Normal Price

2.2.5.1 Basic requirement

Article 29.1,[215] the first sentence of Article 29.2[216] of the RoI of the GCC-CLAD, and Article 2.4 of the ADA oblige the GCC-TSAIP to carry out a fair comparison between the export price and the normal price.[217] These prices only become truly comparable when they reflect the same level of trade, normally the ex-factory level, and based on sales that occurred as

[212] Wooton Ian, Zanardi Maurizio, 'Trade and competition policy: AD versus anti-trust' (2002) University of Glasgow UK.

[213] Cheng LK, Qiu LD, Wong KP, 'Anti-dumping measures as a tool of protectionism: A mechanism design approach' (2001) 34(3) Canadian Journal of Economics/Revue canadienne d'économique.

[214] K Adamantopoulos and D De Notaris, 'The Future of the WTO and the Reform of the AD Agreement: A Legal Perspective' (2000) 24(1) Fordham International Law Journal 30.

[215] A fair comparison shall be made between the export price and the normal value.

[216] Article 29.2 of the RoI on AD Measures begins as follows: 'This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made as close as possible to the same time and with due account taken in consideration, the settlements for differences which affect price comparability.'

[217] 'A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory.' RoI on AD Measures, art 2.4.

close to the same time as possible. The first two sentences of Article 2.4 of the ADA describe the same requirements for enacting a fair comparison.

2.2.5.2 Allowance

Both the third sentence of Article 2.4 of the ADA[218] and the second sentence of Article 29.2[219] of the RoI on AD Measures require adjustment of either the normal value or the export price, or indeed both, in order to normalise any difference between them. They do not, however, fully define which kinds of differences may be corrected by using allowances. Instead, they define the effects that such differences should have. Nonetheless, both Articles give examples for these differences:

i. The conditions and terms of sale, such as delivery and shipment costs or credit terms, associated with transactions involving the product under investigation;[220]
ii. taxation;
iii. levels of trade;
iv. quantities;
v. physical characteristics;
vi. other demonstrable differences that may impact how to compare the prices.[221]

Neither the RoI nor the ADA mention the actual type of allowances the investigating authority should use. Instead, allowance guidelines state that the articles turn on any procedure or adjustment process that ensures a 'fair comparison'. The Appellate Body in *US—Hot-Rolled Steel (2001)* noted that,

> Specifically, this objective is achieved if, by making the allowances required under Article 2.4 of the AD Agreement, the investigating authorities should, in effect, arrive at a price

[218] 'Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.' RoI on AD Measures, art 2.4.

[219] 'This comparison includes differences in conditions and terms of sale, physical characteristics, import charges, taxation, quantities, level of trade, and any other differences, which are claimed and also demonstrated by interested parties to affect prices and price comparability.' RoI on AD Measures, art 29.2.

[220] J Czako, J Human and J Miranda, *A Handbook on AD Investigations* (CUP 2003) 92.

[221] Footnote 7 to Article 2.4 of the RoI on AD Measures clarifies that '[i]t is understood that some of [these] factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision'.

> which corresponds to the 'ex-factory' price of the 'like product' for the specific exporter concerned, as required by that provision.[222]

Moreover, the Appellate Body insisted that such allowances depend on the circumstances of each case, explaining, 'The issue of which specific "allowances" should be made in any case depends very much on the facts surrounding the calculation of export price and normal value.'[223]

The reference to 'difference in condition of sale and terms' in both Articles 29.2 of the RoI and Article 2.4 of the ADA is limited to considerations such as transport costs or credit terms concomitant with the sale transactions. This point is usually interpreted in ambiguous fashion and misunderstood by parties with an interest in the DSB. For example, in *US—Stainless Steel (2001)*,[224] a question arose as to whether the inability of customers to pay for specific sales could be classified as 'differences in condition and terms of sale' for which due allowance should be made. The Panel's response to this question was that

> The requirement to make undue allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets is not a difference that affects the comparability of prices with meaning of Article 2.4 of the ADA.[225]

The Panel concluded that the inability of the customer to pay for certain transactions was not the kind of 'difference in conditions and terms' that eventually ensures fair comparison. Nevertheless, neither article provides any explanation for the phrase 'other differences', which a party may claim or demonstrate in arguing price comparability. The Appellate Body in *US—Hot-Rolled Steel (2001)* provided that,

> Article 2.4 expressly requires that 'allowances' be made for 'any other differences which are also demonstrated to affect price comparability'. There are, therefore, no differences

[222] Appellate Body Report, 'United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan' (n 154) para 170.

[223] ibid, para 179.

[224] Panel Report, 'United States—Antidumping Measures on Stainless Steel Plate in Coils and Stainless-Steel Sheet and Strip from Korea' WT/DS179/R, adopted 1 February 2001, DSR 2001: IV, 1295, para 677.

[225] 'A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.' ADA, art 2.4.

> ‘affecting price comparability’ which are precluded, as such, from being the object of an ‘allowance’.[226]

Thus, an understanding was established that the allowances cited in both the third sentence of Article 2.4 of the ADA and the second sentence of Article 29.2 of the RoI on AD Measures are not inclusive and mandatory, albeit the latter does restrict such differences to those that can be ‘demonstrated’ as relevant by the interested parties. This lack of clarity means the GCC-TSAIP only assesses these methods if a party proposes them and also shows that they impact price and comparability; moreover, the GCC-TSAIP does not have the right to consider any differences apart from those listed in the Article or demonstrated by the interested parties. On the one hand, the GCC-TSAIP in effect ties its own hands in a way that impacts the totality of the comparison process. On the other hand, the ADA maintains sufficient flexibility for either the investigating authorities or interested parties to consider and demonstrate any difference, such that the only factor limiting such identification is the ability to show that such a difference has affected the comparability process.

The obligations under Article 29.2 of RoI on AD Measures make the GCC-TSAIP responsible only for allocating and collecting information to ensure the conduct of a fair comparison. Arguably this behaviour might result in unfair comparisons, or it might indeed enable a GCC country to violate its WTO obligations under Article 2.4 of the ADA. And yet the purpose of this requirement in Article 2.4 is the opposite of these potentialities; it is to ensure fair comparison, regardless of the method selected by the GCC-TSAIP. Overall, the rules for such adjustments cited in both Articles share the same goal, which is to ensure the comparison is fair.

[226] Appellate Body Report, ‘United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan’ (n 154), para 177.

2.2.5.3 Comparisons of constructed export prices for adjustments

In addition to the above general allowances,[227] the fourth sentence of Article 2.4 of the ADA[228] and Article 29.3[229] of the RoI on AD Measures contain another set of allowances that are helpful in determining the conditions within which to construct the export price. These allowances consider the following factors:

i. Costs, including duties and taxes, incurred between importation and resale;
ii. Profits accruing 'if in these cases price comparability has been affected'. Here investigating authorities shall consider
    a. The normal value at a level of trade equivalent to the level of trade of the constructed export price;
    b. Due allowances as warranted under these articles or paragraphs.

Authorities are not obliged, however, to enact these allowances, but may consider them, as per the fourth sentence of Article 2.4 of the ADA. The Panel for *US—Stainless Steel (2001)* concluded that the term 'should' is generally non-mandatory in its ordinary meaning; that is, its use in this sentence indicates that a member is not required to make allowances for costs and profits when constructing an export price. Nevertheless, because the failure to make allowances for costs and profits could only result in a higher export price—and thus a lower dumping margin—the ADA permits but does not require investigations to make such allowances.[230]

By contrast, Article 29.3 of the RoI on AD Measures uses the term 'shall', which expresses an obligation.[231] This obligation forces the GCC-TSAIP to work against its own incentives

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[227] Article 2.4 of the ADA further states that due allowance shall be made in each case on its merits, concerning the differences which affect price comparability, including those in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability, while Article 29.2 of the RoI on AD Measures established that '[t]his comparison includes differences in conditions and terms of sale, physical characteristics, import charges, taxation, quantities, level of trade, and any other differences which are claimed and also demonstrated by interested parties to affect prices and price comparability'.

[228] 'If the comparison requires compare the normal value to constructed export price, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If, in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.' ADA, art 2.4.

[229] 'If the export price is determined on the basis of the selling price of the product under investigation to the first independent buyer in the GCC market, allowances for costs, including duties and taxes, incurred between importation and resale, as well as profit margins accruing, shall also be made. If, in this case, price comparability has been affected, the normal value shall be calculated at a level of trade equivalent to the level of trade of the constructed export price or due allowances shall be made for the differences mentioned in this Article.' RoI on AD Measures, art 29.3.

[230] Panel Report, 'United States—Antidumping Measures on Stainless Steel Plate in Coils and Stainless-Steel Sheet and Strip from Korea' (n 186), para 6.93.

[231] Lexico, 'Shall' <https://en.oxforddictionaries.com/definition/shall> accessed 15 July 2018.

and results in determining low dumping margins; furthermore, it could result in terminating investigations without imposing AD duties. This act, however, fits within the meaning of the fourth sentence of Article 2.4 of the ADA; moreover, no member could challenge GCC Member states when they calculate a low dumping margin in the DSB, and the only parties that could be negatively impacted by such behaviours are situated within the GCC's domestic industry.

2.2.5.4 Converting currency

The ADA acknowledges the importance of currency exchange as a factor in comparing domestic and export prices and provides brief guidance on what should occur in cases that require as much.[232] Article 2.4.2 of the ADA states,

> When the comparison requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.[233]

Conversely and surprisingly, the RoI on AD Measures do not contain any information on, or indication of how, the GCC-TSAIP should deal with such conditions. And yet this factor is impossible to ignore, for the exporting country sells the product in its market based on its national currency and exports it to the international market based on a pre-agreed currency. Furthermore, the importing country sells the product based on its national currency. Thus, currency exchanges are unavoidable in most cases of trade between countries.

This lack of doctrine raises the further question of whether the GCC-TSAIP considers exchange currencies when carrying out comparisons of normal value and export price, and if so, whether the method is compatible with the fair comparison principles cited in the currency conversion guidance located in Article 2.4.2 of the ADA.

It is vital for the GCC-TSAIP to comply with the provisions of the describing mechanism or for indicating the currency conversion factor in deciding whether dumping has occurred.

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[232] 'When the comparison under article 2.4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.' ADA, art 2.4.2.

[233] ADA, art 2.4.2.

One way of increasing the compliance of the GCC-TSAIP with the currency conversion-provision within the WTO's AD and safeguard laws is that the adversely affected parties in the AD cases dealt with by the GCC-TSAIP should lodge a complaint with the DSB about the lack of transparency regarding the application of the currency conversion factor while passing judgements on the given case. The WTO stressed the increasingly role of DSB in detection of violation of WTO-ADA on reporting of the affected parties in AD cases.[234] Third parties may approach the DSB with unfair or non-compliant practices followed by the GCC-TSAIP, and challenge the procedures pursued by the GCC in relation to currency conversion. These instances of complaints from third parties will prompt the DSB to review the current laws and provisions contained in the GCC-TSAIP and will raise alerts regarding non-compliance in this area. Therefore, the GCC-TSAIP can be made compliant with the WTO-ADA in the domain of transparency in the use of the currency conversion factor for calculating the AD margins and related price calculation for the given products.

Another mechanism which third parties may be used by third parties for enhancing transparency or raising concern about transparency is the Committee on AD Practices (ADP). It constitutes an important normative structure within WTO, which is set to review the clauses and provisions in ADA, provide clarifications on their status of implementation and interpretations to the DSB and Appellate Body if it is instructed to do so in the matter of non-clarification events of the provisions. It meets biannually and invites Members of WTO to discuss any difficulties in terms of implementation of ADA, thereby offering a genuine opportunity to both developed and developing countries to raise questions regarding the normative understanding of the ADA, opalization of the ADA provisions in the context of national AD laws and regulations, and answer questions regarding the consistency of the national AD laws with the WTO-ADA. The Committee on ADP also helps Appellate Body and DSB to interpret clauses of ADA carrying certain level of ambiguities in terms of literal meanings and their relevance to the practical cases of ADA in the regional and local contexts of WTO Members.[235]

[234] Sibanda, 'WTO Antidumping Litigation: A Review of Some Procedural and Substantive Issues' (2007) 48 WTO Antidumping Litigation: A Review of Some Procedural Issues.

[235] World Trade Organization, 2023, 'Technical Information on AD' (World Trade Organization, 2023) < https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm> Accessed 05 Feb 2023]

According to Lang and Joanne[236], the purpose of Committee on ADP is to 'build shared normative expectations of the ADA provisions through exchange of information and to the regulators and creation of a consensus around the common regulatory standards, and monitoring the compliance of the Members with these standards in conjunction with regulatory and judicial framework of WTO. The best example of collaboration between the judicial and regulatory arms of WTO can be observed in the event of practical implementation of Article 15 of ADA concerning the concept of special and preferential treatment which is not mentioned in ADA but it is also highlighted in many other WTO agreements. From the wording of Article 15, it seems that this provision reflects the 'endeavour clause rather than the mandatory provision. Thus, in the course of the implementation debate the limited, if any, importance of this provision quickly became one of the focal points for suggested reforms of the ADA'. The Panel and Appellate Body, in the case of *US-Steel Plate*[237], perceived that form the implementation perspective, the Article 15 is a mandatory clause, and instructed Committee on ADP to examine the modalities for its application and clarification and provide its recommendations for how to operationalize this provision in the practical cases of AD.[238]

The Third party-led complaint and the relevant WTO Committees on Antidumping Practices on resolving the issue and increasing the transparency may work by adopting the following steps[239]:

- If decisions and verdicts given by GCC-TSAIP on the currency conversion, and interpretation and methods used by GCC-TSAIP to arrive at conclusions in AD

[236] Lang, Andrew, and Joanne Scott. "The hidden world of WTO governance." European Journal of International Law 20, no. 3 (2009): 575-614.

[237] Panel Report, US – Steel Plate, para. 7.111.

[238] Inama, Stefano, 'Negotiating AD and setting priorities among outstanding implementation issues in the post-Doha scenario: first examination in light of recent practice and DSU jurisprudence' (2002) (UNCTAD/ITCD/TSB/Misc. 72) < https://unctad.org/system/files/official-document/psitcdtsbm72.en.pdf> Accessed 02 Feb 2023.

[239] WTO, 'Technical information on antidumping' (World Trade Organization, 2023) <https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm> Accessed 14 Feb 2023).

cases were not in line with ADA or unfair with respect to the transacting party in ADA case.

- The affected party will lodge complain at DSB against the methods used by GCC-TSAIP for implementation of currency conversion factor.
- The DSB will send notice to GCC-TSAIP for explanations or defend the methodology for currency conversion
- DSB will also involve the WTO Committee on ADA practices for collection of data about particular case. WTO Committee on ADA Practices is responsible for questioning the consistency of national practices of members with ADA laws, reviewing the ADA actions taken by members, providing opportunities to defendant and complainant to discuss issues raised in a particular case
- GCC-TSAIP will provide its defence, notes and explanations which will be analysed by legal experts in the DSB in light of existing ADA rules
- If the methods applied by GCC-TSAIP for currency conversion contradicted ADA rules, then it will direct GCC-TSAIP to reverse the decision or use the methodologies recommended by panel of DSB.
- This procedure will create more transparency and better compliance of member countries with ADA rules
- If ADA rules are not clear in currency conversion, then DSB panel may recommend the reforms in ADA laws to produce more clarity and transparency in the issues highlighted by complainant or defendant.
- Under directives of DSB, WTO Committee on ADA practices will ensure the decisions of DSB are implemented, and transparency in matters of ADA laws at national level in member countries is maintained to adequate level to avoid future confusions in interpretations of ADA laws by member countries.

Notably, if the affected party in an AD case is a low-income country or a developing country compared to the AD user country, then it is less likely that developing countries will adopt the option of lodging a complaint against GCC with the WTO-based DSB, as they have to pay the political and economic cost involved in this process.[240] Against this background, the adversely affected developing countries, as third parties in GCC AD and safeguard cases and not lodging the complaint against the GCC-TSAIP, may be encouraged to use the avenue of

[240] Bown and Hoekman (n 43).

the Advisory Centre on WTO Law (ACWL) which offers economic support to low-income countries seeking to lodge a complaint with the DSB against a comparatively developed AD user. For example, the ACWL offered legal assistance to Bangladesh, a low-income country, to challenge the AD practices pursued by India, a comparatively developed country, through the DSB (DS306, *India-Antidumping Measures on Batteries from Bangladesh,* ACWL, 2006).

Additionally, Bown and Hoekman pointed to another solution for encouraging developing countries acting as defendants in dumping cases to report the lack of transparency in the application of the provisions of the WTO-ADA on behalf of the GCC-TSAIP when making decisions on AD cases, namely, the development of more ACWL-like instruments through effective engagement with NGOs and pro bono attorneys in the private sector with the aim of providing less costly pathways for developing or low-income countries to file complaints against comparatively developed users of the WTO-ADA.[241] This is critically important to gain a better insight into the legal practices followed by Members when deciding on AD cases using the WTO-ADA. The DSB and Appellate Body can further help to identify and report areas of non-compliance such as lack of clarity about the currency conversion factor in the GCC RoI. These measures are more likely to create an environment in which compliance of the WTO Members, including those of the GCC Member States, with legal provisions in the WTO's ADA may be increased.

Bown and Hoekman have suggested another cheaper way of providing an avenue for the grieved and adversely affected third parties in AD and safeguard cases, namely, the establishment of a GCC-based DSB. A fine example of such a system can be found in the 'European General Court', the EU's AD and safeguard resolution mechanism, which assists grieved parties to lodge complaints and challenge the EC's decisions in AD cases.[242] This system has proved fruitful from an economic perspective and in terms of the enforcement of the WTO-ADA and SA in the EU territories.[243] The GCC could establish a GCC-DSB structure by following the example of the European General Court, which can serve as a platform for grieved third parties to highlight procedures, interpretations, and decisions that are inconsistent or opaque in relation to the implementation of the WTO-ADA and SA. This

[241] CP Bown and BM Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8(4) Journal of International Economic Law 861.

[242] Bown and Hoekman (n 43).

[243] L Davis, 'AD Investigation in the EU: How Does It Work?' (2009) ECIPE Working Paper No 04/2009 <https://ecipe.org/wp-content/uploads/2014/12/AD-investigation-in-the-eu-how-does-it-work.pdf> accessed 03 August 2022.

will engender a higher level of transparency in otherwise hidden procedures adopted by the GCC-TSAIP through which cases of AD qualify for investigation in the GCC.

The second approach for increasing the compliance of the GCC-TSAIP with the requirement for transparency in relation to the currency conversion factor involves invoking TPRM, which is responsible for providing a periodic review of the AD and safeguard laws designed and implemented by Members. After reviewing the design and contents of the AD and safeguard laws incorporated by Members into their trade policies, the TPRM provides useful guidelines and recommendations for improving the language and contents of the provisions contained in the respective trade policies and legal frameworks in the Members.[244] The WTO may assign the TPRM to review the GCC-CLAD and RoI for compatibility with the WTO-ADA and SA, and may provide recommendations to the GCC-TSAIP to incorporate the clarity of currency conversion when deciding upon AD cases.

The issue with the TPRM avenue is that it has a restricted role in reviewing the compliance of developing countries like those of the GCC with the WTO-ADA and SA. For example, while the TPRM biannually conducts a review of the actions and legal implementations of the WTO-ADA and SA for developed countries such as the UK and the USA, it reviews the textual and contextual implementation of the WTO-ADA and SA every ten years. Moreover, it is a random process, not applicable uniformly to all developing countries. This leaves a substantial gap in the approaches adopted by developing countries to align the provisions of their trade regulations in line with the WTO-ADA and SA.[245]

Given the economic situation and legal knowledge and understanding of the international trade policies developed by the WTO for its Members, it is the developing and least developed countries that need more frequent review compared to the developed countries in order to understand the legal implications, interpretations and approaches to implementation of WTO-based trade remedies such as the WTO-ADA and the SA. This indicates a clear flaw in the periodicity and sequencing of the reviews by the TPRM. A higher periodicity and sequencing of the reviews by the TPRM targeting developing countries such as those of the GCC may result in better enforcement of WTO trade remedies such as the WTO-ADA and the SA.[246]

Taken together, enforcement of and compliance with the legal provisions in the WTO-ADA is not possible merely by assisting and encouraging adversely affected countries in AD cases

[244] ibid 266, p 17.

[245] ibid 266, p 18.

[246] ibid.

to challenge the decisions of the respective governments in the WTO-DSB; it also requires the WTO to apply some alternative mechanisms such as TPRM reviews for improving the transparency of the proceedings of AD and safeguard cases, the publication of results and other textual alignment of the GCC-CLAD and RoI with the WTO-ADA and SA. It seems that transparency in execution of WTO-ADA and SA and enforcement of their provisions requires a local enforcement mechanism in the form of a GCC-DSB under the auspices of the Supreme Judicial Council of the GCC. This would offer an inexpensive, alternative platform to adversely affected transacting parties in ADA and SA cases, allowing them to signal inconsistencies in the GCC-CLAD and RoI or opacities in the procedures adopted by the GCC-TSAIP for conducting and publishing ADA cases. This will subsequently help the WTO and other local legal authorities to judge the alignment of interpretations and implementation of the GCC-CLAD and RoI by the GCC-TSAIP with the legal provisions in the WTO-ADA and the SA.

2.2.6 Calculating the Dumping Margin

The dumping margin is calculated based on the difference between the export price and the normal value.[247] While such a calculation might appear to be straightforward, the various methods of calculation can raise challenging and controversial issues. In *EC—Bed Linen (2001),* the Appellate Body concluded that the purpose of ADA Article 2.4.2[248] is to set the basic legal framework which investigation authorities should follow when comparing normal and export values to determine whether the former is higher than the latter, or, in other words, whether dumping is occurring. 'Article 2.4.2 of the AD Agreement explains how domestic investigating authorities must proceed in establishing "the existence of margins of dumping", that is, it explains how they must proceed in establishing that there is dumping.'[249]

The Appellate Body in *US—Hot-Rolled Steel* (2001) noted that the use of the plural form of the word 'margins' rather than the singular 'margin' in Article 2.4.2 demonstrates an

[247] Czako, Human and Miranda (n 182).

[248] 'Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted-average-to-weighted-average or transaction-to-transaction comparison.' ADA, art 2.4.2.

[249] Appellate Body Report, 'European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India', WT/DS141/AB/R, adopted 12 March 2001, DSR 2001: V, 2049, para 51.

understanding that investigating authorities should determine dumping margins for *each* exporter and producer of the product under investigation:

> Margins means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product. This margin reflects a comparison that is based upon examination of all of the relevant home market and export market transactions.[250]

In turn, Article 30 of the RoI on AD Measures establishes parameters by which the GCC-TSAIP should determine the existence and extent of dumping. As mentioned above, Article 29 outlines the principle concerning fair comparisons between export price and normal value. Article 30.1 provides guidance on how to make this comparison:

> The existence of dumping margins during the period of the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable exports of product under investigation to the GCC market, or by a comparison of normal value and export price on a transaction-to-transaction basis.[251]

Article 30.1 reflects a preference for comparing the export price and normal value on a weighted-average-to-weighted-average basis, or transaction-to-transaction basis. The ROI allows for a third method. This one compares a weighted average normal value to individual export transactions, but only in particular circumstances, as specified in Article 30.2:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions to the GCC market, if there is a pattern of export prices which differ significantly among different purchasers, regions, or time period, and if using the methods in paragraph 1 would not reflect the dumping being practised.[252]

Article 30.3 of the RoI insists that the dumping margin should be calculated for each exporter or producer of the product in question as follows:

> Dumping margin shall be determined based on the amount by which the normal value exceeds the export price. An individual dumping margin shall be determined for each known exporter or producer concerned by the product under investigation.[253]

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[250] Appellate Body Report, 'United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan' (n 154) para 118.

[251] RoI on AD Measures, art 30.1.

[252] ibid, art 30.2.

[253] ibid, art 30.3.

Overall, it seems that the guidance and methods specified in the RoI regarding how to calculate the dumping margin are consistent with those of Article 2.4.2 of the ADA.

A positive dumping margin higher than 2% is not by itself sufficient to impose AD measures under the ADA; the injury to the domestic industry must also be determined. This injury appears in three forms: (1) material injury to the industry, (2) the threat of future material injury to the industry or (3) the material retardation of establishing developments to the industry.[254] The GCC's provisions (i.e., Articles 31–35 of the RoI on AD Measures) on how to determine injury, and their consistency with ADA provisions are discussed in the following subsections.

2.2.6.1 Defining injury

The injury determination provisions of the GCC RoI do not define injury, as does the ADA.[255] At the same time, the provisions do contain certain definitions of material injury and the threat of material injury. Material injury refers to 'injury which causes a significant overall impairment to the position of the concerned GCC industry'.[256] The threat of serious injury is defined as 'serious injury that is clearly imminent to the concerned GCC industry'.[257]

Footnote 9 of the ADA defines 'injury' as follows:

> Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

The ADA defines the concept to include material injury, the threat of it, and material retardation. The RoI on AD Measures does not contain such a cumulative definition. Instead, they categorise the concept as material injury to GCC domestic industry or threat of it. Moreover, Article 31, which introduces the principles and major elements of injury determination, refers to material injury, suggesting that all principles and elements are confined to material injury.

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[254] Czako, Human and Miranda (n 182).

[255] The footnote to Article 3 of the ADA states that under this Agreement, 'the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article'.

[256] GCC Common Law on AD Measures, art 1.

[257] ibid.

Article 32 of the RoI deals with the threat of material injury and does not refer to any other kinds of harm.[258] Article 33 deals with causation requirements and uses the term 'injuries.[259] Article 35, which regulates the termination of AD investigations, also employs the term.[260] There is thus no terminological consistency in these injury determination provisions, nor is there any reference to material retardation.

There are, however, references to material retardation elsewhere in the text. Article 5.1 of the GCC-CLAD provides that measures can be taken if the GCC-TSAIP finds that imports have been dumped and 'caused material injury or threatened to cause material injury to an established GCC industry or have materially retarded the establishment of a GCC industry'.[261] Moreover, Article 44 of the RoI on AD Measures provides that

> Where a final determination of threat of material injury or material retardation has been made, but no injury has yet occurred, a definitive AD duty may be imposed only from the date of the final determination of a threat of material injury or material retardation of the establishment of a GCC industry.[262]

Surprisingly, none of the Articles that reference the determination of injury mention or include any information regarding material retardation as a form of injury. This absence raises a question as to whether the RoI on AD Measures consider the material retardation of establishing an industry as a form of injury that should be investigated, and there are no provisions on how such an injury could be determined. In contrast, the ADA injury determination provisions include material retardation.

The above discussion shows that the GCC-CLAD and its RoI do not define material injury or specify material retardation in the calculation of material injury in line with the WTO-ADA, stemming from the lack of definitions and procedural elements regarding material injury within the latter. This compels the GCC to follow its own procedures to determine material injury in its own way, which raises questions about the validity of the procedures involved in determination of material injury, threat of it and material retardation.

[258] RoI on AD Measures, art 32.

[259] ibid, art 33.

[260] ibid, art 35.

[261] GCC Common Law on AD Measures, art 5.

[262] RoI on AD Measures, art 45.

These arguments are supported by WTO Panel Reports[263] showing that interpretation of injury is quite narrow and restricted to material injury; at the same time, there is no consensus on material injury among the legal experts either on the WTO Panels or among the Members. Hence, there is a definitional dilemma on the concepts related to injury, which leaves a gap in which the administrative authorities can exercise their powers and discretion to define injury based on their national policies.[264] This situation is unfavourable for the proliferation of the fair-trade concept promoted by compliance with the WTO-ADA. In the event of misuse of the WTO-ADA provisions due to the lack of clarity on the definition of injury or material injury, there is a strong probability that the WTO-ADA will be applied by developing countries such as those of the GCC or other Members to protect their national interests at the expense of the fair competition and healthy trading practices as a result of liberalisation of trade internationally.[265]

Taken together, the WTO needs to define injury, material injury and other related concepts used in line with the injury in order to assess the level of compliance of the Members including the GCC with the WTO-ADA and the GCC's current ADA legislation.

To apply and enforce material injury, threat of it, and material retardation, the GCC may establish a DSB and a Court of Auditors. The European Union established the Court of Auditors to oversee the process through which the EU version of the WTO-ADA and SA is applied and enforced, and to report any inconsistency in the implementation of trade remedies. This helps the EC to make adjustments and amendments to EU-based AD and SGM, thereby aligning them with the provisions of the WTO-ADA and SA.[266] Additionally, the EC has set up the Court of the First Instance which works in the same way as the WTO-DSB to ensure that fair and just decisions are served to the transacting parties in AD cases. It gives adversely affected transacting parties the right to challenge the decisions of the EC in matters related to AD investigations.[267] The GCC may consider establishing an EC-style Court of DSB which can function as an additional wing of Supreme Judicial Council in the GCC and provide assistance to the transacting parties in AD cases in resolving issues related

[263] Panel Report, 'Mexico-AD Investigation of High Fructose Corn Syrup (HFCS) from the United States' WT/DS132/R, adopted 28 January 2000; Panel Report, 'European Communities AD Duties on Imports of Cottage-type Bed Linen from India' WT/DS141/R, adopted 30 October 2000; Panel Report, 'Thailand-AD Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland' WT/DS122/R, adopted 28 September 2000.

[264] Adamantopoulos and De Notaris (n 176).

[265] ibid 283, p 52.

[266] European Commission, '39th Annual Report from the Commission to the European Parliament and the Council on the EU's AD, Anti-Subsidy and Safeguard activities and the Use of Trade Defence Instruments by Third Countries targeting the EU in 2020' SWD(2021) 234 final <https://trade.ec.europa.eu/doclib/docs/2021/august/tradoc_159782.PDF> accessed 03 August 2022.

[267] Davis (n 199).

to material injury and other ambiguities about which adversely affected parties in AD cases complain to the GCC.

2.2.6.2 Objective examination of all positive evidence

As the Appellate Body in *US—Hot-Rolled Steel (2001),* the ADA clarified the basis under which to determine injury as per Article 3.[268] Firstly, 'positive evidence' for the Appellate Body concerns the quality of evidence that the investigating authority relies on to determine the presence of injury.[269] The word 'positive' in this context means that such evidence should be affirmative, trustworthy, objective and credible. The second basis of the Article is to conduct an objective examination that pertains to the investigation process itself. The investigation bodies conduct such examinations based on the principles of good faith and fundamental fairness.

Accordingly, Article 31 of the RoI, which introduces the principles and major elements of injury determination, references 'material injury,' which leads to the suggestion that these principles and elements are confined to material injury. It states that '[a] determination of material injury shall be based on an objective examination of all positive evidence […]'.[270] Furthermore, Article 32.1 of the RoI on AD Measures deals with the threat of material injury but without referring to these principles: 'A determination of a threat of material injury on the GCC industry concerned shall be based on facts and not merely on allegation.' The language insists that the threat of material injury should be determined from the facts, but it does not refer to the principles of the objective examination of positive evidence.[271]

The text of Article 32.1 thus violates the requirement in Article 3 of the ADA for objective examination of positive evidence to determine injury; Article 32.1 does not determine from which bases such facts emerge, or how they should be examined. The GCC text also conflicts with Saudi Arabia's submissions to the DSB as a third party in determining injury, despite Saudi Arabia being a member of the GCC.

This view was further reiterated by Saudi Arabia *in China—Autos (US*), in which, under the heading 'All Aspects of the Determination of Injury Must Be Based on Objective Examination of Positive Evidence', it referred to the principle of objective examination as

[268] 'A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination.' ADA, art 3.1.

[269] Appellate Body Report, 'United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan' (n 154) para 192.

[270] RoI on AD Measures, art 31.

[271] ibid, art 32.1.

an overarching obligation of an investigating authority.[272] The report further stated that '[t]he requirement to conduct an "objective examination" means that the examination must accord with the basic principles of good faith and fundamental fairness and be both unbiased and even-handed'.[273] In *China—HP—SSST (Japan) (2014),* Saudi Arabia interpreted that the principle of objective examination suggests that there must be a logical progression from examining volume and price effect to assessing their impact on the domestic industry.[274]

Saudi Arabia's submissions in its capacity as a third party reveal that this GCC country supports the WTO adjudication bodies' interpretation of the concept of 'positive evidence'. In fact, in *China—Broiler Products (2013)*, Saudi Arabia pointed out that the obligations of the investigating authorities involve conducting objective examinations based on positive evidence permeate all aspects of injury determination.[275]

In *China—Autos (US) (2014)*, Saudi Arabia stated that 'positive evidence' means

> that the examination must agree with the basic principles of good faith and fundamental fairness and must be both unbiased and even-handed. 'Positive evidence' is that which is 'affirmative, objective, verifiable, and credible'.[276]

This position reveals that Saudi Arabia, in general, does not believe that determinations in AD investigations should be made based on all the facts available. Saudi Arabia emphasises that an investigating authority may use the facts available only in the limited circumstances listed in the ADA. Overall, Saudi Arabia's idea of 'positive evidence' is serves as a basis for all aspects of injury determination, and which involves facts of an affirmative, verifiable, and credible nature.

The overall position of Saudi Arabia in these cases demonstrates that it adheres to the WTO approach to the principle of objective examination, but its position also suggests that the principle of objective examination is not as narrow as it appears from a purely textual interpretation of the GCC RoI. Because, as Saudi Arabia points out, this principle permeates all aspects of injury determination, it applies not only to the determination of material injury,

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[272] Panel Report, 'China—AD and Countervailing Duties on Certain Automobiles from the United States', WT/DS440/R and Add 1, adopted 18 June 2014, DSR 2014: VII, 2655, D-16, para 10.

[273] ibid.

[274] Panel Report, 'China—Measures Imposing Antidumping Duties on High-Performance Stainless Steel Seamless Tubes ('HP-SSST') from Japan / China—Measures Imposing Antidumping Duties on High-Performance Stainless Steel Seamless Tubes ('HP-SSST') from the European Union' (n 149) Annex D-4, para 11.

[275] Panel Report, 'China−Antidumping and Countervailing Duty Measures on Broiler Products from the United States', WT/DS427/R and Add 1, adopted 25 September 2013, DSR 2013: IV, 1041: Addendum.

[276] Panel Report, 'China—Antidumping and Countervailing Duties on Certain Automobiles from the United States' (n 228) Annex D-5, para 6.

as the text of Article 31 of the RoI provides, but also to the determination of the threat of material injury and of the material retardation of the establishment of the GCC industry concerned.

This idea contrasts somewhat with the purely textual interpretation of the principle of objective examination of positive evidence as set forth in Article 31 of the RoI. This is because it regards the principle as an overarching and fundamental provision and shows that the principle is not confined to material injury but covers all aspects of injury determination.

To sum up, there is a discrepancy between the purely textual interpretation of the principle of objective examination and the contextual one. According to the purely textual interpretation, the principle of 'objective examination of positive evidence' is weak and narrow, and thus, inconsistent with the WTO framework. The contextual interpretation, however, reinforces and extends the principle, thereby aligning it with the WTO framework.

Actually, this consistency may not be categorised as the non-compliance in strict terms, as the scope of factors mentioned in Article 3 of WTO-ADA for determination of the objective examination of available facts is quite narrow, while the facts may vary from product to product. Narayanan posited that although WTO Members are required to follow the guidelines described in Article 3 of the WTO-ADA, the facts related to products are much broader than what is enumerated in the objective examination clause of the WTO-ADA, and they provide examples of material retardation situations in which the investigating authorities struggle to decide whether the dumping practice occurred if only the factors in the WTO-ADA are taken into consideration for objective examination of facts.[277]

Similar criticism was made by some other legal experts who argued that objective examination of the positive evidence as guided by the WTO-ADA are merely general in nature[278, 279]. When the investigating authorities actually come in contact with a variety of situations in which factors such as the nature of the imports, significant rate of increase, availability of production capacity of the exporter, and the existence of inventories of dumped imports may vary drastically; collecting facts about these factors is quite difficult

[277] P Narayanan, 'Injury Investigations in Material Retardation Antidumping Cases' (2004) 25(1) Northwest Journal of International Law and Business 37.

[278] Antonini, Renato, 'Fair Comparison, Objective Examination and Positive Evidence in Undercutting Margins Computed in EU Trade Defence Investigation? No, Thanks' (2020) 5(15) Global Trade and Customs Journal.

[279] Durling, James P, 'Deference, but only when due: WTO review of AD measures' (2003) 6(125) J. Int'l Econ. L.

for the investigating authorities and requires considerable finance and effort to undertake such venture.[280] Therefore, the binding of WTO Members only to those factors mentioned in the WTO-ADA (Articles 3.4 and 3.7) will lead to unjustified conclusions due to the insufficiency of the evidence presented during AD investigations, thereby nullifying the very purpose of the objective examination of the positive evidence.[281]

Hence, the investigating authorities may come up with their own interpretation and explanation of the positive evidence they require to consider AD cases, due to the fact that the WTO-ADA does not take into account of the complexity of situations arising from products dumped in different geographical regions. The WTO might consider amending Articles 3.4 and 3.7 relating to the consideration of factors for the objective examination of the positive evidence to acknowledge the complexity of the situation, and rather than specify a narrow and limited set of factors, the requirement to submit documents explaining the factors and positive evidence considered during the objective examination of the dumping practices could be added to the WTO-ADA. This measure is more likely to create transparency in the procedures used by WTO Members and will enable the WTO to make the members of the GCC and other developing countries comply with the WTO-ADA in a better manner.

2.3 GCC Definition of Domestic Industry

A critical connotation in the injury determination process is the definition of 'domestic industry'; the term denotes the group of national producers who suffer when imports are dumped into the domestic market and who raise a complaint against such behaviour. The Panel in *Mexico—Steel Pipes and Tubes (2007)* established that 'the concept of "domestic industry" is critical to an injury determination, as it defines the framework for data collection and analyses.[282]

In accordance with Article 4.1 of the ADA,[283] Article 3 of the GCC-CLAD provides that the term "GCC industry" must be defined as follows:

[280] Adamantopoulos and De Notaris (n 176).

[281] ibid 292, p 43.

[282] Panel Report, 'Mexico—Antidumping Duties on Steel Pipes and Tubes from Guatemala', WT/DS331/R, adopted 24 July 2007, DSR 2007: IV, 1207, para 7.321.

[283] 'For the purposes of this Agreement, the term *domestic industry* shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.' ADA, art 4.1.

> Members' producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Article 3 thus identifies two methods of defining the GCC industry. The first involves the straightforward inclusion of all GCC producers of the like product. The second defines the GCC industry when the GCC producers impacted are only a portion of the whole field. These are producers whose collective output of the product represents a major proportion of the total GCC industry. Article 3 does not specify a certain percentage or demonstrate a major proportion of the industry.

The absence of a specific percentage, however, should not mean that any percentage is acceptable, regardless of the fact that it would indeed automatically represent the GCC industry. Instead, when viewed in light of the term 'a whole' in the first method, the phrase 'a major proportion' will automatically refer to a large percentage of the total GCC industry. The phrase 'those of them' in the second method refers to a group of GCC producers from among all GCC producers.

Therefore, the collective product output, which represents a major proportion of those producers, should be determined in relation to the total GCC production from all GCC producers. Hence, the term 'major proportion' is an important reflection of the GCC industry. To reiterate, then, the definition of 'domestic industry' forms the basis of injury determination from which all injury aspects should be determined. This is based on an objective examination of 'positive evidence' as explained in the injury determination section of the GCC RoI.

The Appellate Body in *EC—Fasteners (China) (2011)* identified the condition investigative authorities should meet to define 'domestic industry': 'The purpose of defining the domestic industry . . . [is] to provide the basis for the injury determination.'[284] The Appellate Body clarified that 'domestic industry' should also be defined via an 'objective examination' based on 'positive evidence'. Moreover, this definition of domestic industry must guarantee that the subsequent injury determination involves the objective examination of positive evidence.

Therefore, the definition of the 'GCC domestic industry' should be based on objective examination of positive evidence. Saudi Arabia made its submission as a third party in *China—Autos (US) (2014)* concerning the same issue and insisted that the investigation

[284] Appellate Body Report, 'European Communities—Definitive Antidumping Measures on Certain Iron or Steel Fasteners from China' WT/DS397/AB/R, adopted 28 July 2011, DSR 2011: VII, 3995, para 419.

authority also apply the principle of objective examination of positive evidence to define domestic industry.

> The Kingdom is of the view that[285] the Panel should take this opportunity to confirm that legally permissible injury and causation determinations cannot follow from a definition of domestic industry that does not meet the same standards of 'objective examination' and 'positive evidence'.[286]

Textual analysis of Article 3 of the RoI showed that its definition of GCC 'domestic industry' is entirely consistent with the term's meaning in Article 4.1 of the ADA. It is, however, difficult to assess in Article 3 whether the GCC-TSAIP applied the principle of 'objective examination of positive evidence' when defining 'GCC domestic industry'. The author will consider this issue in Chapter 5, during analysis of GCC AD cases.

2.3.1 Material Injury

To determine the cause of an injury, Article 3.1 of the ADA requires an 'objective examination of all positive evidence', including (1) the volume of dumped imports and its effect on the price in the GCC domestic market for the like product and (2) the impact of dumped imports on the GCC industry concerned.[287]

On a consistent basis, the first sentences of Articles 31.1 and 31.2 of the ADA establish that determining 'material injury' must be based on an 'objective examination' of all 'positive evidence' located in these forms of evidence.

2.3.1.1 The volume of dumped imports and the effect on prices in GCC domestic markets

The volume of dumped imports and their effect on GCC domestic market prices for like products may be determined by evaluating the following factors:

a. Regarding the volume of dumped imports, consideration shall be given to whether there has been a significant increase in dumped imports, either in absolute terms or relative to their production or consumption in the GCC market.

[285] The definition of 'domestic industry' under Article 4.1 of the ADA is fundamental to an accurate injury and causation analysis that is based on an 'objective examination' of 'positive evidence'.

[286] Panel Report, 'China—Antidumping and Countervailing Duties on Certain Automobiles from the United States' (n 228) para 11.

[287] ADA, art 3.1.

b. Regarding the effect of the dumped imports on the sale price of the like product in the GCC market, consideration shall be given to whether:
    i. There has been significant price undercutting by dumped imports when compared with the price of domestic like product;
    ii. Whether the effect of such imports is otherwise to depress prices to a significant degree; or
    iii. Whether the effect of such imports is to prevent price increases, which otherwise would have occurred, to a significant degree.[288]

No one or several of the factors identified in paragraph 1 of this Article necessarily provides decisive guidance. This observation is also supported by Bown, who puts forth an economic standpoint to show that a depression in the prices of the like products in the domestic industry cannot be determined solely through consideration of an increase in the volume of the dumped imports, because it is a multifaceted phenomenon that may be affected by the anti-competitive practices exercised by exporters or sudden reduction in demand for the products as per the viewpoint of economists.[289] Hence, it can be concluded that different domestic industries in different regions may use a set of influencing factors for the evaluation of the volume of dumped imports on the price of the like products in their cognate markets.

2.3.1.2 The meaning of 'dumped imports' and how to determine its occurrence

Before analysing 'dumped imports', it is logical to determine the meaning of the phrase. Based on the definition of dumping in the GCC-CLAD,[290] it is logical to assume that 'dumped imports' are those involving all transactions in which the export price is lower the normal value.

Furthermore, the Panel in *EC–Bed Linen (2001)* concluded that,

> For the term 'dumped imports' to sustain India's position, we would have to conclude that the phrase 'dumped imports' must be understood to refer only to imports that are the subject of transactions in which the export price was below normal value, which India considers to be dumping transactions.[291]

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[242] RoI on AD Measures, art 31.1.

[289] CP Bown, 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement Is Not Enough' (2008) 42(1) Journal of World Trade 177.

[290] Dumping is defined in Article 3 of the GCC CLAD as follows: 'Exporting a product to Members at less than its normal value in the ordinary course of trade for the like product in the exporting country.'

[291] Panel Report, 'European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India' WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077, para 6.135.

Moreover, the Panel in the same case concluded that the term 'dumped imports' refers to all imports of the product from specific producers or exporters as to which an affirmative determination of dumping has been made, rather than to individual transactions.[292] Although the Panel accepted that the definition of 'dumped imports' relies on considering transactions involving the product from particular producers or exporters, it concluded that such a definition should apply to all imports of the products from such sources, rather than individual transactions. Thus, 'the investigating authority is entitled to consider all such imports in its analysis of "dumped imports" under Articles 3.1, 3.4, and 3.5 of the AD Agreement'.[293]

Since neither Article 3.1 nor the first sentence of Article 3.2 of the ADA establishes a specific methodology for investigating authorities to calculate the volume of dumped imports, as the Appellate Body concluded in *EC—Bed Linen (2003)*, the ADA established the following guidance:

> Although paragraphs 1 and 2 of Article 3 do not set out a specific methodology that investigating authorities are required to follow when calculating the volume of 'dumped imports', this does not mean that paragraphs 1 and 2 of Article 3 confer unfettered discretion on investigating authorities to pick and choose whatever methodology they see fit for determining the volume and effects of the dumped imports. Paragraphs 1 and 2 of Article 3 require investigating authorities to make a determination of injury on the basis of 'positive evidence' and to ensure that the injury determination results from an 'objective examination' of the volume of dumped imports, the effects of the dumped imports on prices, and, ultimately, the state of the domestic industry. Thus, whatever methodology investigating authorities choose for determining the volume of dumped imports, if that methodology fails to ensure that a determination of injury is made on the basis of 'positive evidence' and involves an 'objective examination' of dumped imports—rather than imports that are found not to be dumped—it is not consistent with paragraphs 1 and 2 of Article 3.[294]

Accordingly, the methodology used by the GCC-TSAIP to determine the 'volume of imports' would be acceptable as long as it is based on 'objective examination' of 'positive evidence'.

The lack of description in the WTO-ADA of clearcut methods for calculating the volume of dumped imports provides leeway to the administrative authorities of the GCC and other

[292] ibid, para 6.141.

[293] ibid, para 6.136.

[294] Appellate Body Report, 'European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India' WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003: III, 965, para 113.

Members to invent their own methods for doing so, and leaves the provision in Article 3 prone to misuse and open to protectionist discretion.[295] The whole purpose of the WTO-ADA is to restrict the use of dumping practices through the development of restrictive rules promoting competition, and not limiting the chances of fair competition between the imported products and domestic goods.[296] Therefore, further reforms are needed in the context of provisions of the WTO-ADA to define suitable methodologies for calculating the volume of dumped imports. This will increase the level of compliance by Members with the rules of the WTO-ADA and further promote fair trade in the international markets.

2.3.1.3 Determining whether there has been an 'increase in volume of dumped imports'

With respect to the volume of dumped imports, under Article 31.1(a) of the RoI on AD Measures, the GCC-TSAIP shall be given to determine if there has been a significant increase in dumped imports, either in absolute terms or relative to the production or consumption in the GCC market.[297] The GCC RoI does not specify what 'significant' means here, and instead leave it up to the GCC-TSAIP to define. The ADA also does not clarify the term. While Article 32 of the RoI establishes that the investigating authority should consider whether or not there has been a 'significant increase', it also states that if so, it does not automatically mean that injury is present.[298]

In *EC—Tube and Pipe Fittings (2003)*, Brazil proposed a different reading of Article 3.2, arguing that the presence of an increase in dumped imports is required for a positive determination of the presence of injury. The Appellate Body rejected this argument, however, and concluded that 'significant increases in imports have to be "consider[ed]" by investigating authorities under Article 3.2, but the text does not indicate that in the absence of such a significant increase, these imports could not be found to be causing injury'.[299] Saudi Arabia's submissions as a third party could imply that the GCC-TSAIP will consider a 'significant increase' in dumped imports as a paramount requirement for any determination of 'injury' caused. Indeed, Saudi Arabia's position in *China—GOES (2012)* reveals that the country adheres to a strict interpretation of the concept of 'significant increase'. Specifically,

[295] Adamantopoulos and De Notaris (n 176).

[296] ibid 305, p 27.

[297] RoI on AD Measures, art 31.1(a).

[298] ibid, art 32.

[299] Appellate Body Report, 'European Communities—Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil' WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613, para 111, fn 114.

Saudi Arabia interprets 'significant increase' to mean in 'dumped imports', and not merely in 'imports.[300]

2.3.1.4 The effect of dumped imports on sale prices

The GCC-TSAIP considers the volume of dumped imports in the context of their impact on the sale prices of domestic like products in the GCC market when analysing the presence of injury. The conclusion reached in *EC—Tube and Pipe Fittings (2003)* supports this observation: 'One purpose of a price undercutting analysis is to assist an investigating authority in determining whether dumped imports have, through the effects of dumping, caused material injury to a domestic industry.'[301]

The GCC RoI considers this issue under Article 31.1, and the result is that they narrow the processes of investigation and determination of the effect of dumped imports on sales of like product by holding that nothing other than their effect should be considered. This same approach is also demonstrated in Saudi Arabia's submissions as a third party in *China—GOES*.

First, Saudi Arabia pointed out that price effects must be attributed to the subject imports (e.g., the imports under investigation).[302] It observed that reading Article 3.2 of the ADA[303] as not requiring attribution of the effect to the subject imports would create 'incongruous standards for volume effects and price effects.[304] This statement suggests that an investigating authority must consider the effect of the subject imports, not of imports in general. Second, Saudi Arabia stated that an investigating authority must look at the specific price effects of the subject imports rather than at domestic or import prices generally.[305]

The analysis of the price effects of dumped imports includes:

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[300] Appellate Body Report, 'China—Countervailing and Antidumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States' WT/DS414/AB/R, adopted 16 November 2012, DSR 2012: XII, 6251 para 103.

[301] Panel Report, 'European Communities—Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil' WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003: VII, 2701, para 7.277.

[302] ibid.

[303] 'With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.' ADA, art 3.2.

[304] ibid.

[305] ibid.

a) The presence of significant price undercutting[306] by the dumped imports in comparison with the prices of the domestic like product;

b) The effect of dumped imports in depressing prices to a significant degree;

c) The effect of dumped imports in preventing price increases to a significant degree.[307]

RoI Article 31 does not provide any instruction on how to perform such an analysis, however, and neither does ADA Article 3.2.

2.3.1.5 The impact of dumped imports on the GCC industry

As stated above, 'material injury' could also be identified by the negative impact of dumped imports on the GCC industry. Article 31.2 of the RoI states,

> Through an evaluation of all relevant economic factors and indices with a bearing on the state of the industry, the impact of the dumped imports on the GCC industry include:
>
> a) An actual and potential decline in sales, profits, production, market share, productivity, return on investments, or utilisation of capacity;
>
> b) Factors affecting GCC prices;
>
> c) Actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments;
>
> d) The magnitude of the dumping margin.[308]

This list is neither exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

Before analysing this Article, it is necessary to restate that Article 31.2 follows from Article 31 of the GCC RoI. Therefore, the GCC-TSAIP must adhere to the 'positive evidence' and 'objective examination' outlined in Article 31 when assessing the consequences of dumped imports on GCC domestic producers of GCC like products. In keeping with Article 3.4 of the ADA,[309] Article 31.2 of the RoI grants the GCC-TSAIP a way to examine all relevant

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[306] Price undercutting denotes selling goods or services at very low prices by specific firms or company in purpose of drive out all competitor or any possible future competitors out of domestic market (predatory pricing) or international market (dumping).

[307] RoI on AD Measures, art 31.1.

[308] RoI on AD Measures, art 31.2.

[309] 'The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow,

economic factors and indices which reflect the state of the GCC domestic industry. Furthermore, this article provides an illustrative list of examples of the parameters which the GCC-TSAIP should consider when determining 'material injury' to the GCC domestic industry. Finally, this article clearly indicates that this list is neither exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

Both Article 3.4 of the ADA and Article 31.2 of the GCC RoI declare that this list should be treated as a mandatory minimum standard that applies to all cases being evaluated. RoI Article 31.2 directly cites the term 'including' to describe the mandatory evaluation of all listed factors and indices in all cases. Meanwhile, the phrase 'shall include' in Article 3.4 of the ADA—according to the Panel in *EC—Bed Linen (2001)*—is a strong indication that investigating authorities should evaluate all listed factors and indices in all cases:

> The use of the phrase 'shall include' in Article 3.4 strongly suggests to US that the evaluation of the listed factors in that provision is properly interpreted as mandatory in all cases. That is, in our view, the ordinary meaning of the provision is that the examination of the impact of dumped imports must include an evaluation of all the listed factors in Article 3.4.[310]

Article 3.4 of the ADA and Article 31.2 of the GCC RoI do not, however, specify methodologies by which to evaluate these listed factors and indices, but both Articles confirm that the list is non-exhaustive. The GCC-TSAIP is therefore free to consider any other factor and indices it deems relevant.

2.3.1.6 Determining 'threat of material injury'

Article VI of GATT 1994 and the ADA give all WTO members, including GCC countries, the right to take protective actions for their domestic industry, even before an injury takes place. Furthermore, Article VI.1 of GATT 1994 provides that dumping is to be condemned if it injures or 'threatens material injury' to an established industry in the territory of a member, or 'materially retards' establishing a domestic industry.

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inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.' ADA, art 3.4.

[310] Panel Report, 'European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India' (n 245) para 6.154.

Such preventive actions require controls. ADA Articles 3.7[311] and 3.8[312] establish a number of rules that WTO members' investigating authorities should follow when determining if a threat of material injury exists.[313] The Panel in *US—Softwood Lumber VI (2004)* clearly outlines how investigating authorities should act during the process of determining a threat of material injury:

> It must be possible for the reviewing Panel to ensure that the consideration of the investigating authority took into account relevant facts before it and was an unbiased and objective evaluation of those facts. What is critical, however, is that it be clear from the determination that the investigating authority has evaluated how the future will be different from the immediate past, such that the situation of no present material injury will change in the imminent future to a situation of material injury, in the absence of measures.[314]

Accordingly, Article 32.1 of the GCC RoI states:

> A determination of a threat of material injury on the GCC industry concerned shall be based on facts and not merely on allegation, conjecture, or remote possibility and on an examination of whether such injury is clearly foreseen and imminent. Taking into account the following:
>
> a. A significant rate of increase of dumped imports into the GCC market indicating the likelihood of substantially increased importations;

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

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

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

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

(iv) inventories of the product being investigated.

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

[312] 'With respect to cases where injury is threatened by dumped imports, the application of Antidumping measures shall be considered and decided with special care.' ADA, art 3.8.

[313] The Appellate Body recognised, for instance, that 'Article 3.7 of the [ADA] sets forth a number of requirements that must be respected in order to reach a valid determination of a threat of material injury'. Appellate Body Report, 'Mexico—Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States—Recourse to Article 21.5 of the DSU by the United States' WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001: XIII, 6675, para 83.

[314] Panel Report, 'United States—Investigation of the International Trade Commission in Softwood Lumber from Canada' WT/DS277/R adopted 26 April 2004, DSR 2004:VI, 2485, para 7.58.

> b. Sufficient freely disposable capacity of the exporter or an imminent, substantial increase in such capacity indicating the likelihood of substantially increased dumping exports to the GCC market, taking into account the availability of other export markets to absorb any additional exports;
>
> c. Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices and would likely increase demand for further imports; and
>
> d. Inventories of the product under investigation.[315]

It is noted that the text of Article 32.1 of the GCC RoI is almost identical to the relevant part of Article 3.7 of the ADA, the only difference lying in one phrase. Article 3.7 uses the phrase 'the authorities should consider the, *inter alia*, such factors as,' while Article 32.1 indicates that the GCC-TSAIP should take them all into account by using the more precise phrase of 'taking into account the following'.

The phrasing of ADA Article 3.7 implies that investigating authorities do not have an obligation to evaluate all or indeed any of the factors listed in Article 3.7. The Panel in *US—Softwood Lumber VI* determined that the expression 'should consider' indicates that consideration of each of the factors listed in Article 3.7 is not mandatory. Therefore, according to the Panel,

> A failure to consider a factor at all, or a failure to adequately consider a particular factor, would not necessarily demonstrate a violation of [this] provision. Whether a violation existed would depend on the particular facts of the case, in light of the totality of the factors considered and the explanations given.[316] Consequently, 'investigating authorities are not required to make an explicit "finding" or "determination" with respect to the factors considered'.[317]

In RoI Article 32.1, the phrase 'taking into account' means to 'consider something along with other factors before reaching a decision'.[318] In other words, the GCC-TSAIP has to evaluate all factors in all cases without considering the circumstances of each case. Although this behaviour does not necessarily contrast with the requirements of Article 3.7 of the ADA, it does restrict the competency of the GCC-TSAIP when determining the threat of material

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[315] RoI on AD Measures, art 32.1.

[316] Panel Report, United States—Investigation of the International Trade Commission in Softwood Lumber from Canada, WT/DS277/R, adopted 26 April 2004, DSR 2004: VI, 2485, para 7.68.

[317] ibid, para 7.67.

[318] ; Cambridge Dictionary, 'Take Something Into Account' (2018) <https://dictionary.cambridge.org/dictionary/english/take-into-account> accessed 24 June 2018.

injury. This reduction could result in false negative determinations of the threat of material injury. Additionally, Article 32.2 of the GCC RoI requires that

> Other relevant factors that are supported by sufficient evidence may be taken into consideration, however no one or several of these factors listed above, alone or in combination, can necessarily give decisive guidance but the totality of the factors considered must lead to a conclusion that more dumped exports are imminent and that, unless preventative action is taken, material injury will occur.[319]

This article establishes the right of the GCC-TSAIP when determining if a threat of material injury exists to include any factors in addition to those mentioned in Article 32.1, and it clarifies that such factors should be supported by sufficient data.

This position is consistent with the conclusion of the Panel in *Mexico—Corn Syrup (2000)* regarding the last sentence of Article 3.7, which concludes:

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

In the author's view, this language recognises that factors other than those set out in Article 3.7 may necessarily be relevant to making such determinations.[320] Both the last sentence of ADA Article 3.7 and RoI Article 32.1 insist that no one of these factors alone necessarily gives decisive guidance; however, the totality of the factors considered must lead to the conclusion that further dumped exports are imminent, and that unless protective action is taken, material injury will occur.[321]

ADA Article 3.8 requires special care when applying AD measures in cases in which dumping causes 'threat of material injury'.[322] The Article does not clarify the meaning of 'special care', but it is clear that this provision is intended to notify the decision maker to exercise caution.[323] Similarly, while there are no provisions in the GCC RoI that require or recommend caution when levying AD duties due to the 'threat of material injury',

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[319] RoI on AD Measures, art 32.2.

[320] Panel Report, 'Mexico—Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States' WT/DS132/R, adopted 24 February 2000, and Corr 1, DSR 2000: III, 1345, para 7.124.

[275] ADA, art 3.7; RoI on AD Measures, art 32.1.

[322] 'With respect to cases where injury is threatened by dumped imports, the application of Antidumping measures shall be considered and decided with special care.' ADA, art 3.8.

[323] Panel Report, 'United States—Investigation of the International Trade Commission in Softwood Lumber from Canada' WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, 2485), para 7.33.

nevertheless, authorities would be expected to exercise such care; Article 85 indicates clearly that WTO provisions shall be applied to matters where RoI is not explicit.[324]

More critically speaking, Article 3 of the WTO-ADA portrays damages relating to 'material injury'/'threat to material injury' in the bounds of a domestic industry and material delay causing deterioration of the domestic industry. The complexity of the notion of 'material injury' is evident in this Article, necessitating more complex and challenging approaches to determining the material injury, though the injuries directly referring to the damage can be more easily determined. Moving further into the factors stipulated by the WTO-ADA for the determination of material injury may involve 'positive evidence' and 'objective examination' of the volume of imports and its subsequent effects on the domestic industry. The concepts of positive evidence and objective examination are not well-defined within the WTO-ADA, as clauses relating to foregoing legal instruments are not clear in binding Members to adhere to the factors described in Article 3. For example, Article 3(7) of the WTO-ADA states that 'Members shall make determination of a threat to material injury based on the facts', and 'not merely on allegation, conjecture or remote possibility'. Nevertheless, the language of the clause is loose, and does not prevent the investigating authorities within Members from including 'allegation, conjecture or remote possibility'.[325]

Furthermore, the WTO-ADA specifies four factors which should be taken into account when determining the threat of material injury involving calculation of the level of surge in dumped imports and inventory levels of products. However, scholars argue that these factors are not sufficient to accurately calculate the threat of material injury to the domestically produced products.[326]

Taken together, the WTO-ADA still leaves leeway for Members including the GCC to use their own methodologies for the objective evaluation of the threat of material injury or material injury in response to the dumped imports. This can weaken the consistent and thorough application of the WTO-ADA by Members to promote the concept of fair trade, which is the sole aim of the WTO-ADA. Therefore, a more consistent approach is required when defining the terms and clauses within the WTO-ADA, which may promote better compliance by Members with Article 3 of the ADA.

[324] RoI on AD Measures, art 85.

[325] Adamantopoulos and De Notaris (n 176).

[326] ibid 335, p 25.

2.3.2 Determining a Causal Link

ADA Article 3.5[327] requires that once the investigating authorities have determined the presence of both dumping and injury, investigators must establish a cause-and-effect relationship between the two. Such a causal relationship should be differentiated from similar connections between injury and other factors that have negative effects on the domestic industry, and injury that results from any factor other than dumped imports should not be attributed to dumped imports (the non-attribution rule). This requirement is referred to as 'causality analyses.[328]

To carry out such an analysis, the investigating authorities must first verify the presence of a cause-and-effect relationship between the dumped imports and the injury. When the dumped imports and other known factors simultaneously produce injury to the domestic industry, non-attribution analysis is applied.[329] This analysis requires investigating authorities first to locate and isolate the injury caused by factors other than the dumped imports, and then to show that there is a causal link between the dumped imports and injury to the domestic industry.

Article 3.5 of the ADA provides an illustrative list of factors other than dumped imports that may cause injury to the domestic industry at the same time. This list includes (i) the volume and price of imports that are not sold at dumping prices, (ii) a contraction in demand or changes in the patterns of consumption, (iii) the trade-restrictive practices of and competition between foreign and domestic producers, (iv) developments in technology and (v) the export performance and productivity of the domestic industry.[330]

It is clear this list is only intended to provide examples of factors which may become components of causality analysis. Phrases that precede the list support this conclusion,

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

[328] Appellate Body Report, 'United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan' (n 154) para 222, in which the Appellate Body stated: '[Article 3.5] requires investigating authorities, as part of their causation analysis, first, to examine all "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "attributed to the dumped imports".'

[329] ibid, para 226.

[330] ADA, art 3.5.

namely, 'which may be relevant', 'include', and '*inter alia'*. Thus, the list is not mandatory, but it does provide guidance on the kind of factors, other than those of dumped imports, that can cause injury to the domestic industry.[331] Nevertheless, the investigating authority conducting the non-attribution analysis is obliged to evaluate any (i) factors 'known' to the investigating authority, (ii) factors 'other than dumped imports' and (iii) injuries that occurred in the domestic industry at the same time as the dumped imports.[332]

ADA Article 3.5 does not determine any

> particular methods [or] approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the AD Agreement.[333]

Thus, any WTO Members 'is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury'.[334] This also leaves the WTO-ADA vulnerable to misuse by countries to promote their own political and economic interests domestically, which is one of the drawbacks of the WTO-ADA. Legal experts should conduct a more rigorous reforms process in relation to the WTO-ADA, which could include reviewing grey areas in the application of different Articles of the WTO-ADA to improve the language and provide more direct and clear outlines for conducting AD investigations.[335]

Rules Negotiations agreed at Doha Ministerial Conference could be a useful instrument for conducting negotiations in the area of Rules of WTO-ADA for better clarifications of rules and improving disciplines under the ADA. The negotiations on Rules of ADA also aims to clarify and improve the procedures under ADA provisions at the level of regional trade agreements[336]. The Rules Negotiations is classed as an important mechanism for controlling the abuse of ADA laws and reform them to serve their true function of increasing the market

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[331] Panel Report, 'Thailand—Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland' WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001: VII, 2741, paras 7.231, 7.274-7.275.

[332] Appellate Body Report, 'European Communities—Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil' (n 253) 175.

[333] Appellate Body Report, 'United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan' (n 154) para 224.

[334] Appellate Body Report, 'European Communities—Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil' (n 253), para 189.

[335] SA Nozomi, 'Provisions for Trade Remedy Measures (AD, Countervailing and SGM) in Preferential Trade Agreements' (2002) RIETI Discussion Paper Series 02-E-13 <www.rieti.go.jp/jp/publications/dp/02e013.pdf> accessed 03 August 2022.

[336] WTO, 'The Rules Negotiations' (World Trade Organization, 2023) <https://www.wto.org/english/tratop_e/rulesneg_e/rulesneg_e.htm> > Accessed 12 Feb 2023.

access of the goods at international level[337]. Technical Group is another forum created under the Rules investigations for encouraging the informal discussions and criticism of the ADA practices with a view to highlight the problematic areas in the language and implementation of ADA rules at regional levels. The comments, experiences and opinions shared by WTO Members on the Rules Negotiations and Technical Group forums may be used as a basis for highlighting the grey areas and subsequently improving or reforming these areas during the implementation of ADA provisions[338].

In accordance with ADA Article 3.5, ROI Article 33.1 requires investigators to demonstrate the existence of a causal link between the dumped imports and the GCC industry injury, and also that such injury is not related to other factors: 'It must be demonstrated that injuries caused to concerned GCC industry resulting from dumped imports and they are not related to other reasons.'[339] This is a quite daunting task, as the consideration of all factors in a cumulative manner requires a great deal of bureaucratic effort and money to establish a causal link between the injury to the domestic market and the dumped products exclusively. The WTO-ADA provides no definition or specification of other factors, which, as previously noted, can lead to the exploitation of the WTO-ADA by Members in which the investigating authorities collude with the domestic industries or believe the facts provided by the relevant industries, resulting in the use of the WTO-ADA as a protectionist weapon, thereby curbing free trade and fair competition among Members, which is the aim of the WTO-ADA.[340]

2.3.2.1 Relevant causation factors and non-attribution

Article 33.2 of GCC RoI acknowledges several factors that are not necessarily stipulated in ADA Article 3.5, and that may be relevant to determining a causal link between the dumped imports and injury, and that ensure that there is no attribution of the injury to factors other than the dumped imports. Article 33.2 lists examples of such factors, such as (1) the volume and prices of imports that are not sold at dumped prices, (2) a contraction in demand or a change in the pattern of consumption, (3) commercial restriction and competition between

[337] Ministry of Foreign Affairs of Japan, 'Senior officials' statement on AD negotiations' (MOFA Japan, not known) <https://www.mofa.go.jp/policy/economy/wto/a_dump0302.html> Accessed 10 Feb 2023.

[338] Ibid 315

[339] RoI on AD Measures, art 33.1.

[340] M Zanardi, 'AD Law as a Collusive Device' (2004) 37(1) Canadian Journal of Economics/Revue canadienne d'économique 95.

the GCC and foreign producers, (4) technological developments and (5) the export performance and productivity of the GCC industry.[341] Based on this requirement, the GCC-TSAIP is expected to examine any factors that are known and not caused by dumped imports that injured the GCC industry at the same time as the dumped imports.

Article 33.2 does not cite any particular factors to examine, nor does it provide any clear guidance on how the GCC-TSAIP should consider and evaluate the relevant facts in order to demonstrate the presence of a causal link and to ensure that injury resulting from other factors is not attributed to dumped imports. This is a violation of Article 3.5 of the WTO-ADA, which stipulates factors for analysing the causal link between the dumped product under investigation and the injury to the domestic industry. The issue partially results from some gaps in the wording of Article 3.5 in relation to analysis of other factors. The WTO-ADA should take care of domestic situations, and the interplay of various factors which can establish causation between the dumped product and injury to the domestic industry.[342]

Nevertheless, it appears that a particular methodology should be chosen and developed by the GCC-TSAIP. The methodology should be efficient enough to single out dumping as the cause of injury to the GCC domestic injury. Basically, suitable and valid econometric tools should be applied so that the majority of the factors included can be appropriately assessed and the effect of dumping on the GCC industry clearly demonstrated.

It might be not easy or practical to distinguish between the injury produced by other known factors and that caused by dumped imports, as different causal factors may be interrelated and result in a combined effect on the GCC industry. Such separation is difficult, but it is the key requirement of non-attribution. Moreover, the GCC-TSAIP is required to fulfil this condition to comply with Article 3.5 of the ADA and to avoid any case of incompatibility with ADA.

The non-compliance of the GCC with other causation factors is due to the national policies pursued by GCC and interpretations of the articles of the ADA designed to protect the GCC market and businesses from foreign dumped products. Miranda argues that Members or a domestic industry may use various factors, other than those described in the WTO-ADA, to establish a causal link between the dumped products and material injury to the domestic industry for protecting the specific business interests. This may promote the fulfilment of

[341] RoI on AD, art 32.2.

[342] Bown and Hoekman (n 43).

vested business interests and increase the protection of domestic industry at the expense of the fair trade and healthy competition.[343]

The protectionist approach, according to the protection theory[344, 345], stems from ADA Article 4, which defines 'domestic industry as domestic producers as a whole of the like products. This is confusing and misleading, because businesses can use this Article to protect their own business interests and limit the proliferation of other foreign products through the fair-trade rule. Domestic producers can make a case by reporting material injury from foreign dumped products, as in the case of manufacturers and producers in the USA and EU where the causal link Article has been widely used to impose AD sanctions. The USA and EU are reported to impose AD sanctions more than any other developed country; this is more like a protectionist movement supported by the WTO-ADA, thereby limiting the entry of foreign products into the USA and EU markets and lowering the probability of fair trade in the international markets.[346]

The lack of a proper definition of causal link and its methodologies for determining causal link complicates the calculation of the overall damage to healthy competition, the fair-trade principle, and domestic welfare. According to Lee, the WTO-ADA limits the injury to domestic manufacturers and producers of like products, while disregarding the interests of other participants in the local market. For example, beneficiaries of the dumped products include the consumers, retailers and importers in the domestic market; it seems unfair to ignore the cumulative interests of the domestic players in the domestic market.[347]

Therefore, Articles 3 and 4 give leeway to the Members of WTO to overlook the damages incurred by healthy competition in the market and domestic welfare through the imposition of AD measures. Therefore, further reform of ADA provisions may compensate for damage to domestic welfare, which may bind the national authorities to consider the aforementioned

[343] J Miranda, 'Causal Link and Non-Attribution as Interpreted in WTO Trade Remedy Disputes' (2010) 44 Journal of World Trade 729.

[344] Moore, Michael O, 'Rules or Politics?: An Empirical Analysis of ITC Anti-Dumping Decisions' (1992) Economic Inquiry 30, no. 3 (1992): 449-466.

[345] Prusa, Thomas J, 'Anti-dumping: A growing problem in international trade' (2005) 28(5) World Economy.

[346] JS Lee, 'A Critical Analysis of Antidumping Policy at the Multilateral and Regional Levels: The Potential Influence of Europe's Trade Power for Possible Reform' (2012) Europa-Kolleg Hamburg, Institute for European Integration, Study paper No 3/13 <https://europa-kolleg-hamburg.de/wp-content/uploads/2019/05/0313_SP_Lee.pdf> accessed 03 August 2022.

[347] ibid 348, p 20.

domestic factors when calculating injury and subsequently imposing AD measures. Otherwise, countries will continue to violate ADA Articles 3 and 4 by using their random discretions when calculating the injury to the domestic industry.

For example, in *China—HP-SSST (EU) /China—HP-SSST (Japan) (2015)*, the Appellate Body concluded that China violated its obligation toward the WTO by acting inconsistently with Articles 3.1 and 3.5 of the ADA due to its inability to ensure that the injury from other known factors was not attributed to the dumped imports. This inability arose because the Ministry of Commerce of the People's Republic of China (MOFCOM) failed to attribute the injury to the domestic industry due to the decrease in consumption and the increase in domestic production of the like product to the dumped imports of the product.[348]

Similarly, Malaysia applies a proactive rather than a reactionist stance in calculating the injury to the domestic industry. This means that national authorities in Malaysia calculate the overall benefits and damages which the dumped products may cause before issuing licences or imposing levies and taxes on the dumped products. This too is a violation of ADA Article 3, which requires countries to calculate injury based on facts rather than conjecture.

2.3.2.2 Cumulative analysis

Cumulative analysis is the process of evaluating the effect of dumped imports from different countries in an ongoing AD investigation. To establish a causal relationship between dumped imports and injury, Article 3.3 of the ADA[349] sets out the legal framework for such analysis. According to this article and the Appellate Body in *EC—Tube or Pipe Fittings (2003)*, the investigating authorities must meet three requirements before employing cumulative analysis to assess the effects of dumped imports:

(i) The dumping margin from each individual country must be more than de minimis or two percent (2%) or more of the export price;

[348] Appellate Body Reports, 'China—Measures Imposing Antidumping Duties on High-Performance Stainless Steel Seamless Tubes ('HP-SSST') from Japan / China—Measures Imposing Antidumping Duties on High-Performance Stainless Steel Seamless Tubes ('HP-SSST') from the European Union, WT/DS454/AB/R and Add 1/WT/DS460/AB/R and Add 1, adopted 28 October 2015, DSR 2015:IX, 4573, para 5.285.

[349] 'Where imports of a product from more than one country are simultaneously subject to Antidumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.' ADA, art 3.3.

(ii) The volume of imports from each individual country must not be negligible or three percent (3%) or more of the total imports of members importing the product under investigation; and

(iii) Cumulation must be appropriate in light of the conditions of competition between the imported products and between the imported products and the like domestic product.[350]

It is arguable that, by considering this type of analysis, the volume of dumped imports of the product under investigation will increase. Hence, as the impact of dumped imports on the domestic industry might increase, the possibility of determining an affirmative injury would also increase. It is worth mentioning that during the Uruguay Round of negotiations, 'cumulative analysis' became a controversial concept.[351] Moreover, it is clear from Article 3.3 that cumulative analysis is not mandatory for Members; however, if they resort to applying it, they must observe the afore-mentioned three requirements when conducting the analysis.

GCC RoI Article 34 determines the circumstances in which cumulative analysis could take place:

> Where imports of a product from more than one country are simultaneously subjected to antidumping investigation, the effect of such imports shall be cumulatively assessed only if it is determine that: 1) the margin of dumping in relation to the imports from each country is more than de minims dumping margin, two percent (2%) or more of export; 2) the volume of the dumped imports from each country is not negligible: (3%) or more from total of the GCC imports of product under investigation and; 3) accumulative assessment of the effects of the imports is appropriate in light of conditions of competition between the imported products from concerned countries and the conditions of competition between the imported and the like GCC like product.[352]

In compliance with the WTO-ADA, textual analysis of Article 34 reveals that the concept of cumulation is not mandatory under any conditions in the GCC and is only allowed under the specific circumstances described in this Article. Moreover, the Article acknowledges three conditions as described by the WTO-ADA before the GCC-TSAIP makes cumulative

[350] Appellate Body Report, 'European Communities—Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil' (n 253) para 109.

[351] Van den Bossche and Zdouc (n 115).

[352] RoI on AD Measures, art 34.

assessment of the effect of dumped imports of a product from more than one country that is subject to an AD investigation at the same time.

Like the GCC, the EU makes cumulative analysis an optional measure for imposing AD sanctions[353]. However, the USA makes use of the criterion of calculation of combined effects of all lines of the dumped products in a specific domestic industry for determination of their impact on the sale volumes of the 'like products' in the domestic industry[354]. Lee argues that cumulative analysis promotes the protectionist movement towards the domestic industry,[355] therefore, the USA is more cautious about protecting its industry from the entry of dumped products than the GCC and the EU.

2.4 Conclusion

To answer SRQI, this chapter assessed the compatibility of the GCC-CLAD and its RoI with the WTO-ADA, particularly in relation to the determination of AD practices. The legal analysis of all Articles of the GCC-CLAD and its RoI on AD Measures in reference to the ADA showed that the former is often compatible with the WTO-ADA in terms of objectivity and provisions governing dumping determination, injury analysis, and causal analysis. Nevertheless, there are some issues with the text of the GCC-CLAD and its RoI.

Of particular concern are those Articles governing how to define and determine injury by means of the principle of 'objective examination of positive evidence'. Indeed, there is no clear definition of what injury means, or what forms injury may take, in either the law or its RoI. Examining the text of all Articles governing injury analysis showed that the RoI defines three types of injury: 'material injury', 'threat of material injury', and 'material retardation'. Moreover, while the RoI define 'material injury' and 'threat of material injury', they do not define 'material retardation'.

It is worth mentioning that the term 'material retardation' appears in Article 5.1 of the GCC-CLAD and Article 44 of the RoI on AD Measures, while all texts on injury analysis in RoI Articles 31 and 32 refer only to 'material injury' and 'threat injury'. When other Articles refer to 'material retardation', however, it becomes clear that the GCC-CLAD and its RoI actually do consider all three forms of injury. Conversely, the ADA includes a cumulative

[353] Blonigen,Prusa, p.21

[354] Rovengo,Vandenbussche, p. 21

[355] JS Lee, 'A Critical Analysis of Antidumping Policy at the Multilateral and Regional Levels: The Potential Influence of Europe's Trade Power for Possible Reform' (2012) Europa-Kolleg Hamburg, Institute for European Integration, Study Paper No 3/13 <https://europa-kolleg-hamburg.de/wp-content/uploads/2019/05/0313_SP_Lee.pdf> accessed 03 August 2022.

definition that indicates that the term ‘injury’ for domestic industry analysis includes three forms of injury types: ‘material injury’, ‘threat of material injury’, and ‘material retardation’.

If the GCC were, therefore, to redraft more clearly the RoI Articles that govern injury analysis, especially those that define ‘injury’ and ‘injury analysis’, there would be uniformity between the ADA on the one hand and the GCC-CLADCSM and its RoI on the other hand.

Notably, Article 3 of the ADA indicates that ‘injury analysis’, i.e., ‘material injury’, ‘threat of material injury’ and ‘material retardation’, are itself based on the principle of ‘objective examination of positive evidence’, while Article 31 of the RoI has limited information on how to apply this principle, and then only to the analysis of ‘material injury’. Nevertheless, while the text offers narrow applications of the principle of ‘objective examination of positive evidences’, Saudi Arabia’s interpretation in its submissions as a third party to DSB indicates clearly the need to broaden this principle so as to apply it to the analysis of all forms of injury. It is advisable to mandate the principle of ‘objective examination of positive evidence’ in all forms of injury analysis, imitating Article 3 of the ADA. Nevertheless, for the sake of clarity and to avoid interpretations that render the principle inconsistent with ADA, it is advisable to redraft RoI Article 31 to specify that a determination of injury including all its forms (i.e., not only ‘material injury’) shall be based on an objective examination of positive evidence.

In the next chapter, the compatibility of GCC-CLAD with the WTO-ADA will be analysed in the domain of the methods used for selecting and initiating AD cases, and the application of AD measures.

Chapter 3: Compatibility Analysis of GCC RoI with WTO-ADA in relation to the Initiation, Conduction and Implementation of AD Procedures and Measures

3.1 Introduction

Chapter 2 showed that the text of the GCC-CLAD and its RoI on AD Measures, which govern the procedures for determining the presence of dumping, injury analysis, the causal link between them, and how they assess AD measures, are compatible with, if not always identical to, those of the WTO-ADA. To continue to answer SRQI, Chapter 4 begins by examining the GCC's provisions for AD investigations in the contexts of regulations stipulated in WTO-ADA. It focuses on whether the Articles related to the GCC-CLAD and RoI are compatible with the relevant Articles in the WTO-ADA, especially in the domain of initiation of AD investigations and the conduct of investigations. The chapter then determines the legal obligations within the GCC-CLAD and its RoI before examining the principles and provisions governing the transparency and confidentiality of investigation-related information. The final section focuses on the investigation resolution process by analysing the provisions governing the content of public notice.

The chapter is divided into four main sections. The rules of AD investigations are compared and contrasted with the WTO-ADA in Section 3.2. The rules for conducting AD investigations are compared with the relevant provisions in WTO-ADA in Section 3.3, while the AD measures are discussed in Section 3.4. Section 3.5 concludes the chapter.

3.2 Rules Governing AD Investigations

Since a WTO member has the right to carry out an AD investigation on its own initiative, the RoI on AD Measures describe in detail how the GCC Technical Secretariat for Anti-Injurious Practices in International Trade (GCC-TSAIP) has to initiate and conduct this process. The following subsection will present a legal analysis of the main steps in the investigation process, highlighting contrasts with the relevant ADA provisions. These steps include the complaint, investigation procedures, and public notice.

3.2.1 Complaints and Initiating AD Investigations

Articles 2–8 of the RoI on AD Measures provide details for how interested parties can raise AD complaints; they also consider how the GCC-TSAIP, as the GCC's formal investigating authority, receives and deals with such complaints.[356] Complaints about dumping are submitted in writing to the GCC-TSAIP by the GCC industry, or on behalf of the GCC industry by a concerned GCC Chamber of Commerce or Industry, or even by a product union.[357] The complainant is required to provide a non-confidential copy that contains sufficient detail to permit a reasonable understanding of the substance of information submitted in confidence.[358] This complies with WTO-ADA Provision 6.1. (see AD Procedures by WTO):

> The authorities concerned shall provide opportunities for the complainant and the importers and exporters.....to see all information that is relevant to the presentation of their cases, that is of confidential, and that is used by authorities in an AD investigation.

Article 2.4 of the RoI on AD Measures allows the Permanent Committee to initiate an investigation without receiving a complaint from the GCC industry. It can do so on its own initiative or in response to a request from the Ministry overseeing the relevant industry sector under specific conditions.[359] In this context, the GCC-CLAD complies with Article 5.1 of the WTO-ADA, which states that an investigation shall be initiated at the request of stakeholders in the relevant industry. For example, the GCC-TSAIP initiated an AD investigation on receiving a complaint regarding the import of porcelain tiles from China and Spain submitted by Saudi Ceramics and Alfanar Ceramic and Porcelain Factory.[360]

Article 2.3 of the RoI requires requests for AD investigations to be submitted in writing and to contain evidence of (1) the existence of dumping, (2) the alleged injury caused by the dumped imports and (3) the causal link between dumping and the alleged injury.[361] It does not ask require details on how such evidence was collected or achieved. To demonstrate that dumping exists, however, the complaint should include information on the normal value, or a constructed normal value calculation; the export price; a detailed description of the like

[356] RoI on AD Measures, arts 2-8.

[357] ibid, art 2.2.

[358] ibid, art 2.1.

[359] ibid, art 2.4.

[360] Global Trade Alert, 'GCC: Definitive Antidumping Duty on Imports of Certain Ceramic Tiles from China and India (Termination of Investigation on Imports from Spain)' (6 June 2020) <https://www.globaltradealert.org/intervention/70064/AD/gcc-definitive-antidumping-duty-on-imports-of-certain-ceramic-tiles-from-china-and-india-termination-of-investigation-on-imports-from-spain> accessed 03 August 2022.

[361] RoI of on AD Measures, art 2.3.

product; and the dumping margin calculation method. The same observation can be made about the alleged injury: there is no requirement to include reasonable information, such as the volume of the alleged dumped imports, or the effects of the alleged dumped imports on the price of like products in the GCC industry, and hence the impact of the alleged dumped imports on the GCC industry.[362] This is consistent with Articles 5.1 and 5.2 of the WTO-ADA, which require the establishment of a causal link, and evidence of alleged injury and the existence of dumping.

Once the GCC-TSAIP has prepared a report with its recommendations, it sends it to the Permanent Committee for a final decision on whether to reject the AD complaint or to accept it and initiate an investigation.[363] If it is satisfied that the data are sufficient to justify the investigation, the Permanent Committee instructs the GCC-TSAIP to begin an investigation as per the provisions of the GCC-CLAD and its RoI.[364]

A simple reading of RoI Article 3 indicates that the decision to initiate an AD investigation is based only on assessing the evidence provided. Therefore, even if dumping truly exists in the GCC market, if the complainants do not evidence the presence of injurious practices in their written application, the complaint could be automatically closed, and no further investigation would be carried out. This complies with Article 5.3, which states that if 'the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify the proceedings with the case, there should be immediate termination'. (WTO-ADA Procedures)

One of the weaknesses of the WTO-ADA is that it does not place any burden on authorities for the collection of relevant information and instead makes this the sole responsibility of the stakeholders or relevant industries, who may distort the information in order to protect their own business interests in the local market. It is advisable for the WTO-ADA to expand its role at this stage by allowing it to collect and gather information on its own for the purpose of meeting the standards of sufficient evidence to initiate the investigation. AD provisions have been applied to the GCC market only since 2003, and there could be a high probability of underuse or misuse of complaint provisions by GCC industry representatives.

In *Guatemala—Cement II* (2002), the Panel observed that Articles 5.2 and 5.3 'contain different obligations. One consequence of this phenomenon is that 'investigation authorities need not content themselves with information provided in the application but may gather

[362] Van den Bossche and Zdouc (n 92).

[363] RoI of the GCC Common Law on AD, art 3.

[364] ibid, art 4.

information on their own in order to meet the standard of sufficient evidence for initiation in Article 5.3'.[365]

The Permanent Committee decides to initiate an AD investigation only when the complaint is supported by domestic producers whose total production represents more than 50% of the total domestic like product on the part of the industry expressing either support for, or opposition to, the complaint, and when the domestic producers showing support for the complaint account for at least 25% of the total production of the domestic like product produced by the GCC industry.[366] Moreover, if the producers[367] have a close relationship with either the exporter or importer, or even if they are themselves importers of the product, the Permanent Committee might not take such producers into account during its assessment of the representativeness of the concerned GCC industry.[368]

Article 35 of the RoI addresses dumping provisions, and states that the application to initiate an AD investigation should be rejected and any investigation already in progress must be terminated in the following circumstances:

1) Withdrawal of the complainant, except under conditions where such action is against GCC interest;
2) Insufficient evidence to indicate the presence of dumping, injury and a causal link between dumping and injury to justify continuing;
3) The calculated dumping margin is less than 2%, expressed as a percentage of the export price;
4) The volume of the dumped imports of the product under investigation is negligible, i.e., less than 3% of the total imports of the product go to a GCC market, unless countries accounting for less than 3% individually, account collectively for more than 7% of the imports of the like product to the GCC market.[369]

Hence it can be argued from the aforementioned analysis that the GCC-CLAD and RoI are compliant with Articles 5 and 6 of the WTO-ADA in relation to accepting complaints from

[365] Panel Report, 'Guatemala—Antidumping Investigation Regarding Portland Cement from Mexico' WT/DS60/R, adopted 25 November 1998, as reversed by Appellate Body Report WT/DS60/AB/R, DSR 1998: IX, 3797.

[366] RoI on AD Measures, art 6.1.

[367] Producers shall only be deemed to be related to the exporters and importers if one of them directly or indirectly controls the other, or both of them are directly or indirectly controlled by a third party, and providing that there are grounds for believing or suspecting that the effect of the relationship is such as to concern the producer to behave differently from non-related producers, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

[368] RoI on AD Measures, art 6.2.

[369] ibid, art 35.

or terminating AD cases involving the relevant stakeholders in the domestic market of the GCC.

3.3 Rules for Conducting an AD Investigation

Articles 9–26 of the RoI contain the rules and framework for how the GCC-TSAIP should carry out the process of investigation, including information and evidentiary and procedural elements.[370] Once the Permanent Committee has decided that an investigation shall begin, a notice of the initiation of the investigation is published in the Official Gazette, which is issued by the GCC-TSAIP, within ten working days from the date of decision.[371] Article 10 of the GCC RoI obliges the GCC-TSAIP to provide the full text of the non-confidential version of the complaint and a copy of the notice of investigation to all known interested parties and the representatives of the exporting countries as soon as an AD investigation is initiated.[372]

By this action, the GCC-TSAIP reserves the right for all interested parties to access the information and evidence contained in the complaint application. The purpose of this obligation is mainly to reserve the right of the defendant to know the evidence on which the complainant is relying to raise the complaint and to prepare their response. The Article does not provide any information on how the GCC-TSAIP determines who constitutes an 'interested part[y]'. While it might be easy to identify the complainants, as they initiate the investigation and are clearly defined in Article 6.1 of the RoI on AD Measures, the RoI provide no information on identifying the defendants. Domestic producers within WTO Members enjoy the control of initiating an AD investigation by triggering, the AD complaint application. The producers raising the complaint thus have the opportunity and time to collect vital evidence that supports their complaint in advance of submission.

The defendants receive no notification until the investigation is initiated. The GCC-TSAIP begins its investigation by sending questionnaires to known 'interested parties', including the known exporters, importers, foreign producers, and consumer associations, to collect the data and information necessary for the investigation.[373] Responses are due to all interested parties within 40 days of receipt of these questionnaires.[374] An extension of 10 days may be

[370] ibid, arts 9-26.

[371] ibid, art 9.

[372] ibid, arts 10-1 and 10-2.

[373] ibid, art 11.

[374] ibid, art 12.1.

granted when a practicable cause to do so is demonstrated before the end of the original period.[375]

The RoI assumes that the questionnaires have been received by all interested parties seven days after they were sent or transmitted to the appropriate diplomatic representative of the exporting countries.[376] The GCC-TSAIP has the right to disregard responses sent after the time limit provided for their submission.[377]

By imposing an appropriate time limit on the return of completed questionnaires, the GCC-TSAIP aims to control the time of the investigation and the many concomitant steps to producing results and decisions. These resolutions are normally achieved within a period of 12–18 months, as specified in Article 23 the RoI: 'The investigation shall be completed within twelve (12) months from the date of initiation. The Permanent Committee may in special circumstances extend this period for no more than six (6) months.'[378]

The GCC-TSAIP may face difficulty in carrying out its investigations due to the large number of exporters, producers, importers, and types of products or transactions under investigation, which makes this investigation process complicated. GCC Members meet most of their needs for goods through imports from other countries across the world.[379] For example, Saudi Arabia imports 80% of its food from other countries.[380] Therefore, the GCC market is more likely to have many producers and exporters from different countries who are competing to supply GCC Members with the goods they need.

The RoI on AD Measures acknowledges that difficulty by allowing the GCC-TSAIP in such circumstances to limit its investigation to a representative sample of interested parties, products, or transactions under investigation.[381] The representative sample typically comprises statistically valid samples, based on either the information and evidence available at the time of selection, or by choosing the largest percentage of the export volume, production, or sales of the concerned country that can be verified during the period of investigation.

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[375] ibid, art 12.2.

[376] ibid, art 12-3.

[377] ibid, art 12-4.

[378] ibid, art 23.

[379] Kazzi, 'Is the Gulf Cooperation Council (GCC) Customs Union a Myth?' (n 37).

[380] SM Taha, 'Kingdom Imports 80% of Food Products' (*Arab News,* 19 April 2014) <www.arabnews.com/news/558271> accessed 12 July 2018.

[381] RoI of on AD Measures, art 13.

The RoI does not, however, identify limitations or controlling tools in the sampling technique that the GCC-TSAIP should follow during the sampling process. By comparison, the WTO allows the investigation authorities of its members to employ a controlled sampling technique, as outlined in Articles 6.10.1[382] and 6.10.2[383] of the ADA.

This discrepancy raises an important question about how the GCC-TSAIP carries out the sampling technique under Article 13 the RoI, and if it considers its obligations under the ADA regarding this technique. This question will be addressed in detail in Chapter 5 of this thesis through legal analysis of cases raised by GCC domestic producers.

Once the interested parties are determined and the questioners' responses sent to them, Article 14 of the RoI on AD Measures provides all participating parties with another chance to define their interests by holding a public hearing. They have a fair opportunity[384] to present their views and arguments, while taking into consideration the need to protect the confidentiality of the presented information.[385] Article 14 does not, however, specify who has the right to initiate such a public hearing. Article 6.2 of the ADA states clearly that such a meeting should take place only at the request of the interested parties.[386] The author suggests, however, that whether it is requested by the GCC-TSAIP or the interested parties, such a meeting would be consistent with the overall goal of investigations, which is to collect and verify as much evidence as needed to facilitate a rightful final decision. Yet Article 14.2 of the RoI also states that there is no obligation for any interested party to attend the public hearing, and failure to do so will not have a negative effect on that interested party's case.

Article 15.1 of the RoI provides an explanation of how the GCC-TSAIP will deal with the information presented. Apart from any confidential information, the record of the public hearing is kept in the public file by the GCC-TSAIP.[387] Article 15.2 also allows all interested

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

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

[384] RoI on AD Measures, art 14. Article 17 of the GCC RoI on AD Measures states: 'Public Hearings shall be presided over by the Director General of the GCC-TSAIP or his interim, who shall undertake the necessary measures to protect confidential data and statistics. Public hearings shall be organized in a manner to ensure that all participating parties have adequate opportunities to present their views.'

[385] Article 16 of the GCC RoI on AD Measures states that interested parties who intend to attend a public hearing shall notify the GCC-TSAIP at least seven working days before the date of the public hearing of the names of their representatives that will attend the hearing as well as the written arguments and information to be provided at the hearing.

[386] ADA, art 6.2.

[387] RoI on AD Measures, art 15.1.

parties to participate in the public hearing and to provide reasonable rationales if they wish to present information related to the investigation orally.[388] Oral information is considered only if it is subsequently submitted in written format within the designated time limit of no more than ten days past the date of the public hearing.[389]

In addition to overseeing the questionnaires and a public hearing, under Article 18 of the RoI on AD Measures, the GCC-TSAIP practises its right to verify the information provided or to obtain additional detail related to the ongoing investigation by carrying out onsite visits inside or outside the GCC countries.[390] Article 18 restricts the GCC-TSAIP's proposed onsite visits to all apart from GCC Members by pre-obtaining agreements from concerned bodies and by ensuring there are no objections from concerned countries after notifying their representatives about the intended visit. Article 18 lays out a basic framework for how to verify information, while providing that the existing procedures and additional parameters provided in ADA Annex I should be applied during onsite visits.[391] An overview of the GCC's investigation procedures is shown in Figure 1 (below).

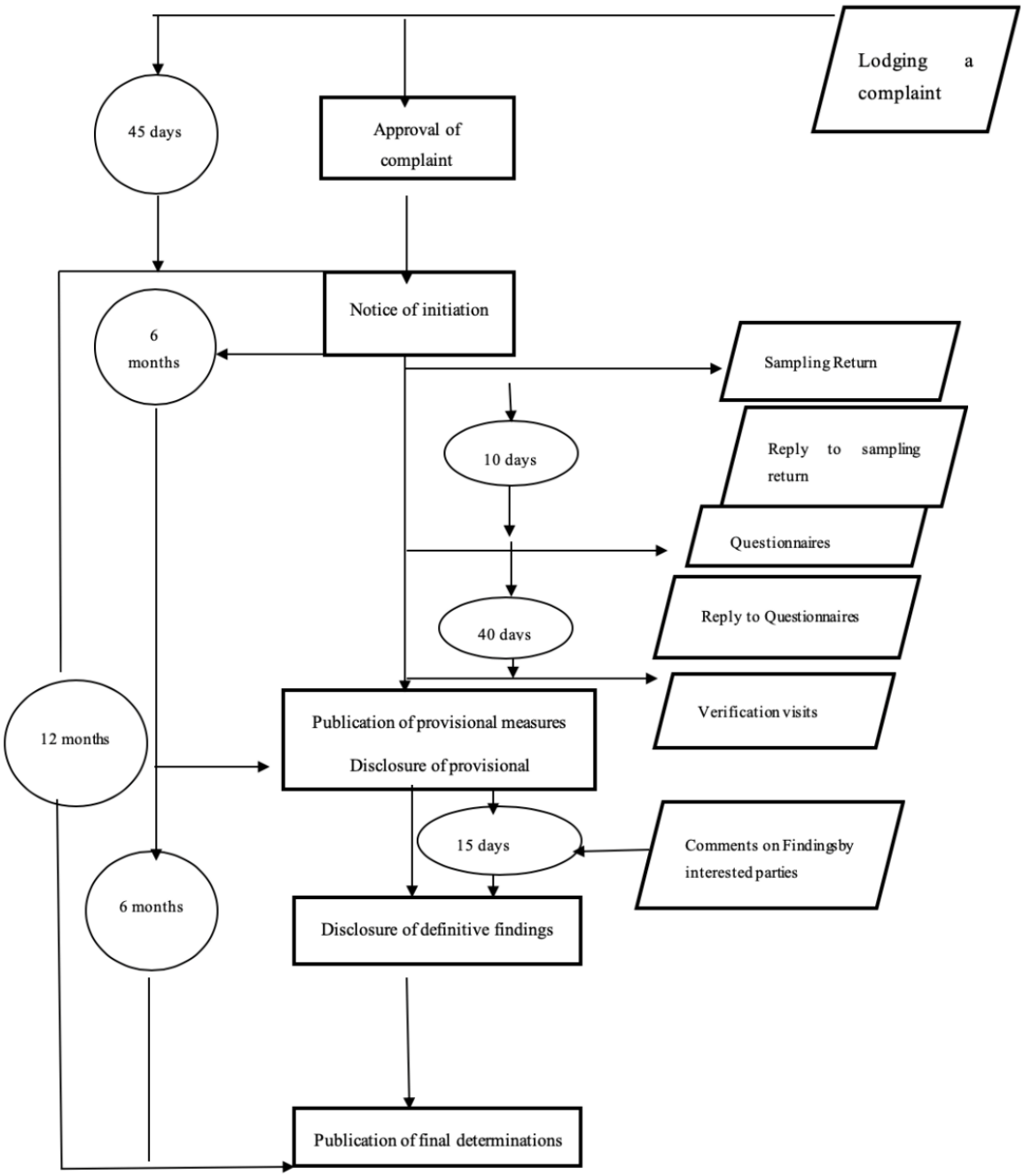
[388] ibid, art 15.2.

[389] ibid.

[390] ibid, arts 18.1 and 18.2.

[391] ibid, art 18.3.

Figure 1: The AD Investigation Process as per the GCC Common Law on AD and its RoI (source developed by author).



3.3.1 The Legal Obligations of Investigating Authorities in the course of AD Investigations

Under the WTO-ADA, the legal obligations of investigating authorities in the Members during the AD investigations are designed to grant fairness and transparency, and to prevent abuse that may result from an WTO member using the AD measures cited in the subparagraphs of Article 6 of the ADA. The Appellate Body *in EC—Bed linen (2003)* concluded that '"the" subparagraphs of Article 6 set out evidentiary rules that apply throughout the course of an AD investigation and provide for due process rights that are enjoyed by "interested parties" throughout such an investigation'.[392]

These obligations are categorised based on their aims:

i. Avoiding unreasonable requests for information;

ii. Providing access to available information, while subject to some restrictions;

iii. Giving all interested parties the full opportunity to defend their interests;

iv. Carrying out an objective and comprehensive evaluation of all available evidence.

The compatibility analysis of the GCC's adherence to the legal obligations stipulated by WTO-ADA is presented in the following subsections.

3.3.1.1 Avoiding unreasonable requests for information

The ADA obliges investigating authorities to avoid any refinement when disseminating information from interested parties; this is due to the challenges involved in supplying the requested information, particularly in the case of small companies and industries. Article 6.13 of the ADA establishes that 'the authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable'.[393] Moreover, Annex II.2 of the ADA points out that

> The authorities may also request that an interested party provide its response in a particular medium (e.g., computer tape) or computer language. Where such a request is made, the

[392] Appellate Body Report, 'European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India—Recourse to Article 21.5 of the DSU by India' WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003: III, 965, para 136.

[393] ADA, art 6.13.

> authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language.[394]

Annex II.2 of the ADA clarifies that the investigating authority

> should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g., it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g., it would entail unreasonable additional cost and trouble.[395]

For their part, the GCC-CLAD and its RoI on AD Measures cite nothing that obliges the GCC-TSAIP to avoid unreasonable requests for information. Article 85 of the RoI on AD Measures, however, obliges the GCC-TSAIP to adhere to the ADA obligation: 'The provisions of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, shall be applied on matters which are not stated in these RoI.'[396]

3.3.1.2 Providing access to relevant information

As stated above, Article 6.1 of the ADA obliges 'all interested parties in an AD investigation [to receive] notice of the information which the authorities require'.[397] Annex II.1 of the ADA further indicates that,

> As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.[398]

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[394] ADA, Annex II.2.

[395] ibid.

[396] RoI on AD Investigation, art 85.

[397] ADA, art 6.1.

[398] ibid, Annex II.1.

In sum, these provisions establish that interested parties should be notified in detail of any information required from an interested party; this should include the way the information should be provided and the consequence in failing to meet this requirement. Accordingly, Article 26.1 of the RoI clarifies the consequence of not provided the required information to the GCC-TSAIP:

> If any interested party refuses access to, or otherwise does not provide necessary information or does not submit them within the period of time prescribed form or significantly impedes the investigation, preliminary and final determinations either affirmative or negative may be taken on the basis of the information available.[399]

Furthermore, Article 26.2 of the RoI establishes how the GCC-TSAIP should deal with bad information: 'If any interested party provides false or misleading information, such information shall be disregarded, and available information may be used.'[400]

To ensure that Articles 26.1 and 26.2 align with the ADA, RoI Article 26.3 obliges the GCC-TSAIP to establish that Articles 26.1 and 26.2 should be implemented per 'applicable procedures and provisions set forth in Annex II of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 shall be taken in consideration'.[401]

Once an interested party has provided the required information, Article 6.4 of the ADA stipulates that the authorities should ensure that the interested parties may see all available information:

> The authorities shall, whenever practicable, provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an Antidumping investigation, and to prepare presentations on the basis of this information.[402]

To clarify, this obligation does not oblige the investigating authorities to make the evidence directly available to interested parties. Instead, investigating authorities should only make the evidence available upon a written request from an interested party issued within the specified timeframe. Moreover, such disclosure should be restricted by the confidentiality of the evidence. Nevertheless, the RoI only acknowledges this right if it proceeds within the

[399] RoI on AD Measures, art 26.1.

[400] ibid, art 26.2.

[401] ibid, art 26.3.

[402] ADA, art 6.4.

stated timeframe; this schedule is indicated in the Official Gazette as part of the published notice of initiating the AD investigation.

Article 14.3 the RoI on AD Measures is subject to the requirement for an AD investigation providing that

> all parties that request to participate in the investigation as [an] interested party within the time-limit stated in the notice of initiation shall have fair opportunities, whenever practicable and upon written request, to see information related to the investigation and that used to reach the findings of the investigation, in accordance with the rules concerning confidential information contained in this Common Law and its RoI.[403]

This means that interested parties may prepare their presentations and submissions accordingly.

Article 6.9 of the ADA requires the investigating authority to inform all interested parties about the essential facts under consideration by the investigation to reach a final decision.[404] This disclosure should be made sufficiently before reaching the final decision, so that the interested parties have opportunities to present their positions.[405]

Article 6.9 of ADA concerns the end of an investigation, after the investigating authority has allocated the facts and evidence that are essential for their final decision. This means the facts are paramount for either imposing AD measures or terminating an investigation without imposing measures; moreover, it is the responsibility of the investigating authority to disclose these essential facts in an appropriate way. All interested parties then develop a good understanding of why such a decision has been made.[406] As the Appellate Body provided in *China—GOES (2012)*, disclosing essential facts subject to Article 6.9 is paramount to ensuring that the interested parties are able to define their interests. Therefore,

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[403] RoI on AD Measures, art 14.3.

[404] 'The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.' ADA, art 6.9.

[405] To explain which facts must be disclosed, Article 6.9 of the ADA covers those under consideration in the course of an investigation before the final decision is undertaken; there are facts that are in record which the investigating authorities rely on to reach their final decision. It is worth noting that Article 6.9 does not require that the investigating authority discloses all facts in record before taking a final decision but only disclosed the essential facts, i.e. facts that are significant, important, or salient. Appellate Body Report, 'China—Countervailing and Antidumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States' WT/DS414/AB/R, adopted 16 November 2012, DSR 2012: XII, 6251, para 240.

[406] As explained above, in order for the investigating authority to be able to impose Antidumping measures at the conclusion of the investigation, the investigating authority should indicate the presence of the following: 1) non-negligible dumping margin which should be more than> 2%; 2) injury to domestic industry; 3) a causal link between dumping practices and the injury. So, the essential facts should consist of facts in light of the content of the findings needed to fulfil the substantive obligations of the imposition of Antidumping measures under the ADA or the termination of the investigation without the imposition of any measures.

this disclosure should occur in sufficient time for interested parties to do just that.[407] Interestingly, even as a third party, Saudi Arabia in accordance with Article 6.9 in *China—Autos (2014)* insisted on the obligation of the investigating authority to disclose all essential facts which formed the basis for the final decision, and in a manner that allowed all interested parties to review the facts and define their interests.[408]

Meanwhile, Article 24 the RoI on AD Measures requires that the GCC-TSAIP notifies the complainant only once a decision has been undertaken and, even then, there is ambiguity about the information contained in such a notification:

> Upon the decision to impose measures, whether provisional or definitive, the GCC-TSAIP shall notify the complainant and issue a public notice of the application of the measures in the Official Gazette, which shall contain the following information, taking into consideration confidentiality requirements:
>
> - The identity of the parties subject to the measures.
> - The identification of the products subject to the measures.
> - A summary of the reasons leading to the imposition of measures.
> - The form, level, and duration of the measures' application.[409]

From the above, it can be concluded that GCC Members act in a manner that is inconsistent with Article 6.9 in the following ways:

- They fail to inform all interested parties of the essential facts under consideration on which they rely to reach the conclusion and final decision *before* the decision is made, even while they directly inform the interested parties of the final decision.
- They fail to grant the interested parties a full understanding of the rationale for their decision, even when notifying them of the decision.

3.3.1.2.1 Confidential information

The non-disclosure of a confidential information request is designed to protect the commercial interests of the parties submitting information to the investigating authority. However, the investigating authority should keep in mind the transparency rights of other

[407] Appellate Body Report, 'China – Countervailing and Antidumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States' WT/DS414/AB/R, adopted 16 November 2012, DSR 2012: XII, 6251, para 240.

[408] Panel Report, 'China – Antidumping and Countervailing Duties on Certain Automobiles from the United States' WT/DS440/R and Add 1, adopted 18 June 2014, DSR 2014: VII, 2655, para 7.67.

[409] RoI on AD Measures, art 24.

interested parties.[410] Therefore, as previously noted, the disclosure obligations and transparency requirements of Article 6.4 of the ADA, are counterbalanced by the confidentiality requirements established in Article 6.5 of the ADA:

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[411]

Information is classified as confidential if

1. It is by nature confidential;
2. The Article defines the information confidential if when disclosed the information would result in
    i. A significant competitive advantage to a competitor; or
    ii. A significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information; or
3. The information is provided on a confidential basis by the interested parties, and they show reasonable cause.

Investigating authorities thus should review whether a party seeking confidential treatment for the information has shown a reasonable cause. As the Appellate Body provided in *EC—Fasteners (2011)*, the alleged cause must include a reason that is sufficient to justify withholding information from both the public and other interested parties in the investigation.[412]

Once the investigating authority grants confidential treatment for the requested party, it will ask this party, according to Article 6.5.1 of the ADA,[413] to furnish non-confidential summaries. These summaries should contain sufficient detail to facilitate a reasonable understanding of the substance of the information submitted in confidence. In case the

[410] D Bienen, G Brink and D Ciuriak (eds), *Guide to International AD Practice* (Kluwer Law International, 2013).

[411] ADA, art 6.5.

[412] Appellate Body Report, 'European Communities—Definitive Antidumping Measures on Certain Iron or Steel Fasteners from China' (n 238) para 538.

[413] 'The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.' ADA, art 6.5.1.

interested parties cannot provide a summary because the information does not lend itself to such, they must provide a statement of their reason to justify that fact. Under Article 6.5.2 of the ADA,[414] investigating authorities may, however, reserve their right to disregard this information unless the party concerned can satisfactorily demonstrate that it is correct. The authority may reject confidentiality requests in the following circumstances:

- If the request for confidentiality is not warranted;
- If the supplier of information is either unwilling to make the information public or to authorise its disclosure in general or in summary form.

Having discussed how the ADA treats confidential information submitted by interested parties, and the obligations that investigating authorities should follow in this matter, the chapter will now consider the GCC RoI and the way in which it treats such information. Article 19 of the GCC RoI establishes how the GCC-TSAIP treats confidential information.

Article 19.1 firstly establishes the two types of confidential information:

> Any information which is by its nature confidential or which is provided on a confidential basis by interested parties shall be treated as confidential, if reasonable cause being shown, such information shall not be disclosed without the specific permission of the party submitting it.[415]

Here it identifies the same types of confidential information as Article 6.5 of the ADA, i.e., 'confidential by nature' or 'acquires confidentiality due to its submission on a confidential basis by interested parties upon demonstrating reasonable cause'. Unlike ADA Article 6.5, however, RoI Article 19.1 does not provide any details as to how the GCC-TSAIP may define 'confidential information by nature', nor does it describe what may constitute a 'reasonable cause' that interested parties may submit to the GCC-TSAIP when requesting confidentiality.

Article 19.2 of the RoI does establish how interested parties may provide confidential information:

> Interested parties providing confidential information shall be required to furnish reasons supporting its confidential treatment and non-confidential summaries thereof. Such

[414] 'If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.' ADA, art 6.5.2.

[415] RoI on AD Measures, art 19.1.

summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.[416]

Furthermore, Article 19.3 states: 'In exceptional circumstances, interested parties may indicate that information is not susceptible [to] summary. In such cases, a statement of the reason must be provided.' In comparison, Article 19.4 of the RoI Antidumping Measures indicates that the GCC-TSAIP has the right to discard submitted information on the basis of confidentiality: If a request for confidentiality is found to be unwarranted, and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, such information may be disregarded unless it can be satisfactorily demonstrated by appropriate sources that the information is correct.[417]

In summary, the text and meaning of Articles 19.1—19.4 of the RoI on AD Measures are compatible with Articles 6.5, 6.5.1 and 6.5.2 of the ADA.

3.3.1.2.2 Public notices as a means of assessing the commitment of the investigating authority towards transparency and confidentiality

Under Article 12 of the ADA, the purpose of a public notice is to enhance the transparency of determinations carried out by investigating authorities and to encourage investigating authorities to reach their determinations through reasoning techniques.[418] Article 12 of the ADA provides a framework for the Public Notice and Explanation of Determinations; the article indicates how, with which parameters, and under which conditions published reports regarding the initiation and termination of AD investigations and provisional or definitive AD measures should contain and adhere to.[419] For example, Article 12.2.1 of the ADA states that:

> A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to the acceptance or rejection of arguments. Such a notice or report shall, with due regard to the requirement to protect confidential information, particularly contain:
>
> I. The names of the suppliers, or when this is impracticable, the supplying countries involved;

[416] ibid, art 19.2.

[417] ibid, art 19.3.

[418] R Wolfrum, P-T Stoll and M Koebele, *WTO: Trade Remedies* (vol 4, Brill 2008).

[419] ADA, art 12.

II. A description of the product which is sufficient for customs purposes;

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

IV. Considerations relevant to the injury determination, as set out in Article 3;

V. The main reasons leading to the determination.[420]

Moreover, public notice is the only way by which to assess whether the investigating authorities apply the principle of transparency and confidentiality of information. The Appellate Body in *China—HP—SSST* (*EU/China—HP—SSST (Japan) (2015)* establishes that the task of the WTO panel is only to assess whether the report and relevant documents show that the investigating authority has objectively examined the good cause, taking into account the nature of the information issued and the reasons submitted by the interested parties. The Appellate Body does not have to review the entire record to determine whether the investigating authority has objectively assessed good cause.[421]

Accordingly, Saudi Arabia in its third-party submissions in *China—Autos (US) (2014)* insisted that the public notice should meet the transparency criteria. Saudi Arabia held that meeting these criteria upon publishing the notice is an important part of the process leading to the final decision. Saudi Arabia stated clearly that the notice should contain sufficient detail about all evidence and facts that the investigation considered, and the reasons behind

[420] ADA, art 12.2.1.

[421] Appellate Body Reports, 'China—HP-SSST (Japan) / China—HP-SSST (EU)' (n 296), para 5.40.

its decision.[422] Articles 9,[423] 22[424] and 24[425] of the RoI regulate the information issued and published in the Official Gazette about the Permanent Committee's decisions to initiate or terminate an investigation, and to impose provisional or definitive AD duties.[426] All these Articles require the Official Gazette to publish only summaries, and to avoid detail. This limitation is in clear conflict with Article 19 of the RoI on AD Measures; it applies a confidentiality requirement in all circumstances and prevents clarity on how final decisions and determinations were reached.[427] This legal standard leads GCC Members to act in ways

[422] Panel Report, 'China—Antidumping and Countervailing Duties on Certain Automobiles from the United States' (n 228) Annex D-5, para 7.

[423] Article 9 of the GCC RoI on AD Measures states: 'The notice of the initiation of an investigation shall be published in the Official Gazette within ten (10) working days from the date on which the affirmative Permanent Committee decision was taken. The initiation of an investigation shall be effective on the date on which the notice of initiation is published in the Official Gazette. The notice of initiation of an investigation shall contain the following information:

I. A description of the product under investigation, including its technical characteristics, end-uses and its current tariff classification number.

II. A description of the like domestic product(s) or directly competitive product(s), including their technical characteristics and end-uses.

III. The name and address of the complainant and all other known producers of the like domestic product(s) or directly competitive product(s).

IV. Name(s) of the country(ies) of origin or export of the product under investigation.

V. A general summary of the factors related to the allegations of serious or material injury or threats thereof and practices under investigation.

VI. The investigation's initiation date.

VII. The timetable for the investigation procedures, including:

VIII. The deadline for interested parties desiring to participate in the investigation to make themselves known in writing to the GCC-TSAIP,

IX. The time frames within which interested parties shall present their arguments or information in writing,

X. The time-limits within which interested parties have the opportunity to present their submissions in writing,

XI. The period within which interested parties shall request a public hearing when necessary.

8. The address of the GCC-TSAIP, the GCC-TSAIP Director General's name, address and phone or the party to whom the interested parties shall submit information and comments.'

[424] Article 22 of the GCC RoI on AD Measures states sates that: 'Upon the decision of the Permanent Committee to terminate the investigation without imposing measures, the GCC-TSAIP shall notify the complainant and publish a public notice in the Official Gazette along with the decision, including the following information:

I. Identity of the complainants and the domestic products that requested the investigation;

II. Identifying the products under investigation;

III. Reasons for termination.'

[425] Article 24 of the GCC RoI on AD Measures states reads as 'Upon the decision to impose measures, whether provisional or definitive, the GCC-TSAIP shall notify the complainant and issue a public notice of the application of the measures in the Official Gazette, which shall contain the following information, taking into consideration confidentiality requirements'

[426] RoI on AD Measures, arts 9, 22 and 24.

[427] ibid, art 19.

that are inconsistent with those articulated in Articles 6.5[428] and Article 12[429] of the ADA, in that they fail to employ the principles of transparency, confidentiality, and dissemination of the required facts and evidence to justify the final decision in their Official Gazette.

3.3.1.3 Giving all interested parties full opportunity to defend their interests

The reasons behind the obligation to share relevant information before concluding an investigation and its final decision are clarified in many provisions of the ADA[430] as well as within Article 14.3 of the RoI on AD Measures. These Articles aim to give all interested parties a fair opportunity to define their interests. Furthermore, Article 6.2 of the ADA establishes that:

> Throughout the antidumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented, and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.[431]

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[428] 'Any information which is by nature confidential, or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it'. Moreover, Article 6.5 clearly indicate that the authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.' ADA, art 6.5.

[429] Article 12 of the ADA provides the framework of the Public Notice and Explanation of Determinations. The Article indicates how, what parameters, and the conditions of public published reports regarding an Antidumping investigation initiation, investigation termination and provisional or definitive Antidumping measures should contain and adhere to. For example, Article 12.2.1 of the ADA states that a public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

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

I. a description of the product which is sufficient for customs purposes;

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

III. considerations relevant to the injury determination as set out in Article 3;

IV. the main reasons leading to the determination

[430] For instance, under Article 6.4 of ADA, domestic authorities must allow all interested parties to see the information that is relevant for the 'presentation of their cases'. Similarly, Article 6.9 mandates that all interested parties be informed of the essential factual grounds of a final determination, 'with sufficient time for the parties to defend their interests.'

[431] ADA, art 6.2.

The first sentence of this Article emphasises the right of the interested parties to defend their interests. The Article further states that the investigating authorities must

I. Provide upon request an opportunity for all interested parties to meet those with adverse interests, thus offering the opportunity to hear opposing views and rebuttal arguments; and
II. Allow the interested parties to present other oral information on justification.[432]

There is no obligation, however, for any party to attend the meeting, and failure to attend by any party should not prejudice the case.[433]

In the GCC RoI, no provision explicitly grants the interested parties the right to defend their interests by meetings groups with adverse interests, or to present oral information as justification. Moreover, it is not clear whether the GCC-TSAIP preserves such rights under Article 85 of GCC RoI.[434]

3.3.1.4 Carrying out an objective and comprehensive evaluation of all available evidence

Article 6.6 of the ADA states: 'Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.'[435] This Article obliges the investigating authorities to assess the accuracy of information received from interested parties. It should be noted that the ability of the investigating authorities to verify the accuracy of submitted information is based on the reputation of the complainant who submitted the information. Thus, the investigating authorities have the right to undertake any verification process they need, even in territories that belong to other members, if they deem this necessary.

By complying with WTO-ADA Article 6.6, Articles 18.1 and 18.2 of the RoI on AD Measures establish that the GCC-TSAIP must obtain and verify the required information and

[432] According to Article 6.3 of the ADA, information presented orally may be taken into account 'only in so far as it is subsequently reproduced in writing and made available to other interested parties'. This provision does not clarify whether the burden of reproducing the information in writing and making it available to other parties rests upon the party submitting the information. However, considering that the investigating authorities are required to provide *all* interested parties with the relevant information at their disposal, it seems that such burden lies on the investigating authorities' shoulders.

[433] ibid.

[434] 'The provisions of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 shall be applied on matters which are not stated in these RoI.' GCC RoI on AD Measures, art 85.

[435] ADA, art 6.6.

stipulates as allowed when carrying out on the spot visits, either inside or outside the GCC Members.

Article 18.1 of the RoI states:

> In order to verify the information provided or to obtain further details related to the investigation, the GCC-TSAIP may carry out visits to countries outside the GCC Members, provided that it obtains the agreement of the firms concerned and receives no objection from the country concerned after notifying their representatives to the on-the-spot visit.[436]

This is confirmed in Article 18.2 of the RoI on AD Measures, which states that, 'in order to verify the information provided or to obtain further details related to the investigation, the GCC-TSAIP may carry out on the spot visits inside GCC Members'. However, Article 18.3 of the RoI Antidumping Measures requires that 'the procedures described in Annex I of the WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 shall apply to on-the-spot visits conducted under this Article'.[437]

3.3.1.5 Considering all information submitted by interested parties in determinations

To ensure fair and balanced conclusions to AD investigations, the ADA obliges investigating authorities to consider all information submitted by interested parties. ADA Annex II.3 specifies that such information should meet certain criteria, as explicated in the investigation process:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.[438]

Thus, to reach a final determination, the investigative body must ensure that the information is:

i. verifiable;

[436] RoI on AD Measures, art 18.1.

[437] ibid, art 18.2.

[438] ADA, Annex II.3.

ii. appropriately submitted so that the investigation may reference it without undue difficulties;

iii. supplied in a timely fashion and where applicable;

iv. supplied in a medium or computer language requested by the authorities.[439]

The Appellate Body in *US—Hot-Rolled Steel (2001)* concluded that investigating authorities are 'directed to use information if [these] three, and, in some circumstances, four, conditions are satisfied'. In the view of the Appellate Body, 'if these conditions are met, investigating authorities are not entitled to reject information submitted when making a determination. One of these conditions is that information must be submitted 'in a timely fashion'.[440]

No provisions in the GCC RoI mandate the GCC-TSAIP to include all information submitted by interested parties or to consider the criteria of all information when making their determinations.

Again, it could be argued that the GCC-TSAIP would meet the same requirements of Annex II.3 under Article 85 of the GCC RoI. However, it is difficult to assess whether the GCC-TSAIP adheres to these requirements as it is difficult to gain access to its investigation documents. Future research with the aim of revealing insider information about timely submission of AD case-related information from the concerned parties and methodologies for the manipulation of such data could use qualitative research methodologies involving interviews with authorities in charge of the GCC-TSAIP and AD cases and with authorised access to documents held by the GCC relating to the investigation of alleged dumping.

Additionally, the WTO's DSB may play an effective role in increasing the transparency of the AD investigations, as has been observed to do in the AD cases handled by the European Commission (EC). Davis points to the involvement of the WTO's DSB and its clear role in revealing whether the EC has made use of all information submitted by the concerned parties when assessing evidence of dumping.[441]

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[439] As noted above, if the interested party does not maintain its computerised accounts in the requested medium or computer language, *and* if presenting the response as requested would result in an unreasonable extra burden on the interested party, the authorities should not maintain a request for a response in such a medium or particular computer language. According to Annex II.3 states that, if these conditions are met, a party's failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation. In those cases, if the authorities do not have the ability to process information if provided in a particular medium (e.g., computer tape), Annex II.4 indicates that the information should be supplied in the form of written material or any other form acceptable to the authorities.

[440] Appellate Body Report, 'United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan' (n 154) para 81.

[441] Davis (n 199).

3.4 AD Measures

Once the investigation process concludes and dumping has been demonstrated, meaning the process has established a causal link between injury and the dumped imports, the investigating authority may be able to impose AD measures, as per Article 1 of the ADA.[442]

Article 9.1 of the ADA specifies that only the authorities of the importing member have the right to decide whether or not to impose an AD duty after all requirements for the imposition have been fulfilled.[443] Moreover, the use of the perfect tense in Article 9.1 of the ADA, i.e., 'have been fulfilled', is significant here for it establishes that imposing and collecting AD duties under Article 9.1 take place only after determining first dumping, second injury, and third a causal link between them under Articles 2 and 3 of the ADA.[444, 445]

ADA Article 1 does not provide any details about the type of dumping measures that the member should impose, however, and the Article contains only the phrase 'antidumping measures'. In US —*1916 Act*, however, the Appellate Body stated that that 'the ordinary meaning of the phrase "an Antidumping measure" seems to encompass all measures taken against dumping'. Therefore, this phrase entails 'not any explicit limitation to particular types of measure'.[446]

The GCC RoI, and specifically the preface of Article 35, provide that 'a recommendation of immediate termination of the investigation shall be made without imposing any measures in the following circumstances'.[447] Here the use of the phrase 'immediate termination of investigation and without imposing any measures' clearly indicates that in the GCC RoI, any type of AD measures may only be imposed after completing an investigation that included a determination of dumping, the presence of injury, and a causal connection between them. The author will show this understanding when examining AD investigations in AD cases in Chapter 4.

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[442] 'An Antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.' ADA, art 1.

[443] 'The decision whether or not to impose an Antidumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the Antidumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member.' ADA, 9.1.

[444] RoI on AD Measures, arts 2 and 3.

[445] Appellate Body Report, 'European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India—Recourse to Article 21.5 of the DSU by India' WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003: III, 965, para 123.

[446] Appellate Body Report, 'United States—Antidumping Act of 1916' WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793, para 119.

[447] RoI on AD Measures, art 35.

The ADA and RoI identify three types of AD measures: (1) provisional measures, (2) price undertakings and (3) definitive AD duties. In the next section, the ADA and RoI on imposing each of these measures are briefly discussed and points of conflicts between them are indicated.

3.4.1 Imposing Provisional AD Measures

3.4.1.1 Requirements for imposing provisional AD duties

Article 7 of the ADA[448] establishes that the importing country may impose provisional AD measures if the following requirements are fulfilled: (i) an investigation has been initiated in accordance with Article 5 of the ADA; (ii) a public notice has been provided to that effect; and (iii) the interested parties have been given adequate opportunities to submit information and make comments.

Furthermore, in accordance with Article 7.1 of the ADA,[449] imposing provisional measures should be consistent with the following substantive requirements: (i) that a preliminary affirmative determination of dumping and its consequent injury to a domestic industry was made; and (ii) that the authorities concerned judge such measures necessary to prevent injury during the investigation.

Article 36.1 of RoI on AD Measures establishes the same substantial requirements to impose provisional AD duties. The Permanent Committee may impose provisional measures if:

a. An investigation has been initiated and public notice has been published in the Official Gazette;
b. The interested parties have been given adequate opportunity to submit information and make comments;
c. A preliminary affirmative determination of dumping and consequent injury to the GCC industry has been made, and provisional measures have been determined as necessary to prevent injury from increasing or arising during investigation. A preliminary negative determination of dumping does not necessarily lead to

[448] 'Provisional measures may be applied only if: (i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments [...].' ADA, art 7.1.

[449] 'Provisional measures may be applied only if: [...] (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and (iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.' ADA art 7.1(ii)-(iii).

terminating the investigation, but no provisional measures may be imposed in such case.[450]

Taken together, the GCC RoI is in full compliance with the Article 7.1 of the WTO-ADA for meeting the requirements for imposing the AD measures.

3.4.1.2 Forms of provisional AD measures

Article 7.2 of the ADA establishes that provisional measures, in addition to provisional duties, may require security via a cash deposit or bonds equal to the provisionally estimated amount of the AD duty; this amount must not exceed the provisionally estimated margin of dumping. Provided that both the normal duty and the estimated amount of the AD duty are indicated, withholding appraisement becomes subject to the same conditions as other provisional measures.[451]

Article 36.2 of the GCC RoI states: 'Provisional measures may take the form of a provisional customs duty or, preferably, a security—by way of cash deposit or bond—not greater than the dumping margin provisionally estimated.'[452]

3.4.1.3 Length of provisional AD duties

Articles 7.3 and 7.4 of the ADA[453] establish the rules regarding the initiation and length of provisional measures:

- Provisional measures may not be applied sooner than 60 days from the date of initiating the investigation;
- Applying provisional measures shall be limited to as short a period as possible and is not to last more than four months;
- If the request by exporters represents a significant percentage of the trade involved, this period may be extended to be six months;

[450] RoI on AD Measures, art 36.1.

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

[452] RoI on AD Measures, art 36.2.

- When authorities of an investigation examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.[454]

Article 36.3 of the GCC RoI on AD Measures also determines the period of such provisional duties and the cases in which this period could be extended:

> The application of provisional measures shall be limited to as short a period as possible, not exceeding four (4) months and may be extended for further two (2) months upon request by exporters representing a significant percentage of the trade of the concerned product or upon no objection when notifying those exporters by the GCC-TSAIP.[455]

Furthermore, the last sentence of RoI Article 36.2 establishes that 'provisional measures may not be applied sooner than 60 days as from the date of initiation of the investigation'.[456]

3.4.2 Price Undertakings

The ADA provides that instead of imposing definitive AD duties or provisional measures, AD proceedings must be suspended if the investigating authorities and exporters agree to increase the price or to stop exports of the product.[457]

3.4.2.1 Substantial requirements for accepting price undertakings

Article 8.1 of the ADA identifies the following requirements to accept price undertakings. Price undertakings should be (i) voluntary, (ii) satisfactory, and (iii) preceded by a determination of dumping and injury. They should be voluntary because the investigating authorities may only suggest price undertakings to the exporters, and the exporters are free to accept or reject these suggestions.[458] At the same time, the investigating authorities should be satisfied that such action would eliminate the negative impact of dumping on the domestic

[454] ADA, arts 7.3 and 7.4.

[455] RoI on AD Measures, art 36.3.

[456] ibid, art 36.2.

[457] 'Proceedings may be suspended or terminated without the imposition of provisional measures or Antidumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated.' ADA, art 8.1.

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

industry. Finally, no price undertakings can be accepted unless they proceed after a preliminary affirmative determination of dumping and injury.[459]

Two of these requirements are provided in Articles 39.1 of the RoI: 'Upon the approval of the Permanent Committee, the GCC-TSAIP may be suspended or terminated without imposition of AD duties in case the GCC-TSAIP receives a satisfactory voluntary undertaking from any exporters.'[460] Article 39.2 explains the third requirement: 'Price undertakings shall not be sought or accepted from exports unless a preliminary affirmative determination of dumping, injury, and causal link has been made.'[461]

3.4.2.2 Accepting/rejecting the offer of a price undertaking

Once the exporters have offered a price undertaking, the investigating authority may accept or reject the offer. Under Article 8.3 of ADA, the investigating authority may reject the offer based on (i) practical reasons or (ii) reasons of general policy. If the investigating authority rejects the offer, it should inform the exporter about its reasons and provide the exporter with a chance to comment on the decision.[462]

If the investigating authority accepts the offer, the investigation process should stop unless the exporters ask for the investigation to be continued or the investigating authority decides to continue the investigation.[463] If the offer is accepted and the investigation results have demonstrated a negative determination of dumping injury, the undertaking should automatically lapse. Conversely, if the investigation results demonstrate an affirmative determination of dumping and injury, the undertaking may continue.[464]

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[459] Before the determination of price, undertakings may not be sought or accepted from exporters.

[460] RoI on AD Measures, art 39.1.

[461] ibid, art 39.2.

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

[463] Footnote 19 of the ADA disallows the simultaneous continuation of proceedings and implementation of price undertakings.

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

The author has identified the same scenario in the GCC RoI on AD Measures through examining the provisions cited below. Article 39.3 provides the following reasons for not accepting undertaking offers:

> Undertakings offered need not be accepted if their acceptance is considered impractical, because the number of actual or potential exporters is too great, or for any other reasons, including reasons of general policy. Should the case arise and when practicable, the exporter shall be provided with the reasons that have led to a consideration that acceptance of an undertaking would be inappropriate and shall, to the extent possible, be given an opportunity to make written comments thereon.[465]

Article 40.2 the GCC RoI on AD Measures provides a potential scenario that may occurs upon accepting the offer:

> Where price undertakings are accepted, the investigation of dumping and injury shall nevertheless be completed if an exporter so desires or the GCC-TSAIP so decides. In such a case:
>
> a. If a negative determination of dumping or injury is made by the Permanent Committee, the price undertaking shall automatically lapse. Except in cases where such a determination is due in large part to the existence of such an undertaking. In such cases it may be required that an undertaking be maintained for a reasonable period consistent with the provisions of these RoI.
>
> b. In the event that an affirmative determination of dumping and injury is made by the Permanent Committee, the undertaking shall continue consistent with its terms and the provisions of these RoI.[466]

Based on the above, it can be concluded that the GCC RoI complies with the WTO-ADA's provisions on price undertaking in relation to meeting the requirements of price undertaking and the approach taken by the GCC-TSAIP in accepting or rejecting the offer of price undertaking.

3.4.3 Governing Standards for the Determination and Imposition of AD Measures

The ADA allocates four principles that aid in the process of determining and imposing AD measures:

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[465] RoI on AD Measures, art 39.3.

[466] ibid, art 40.2.

- optional application;
- lesser duty;
- proportionality;
- non-discrimination;
- non-retroactivity.

These principles help the investigating authorities to answer the substantial question of 'to what extent and how are such measures imposed'.

3.4.3.1 The 'optional application principle' and the 'lesser duty rule'

Under the ADA, imposing AD measures is optional and there is no provision to stop the WTO member from waiving its right to impose measures, even if the investigation results in a positive determination of dumping and injury. Furthermore, the ADA encourages all WTO members to employ domestic laws that allow the collection of fewer AD duties. Simply put, the ADA welcomes the injured party deciding to collect duties that are lower than the calculated dumping margin.[467]

The author believes all WTO members should try to incorporate into their national laws such principles as those that lead to optional duties and understands the 'lesser duty' principle as liberalising trade and removing obstacles to it.

Accordingly, Article 38.1 of the GCC RoI on AD Measures determines the extent to which AD measures should be applied: 'An antidumping measure shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury.'[468] Moreover, Article 40.1 establishes the principle of applying lesser duty to price undertakings. According to this provision, 'price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. Price undertakings shall remain in force only as long as they are necessary to counteract the injurious effect of the dumping'.[469]

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[467] Article 9.1 of ADA establishes that '[i]t is desirable that the imposition [of AD duties] be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry'. Article 8.1 of the ADA extends the application of the lesser duty principle to price undertakings. According to this provision, 'Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.'

[468] RoI on AD Measures, art 38.1.

[469] ibid, art 40.1.

It is interesting to note that the GCC's approach of applying lesser duty to price undertakings to ensure that price increases do not exceed the margin of dumping. This sounds closer to the protectionist discretion, as most AD rules are prone to protectionist discretions which may promote the monopoly of the domestic industries, discourage the entry of foreign produce into the domestic market, reduce healthy competition, and cause a decrease in overall welfare compared to the normal dumping margin system. Furthermore, Pauwels Vandenbussche, and Weverbergh refer to the practice of applying the 'lesser duty' rule as an attempt to decrease market welfare, as it allows an opportunity for domestic producers to increase their sales while the AD investigation is in progress.[470] Hence, they argue that domestic output increases if the lesser duty system is not applied in certain circumstances.[471] A similar argument is put forth by Lee, who claims that although having a lesser-duty system is advantageous, but it is more advantageous to not have such a system if it promotes protectionist discretions as a result of AD investigations.[472]

3.4.3.2 The proportionality principle

Article 9.2 of the ADA establishes in relevant part that 'when an [AD] duty is imposed in respect of any product, [it must] be collected in the appropriate amounts in each case'.[473] In addition, Article 9.3 of the ADA establishes that 'the amounts of the antidumping duty shall not exceed the margin of dumping as established under Article 2' of the ADA.[474]

At the same time, ADA Article 8.1 provides that price undertakings must 'not be higher than necessary to eliminate the margin of dumping'.[475] In sum, if the investigating authorities decide to impose AD measures, such as duties and price increase undertakings, they must not exceed the equivalent dumping margin. This is called the proportionality rule, and it sets forth that under no circumstances should AD measures be applied beyond the need to address the negative impact of dumping.

The proportionality rule is noted in all RoI provisions governing all three types of AD measures. Article 36.2 of the RoI sets forth the relevant part, which is that 'provisional measures may take the form of a provisional customs duty or, preferably, a security-by way

[470] W Pauwels, H Vandenbussche and M Weverbergh, 'Strategic Behaviour under European Antidumping Duties' (2001) 8(1) International Journal of the Economics of Business 75.

[471] Rovegno/Vandenbusshe (fn.62), p. 5; cited in Ibd 528.

[472] Lee (n 295).

[473] ADA, art 9.2.

[474] ibid, art 9.3.

[475] ibid, art 8.1.

of cash deposit or bond-not greater than the dumping margin provisionally estimated'.[476] In addition, Article 37.1 states, 'Definitive antidumping measures shall be imposed by the Ministerial Committee acting on a proposal submitted by the Permanent Committee and shall not be greater than the established margin of dumping.'[477] Similarly, Article 40.1 establishes that price undertakings must 'not be higher than necessary to eliminate the margin of dumping'.[478]

Many legal experts have raised arguments against the principle of proportionality and its use in interpreting violations of the WTO-ADA. For instance, Andenas and Zleptnig posited that proportionality principle is an unwritten principle in WTO law, and there is no universal format of procedures mentioned anywhere in the books of the WTO for assessing whether Members have used this principle in the right context.[479] In a similar fashion, Newmann and Turk concluded that institutionally, the WTO is not fit for analysing whether values and interests, both economic and non-economic are properly balanced while imposing sanctions and penalties resulting from the harms to the domestic industry due to dumped products.[480] Therefore, a degree of caution is advised while applying the 'principle of proportionality' in challenging the decisions of national investigators conducting AD investigations in the WTO Dispute Tribunals, as domestic values/interests and the imposition of the proportionality principle may interfere with each other when defining and interpreting the proportionality principle in the context of the GCC market.[481]

3.4.3.3 The non-discrimination principle

Article 9.2 of the ADA also identifies another substantial principle governing how to apply AD measures. This Article obliges the investigating authorities to impose and collect AD duties against any product on a non-discriminatory basis from all sources found to have dumped and caused injury.[482] In its turn, GCC RoI Article 37.2 establishes the following non-

[476] RoI on AD Measures, art 36.2.

[477] ibid, art 37.1.

[478] ibid, art 40.1.

[479] M Andenas and S Zleptnig, 'Proportionality and Balancing in WTO Law: A Comparative Perspective' in K Alexander and M *Andenas (eds), The World Trade Organization and Trade in Services* (Brill Nijhoff 2008).

[480] J Neumann and E Turk, 'Necessity Revisited: Proportionality in World Trade Organization Law after Korea-Beef, EC-Asbestos and EC-Sardines' (2003) 37(1) Journal of World Trade 199.

[481] AD Mitchell, 'Proportionality and Remedies in WTO Disputes' (2006) 17(5) European Journal of International Law 985.

[482] 'When an Antidumping duty is imposed in respect of any product, such Antidumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted.' ADA, art 9.2.

discriminatory basis for collecting and imposing AD duties: 'Definitive antidumping duties are imposed on all sources found to be dumping and causing injury to the GCC industry, except for imports from those sources from which price undertakings have been accepted.'[483]

3.4.3.4 Non-retroactive application of AD duties

Article 10.1 of the ADA establishes that AD duties are not retroactive. Based on this principle, AD measures should be applied to products imported for consumption only after enacting a decision to impose provisional and definitive measures.[484] When there is provisional or definitive determinations of 'threat' or 'material injury', Article 10.4 of the ADA provides those definitive duties may only be imposed after the date of this determination.[485]

The GCC RoI sets forth the principle of non-retroactive duties under Article 42.1: 'Provisional measures and definitive Antidumping duties shall only be applied to products imported for consumption from the date of imposition.'[486] Article 42.2 also establishes the following retroactive principle:

> The Ministerial Committee may, acting on a proposal submitted by the Permanent Committee, impose definitive antidumping duties retroactively for the period for which provisional measures have been applied, where:
>
> a. A final determination of material injury has been made.
>
> b. A final determination of threat of material injury has been made where it is considered that the effect of the dumped imports would, in the absence of the provisional measures, lead to a determination of material injury.[487]

Although the provisions of the ADA do not include language on retroactive application of AD duties, in this context, such duties would not conflict with the non-retroactive application of the AD duties cited in ADA Article 10.1. This lack of conflict arises out of the fact that

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[483] RoI on AD Measures, art 37.2.

[484] 'Provisional measures and Antidumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.' ADA, art 10.1.

[485] 'Where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive Antidumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.' ADA, art 10.4.

[486] RoI on AD Measures, art 42.1.

[487] ibid, art 42.2.

retroactive application of AD duties here applies to products that have entered since the date of imposing provisional duty, and not before.

3.5 Conclusion

This chapter answers SRQI by assessing the compatibility between the GCC-CLAD and its RoI with the ADA, with particular focus on the compatibility of provisions relating to initiation, conduction and AD measures in the GCC-CLAD with the relevant provisions in WTO-ADA. The chapter highlighted the right of WTO Members regarding the prompt to carry out AD investigations upon receiving complaints that contain evidence of (1) the existence of dumping, (2) the alleged injury caused by dumped imports and (3) the causal link between dumping and the alleged injury. Moreover, the WTO obliges their Members under Article 6.1 to collect and verify the complainants' evidence.

The analysis and interpretation of Article 2.3 governing AD complaints in the RoI showed that the article's provisions meet the ADA requirement regarding receiving and accepting complaints. There are, however, no provisions that oblige the GCC-TSAIP to collect additional information to justify initiation of an AD investigation.

The WTO under Article 6.1 of the ADA obliges its members to consider indicating clearly that this obligation should not affect the capacity of the investigating authorities. Moreover, they should find a balance between a proper investigation and compliance with the following obligations:

i. Avoiding unreasonable requests for information;
ii. Providing access to available information, which should be subject to some restrictions;
iii. Giving all interested parties full opportunity to defend their interests;
iv. Carrying out an objective and comprehensive evaluation of all available evidence.

The chapter examined Articles 9, 22, and 24 of the RoI on AD Measures governing content published by the Official Gazette as tools to assess the transparency GCC-TSAIP investigations in reference to relevant ADA provisions. The analysis of those Articles revealed that there are areas of inconsistency, such as the provisions governing transparency and confidentiality when conducting investigations and announcing their results.

Additionally, Article 6.9 of the ADA obliges investigating authorities to inform all interested parties in sufficient time about essential facts and evidence that go into the final

determination. Conversely, Article 24 of the RoI on AD Measures notes that the interested parties need only be notified when a final decision has been made.

Overall, the provisions governing AD investigations are compatible with ADA obligations, apart from those governing transparency and confidentiality. It is advisable, therefore, to redraft Articles 9, 22, and 24 concerning the transparency and confidentiality requirements under Articles 6.4, 6.5 and 12 of ADA to grant said compatibility.

More specifically, Article 24 should be redrafted to meet the proposals of ADA Article 6.9 that ensure timely disclosure of the facts and evidence on which the final decision will rely, thereby granting all parties concerned the right to defend their interest. As highlighted in Chapter 2, WTO Members are also obliged to ensure that their AD laws and policies are consistent with WTO decrees, and they should also interpret and implement their domestic laws in ways that avoid conflict with WTO laws. Indeed, local laws that conflict with the WTO-ADA should not be reformed.

Chapter 4 will examine how the GCC interprets and implements AD policies in reference to these WTO requirements using AD cases.

Chapter 4: Analysis of AD Cases in the GCC

4.1 Introduction

The textual analysis of the regulations and articles of the GCC-CLAD and its RoI framework provided in the previous chapter forms the basis of the current chapter's answer to SRQII, 'How has the GCC-TSAIP interpreted and implemented the GCC-CLAD and its RoI regarding AD cases?' This chapter will also examine three AD (AD) cases that may be described as follows:[488]

1. Imposing definitive AD duties against imports of automotive batteries originating in, or exported from, the Republic of South Korea;
2. Initiating an AD investigation against imported seamless pipes and tubes of iron or steel used for oil or gas pipelines and drilling circular cross-sections with an external diameter not exceeding 16 inches (406.4 mm), originating in or exported from the People's Republic of China;
3. Initiating an AD investigation against imports of uncoated paper and paperboard (Kraft liner or fluting or test liner) in rolls or sheets, other than that of heading 4802 or 4803 (containerboard), originating in Spain, Italy, and Poland.

The chapter contains three main parts; the first part will describe three cases which have been previously dealt by competent authorities in the GCC countries; the second part will focus on the analysis and discussion on these cases with focus on compliance with WTO-ADA in the practical sense. The second section also presents some solutions for GCC and WTO which intends to enable the former to comply with the WTO-ADA more effectively. The conclusion of the chapter has been presented in third part.

[488] It is worth noting that only a few AD proceedings had been announced at the time of writing. The author chose the first two cases because their final conclusions already had been reached and announced, and the third case because there was a high expectation that its final results would be announced soon, enabling him to update the chapter accordingly later.

4.2 Case 1: Imposing Definitive AD Duties Against Imports of Automotive Batteries Originating in or Exported from the Republic of South Korea

4.2.1 The Complaint

The proceeding originated from a complaint lodged on 12 November 2015 by a GCC domestic industry. The complaint alleged that electric lead acid accumulators (automotive batteries) with a capacity of 35 to 115 amp-hours, were being exported from the Republic of South Korea to the GCC market at dumped prices compared to their domestic prices. This caused material injury to the GCC domestic industry of like products.[489]

4.2.2 The GCC Domestic Industry

The complaint was rendered by the Middle East Battery Company (MEBCO) from Saudi Arabia, and supported by two other companies, the National Batteries Company from Saudi Arabia, and Reem Batteries & Power Appliances from Oman. This group of three companies represented the GCC industry of the product of concern, according to Article 6, paragraph 1 of the RoI on AD Measures.[490]

4.2.3 The Product under Investigation

The product in questions was an electric lead-acid accumulator with a capacity of 35 to 115 amp-hours, both rectangular and otherwise, including the square kind used for starting piston engines (i.e., automotive batteries). Furthermore, the product under investigation was classified under the GCC Unified Tariff Code (item 85 07 10 00).[491]

4.2.4 The GCC's Like Product

The GCC like product was an electric lead-acid accumulator with a capacity of 35 to 115 amp-hours, both rectangular and otherwise, including the square kind used for starting piston engines (i.e., automotive batteries).[492]

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[489] GCC-TSAIP 'Concerning the Initiation of an Antidumping Investigation against the Imports of Electric Lead-Acid Accumulators of Capacity of 35 up to 115 Amp-Hours, Whether or Not Rectangular (Including Square) of a Kind Used for Starting Piston Engines (Automotive Batteries), (2015), V5 Official Gazette, adopted in 31 December 2015, para 1.

[490] ibid, para 2.

[491] ibid, para 4.

[492] ibid, para 3.

4.2.5 The GCC's Allegations of the Existence of Dumping

The GCC domestic industry's allegation of the presence of dumping was based on a simple comparison between the export price and local sales price of the product under investigation in the domestic market in South Korea at the same level of trade. This resulted in a dumping margin of more than 2%, which is not de minims.[493]

4.2.6 The GCC's Allegations of the Presence of Material Injury

Firstly, the GCC industry established that the volume of the alleged dumped imports of the product under investigation from South Korea had increased. This increase was exceeded in absolute terms and relative to GCC production, comprising above 3% of the total imports of the product under investigation from all other countries of the world into the GCC market. These dumped imports caused the following material injuries to the GCC industry:

1. A decrease in the volume of production;
2. A decrease in the rate of the capacity of utilisation;
3. Price decline and depression;
4. Price undercutting between the GCC like product and the imported product;
5. A drop in the percentage of the market share for the GCC industry;
6. An increase in inventory volume;
7. A drop in profitability;
8. A drop in cash flow;
9. A drop in labour productivity;
10. A decrease in the rate of return on investment, an inability to raise capital and a subsequent inability to grow.[494]

4.2.7 The Investigation Procedure

The GCC-TSAIP examined the accuracy and adequacy of the data enclosed in the complaint and wrote an initial report. The report was then submitted to the Permanent Committee, which approved initiating an investigation. Finally, notice of the launch of proceedings were

[493] ibid, para 5.

[494] ibid, para 6.

sent to all concerned parties and published in the Official Gazette by the GCC-TSAIP on 31 December 2015.

The period required to complete the investigation was determined to be within one year of the date of announcement in the Official Gazette, but with the potential to extended it under some circumstances to an additional six months. The data collection period for this dumping investigation extended from 1 July 2014 to 30 June 2015, while the period of the data relevant to this injury investigation spanned from 2012 to the first half of 2015. Questionnaires were sent to all companies that made themselves known within a specific time and to all involved parties.

The GCC-TSAIP preserved the right for all interested parties to submit a request to attend the hearings and clarifies all details for making such a request. It also declared that it might use sampling techniques should many interested parties or number of products for investigation arose, and it published some details regarding the technique.

Furthermore, the GCC-TSAIP reserved its right to conduct verification visits at the GCC manufacturer sites and those of the South Korean exporters, which it stated in the notice of investigation initiation. Moreover, the body clearly announced that in case the interested parties did not cooperate, for example by refusing visits or not providing necessary information within the specified time limit, it would make the final decision based on the best available information. The GCC-TSAIP also kept all relevant non-confidential information submitted by the interested parties in a public file pending final determination; this file was available at the premises of the investigation authority in Riyadh, Saudi Arabia, for all interested parties.[495]

4.2.8 The Final Decision and Imposition of AD Duties[496]

On 23 April 2018, the GCC-TSAIP for Anti-Injurious Practices in International Trade officially announced that it will impose definitive AD duties for a period of five years against the GCC imports of the product under investigation; this period began on 25 June 2017, according to the data (see Table 3).[497]

[495] ibid, paras 7-14.

[496] GCC-TSAIP. No (5/1 AD/2016) 'Imposition of Definitive Antidumping in Duties Against the GCC Imports of Electric Lead-Acid Accumulators of Capacity of 35 up to 115 Amp-Hours, Whether or Not Rectangular (Including Square) of a Kind Used for Starting Piston Engines (Automotive Batteries)' (2017) Official Gazette, V10, adopted 23 April 2017, para 1

[497] ibid, paras 2 and 3.

Table 3: Definitive AD Duties Imposed against GCC Imports of Automotive Batteries from the Republic of South Korea

Country of Origin	Exporter/ Producer Company	Final dumping as a percentage of the CIF value
The Republic of Korea	Dong-Ah Tire Rubber Co., Ltd	25%
	ATLASBX Co., Ltd	21%
	Sebang Global Battery Co., Ltd	19%
	Hyundai Sungwoo Solite Co., Ltd	12%
	Others	25%

The GCC-TSAIP justified this final decision: the product under investigation that originated in, or exported from, the Republic of Korea was imported into the GCC market at dumped prices. The analysis and evaluation of the injury factors during the period of investigation led the GCC-TSAIP to conclude that the GCC industry had suffered from the presence of material injury caused by dumped imports that negatively affected the selling prices of the GCC originating like-product in the GCC market. Moreover, economic factors of the GCC industry were badly impacted by these dumped imports. The investigation deemed the sole cause of the material injury to be the dumped imports of the product under investigation. Thus, sufficient evidence was present to explain the causal link between the dumped imports and the material injury to the GCC industry.[498]

4.2.9 Analysis

4.2.9.1 Receipt of complaint and announcement of investigation

A review of the investigation showed that the complaint was supported by several producers representing the GCC industry. Although the notice of initiation did not mention this information, it specified that they had met the requirement in Article 6.1 of the RoI on AD Measures, so they should at least have been producing 25% of the GCC production of the

[498] ibid, para 4.

product under investigation. The main complainant was MEBCO, a joint project between Johnson Controls International, which owned a 49% share, and Saudi investors, who owned 51% of the automotive maintenance-free batteries company.[499] Two other GCC producers, Oman's Reem Batteries and Power Appliance Co. SAOC (Reem Batteries), and Saudi Arabia's National Batteries Company (NBC), also supported the complaint. Reem was established in 1991 and originally set up in technical collaboration with Johnson Controls Battery Group, USA.[500]

There were no GCC industry firms, as are usually present in Europe, which may have made the coordination required to raise AD complaints among GCC manufacturers difficult. As MEBCO is owned partially by Johnson Controls International, however, this company provided support for initiating the complaint. Johnson Controls has more experience with such situations than Saudi manufacturers, while also possessing a technical relationship with Reem Batteries. This familiarity may have facilitated communication and coordination between two of the largest automobile battery manufacturers in the GCC market.

Article 6.1 of the RoI on AD Measures clearly mentions that GCC producers who raise a complaint should be able to demonstrate production that exceeds the total output of manufacturers who both support and oppose the complaint. In this case, however, the complaint remained confidential until the notice that initiated the investigation, which prevented other GCC manufacturers from having a chance to express their opinions on the complaint. Access to the initiation of investigation could have revealed that the GCC-TSAIP did not send letters regarding the complaint to related manufacturers. This lack means that the GCC-TSAIP did not ask for opinions on the complaint, and therefore obtained no information that it may have subsequently employed to verify the eligibility of the complainants representing the GCC industry. Some may argue that the only circumstances that could have stopped the proceeding are insufficient or inaccurate evidence, and that such a provision would not affect the outcome of whether to accept the complaint.

This contrasts with EU cases on AD in which, if the total production of those who oppose the complaint exceeds the production of the entities who support it, the investigative authority may refuse the AD complaint.[501] In this case, however, the percentage of those who opposed the GCC's manufacturers could not impact the final decision on whether to accept

[499] Middle East Battery Company (2018) <www.mebco.com/Pages/default.html> accessed 23 March 2018.

[500] Reem Batteries and Power Appliances Co SAOC, 'About Us' (2018) <https://reembatteries.com/about-us/> accessed 23 March 2018.

[501] European Commission, 'When Can a Complaint Be Lodged?' <https://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151018.pdf> accessed 04 November 2018.

the complaint was accepted, but could affect the eligibility of the complainant to represent the GCC industry regarding the product under investigation and its ability to initiate such a complaint.

In closely reviewing the provided complaint evidence, one would find the complainers only provided evidence and information to show there was dumping and material injury but may have left out any clear information or evidence about the causal link between the alleged dumping and material injury to the GCC industry. They may have argued that they included such information under the alleged injury section. Even so, and even if they included evidence of a causal link under the alleged injury section, this is still unacceptable, since both Article 2.3 of the RoI of the GCC CLAD and Article 5.2 of the ADA have identified three elements of information and evidence to include as clear indications in a complaint:

1. The existence of dumping;
2. The injury caused by the alleged dumping;
3. The causal link between the alleged dumping and the alleged injury caused to the complainant;
4. All available information that could support the complaint.[502]

It is difficult for the author to understand how the GCC-TSAIP examined the accuracy and adequacy of the evidence provided by the complainants. This is because of the fact that the RoI of the GCC CLAD do not provide guidance to the complainant about which sources may offer adequate information and evidence and how to ensure that such sources are valid from the GCC-TSAIP perspective. For example, the EU AD complaint guidance specifies that the evidence should be sourced from invoices, price offers, publications in specialised press, and official statistics.[503]

4.2.9.2 The investigation period

In addition, the investigation lasted one and a half years, counting from the date of initiation. Normally, investigation take one year from date of initiation and extend to 18 months only in special situations.[504] This investigation lasted more than one year without justification in either the initiation or a follow-up notice, and also without demonstrated permission for an

[502] RoI on AD Measures, art 2.3; ADA, art 5.2.

[503] (n 438).

[504] RoI on AD Measures, art 23.

extension from the Permanent Committee, allowing a possible conclusion that the GCC-TSAIP interpreted and applied RoI Article 23 in a manner inconsistent with its text.

It should be noted that the GCC-TSAIP adhered to the timeframe for all complaint-related procedures. It took only 40 days instead of the allowed 45 to reach a conclusion regarding the complaint, for example. On 22 December 2015, the GCC-TSAIP issued an intention letter to the embassy of South Korea in Riyadh, and it published the investigation initiation in the Official Gazette within 10 days, on 31 December 2015.[505] The GCC-TSAIP allocated one year to collect data for the dumping investigation period, 1 July 2014 to 30 June 2015. For injury investigation purposes, it determined the data collection period to be three and a half years, starting in 2012 and extending to the first half of 2015.

Interestingly, although such information comprises a basic element of the investigation procedures, there is no information about it in the GCC. It seems that the GCC-TSAIP relied on Article 85 of the RoI to determine the investigation duration; this Article grants permission to seek information or guidance in circumstances where details are insufficient.[506] The ADA also does not establish a specific period for an investigation's data collection, nor does it give general guidelines on how investigating bodies should determine this period for dumping or injury investigations.

This information is significant for all WTO members. Thus, on 5 May 2000, the Committee on AD Practices (ADP Committee)[507] provided notice regarding this matter, accompanied by a number of recommendations concerning data collection periods in investigations on dumping and injury.[508] It appears that in the automotive batteries case, the GCC-TSAIP

[505] It should not take more than 55 days form the first working day after receiving the complaint per Articles 3 ,4 and 9 of the RoI of AD Measures.

[506] RoI on AD Measures, art 85.

[507] The Committee on AD Practices is established according to Article 16 of the ADA. It is composed of representatives from each WTO member. The committee should elect its own Chairman and meet at least twice a year or otherwise on request of any member. One of the main functions of the committee is concerned with consulting and seeking information from any source they believe it is appropriate to gather information from. When the committee seeks such information from sources within the jurisdiction of a member, it should inform this member in advance. Furthermore, the committee should get the consent of the member or any firm to be consulted.

[508] WTO, WTO Doc G/ADP/ 6 (adopted by the Committee on 5 May 2000) titled 'Recommendation Concerning the Period of Data Collection for Antidumping Investigations'. In light of the foregoing considerations, the Committee recommends that with respect to original investigations to determine the existence of dumping and consequent injury –

1. As a general rule:

the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months,[1] ending as close to the date of initiation as is practicable;

the period of data collection for investigating sales below cost[1], and the period of data collection for dumping investigations, normally should coincide in a particular investigation;

applied the Permanent Committee's general recommendations for data collection and injury investigation periods, which were one and three years, respectively. It also applied the transparency requirement for these periods in an appropriate way by publishing and announcing the initiation of an AD investigation notice in the Official Gazette, and it ensured all interested parties were informed before the investigations started.

The GCC-TSAIP failed, however, to set the start and end date of the data collection period per the ADP Committee's recommendation, which is that the end date should be close to the date of initiating the investigation. The GCC-TSAIP instead allocated the end date to be 30 June 2015, i.e., six months before the date of the investigation was initiated, which was 31 December 2015.

It is unclear whether this shorter period might have impacted the result, for the function of this time is precisely to discover sufficient data to factor into the final decision. Henrik Horn and Petros Mavroidis noted, 'The period of investigation, which includes the period of data collection, is a tool to serve the overall objectives that the imposition of antidumping duties is intended to serve. It should be used for this purpose and for this purpose only.'[509]

It is not mandatory for the GCC-TSAIP to adhere to the ADP Committee's recommendation; it is but a general guidance to WTO Members that emerged as a response to a number of enquires. Moreover, the ADA does not itself include it.

The panel report on *US—Hot-Rolled Steel (2001)* suggested that the ADP Committee's recommendation regarding the length of the data collection should be added to the ADA. The report went further to argue that Members' investigative bodies ought to be obliged to adopt the same:

> We note that the ADP Committee recently adopted a recommendation which provides that 'the period of data collection for injury investigation normally should be at least three years'.

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the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation;

in all cases the investigating authorities should set and make known in advance to interested parties the periods of time covered by the data collection and may also set dates certain for completing collection and/or submission of data. If such dates are set, they should be made known to interested parties.

2. In establishing the specific periods of data collection in a particular investigation, investigating authorities may, if possible, consider practices of firms from which data will be sought concerning financial reporting and the effect this may have on the availability of accounting data. Other factors that may be considered include the characteristics of the product in question, including seasonality and cyclicality, and the existence of special order or customized sales.

3. In order to increase the transparency of proceedings, investigating authorities should include in public notices or in the separate reports provided pursuant to Article 12.2 of the Agreement, an explanation of the reason for the selection of a particular period for data collection if it differs from that provided for in: paragraph 1 of this recommendation, national legislation, regulation, or established national guidelines.'

[509] H Horn and PC Mavroidis (eds), The WTO Case Law of 2001 (CUP 2004).

> Committee on Antidumping Practices, Recommendation concerning the Periods of Data Collection for Antidumping Investigations, adopted by the Committee on 5 May 2000, G/ADP/6. We note, however, that this recommendation was adopted after the investigation at issue in this dispute had been completed. Moreover, the recommendation is a non-binding guide to the common understanding of Members on appropriate implementation of the AD Agreement. It does not, however, add new obligations, nor does it detract from the existing obligations of Members under the Agreement. See G/ADP/M/7 at para 40, G/ADP/AHG/R/7 at para 2. Thus, any obligations as to the length of the period of investigation must, if they exist, be found in the Agreement itself.[510]

Conversely, the panels of a number of recent WTO Dispute Settlements have insisted that the ADP Committee's recommendation regarding the length of the data collection should be implemented wisely, and they referred to the ADP Committee's Guidelines as the way to reach this decision. The panel for *Argentina—Poultry Antidumping Duties (2003)* provided a different opinion, expressing its support for the ADP Committee's recommendation:

> The Recommendation Concerning the Periods of Data Collection for Antidumping Investigations states, inter alia, that the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable; and that the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation. From this, we take it that it is desirable that there be a substantial coincidence in the period of investigation for dumping and the period during which injury was found.[511]

From the above, it could be concluded that the GCC-TSAIP might need to adhere to ADP committee's guidelines to ensure that it acts within the WTO framework. Provisions may be inserted, so that in cases where such a schedule is impossible, the GCC-TSAIP may provide an explanation of why it may need longer or shorter times to reach a final decision.

A further potential confusion that stems from the GCC announcement of the period of data collection for both the dumping and injury investigations lies in the language itself. The GCC-TSAIP uses the term 'investigation period' to refer to *both* the *investigation* period, i.e., the period during which the investigation procedures shall ensue, and the *data collection* period of both the dumping and injury investigations. It is therefore advisable to re-draft the

[510] Panel Report, 'European Communities –Antidumping Duties on Malleable Cast Iron Tube or Pipe Fitting from Brazil' WT/DS219/R, adopted 7 March 2003, para 7.321.

[511] Panel Report, 'Argentina - Definitive Antidumping Duties on Poultry from Brazil' DS241, adopted 19 May 2003, para 7.287.

sentence so that it becomes clearer and matches the ADP Committee's guidance on these terms. In such a case, the notice would have stated that

- The period of data collection for dumping investigations extends from 1 July to 30 June 2015; and
- The period of data collection for injury investigations covers the years extending from 2012 to the first half of 2015.

4.2.9.3 Gathering information

When the investigation and data collection periods for dumping and injury are determined, the GCC-TSAIP sends questionnaires to collect information. These questionnaires go to the GCC industry, i.e., all known importers of the product under investigation, and the known producers and exporters.[512] The questionnaire primarily concerns the technical and physical characteristics of the product under investigation, the GCC like product, and the prices and costs associated with the allegedly dumped product. This information is used for the dumping and injury calculations. The author, however, was not able to study or analyse the dumping calculations or injury determinations, for the GCC-TSAIP did not publish such details, nor did it grant the author access to the information. Normally, the GCC-TSAIP's habit is to announce the result in the form of a one or several short paragraphs that contain no detail.

4.2.9.4 The GCC's definition of 'domestic industry'

The GCC-TSAIP has defined the GCC domestic industry in a simple way by assuming[513] that the main complainant and its supporters are representative of the GCC industry.[514] This interpretation emerges from Article 6 of the GCC CLAD RoI, but it completely neglects to actually define 'GCC domestic industry'. Article 3 of GCC CLAD defines the term as follows: 'Members of GCC's producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.'[515]

[512] RoI on AD Measures, art 11.

[513] KD Raju, World Trade Organisation Agreement on Antidumping: A GATT/WTO and Indian Jurisprudence (vol 15, Kluwer Law International 2008).

[514] Article 6 of the RoI on AD Measures is concerned with the procedures for lodging complaints.

[515] GCC Common Law on Antidumping Measures, art 3.

This definition does not allocate specifications, nor does it explain the meaning of the phrase 'collective output of the product that constitutes a major proportion of the total domestic production' on which it relies. It appears that the GCC-TSAIP uses the percentage of production that should be produced by the complainants to interpret the term 'major' here. This method could negatively impact final decisions and conflict with the text in Article 3 of the GCC CLAD. These repeated vaguenesses may lead the GCC-TSAIP to act in a manner that is inconsistent with Article 4.1 of the ADA.[516]

Originally, the term 'GCC domestic industry' should have included all GCC producers of the GCC like product for the purposes of material injury analysis. There is no doubt that the definition would have been accurate enough to represent the GCC domestic industry for the purpose of the injury investigation. The Appellate Body Report for *US—Hot-Rolled Steel (2001)* insisted that investigating authorities should consider the total domestic industry when examining 'injury', confirming that

> investigating authorities are directed to investigate and examine imports in relation to the 'domestic industry', the 'domestic market for like products', and 'domestic producers of [like] products'. The investigation and examination must focus on the totality of the 'domestic industry' and not simply on one part, sector, or segment of the domestic industry.[517]

Such complete attention is usually impractical for the GCC-TSAIP, however, especially if there are a large number of GCC producers of the like product. In such cases, this could put the GCC-TSAIP in a position to exceed the period of the investigation timeline. It is normally easier for the investigating authority to deal with a proportion of the total GCC domestic producers rather than all producers, and this proportion should reflect the entire GCC domestic industry. Choosing the AD complaint initiators as the only GCC domestic industry representatives may result in false negative or positive evidence of injury, and hence affect the final decision.

As stated, the 'GCC domestic industry' definition is not conclusively defined, which means the GCC-TSAIP has a lot to do to achieve a good GCC domestic industry definition for the purpose of the injury investigation. As the 'domestic industry' is a basic element of injury determination, it should apply the principles of objective examination and positive evidence

[516] 'For the purposes of this Agreement, the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.' ADA, art 4.1.

[517] Appellate Body Report, 'United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan' DS184/R, adopted 24 July 2001, para 190.

as indicated in Chapter 3. Allocating the GCC domestic industry should occur during the dumping investigation and before commencing the injury investigation; if the GCC-TSAIP adheres to the current definition of 'GCC domestic industry', it might not be able to do so.

In terms of the case in question, under the 'GCC domestic industry' definition published in the Official Gazette, only three producers of the GCC like product were included in the injury investigation. But the GCC-TSAIP could have also selected any large proportion, such as 75% of the total producers of the GCC like product to become the mechanism by which to study the alleged injury to the GCC domestic industry. This contradicts Article 4.1 of ADA that does not determine any specific percentage. However, it is logical to consider that 'major proportion' should indicate a relatively large percentage of the total GCC producers of the GCC like product.

A large proportion, e.g., 75%, is not usually the best scenario to follow, however, as the Appellate Body also noted regarding the term 'major proportion' in *EC—Fasteners (China) (2011)*:

> [The term] should be properly understood as a relative high proportion of the total domestic production…Indeed, the lower the proportion, the more sensitive an investigation authority will have to ensure that the proportion used substantially reflects the total production of the producers as a whole. [518]

As the GCC-TSAIP does not publish percentages regarding the amount of GCC like products produced by GCC producer complainants, it could be assumed that they produce the minimum percentage required to be able to raise an AD investigation, which is 25% of the total GCC production of the product under investigation. Nonetheless, this percentage might not logically fulfil the requirement of the 'major proportion' cited in the GCC domestic industry definition. Some may argue that if the GCC-TSAIP does not mention the percentages in the Official Gazette, it could indeed be relying on 100% of GCC producers of the like product when it uses the term 'producers of the GCC like product'. In such a case, there would indeed be no need to conduct an investigation based on objective examinations and positive evidence. This assumption might not be the case in this situation, however, as the GCC-TSAIP announced clearly that those producers represent the GCC domestic industry for the GCC like product: 'These companies represent the GCC domestic industry

[518] Appellate Body Report, 'European Communities—Definitive Antidumping Measures on certain Iron or Steel Fasteners from China' DS397/R, adopted 15 July 2011, para 411. The 25% benchmark mentioned in ADA art 5.4 is not relevant for determination of domestic industry because Article 5.4 refers only to the initiation of an investigation.

in accordance with Article 6.1 of the RoI on AD Measures. As defined in the Cambridge Dictionary,[519] the word 'representative' implies that these companies act and speak on behalf of several manufacturers; if this is not the case, the statement should be written more simply: 'GCC domestic industry of GCC like products is Middle East Battery Company (MEBCO), the National Batteries Company in Saudi Arabia, and Reem Batteries & Power Appliances in Oman.'

The recommendation here is not necessarily to include all GCC producers of GCC like products, as some are not eligible to be covered under the GCC domestic industry definition and should be excluded. For example, GCC producers may be related to the importers or exporters of the product under investigation or may be importers of the product under investigation themselves. On the one hand, their inclusion would open the door for all GCC producers of a like product without checking their eligibility, which could potentially include many producers and help to fulfil the GCC industry definition cited in Article 3 of the GCC CLAD. On the other hand, their inclusion could lead to violation of Article 4.1 of the ADA.

By limiting its definition of 'GCC domestic industry' to the complainants, the GCC-TSAIP did not independently identify other eligible GCC producers to whom it could send the questionnaires or to use as a representative sample of the GCC domestic industry. Although the RoI on AD Measures and the ADA does not specify the eligibility of using sampling techniques in determining the domestic industry definition, the ADA permits the use of this technique in determining the dumping margin or the support and opposition for an application. As the US submission to the EC states,

> The United States agrees with the EC and India the Agreement permits an importing member to use a sample of the domestic industry in evaluating the effect and impact of the dumped imports. Although the agreement doesn't explicitly refer to the use of sampling in this context, it does specify that sampling is appropriate in other texts, e.g., using samples which are statistically valid to determine dumping margins, and use of statistically valid sampling techniques to determine support and opposition for an application in the case of fragmented industries. The United States notes the critical criterion for sampling is that it be statically valid. [520]

The panel on *China—Boiler Products (2013)* did not criticise China's use of the sampling technique in defining the domestic industry, which provided a legal basis to employ this

[519] A representative is defined as someone who speaks or does something officially for another person or (Cambridge Dictionary, 2018) <https://dictionary.cambridge.org/dictionary/english/representative> accessed 24 March 2018.

[520] WTO, Dispute Settlement Reports 2001 (vol VI, CUP 2004).

technique. They only had issues with the method of the sampling, arguing that it did not follow the principle of 'objective examination and positive evidence':[521] 'MOFCOM limited its definition of the domestic industry to domestic producers that voluntary returned domestic producers' questionnaire response, China should have, but didn't, identify the universe of domestic producers in order to provide questionnaire to either each producer or alternatively, a representative sample of domestic producers.'

Accordingly in this case, the GCC-TSAIP not only failed to identify the GCC producers other than the complainants; it also failed to provide adequate notice and opportunity for domestic producers other than those of the complaint to participate in filling the questionnaires. The Official Gazette stated,

> Questionnaires will be sent to the GCC domestic industry and to the known importers of the product under investigation. Unknown foreign producers, exporters, and importers of the product under investigation shall declare themselves as interested parties to the Investigation Authority in order to receive a copy of the questionnaire within 21 days from the date of publication of this notice in the Official Gazette.[522]

Overall, the process employed by the GCC-TSAIP to define the GCC domestic industry inevitably results in examining only GCC producers who lodged the complaint, and therefore cannot fulfil the objectivity requirements of Articles 3.1, 3.2, 3.4, 3.5 and 4.1 of the ADA. The panel on *China—Boiler Products (2013)* noted,[523] 'An investigation authority must independently collect information relevant to its definition of the domestic industry. An investigation authority cannot define the domestic industry consistently with Articles 3.1 and 4.1 of the ADA without making active, independent effort to identify the universe of domestic producers of the like product.'

4.2.9.5 Determining material injury and analysing causation

The GCC-TSAIP may be biased, working with a flawed definition of the domestic industry that may distort its analysis of the share market, price effects, impact, and causation under Articles 3.2, 3.4 and 3.5 of the ADA and Articles 31 and 33 the RoI on AD Measures.[524] It is moreover difficult to analyse how the GCC-TSAIP carried out the injury investigation due

[521] Panel Report, 'China—Antidumping and Countervailing Duty Measures on Broiler Products from United States' (n 231).

[522] GCC-TSAIP 'Concerning the Initiation of an Antidumping Investigation against the Imports of Electric Lead-Acid Accumulators' (n 434) para 9.

[523] Panel Report, 'China—Antidumping and Countervailing Duty Measures on Broiler Products from United States' (n 231) para 65.

[524] ADA, arts 3.2, 3.4 and 3.5; RoI on AD Measures, arts 31 and 33.

to the lack of adequate published evidence and information. The author, however, concluded that GCC-TSAIP conducted the injury determination process according to the general requirements of Article 31 and 33 of the RoI, and Articles 3.1, 3.2, and 3.4. of the ADA. These Articles indicate an increase in the volume of dumped imports impacts the price of the GCC like product and the GCC domestic industry indices of the concerned product. Concomitantly, the Articles also evaluate all economic factors that could result in, or contribute to, the injury. Based on this evaluation, the GCC-TSAIP concluded that there are no factors, other than dumped imports, responsible for the injury.

4.2.9.6 Transparency and confidentiality principles

The two relevant volumes (5 and 10) of the Official Gazette do not contain any information regarding the principles of transparency and confidentiality.[525] The absence of transparency raises an essential question if the GCC-TSAIP applied the RoI's principle of transparency and disclosure. Basically, the GCC-TSAIP announces the complaint application after it has been accepted and the investigation is about to start. Therefore, the announcement in the Official Gazette is to initiate the AD investigation, although this may result in vagueness in terms of the number of AD companies raised and the reasons for rejecting some.

Thus, the GCC-TSAIP did not only act within the guidelines the RoI, as there is no specific Articles require publishing such information, but also in a manner consistent with Article 5.5 of the ADA,[526] which prevents publication information about an AD complaint until after it has been accepted. The aim of such behaviour is to protect the market from price fluctuations that could lead to market unrest.

The public notice published by the investigating authority is the only way to ensure transparency, the disclosure of facts, and the confidentiality principles of the national AD law and the ADA, as explained in Chapter 4.

A closer look at the notice of initiation for this case further reveals that it contains all the required information cited in Article 9 the RoI and Article 12.1 of the ADA.[527] Furthermore,

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[525] GCC-TSAIP, 'Concerning the Initiation of an Antidumping Investigation Against the Import of Electric Lead-Acid Accumulators of Capacity of 35 up to 115 Amp-Hours, Whether or Not Rectangular (Including Square) of a Kind Used for Starting Piston Engines (Automotive Batteries)' (2015) Official Gazette, V5, adopted 31 December 2015; GCC-TSAIP. No (5/1 AD/2016) 'Imposition of Definitive Antidumping in Duties Against the GCC Imports of Electric Lead-Acid Accumulators of Capacity of 35 up to 115 Amp-Hours, Whether or Not Rectangular (Including Square) of a Kind Used for Starting Piston Engines (Automotive Batteries)' (2017) Official Gazette, V10, adopted 23 April 2017.

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

[527] RoI on Antidumping Measures, art 9; ADA, art 12.1.

it contains some additional, not required information, such as the details of the investigation procedure and what to do in the case of non-cooperation on the part of the interested parties, the sampling techniques, and how to reach the public file.[528] It appears that the GCC-TSAIP included all information that could be helpful in gathering the information and evidence, and to ensure that all interested parties had the same rights. The same observation is true for the EU AD investigation notice.

In contrast, the announcement for the final result and the imposition of AD duties did not contain details or information on how this final result had been reached, as is consistent with Article 24 of the RoI.[529] It contained only the following information:

- The identity of the parties subject to the measures;
- The identification of the products subject to the measures;
- A summary of the reasons leading to imposition of the measures;
- The form, level, and duration of the measures.

Although the GCC-TSAIP adhered to the textual meaning of Article 24 of the RoI, it may have violated the principles of transparency and the disclosure fact requirements of Article 12.2.1 of the ADA.[530] Article 12.2.1 clearly declares that the investigating authority should disclose sufficient detail on how it determined the dumping margin; the method it employed; the reasons for choosing this method; the details on how it determined injury; and the main rationales on which it relied to reach a final decision.[531] By providing only a summary, it thus seems that the GCC-TSAIP assumed that the information was confidential, which it is not, as clearly indicated in Article 12.2.1 of the ADA.

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[528] The public file is the where the investigating authority, during the course of investigation, makes available all relevant non-confidentiality information submitted by the interested parties. This information is available for all interested parties at the premises of the investigating Authority in Riyadh pending the final determination.

[529] RoI on Antidumping Measures, art 24.

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

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

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

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

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

(v) the main reasons leading to the determination.'

[531] ADA, art 12.2.1.

In *EC—Tube or Pipe Fittings (2003)*,[532] and consistent with Article 12.2.1, the panel concluded that the investigation member must publish its findings and conclusions about each injury factor cited in Article 3.4 of the ADA. Moreover, the panel asked the investigating authority to include a complete evaluation of all injury factors cited in Article 3.4 of the ADA, i.e., those which help in understanding the published determinations.[533]

On the other hand, the transparency within the WTO is not sufficient as what Jackson explains, "As at September 2005 all proceedings have been closed to the public, and indeed portions are closed even to WTO members that are not parties".[534] This could result in lack of public awareness regarding to if the procedures are being conducted properly and legally or not. As well as it may lead to unfair dispute process or corruption, taking in consideration not to violate judicial procedures or confidentiality.

4.3 Case 2: The GCC's Initiation of an AD Investigation of Seamless Pipes and Tubes of Iron Originating in or Exported from the People's Republic of China[535]

4.3.1 The Complaint

In the Official Gazette on 18 April 2017, the GCC-TSAIP reported the initiation of an AD investigation concerning imports into the GCC market of seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling circular cross-sections with external diameters not exceeding 16 inches (406.4 mm). These products originated in or were exported from China. The AD inquiry was opened following a complaint that was filed on 2 February 2017 by Jubail Energy Services Company (Jesco) from the Kingdom of Saudi Arabia. The complaint was supported by ArcelorMittal Tubular Products Al-Jubail Co., also from the Kingdom of Saudi Arabia.[536]

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[532] Panel Reports, European Communities—Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219, adopted 7 March 2003, paras 7.424-7.426.

[533] Wolfrum, Stoll and Koebele (n 364).

[534] JH Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006) 155.

[535] GCC-TSAIP, No (2017/AD2/7) 'Concerning the Initiation of an Antidumping Investigation Against Imports of Seamless Pipes and Tubes of Iron or Steel of a Kind Used for Oil or Gas Pipelines and Drilling of Circular Cross-Section, of an External Diameter Not Exceeding 16 Inches (406.4 Mm) Originating in the People's Rebublic of China' (2017) Official Gazette, V11, adopted 25 April 2017.

[536] ibid, para 1.

4.3.2 The GCC Domestic Industry

The companies were the Jubail Energy Services Company (Jesco) from the Kingdom of Saudi Arabia and ArcelorMittal Tubular Products Al-Jubail Co.[537]

4.3.3 The Products under Investigation

The products under investigation were seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling circular cross-sections with an external diameter not exceeding 16 inches (406.4 mm), according to the API and other similar specifications.[538]

4.3.4 The GCC's Like Products

The GCC like products were seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling circular cross-sections with an external diameter not exceeding 16 inches (406.4 mm), according to the API and other similar specifications.[539]

4.3.5 The GCC's Allegation of the Existence of Dumping

Based on a comparison of, on the one hand, the export price of the product under investigation from China into the GCC market, with on the other hand, its constructed normal value in the Chinese domestic market at the same level of trade, the GCC industry alleged that there had been dumping. This comparison proved the existence of a dumping margin exceeding 2%, which is not *de minims*.[540]

4.3.6 The GCC's Allegation of the Presence of Material Injury

The complainants alleged that there was a significant increase in the volume of imports of the product under investigation from China, exceeding in absolute terms and relative to the domestic production 3% of the total imports of the product under investigation from all countries across the world into the GCC market. This resulted in material injury to the GCC domestic industry in the following forms:

1. A decline in the volume of production;

[537] ibid, para 2.

[538] ibid, para 4.

[539] ibid, para 3.

[540] ibid, para 5.

2. A drop in the rate of capacity utilisation;
3. Price depression and price suppression;
4. A decrease in labour, wages, and productivity;
5. A decline in market share;
6. A drop in cash flow and profitability;
7. Price undercutting between the like product and the imported product under investigation;
8. A decline in the rate of return on investment, an inability to raise capital, and an inability to grow.[541]

4.3.7 The Investigation Procedure

When the complainants submitted the complaint application, the GCC-TSAIP examined and verified it. Next, it issued a written report to the Permanent Committee, which then made the decision to start an investigation. All details about the complaint and investigation procedures were published in the Official Gazette on 25 April 2017. The investigation period was determined as one year with the possibility of adding six more months if special circumstances arose. The data collection period for the dumping investigation extended from 1 January 2016 to 31 December 2016. The investigation of the injury period covered 2013-2017. Questionnaires were sent to the GCC domestic industry representatives and all known importers and foreign exporters to collect the necessary information and evidence to reach a final decision.[542]

4.3.8 The Final Decision

On 1 of November 2018, the GCC-TSAIP announced the termination of the investigation without imposing any AD duties. The reason was the insufficiency of data to demonstrate a causal link between the dumping and the injury.[543]

[541] ibid, para 6.

[542] ibid, para 7.

[543] GCC-TSAIP, No (18/2D/2018) 'Concerning the Termination of the Antidumping Proceeding Against the GCC Imports of Seamless Pipes and Tubes of Iron or Steel of a Kind Used for Oil or Gas Pipelines and Drilling, Orginating in the People's Republic of China' (2018) Official Gazette, V16, adopted 1 November 2018

4.3.9 Analysis

4.3.9.1 Receipt of complaint and announcement of investigation

The GCC-TSAIP received a significant number of allegations and complaints from the GCC producers, in particular from Saudi Arabia; this was the first formal AD complaint accepted from the GCC producers in the iron sector. Chinese iron producers are the biggest competitors for Saudi products, and iron dumped imports are considered to be one of the biggest challenges they face.[544] Accordingly, the Saudi manufacturers lodged dumping complaints against China regarding several its iron products.[545]

The GCC-TSAIP delayed the notice of initiation of investigation by six days. Although the complaint was received on 2 February 2017, the GCC-TSAIP needed 30 working days from the date the complaint was received to prepare the initial report for the Permanent Committee. The Permanent Committee then took 15 working days from this date. A further ten working days were provided to announce the initiation of the investigation by the Permanent Committee. Thus, per the rules in place, the GCC-TSAIP had 55 working days to start its investigations[546] but took 61.

Therefore, the GCC-TSAIP acted in a manner inconsistent with Article 3, 4 and 9 of the RoI, for the notice did not contain details about the time taken by the GCC-TSAIP to examine and verify the accuracy of the complaint and to prepare the initial report, nor details about how long the Permanent Committee took to issue the final decision and give permission to initiate the investigation. The lack of detail makes it impossible to determine at which stage in the process the delay occurred.

Similarly, the GCC-TSAIP did not mention exactly how the complainants represented the entire GCC domestic industry, nor the percentage of GCC producers who supported or opposed the complaint per Article 6 of the RoI on AD Measures.

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[544] MEED (Intelligence Events Insight), 'Thought Leadership Report: Middle East Iron and Steel Industry 2016' (2015) <www.soharportandfreezone.com/SHRCMS/Uploads/Meed/2017-5-29-8-39-48Meed_Report_SPREADS.pdf> accessed 13 August 2018.

[545] F Al-Bakmi, '"Dumping" the Saudi Market with Chinese Iron with Prices Below 50% of the Local Market: The National Committee Files a Judicial Case against Chinese Companies' (*Al-Shark Al-Awsat*, 28 August 2016); H Al-Materi 'The Iron Industry Is Threatened and the Protection Fees Support Export' (*Aukad*, 28 March 2016).

[546] RoI on AD Measures, arts 3, 4 and 9.

4.3.9.2 Defining the GCC's 'domestic industry'

As noted in the previous case, the GCC-TSAIP is limited when it comes to defining the GCC domestic industry on behalf of which the GCC producers lodged the complaint, and it does not employ the principle of objective examination and positive evidence. The same observation holds true in this case.

4.3.9.3 The investigation period

In addition, the data collection period of the dumping investigation was not allocated to occur within the time recommended by the ADP committee, as there was about a five-month gap between the end of the data collection period of the dumping investigation and the date of investigation initiation. This delay may stem from the time it took to file and accept the complaint.

4.3.9.4 Non-market economy status: The case against China

This complaint was lodged against China, which the WTO classified as a non-market economy[547] until recently, when its market became classified by some countries, like the US and EU, as a 'non-economic market'. According to the Protocol of Accession of China WTO of 2001, a WTO member has the right to deal with China's market as a non-economy market for 15 years, or until 11 December 2016.[548] The US argued that after this date, each WTO member would have to revaluate China's economic market, as China does not provide any documents or evidence to show that its market had become an 'economic market'. The EU considered changing some of its AD rules regarding China, whilst China has requested dispute settlement consultations with the United States and the EU at the WTO.[549]

To provide a final answer regarding this matter, the US Department of Commerce's International Trade Administration carried out an analysis based on the six factors of the Tariff Act of 1930. These are the elements that indicate whether countries are economic or non-economic markets:

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[547] In the particular situation of economies where the government has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, GATT 1994 and the Agreement recognise that a strict comparison with home market prices may not be appropriate. Importing countries have thus exercised significant discretion in the calculation of normal value of products exported from non-market economies.

[548] RA Nasser and LB Costa, 'Brazil: The Need for Enhanced Effectiveness' in M Yilmaz (ed), *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (CUP 2013).

[549] B Ringel, 'Commerce Continues China's Status as a Non-Market Economy' (*Trade and Manufacturing Monitor*, 31 October 2017) <www.ustrademonitor.com/2017/10/commerce-continues-chinas-status-as-a-non-market-economy/> accessed 03 November 2018.

1. The extent to which the currency of the country under investigation is convertible into that of other countries;
2. The extent to which the wage rate in the country under investigation is determined by free bargaining between labour and management;
3. The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
4. The extent of government ownership or control of the means of production;
5. The extent of government control over the allocation of resources and over the price and output decisions of enterprises;
6. Any other appropriate considerations.[550]

The United States, as a third party, formally sent a 40-page statement expressing its opposition to the WTO classification of China as a non-economic country, thereby supporting the EU in its dispute settlement with China. The United States also argued many times that the main reasons China's market is considered 'non-economic' are the Chinese government's role in its domestic economy, and its direct relationship with the market and private sectors, both of which lead to distortions of its domestic economy.[551]

From 2017 onwards, the US began to block all appointments to the WTO appellate body when its judges' terms expired. This means that a country that has been subject to a ruling in a dispute can simply file an appeal, thereby evading the panel's decision. This greatly limits the ability of the WTO to mediate disputes. This initiative formed a part of President Donal Trump's broader aim to affect the global trading order. Trump imposed arbitrary tariffs on all of the US's key trading partners and commenced a trade war with China. The EU responded by proposing the multi-party interim appeal arbitration agreement (MPIA), which was based on the aim of replicating the WTO appellate body's procedures and practices. Although the arrangement is only applicable to participant states, any WTO Member State may join.

The MPIA is considered to be a significant mechanism for saving the trading regime and preventing the US from completely eroding the foundational principles and rules of the WTO. It has been suggested that the ADA "could be used to address government subsidy

[550] L Wils-Owens, 'China's Status as a Non-Market Economy' (2017) US Department of Commerce International Trade Association Memorandum A-570-053 <https://enforcement.trade.gov/download/prc-nme-status/prc-nme-review-final-103017.pdf> accessed 03 November 2018.

[551] Gao (n 63).

distortions in the market",[552] an issue that directly arose in *Ukraine – Ammonium Nitrate*.[553] Alternatively, there could be a role for the GCC in this respect, given that it is based on the overarching aim of peacefully settling disputes between states. However, it has been argued that the GCC is rarely invoked, because, as Altamimi proposes, "states prefer a diplomatic settlement".[554] Thus the role of the GCC may not be significant in this respect.

In an unexpected move, China tried to deny the presence and importance of the concept of 'non-economic market' in context of the ADA. Through the Chinese Foreign Ministry spokesperson, Geng Shuang, China declared, 'The concept of the so-called non-market economy can be found in no multilateral WTO rules, since it was created by several countries during the Cold War and only incorporated into domestic law of a scanty few of the 164 WTO members.'[555]

The vagueness of the situation has been exacerbated by China's acknowledgment of the concept of the non-market economy market on other occasions, and indeed accepting to be treated as a non-economic market until the end of 2016. Shuang added, 'It has nothing to do with whether China meets the so-called standards of market economy status or not. It is written down in black and white in the Article 15 … This is clear-cut and beyond dispute.'

Article 15 of China's WTO accession agreement states, 'Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.'[556]

In any case, these complexities should draw the attention of the GCC-TSAIP when it is carrying out investigations against China. It is understandable that the GCC-TSAIP tried to adhere to and fulfil its obligation as a WTO member. The dumping and injury investigation process are not always straightforward, and the investigating body should use all available

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[552] C Herghelegiu and L Rubini, 'Where Have All the Distortions Gone?' Appellate Body Report, Ukraine–Ammonium Nitrate' (2021) 20(4) World Trade Review 1, 1.

[553] Appellate Body Report, 'Ukraine – Ammonium Nitrate: AD Measures on Ammonium Nitrate' WT/DS493/AB, 12 September 2019.

[554] Altamimi, Abdulmalik M, 'An appraisal of the gulf cooperation council's mechanisms for co-operation and the settlement of disputes.' (2020) 2(10) Asian Journal of International Law.

[555] Embassy of the People's Republic of China
in the Republic of Lebanon, 'Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference on December 1, 2017' (1 December 2017) <https://www.mfa.gov.cn/ce/celb//eng/fyrth/t1515872.htm > accessed 6 August 2022.

[556] ibid.

legal tools to protect its market from dumping and other unfair trade practices. By sending its questionnaires to the Chinese company, the GCC-TSAIP declared that the GCC Members consider the Chinese market as an economic one.

It seems that the GCC-TSAIP followed Article 15 of China's WTO Protocol Accession, for it did not request proof from these Chinese companies that they are not controlled by the Chinese government. The GCC-TSAIP might have, however, employed a particular method to deal with China's proposed disregarded domestic prices. This method depends on the presence of a Particular Market Situation (PMS) in the market of the exporting country being investigated for dumping, as per Article 27.5 of the RoI on AD Measures[557] and Article 2.2 of the ADA. The latter states,

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[558]

Accordingly, if there is any PMS, the normal value may be determined from the sales of the product under investigation in third-party countries or calculations of the normal constructed value. Neither Articles 27.5 nor 2.2, however, provide any guidelines on what might be considered a PMS. At the time of writing this thesis, the WTO bodies had not concluded the issue of PMS.[559] Thus, the absence of a multilateral standard on how to interpret and apply PMS has made all WTO members exercise efforts to determine the presence of a PMS in AD investigations.

The practice of Australia in this matter provides a good example of how a PMS may be used to deal with China as a non-market economy for the purpose of AD investigations. Australia recognised China as a market economy in 2005 and promised not to use the non-market

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[557] As per RoI on AD Measures, art 27.5.

[558] ADA, art 2.2.

[559] W Zhou and A Percival, 'Debunking the Myth of "Particular Market Situation" in WTO Antidumping Law' (2016) 19(4) Journal of International Economic Law 863; M Yun, 'The Use of "Particular Market Situation" Provision and Its Implications for Regulation of Antidumping' (2017) 21(3) East Asian Economic Review 231; W Zhou, 'The Issue of "Particular Market Situation" under WTO AD Law' in JJ Nedumpara and W Zhou (eds), *Non-Market Economies in the Global Trading System* (Springer 2018); YY Lesmana and JW Koesnaidi, 'Particular Market Situation: A Newly Arising Problem or a New Stage in the Antidumping Investigation' (2019) 14(2) Asian Journal of WTO and International Health Law and Policy 405.

economy methodology against China. Australia's investigating authorities, however, have frequently treated China's market as a non-market by applying a PMS. The investigating authority considers whether a PMS is present due to governmental influence and figures out whether the impact of governmental involvement has distorted the competitive conditions in the domestic market. This approach may lead to findings that China's governmental control of the market could result in artificially low domestic prices, or at the very least, prices not commensurate with those of a competitive market.[560]

In conclusion, the author suggests that relying on data received directly from China without examining China's economic status will result in unfair decisions and impact the competency of the GCC CLAD and its RoI in protecting the GCC market. From the author's perspective, this is the first real examination of the adequacy and competency of both the GCC CLAD and its RoI, and the GCC-TSAIP investigations into protecting the GCC market against harmful dumping practices.

In this case, however, the AD proceeding was terminated as, under RoI Article 21.1, the Permanent Committee found the GCC-TSAIP's assessment of a causal link between dumping and injury did not provide detail on how it reached this conclusion. Therefore, the GCC-TSAIP continued to violate the transparency requirements cited in the ADA.

4.4 Case 3: The AD Investigation of Uncoated Paper and Paperboard Originating in Spain, Italy, and Poland

4.4.1 The Complaint

This investigation was initiated after a complaint was lodged by the Middle East Paper Company (MEPCO) from the Kingdom of Saudi Arabia. MEPCO represents 25% of the total GCC production. The complaint was supported by several companies from GCC countries. The complaint included significant proof of dumping of the product under investigation that was imported from Spain, Italy, and Poland. In addition, it included proof of material injury to the GCC industry, which resulted from dumping the product under investigation.[561] The GCC Domestic Industry

[560] S Noel and W Zhou, 'Replacing the Non-Market Economy Methodology: Is the European Union's Alternative Approach Justified Under the World Trade Organisation AD Agreement?' (2016) Global Trade and Customs Journal 11; SK Jayasuriya, D MacLaren and GB Magee, *Negotiating a Preferential Trading Agreement: Issues, Constraints and Practical Options* (Edward Elgar 2009).

[561] GCC-TSAIP, No (10/AD3/2017) 'Concerning Initation of Antidumping Investigation Against Imports of Unoated Paper and Paperboard (Kraft Liner or Fluting or Test) in Rolles or Sheets, Other than that of Heading 4802 or 4803 (Cotainer Board) Originating in Spain, Italy and Poland' (2017) Official Gazette, V13, adopted 25-31 July 2017, para 1.

The companies concerned were MEPCO and several companies from GCC countries.[562]

4.4.2 The Product Under Investigation

The product under investigation was uncoated paper and paperboard (Kraft liner or fluting or test liner) in rolls or sheets, other than heading 48.02 or 48.03 (containerboard). The product under investigation was classified under the following GCC Unified Tariff Codes: (48041100), (48041900), (48043100), (48043900), (48044100), (48051100), (48051910), (48051920), (48051990), (480524000) and (48052500).[563] The GCC Like Product

The GCC like product was uncoated paper and paperboard (Kraft liner or fluting or test liner) in rolls or sheets, other than of heading 48.02 or 48.03 (containerboard). The GCC like product was used as an outer and intermediate pile in corrugated board to strengthen containerboards.[564] The GCC Allegation of the Existence of Dumping

The GCC industry alleged that the dumping margin exceeded 2%, which is not *de minims*, based on a comparison between, on the one hand, the export price of the product under investigation from Spain, Italy, and Poland that was exported into the GCC market, with, on the other hand, its normal value in the domestic market of the concerned countries at the same level of trade.[565] The GCC Allegation of the Presence of Material Injury

The GCC industry made its allegation based on the presence of a significant increase in the volume of dumped imports of the product under investigation from Spain, Italy, and Poland that was exported into the GCC market in absolute terms and relative to the domestic production. The total dumped imports represented more than 3% of the total imports of the product under investigation from all countries to the GCC market. According to the complainants, the dumped imports caused material injury to the GCC industry, in the following formats:

1. A drop in the volume of production;
2. A decrease in productivity;
3. Price undercutting between the GCC like product and the imported dumped product;
4. A decline in the rate of capacity utilisation;

[562] ibid, para 2.

[563] ibid, para 4.

[564] ibid, para 3.

[565] ibid, para 5.

5. A decrease in volume sales;
6. An accumulation of inventory of the GCC like product;
7. A decline in the rate of return on investment;
8. A decrease in the profits;
9. A drop in cash flow;
10. An inability to raise capital and investment and to grow;
11. Price suppression and depression.[566]

4.4.3 The Investigation Procedure

Once the application was received, the GCC-TSAIP carried out the verification process to check and examine the accuracy and adequacy of the information provided. Based on the recommendation from the GCC-TSAIP, the Permanent Committee decided to accept the complaint and grant permission to the GCC-TSAIP to initiate and officially announce the investigation by publishing a notice in the Official Gazette on 31 July 2017.

The investigation was due to be finished within one year but could be extended to 18 months under particular circumstances. The data collection period for the dumping investigation was 1 January to 31 December 2016, and the data collection period for the injury investigation was 2013–2016. Questionnaires were sent to all known companies, and all unknown companies were invited to make themselves known within a specific time. The GCC-TSAIP announced that the investigating authority may apply sampling techniques in the case of many interested parties or an increased number of products.[567]

4.4.4 Analysis and Discussion

The GCC-TSAIP did not mention the date it received the complaint, making it difficult to assess how the GCC-TSAIP implemented Articles 3, 4 and 9 of the RoI. In the previous case there was a six-day delay recorded in the investigation initiation procedures. It appeared that the GCC-TSAIP needed more time to provide a final decision on whether to accept and initiate the AD investigation, and to mask its inability to carry out the procedures under

[566] ibid, para 6.

[567] ibid, paras 7-11.

Articles 3, 4 and 9 of RoI, it chose simply not to declare the date on which the complaint was received.

If indeed the GCC-TSAIP did conceal the date the complaint was received, its action not only provides evidence of a delay in accepting the complaint and initiating the investigation, but also of a gap in time between the end date of the data collection for the dumping investigation and the start date of the investigation, which should be the same according to ADP committee guidance on the period of investigation.

The GCC-TSAIP continued to define the GCC domestic industry and frame its acceptance of the complaint in the same ways detailed above. In other words, it continued to violate Articles 3, 31, 33 and 9 of the RoI on AD Measures and Articles 4.1, 3.1, 3.2, 3.4, 3.5 and 5.4 of the ADA.

This is not the first complaint against unfair trade practices in the field of uncoated paper and paperboard provided in rolls and sheets. In November 2009, the GCC industry representatives of the concerned product lodged an increased imports complaint.[568] On 31 May 2010, after about seven months of investigation, the GCC-TSAIP announced the termination of the investigation due to lack of evidence of serious injury to the GCC domestic.[569]

Seven years later, in 2017, the same GCC producers lodged another unfair practice complaint in the form of an AD complaint. This raised an important question: has the GCC domestic industry of uncoated paper and paperboard in rolls and sheets faced several unfair practices, or only one type—dumping or increased imports—and just did not have the competence to differentiate between them? The awareness of GCC producers regarding unfair trade practices in the GCC market is an importance matter that plays an essential role in lodging unfair trade practice complaints, and this study was planning fieldwork to examine this issue; no responses, however, were received from domestic producers.

Given the analyses of the cases, it is evident that the GCC-TSAIP's interpretations of the GCC CLAD and its RoI on AD Measures were, for the most part, consistent with the principles and objectives of both GCC law and ADA. However, some deviations were observed in practical applications of provisions of WTO-ADA to the cases, for example, the GCC-TSAIP did not adhere to either the GCC CLAD RoI, or the ADA, or both, in initiating

[568] GCC-TSAIP. No (1/2009), 'Initation of a Safeguard Investigation Against Increased Imports of Other Uncoated Paper and Paperboard in Rolls or Sheets into GCC Market' (2009) Official Gazette, V2, adopted 7 November 2009.

[569] GCC-TSAIP. No (1/2010) 'Termination of a Safeguard Investigation Against Increased Imports of Other Uncoated Paper and Paperboard in Rolls or Sheets into GCC Market' (2010) Official Gazette, V3, adopted 31 May 2010.

investigation procedures and defining the GCC domestic industry, which both impacted the effectiveness of the injury determination methods. The analysis also indicated the GCC-TSAIP difficulties in adhering to timelines in reaching final decisions on whether to accept or reject AD complaints. In addition, there was a lack of transparency during investigations and in final results announcements, mostly due to the differences in textual interpretations of the GCC-CLAD and RoI by the investigating authorities.

It is vital for the GCC-TSAIP to comply with the provisions of the WTO-ADA in the areas of definition of domestic market, adherence to the deciding the AD cases within the given timelines in WTO-ADA and transparency of the AD investigations though publications of the outcomes on publications of WTO.

The compliance of the GCC-TSAIP with the WTO-ADA may be increased through encouraging the adversely affected parties in the AD cases dealt by GCC-TSAIP to file a complaint at DSB about the lack of transparency in interpretation and implementation of the WTO-ADA articles on behalf of GCC-based competent authorities while deciding on the ADA cases. The WTO (2006) has developed DSB with its increasingly role in detection of violation of WTO-ADA on reporting of the affected parties in AD cases.[570] The third parties may approach to DSB against unfair or non-compliant practices followed by GCC-TSAIP, and challenge the procedures pursued by GCC in relation to areas of concerns within the WTO-ADA during the proceedings of the ADA cases in GCC countries. These complaints are more likely will make DSB to review the current laws and provisions contained in GCC-TSAIP, thereby leading to detection and correction of the non-compliant behaviour of the competent authorities in GCC.

Of note, in the event of affected party in the low-income region of the world, then it is less likely that it will adopt the option of lodging a compliant in the WTO due to high economic cost involved in litigations.[571] In this situation, the grieved parties may be aided by Advisory Centre on WTO Law (ACWL) which is an instrument developed for instructing and aiding the low-income countries in complying with WTO-ADA regulations. ACWL, for example, aided Bangladesh – a low-income country to challenge the AD practices pursued by India – a comparatively developed country in DSB (DS306, *India-Antidumping Measures on Batteries from Bangladesh,* ACWL, 2006).

[570] ibid.

[571] Bown and Hoekman (n 43).

Bown and Hoekman, furthermore, suggested another solution for encouraging developing countries to challenge the high-income countries for their indiscriminating behaviour towards the low-income countries while implementing the WTO-ADA regulations is the development of ACWL-like more instruments through effective engagement with the NGOs and pro bono attorney in the private sector for providing the less costly solutions to the developing or low-income countries to file complaints against the comparatively developed user of WTO-ADA.[572] This is critically important to gain better insight into the legal practices followed by the Members while deciding on the AD cases using the WTO-ADA. The DSB and Appellate Body can further help to identify and report areas of non-compliance such as lack of clarity about the areas of concerns in implementations of WTO-ADA Articles in GCC-RoIs to the General Committee of WTO. These measures may pave the way for improving the compliance of GCC with areas of concerns in implementation of WTO-ADA articles.

Another cheaper way of providing an avenue to the grieved and adversely affected third parties in AD safeguard cases, as suggested by Hoekman and Bown, is the establishment of the GCC-based DSB.[573] This is exemplified by EU which established 'European General Court', which assists the grieved parties to lodge complaints and challenge EC's decisions in AD cases.[574] This system is proved fruitful from economic perspective and enforcement of WTO-ADA in the EU territories.[575] By following the footsteps of EU, GCC may structure the GCC-DSB for the grieved third parties to highlight the procedures, interpretations, and decisions carrying inconsistencies and opacities in relation to transparent implementation of WTO-ADA. These measures create a positive impact on improving transparencies in otherwise hidden procedures adopted by GCC-TSAIP for qualification of cases for AD investigations in GCC.

Furthermore, the compliance of the GCC-TSAIP with ADA-WTO in relation to improving transparency about implementation and interpretations of WTO-ADA rules can be mediated through TPRM – a body with responsibility of providing a periodic review of the AD and safeguard laws designed and implemented by Members. TPRM provides useful guidelines and recommendations for improving the language and contents of the provisions contained in the respective trade policies and legal frameworks in the Members based on their reviews

[572] Bown and Hoekman (n 196)

[573] Bown and Hoekman (n 43).

[574] ibid.

[575] Davis (n 199).

of AD rules.[576] It is suggested to WTO that it should commission the TPRM to review the GCC-CLAD and RoI to evaluate their compatibility with the WTO-ADA, which may provide recommendations to GCC-TSAIP to incorporate the clarity of currency conversion while deciding upon AD cases.

The drawback pointed by scholars with the TPRM is that it lacks periodicity in reviewing the developing countries, priorities are given to the developed countries which they contemplate are more likely to violate the AD rules. Furthermore, TPRM carries out reviewing process of the actions and legal implementations of the WTO-ADA after every two years, which does not include the developing and least developing countries in their review list, which leaves the gap for misinterpretation of ADA rules on behalf of competent authorities in developing and least developed countries. it reviews the textual and contextual implementation of the WTO-ADA after every 10 years for developing countries which are selected through a random process rather than a systematic process, thereby leaving a substantial gap in developing procedures and methods for implementation of AD rules based on their local legal practices rather than by following the international trade standards recommended by WTO.[577] This reflects a clear flaw in the periodicity and sequencing of the reviews of TPRM; targeted approaches are needs by WTO and TPRM for the developing countries such as GCC in order to review their laws and rules regarding ADA, it may result in execution of WTO trade remedies such as WTO-ADA more effectively across the globe.[578]

To sum up, compliance of developing Members of WTO such as GCC with the WTO-ADA provisions can be improved by adopting multi-dimensional approaches involving the assistance and encouragement of the adversely affected countries in AD cases to challenge decisions of the respective governments in WTO-DSB, making TPRM reviewing process more systematic and periodic for the developing countries with focus on improving transparency in the proceedings of AD, interpretations and methodologies used by developing countries to implement AD rules in their local contexts in line with the WTO recommendations. Furthermore, transparency in execution of WTO-ADA provisions may be improved through establishment of GCC-DSB under Supreme Judicial Council of GCC as an alternative cheap platform to grieved parties in AD cases, which may listen to complaints and cases filed against competent authorities in GCC countries. These measures

[576] ibid 266, p 17.

[577] ibid 266, p 18.

[578] ibid 266, p 18.

may help GCC align interpretations and implementation of GCC-CLAD and RoIs by GCC-TSAIP in line with the WTO-ADA provisions.

4.5 Conclusion

The current chapter has answered the SRQII associated with this study. It has analysed the definitive AD duties imposed by the GCC Ministerial Committee on imports of automotive batteries originating in or exported from the Republic of South Korea. It also analysed two ongoing AD investigations, one against imports of uncoated paper and paperboard in rolls or sheets originating in Spain, Italy, and Poland, and the other against imports of seamless pipes and tubes of iron or steel originating in, or exported from, the People's Republic of China.

The analysis of all cases has shown that the GCC-TSAIP's interpretations of the GCC-CLAD and its RoI on AD Measures were, for the most part, consistent with the principles and objectives of both GCC law and ADA. The chapter did identify some points where the GCC-TSAIP did not adhere to either the GCC CLAD RoI, or the ADA, or both, in initiating investigation procedures and defining the GCC domestic industry, which both impacted the effectiveness of the injury determination methods. The analysis also indicated the GCC-TSAIP difficulties in adhering to timelines in reaching final decisions on whether to accept or reject AD complaints. In addition, there was a lack of transparency during investigations and in final results announcements, mostly due to the related Article text of the GCC Common Law and its RoI, but not the way in which the GCC-TSAIP applied the Articles, as identified in Chapters 2 and 3.

In addition, the chapter has shed light on the political effects that may challenge the WTO DSB legal framework and the crisis between USA and China that led to disable the dispute settlement which creates pressure between conflicting countries and requires WTO to deal with it in the future within the legal aspects.

Chapter 5: Compatibility of GCC SGM with the WTO Safeguard Agreement

5.1 Introduction

This chapter answers SRQIII: 'Is the GCC CLSM (CLSM) and its RoI compatible with provisions of WTO Agreement on Safeguard (SA) and Article XIX of GATT 1994? To achieve that goal, the author will explicate those SGM that function to protect the domestic industry from unfair trade practices (e.g., increased imports) in the context of GATT/SA provisions. The discussion will follow with an overview of the GCC CLSM and its RoI, before engaging in deep textual analysis and interpretation of these texts in light of GATT/SA provisions to shed light on areas of incompatibility, if any.

This chapter has been divided into eight sections. The first and second section introduced SGM in the context of the WTO and SGM in the context of GCC-CSLM/RoI. The general requirements for applying the SGM are discussed in section three, while the section four elaborates the applications of SGM stated in GCC-CLSM/RoI with focus on whether they comply with the WTO-SA. The provisions relating to Provisional Safeguard Duties in GCC-CLSM/RoI were compared and contrasted with WTO-SA in section five, while the procedures for imposing SGM in context of GCC-CLSM/RoI were discussed in section six. Section seven concludes this chapter.

5.2 Overview of the SGM in the Context of the WTO

According to Article XIX of GATT of 1994 and the SA, SGM are defined as forms of trade measures that WTO members may employ to protect their domestic industries from unfair competition. The measures focus on increased imports of any product that causes or threatens to cause serious injury to domestic industries of like or directly competitive products. The measures serve to respond to unforeseen developments and the effect of GATT obligations incurred by the contracting party.[579]

WTO members are permitted under Article XIX of GATT of 1994 and the SA to impose SGM to protect their domestic industries. It is worth noting that these types of trade measures are applied to all imports from all countries, and not from specific countries or companies across the world. SGM look to provide protection for the domestic industries of like or

[579] GATT 1994, art XIX (a); SA.

directly competitive products, or from products imported in significantly high amounts. A safeguard is not applied for the purpose of protecting only one product category, and it does not ask if the 'serious injury' is specific to a domestic industry.[580] SGM are temporal safety valves in emergency situations, such as when domestic enterprises are being forced out of business or unemployment rates are increasing in a particular industry. The member must prove that it would not be able to prevent the injury without using this safety valve because their WTO obligations do not permit increased tariffs or placing restrictions on the import of the product(s) under investigation.[581] In general, emergency actions should be employed as a response to extraordinary events. This understanding is confirmed by the fact there are no actions that can be employed in a manner consistent with WTO laws that have been found to enhance or restrict trade barriers among WTO members.

The Appellate Body in *US—Line Pipe (2002)* addressed three questions as to whether a WTO Member has the right to apply SGM. If so, have they practised them within the limits of the WTO requirements? The Appellate Body concluded that there is tension between the right of the member to apply SGM and the ability to apply them to the necessary extent without affecting the WTO's protected principle of fair trade.[582]

The SA was enacted on 1 January 1995. A question raised at that time concerned whether the SA should replace Article XIX of GATT 1994 or if they should be used in tandem. The WTO Appellate Bodies' final answer confirmed that the SA and Article XIX 1994 together are a single entity for these regulations.[583] In *Argentina—Footwear (EC)* and *Korea—Dairy*, the Appellate Bodies held that 'any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the SA and Article XIX of GATT 1994'.[584] Both provide the legal framework with which each WTO member must comply in establishing their domestic provisions regarding SGM. By adhering to regulations in both documents, the member is complying with its obligations toward the WTO.

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[580] AO Sykes, *The WTO Agreement on Safeguards: A Commentary* (OUP 2006); Y-S Lee, 'The Agreement on Safeguards' in PFJ Macrory, AE Appleton, MG Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005).

[581] C Hu, 'Dispute Settlement Practice on SGM under the WTO' (Master's thesis, KDI School of Public Policy and Management 2003).

[582] Appellate Body Report, 'United States—Definitive SGM on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US-Line Pipe)' 8 March 2002, WT/DS202/AB/R, para 84.

[583] Japanese Ministry of Economy, Trade, and Industry, 'Chapter 7: Safeguards' (2018) <www.meti.go.jp/english/report/downloadfiles/2010WTO/2-7Safeguards.pdf> accessed 03 April 2018.

[584] Appellate Body Report, 'Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products' WT/DS98/AB/R, adopted 12 January 2000, DSR 2000: I, 3, para 77; Appellate Body Report, 'Argentina – SGM on Imports of Footwear' WT/DS121/AB/R, adopted 12 January 2000, DSR 2000: I, 515, para 94.

By implication, and based on the provisions of Article XVI: 4 of the Marrakesh Agreement that established the WTO Agreement, all WTO members must ascertain that their national laws and administrative procedures are consistent with GATT/WTO rules. Article 12.6 of the SA obliges members to notify the Committee on their laws, regulations, and administration procedures concerning safeguards or modifications they may have made.[585] It is not that the domestic law must be identical to SA in terms of the text, but rather that it should apply the SGM in a manner that complies with GATT/WTO provisions.

Yong-Shik Lee noted that domestic and regional provisions of a safeguard have significant differences among themselves and with the provisions of the SA and Article XIX of GATT, such as the safeguard provisions of the EU and US.[586] Sykes also pointed out that 'textual preconditions for the use of safeguards in the treaty text are incoherent, and that the Appellate Body has compounded the problem through a series of dubious and unhelpful rulings.[587] Thus questions are regularly raised on the extent to which the SGM applied under domestic law will be compatible with the requirements of GATT/WTO provisions. This chapter will provide the answer to this question regarding the text of SGM under the GCC CLSM and its RoI. The next chapter will look its interoperation and how GCC members implement it to safeguard their domestic industry.

5.3 SGM in the Context of the GCC CLSM and its RoI

The GCC's safeguard provisions are in the GCC Common Law on AD, Countervailing, and SGM (CLADCSM) and Chapter 5 of its RoI. The GCC Common Law contains the general principles regarding safeguards, such as definitions of the GCC domestic industry, the product under investigation, the GCC market, and so forth. Chapter 5 is composed of three sections. Section I contains all the provisions on how injury should be determined; Section II provides guidance on how provisional and definitive measures should be calculated and applied; Section III offers a detailed policy on how to determine the period of definitive SGM. The author will refer to the document that contains the GCC's safeguard provisions as the GCC CLSM (CLSM), and to the document that includes the procedures and policy required to apply such rules as GCC-RoI.

[585] SA, art 12.6.

[586] Lee, 'SGM' (n 63).

[587] Sykes, 'The Safeguards Mess' (n 32).

5.4 General Conditions Required to Apply SGM

Both the SA and Article XIX of GATT 1994 identify five necessary co-conditions that a member must demonstrate to become eligible to impose SGM:

1. Unforeseen developments;
2. The effect of GATT obligations;
3. Increased imports;
4. Serious injury;
5. Causal link.

5.4.1 Unforeseen Developments

Article 71.1 of the RoI on SGM provides a loophole out of the 'unforeseen developments' requirement:

> A safeguard measure may be applied to a product being imported irrespective of its source, if it is established that such product is being imported in such increased quantities, absolute or relative to Members production, and under such conditions as to cause or threaten to cause a serious injury to the GCC industry that produced like or directly competitive products.[588]

Interestingly, this GCC provision does not consider 'unforeseen developments' as conditions for the right to impose SGM, while it is a fundamental requirement to apply SGM in the Article XIX of GATT.[589] As mentioned above, the SGM were introduced to treat 'emergency' circumstances resulting from events that happen after undertaking GATT obligations. Such events logically must be 'unforeseen' during the time at which the members assume GATT obligations, and the member should not have been able to counter such events by using legal tools or available measures due to their obligation to GATT. SA, however, it does not mention this requirement. GATT Article XIX 1(a) states,

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent

[588] GATT 1994, art XIX 1(a).

[589] S Rai, 'Imposition of SGM and Unforeseen Developments' (2007) 41(4) Foreign Trade Review 48; M Matsushita and others, *The World Trade Organization: Law, Practice, and Policy* (OUP 2015).

> and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.[590]

It is clear that GCC Members have developed the legal conditions to impose SGM based only on Article 2.1 of the SA, which provides that

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive product.[591]

A comparison of the language of SA Article 2.1 with GATT Article XIX (1a) reveals that the latter's requirement to determine unforeseen developments and the effect of the obligations incurred by a contacting party under this agreement, including tariff concession—which is likewise mentioned in XIX (1a)—are omitted in Article 2.1 of SA. Does this mean that the unforeseen developments requirement and the effect of the GATT obligations incurred party would not have legal effect because of the entry into force of WTO Agreement? Do the GCC Member States have the right to omit this clause, and what reasons might there be for omitting it?

The GCC CLSM and its RoI provisions may not include the requirement of 'unforeseen developments' to eliminate the narrow and restrictive application of the safeguard measure requirement. As this requirement is controversial and questionable, it is one of the most substantive issues faced by WTO Members when they are planning to impose SGM.

Because the provisions of Article XIX of GATT and the SA should be applied in a cumulative manner, the Appellate Body in *Argentina—Footwear (EC)* and *Korea—Dairy* concluded that 'unforeseen developments' has specific meaning and insisted on its importance. They declared that, if the negotiators had intended to expressly omit this clause, the Uruguay Round negotiators would have and could have said so in the SA, but they did not.[592]

One reason for omitting 'unforeseen developments' as a condition required to impose SGM could be the vagueness whether the term refers to conditions or circumstances. In *Argentina—Footwear* and *Korea—Dairy*, the Appellate Body stated that the requirements

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[590] GATT 1994, art XIX 1(a).

[591] SA, art 2.1.

[592] Appellate Body Report, *Argentina—SGM on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, para 88; supra note 15; Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para 82, supra note 14.

of ‘unforeseen developments and the effect of GATT obligations, as stated in clause Article XIX: 1(a), are not independent conditions. They are, however, circumstances ‘which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of GATT 1994’.[593]

Thus, there is no clear difference between ‘conditions’ and ‘circumstances. It is, furthermore, not possible to call the first clause of Article XIX: 1(a) a ‘condition’. This term is only used for the requirement mentioned in Article 2.1 of the SA, which is entitled ‘Conditions’.[594] The circumstances, however, do constitute a requirement for imposing SGM. It should be noted that there is no clear Article in the GCC CLSM and its RoI covering the conditions or circumstances that should be evident to impose SGM. The author has extracted the conditions from Article 71.1 of the RoI on SGM with reference to both Article 2.1 of the SA and Article XIX of GATT 1994: 1(a). Article 71 is titled ‘Determination of Injury’.[595]

Overall, a close examination of WTO dispute settlement practices regarding SGM indicates an obligation to incorporate ‘unforeseen developments’ as a requirement for applying SGM, i.e., it is consistent with WTO.[596] The purpose of the SA is to clarify and strengthen GATT safeguard provisions, in particular Article XIX, here it incorporates the old clause of XIX: 1(a), which introduces vagueness and discourages the use of SGM. The author observes several other aspects about the WTO panel and appellate bodies that further confirm this observation.

Firstly, the panel and appellate bodies defined ‘unforeseen’ as unexpected. Moreover, they considered the difference between ‘unforeseen’ and ‘unforeseeable’ as essential. The term ‘unforeseen’ demonstrates a lower threshold than ‘unforeseeable’. It indicates that, even if the development is foreseeable, the member’s inability to foresee it is acceptable. Such an interpretation may encourage members to behave in a legally inattentive manner when applying SGM.

Furthermore, the panel and appellate bodies provide an additional explanation for the difference between the two terms by referring to the Working Party’s ruling in *US—Hatter’s Fur*, which states that ‘unforeseen development’ should be interpreted as “a development that occurs after the negotiation of the relevant tariff concession has taken place”. These developments could not be anticipated by the negotiators of the country making the

[593] RA Rogowsky, ‘WTO Disputes: Building International Law on Safeguards’ (2001) 50(1) Virginia Lawyer 1.

[594] Piérola (n 28), ‘Unforeseen Developments and the Effect of GATT Obligations’.

[595] RoI on SGM, art 71.1.

[596] Hu (n 524).

concession; this could be foreseen when the concession was negotiated. However, the interpretation of 'unforeseen developments' is 'still unclear and argumentative'.[597]

Here, the author notes that relying on the Working Party interpretation of 'unforeseen developments' could result in members arguing about developments that occurred since the Kennedy Round, if their tariff concession was negotiated during this round. Moreover, it is difficult to assess the degree of objectivity and adequacy for 'unforeseen developments' as a requirement to impose SGM, as the standards to determine them are still unknown in dispute settlement practice. In conclusion, due to the ambiguous and controversial nature of the term 'unforeseen developments', this requirement is one of the most disputed issues between members under the WTO's DSU.

From the previous findings, the author has concluded that GCC's provisions on safeguards are incompatible with Article XIX: 1(a), as they are not considered 'unforeseen developments' that constitute a requirement to impose SGM. Not only do the GCC Members omit this requirement from their safeguard provisions, but some WTO countries usually skip it when developing regional agreements, such as the Economic Partnership Agreements (EPAs)[598] between the EU and African, Caribbean, and Pacific) ACP) countries.[599] Bashar Malkawi recently pointed out that the Jordanian regulations of the 2000 safeguard do not mention or refer to any requirements under Article XIX of GATT 1994, including 'unforeseen development'.

5.4.2 The Effect of the Obligations Incurred by a Member

In respect to the second requirement of Article XIX (a) of GATT 1994, i.e., 'a result of […] the effect of the obligations incurred by a contracting party under this Agreement, including tariff concession'.[600]

The Appellate Body of *Argentina—Footwear (EC) (2000)* stated, 'We believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing

[597] GATT documents GATT/CP/106, 'Report of the Intersessional Working Party on the Complaints of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX, Hatters' Fur', 22 October 1951.

[598] Economic Partnership Agreements (EPAs) are trade and development agreements negotiated between the EU and African, Caribbean and Pacific (ACP) partners engaged in regional economic integration processes.

[599] Lissel (n 63).

[600] GATT 1994, art XIX (a).

Member has incurred obligations under the GATT 1994, including tariff concessions.[601] The Body further insisted that it is essential for investigating authorities to demonstrate that the effect of GATT obligations under certain circumstances may result in increasing the imports of the product under investigation into the territory of that contracting party and cause or threaten to cause serious injury to apply SGM consistently with Article XIX of GATT 1994.

> As a result of the effect of the obligations incurred by a Member as setting forth 'certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994.[602]

However, the GCC CLSM and its RoI never refer or mention the effect of GATT obligations as essential legal requirements to impose SGM in line with Article XIX of GATT 1994.

5.4.3 The Presence of Increased Imports

According to GATT/SA, the first condition that should be considered when applying SGM is whether the increase in imports is recent, sharp, sudden, and significant enough to cause or threaten to cause serious injury to the domestic industry.[603] This uniqueness is not mentioned in the GCC provisions on increased imports of the product under investigation as either significant or in relation to the GCC domestic industry.[604] *Argentina—Footwear (EC)*, encountered the question of whether to determine 'increased imports' based on quantity or value. The panel concluded that both the rate and number of increased imports should be established based on absolute terms and relative to domestic production. The GCC provisions, however, mention only those quantities that should be established in absolute terms and relative to the GCC domestic industry. The wording of this requirement is cited in Article 71.1 of the RoI on SGM, which is the same as that of Article 2.1 of the SA. Moreover, Article XIX of GATT stipulates that SGM should be applied because of an emergency in the importing country. Nothing seems to be different in the GCC's safeguard provisions as the reasons for omitting the clause may hinge on being able to withdraw from liberalisation in specific circumstances.[605]

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[601] Appellate Body Report, 'Argentina—SGM on Imports of Footwear' WT/DS121/AB/R, adopted 12 January 2000, DSR 2000: I, 515, para 91. See also Appellate Body Report, 'Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products' WT/DS98/AB/R, adopted 12 January 2000, DSR 2000: I, 3, para 84.

[602] Appellate Body Report, 'Argentina—SGM on Imports of Footwear' (n 545) para 92.

[603] ibid, para 131.

[604] RoI of the GCC Common Law, art 71.1.

[605] Lissel (n 63).

More critically speaking, neither the GCC-CLSM/RoIs nor the WTO-SA or the Appellate Body mentions about the 'exact' quantities which should be equivalent in effect to cause the serious injury of threaten the domestic market's stability. Though the Appellate Body decision insists on the increase in imports must be 'recent', however, it does not provide any clue about 'how recent or define the quantity of the imports. In other words, the phrase coined by Appellate Body, which is 'recent enough, sudden enough, sharp enough, significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'' does not provide a concrete and perceptibly visible guidelines for the competent authorities in Members to decide whether the given quantity is causing the injury.[606]

Similarly, the words, 'sharp enough', and 'significant enough' are mere abstract terms, and does not give anu indication about the exact quantities of the imports which may be considered as a contributor to the injury or threat to cause injury in the local market. All the wordings employed by either the WTO-SA, Appellate Body Decisions on safeguard cases or GCC-CLSM/RoIs seem to ignore the fundamental issue that from the economic perspective, the increased quantities of the imports is a 'result of a variety of possible developments. The treatment lent by the Appellate Body to the 'increased quantities' requirement does nothing but to add more confusion to the conundrum of the 'increased quantities' of imports in the WTO-SA.

There is a need to lend badly needed clarification to the concepts of 'increased quantities', 'sharp enough', 'recent enough' and 'significant enough' in order to create better vision and clarity in understanding and interpreting these terminologies on behalf of the competent authorities in GCC and other member countries. This situation adds more complexity to the situation in the cases of the developing countries such as GCC, when the legal knowledge and technical expertise of the officials dealing with the SGM are already limited. In the event of developing countries with less practice in implementation of international trade remedies promulgated by the WTO and limited capacity in building the legal base of knowledge to understand and implement WTO-SA effectively, it is important for WTO and the related legal bodies to provide the much-needed clarification on the subjects of the quantities of important, specification of sharp and significant increases in more direct way, which warrants another round of reforms in the WTO-SA to address these issues for increasing the

[606] Sykes, 'The Persistent Puzzles of Safeguards (n 31).

compliance of Members with the Articles in the WTO-SA.[607] Thus, from the author's point of view, there is lack of assistance from the WTO to support developing countries in understanding the procedures under the DSB to manage how to resolve disputes under the WTO.

5.4.3.1 The product under investigation

Both Article 2.1 of the SA and Article XIX :1(a) define the 'product under investigation' as the product imported into the territory of a member that causes, or threatens to cause, serious injury to the domestic industry of like, or directly competitive, products.[608] Simply put, it is the imported product being considered for safeguard action. No definition of this important term was found in the GCC CLSM and its RoI. However, the author assumed that the GCC-TSAIP would use the definition that appears in Article 2.1 of the SA based on the permission they obtained under Article 85 of the RoI on SGM. The GCC-TSAIP's definition of the 'product under investigation' is not important, however, if the resulting legal implications are considered during the defining process. Fernando Piérola offers legal implications that may result from differing definitions of 'product under investigation':

1. The definition provides the basis of the determination based on whether there is an increase in imports. At the same time, the definition provides the basis for applying provisional SGM.
2. The definition sets the scope of SGM, which should be enacted against the product under investigation.
3. The definition sets the scope of the countries affected by the application of SGM.[609]

Thus, the GCC-TSAIP should consider all legal implications when providing a definition of 'product under investigation'. Such a definition should work consistently with all legal implications. The GCC-TSAIP can be pushed to review its GCC-CLSM through the reviewing mechanism called TPRM at WTO. The purpose of TPRM is to review the trade remedies laws formulated by Members, and offer them recommendations via the WTO Secretariate to improve the legal provisions contained in the local trade laws and policies.[610] The issue with the review mechanism at WTO is that it conducts the reviews of the trade

[607] T Ahn, 'Restructuring the WTO Safeguard System' in M Matsushita, T Ahn and T-J Chen (eds), *The WTO Trade Remedy System: East Asian Perspectives* (Cameron May 2006).

[608] SA, art 2.1; GATT 1994, art XIX :1(a).

[609] Piérola (n 28) 'Period of Investigation and Products at Issue'.

[610] Bown and Hoekman (n 43).

policies and laws of the developing member countries selectively after ten years, and this study suggests that it should be reviewed after every two years so as to remove any legal technical non-compliance issues introduced by developing countries like GCC in their local trade laws and policies. Kazzi further suggests the application of training system within WTO to train and teach the officials of developing countries for the purpose of guiding the relevant officials to build their trade laws and policies effectively in line with the WTO-SA provisions[611].

5.4.3.2 Domestic like products or directly competitive products [compliance]

Basically, like, or directly competitive, products are those domestic products which are alleged to be negatively impacted by increased imports of the product under investigation. Thus, they should be defined independently from the products under investigation. Article 4.1 of the SA does not contain any definition of 'like products' and 'directly competitive products' in relation to the 'product under investigation'.[612] The RoI on SGM only contains a definition of 'like products' and no definition of 'directly competitive products'. These former definitions are not specific to safeguards; instead, they offer a general definition for the purpose of all trade measures, such as AD (AD) or countervailing measures. The RoI of the GCC-CLADCSM defines 'like product' as

> GCC products which are identical or alike in all respects to the product under investigation, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under investigation.[613]

Literally, the 'like product' is one that is similar to the other product or has its same characteristics.

Thus, the GCC definition of 'like products', as per Article 1 of the RoI on SGM, meets this criterion and seems adequate to determine the GCC product. Nevertheless, the presence of directly competitive products means that there is a direct competition between the product concerned and the product under investigation. Both definitions establish two concepts: similarity and competition. To identify these two criteria, like and directly competitive products should be compared to the product under investigation, as explicated below:

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[611] H Kazzi, 'Arab Countries and the Doha Round: Between Ambitions and Realities' (2014) 10(22) European Scientific Journal <https://doi.org/10.19044/esj.2014.v10n22p%25p> accessed 03 August 2022.

[612] Hu (n 524).

[613] RoI on SGM, art 1.

The term ‘directly competitive or substitutable’ describes a particular type of relationship between the two products, one imported and the other domestic. It is evident from the wording of the phrase that the essence of that relationship is competition. This connotation is clear both from the word ‘competitive’, which means ‘characterized by competition’, and from the word ‘substitutable’, which means ‘able to be substituted’. The context of the competitive relationship is necessarily the marketplace since this is the forum where consumers choose between different products.

Competition in the marketplace is a dynamic, evolving process. Accordingly, the wording of the phrases ‘directly competitive or substitutable’ implies that the competitive relationship between products should not be analysed exclusively with reference to current consumer preferences. The word ‘substitutable’ indicates that the requisite relationship may exist between products that are not, at a given moment, considered substitutes but which are, nonetheless, capable of being substituted for one another.[614] If the product’s likeness and competitiveness with the product under investigation is established, the domestic producers of such products should form part of the ‘domestic industry’ definition as indicated in Article 4.1 and Article 3 of the GCC CLSM. Hence, the determination of serious injury becomes critical.

5.4.4 Serious Injury

A serious injury, or threat to cause injury, to the domestic industry is the core motivation to impose a safeguard investigation and hence SGM. To determine a ‘serious injury’, the following two criteria must be in place: (i) the domestic industry of concern is defined; (ii) all relevant factors that could have any effect on the industry are examined carefully. In cases of threats of injury analysis claims, a third criteria comes into play: (iii) all legal conditions and methodology developed by WTO case law are fulfilled.

Both SA and GCC CLSM define ‘domestic industry’ in the same manner. SA Article 4.1.(c) states,

> In determining injury or threat thereof, a ‘domestic industry’ shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.[615]

[614] Appellate Body Report, ‘Korea—Taxes on Alcoholic Beverages’ WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999: I, 3, para 114; Period of investigation and products at issue

[615] SA, art 4.1.(c).

GCCCLSM Article 3 observes,

> Members' producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. For the purpose of safeguard investigations, the term GCC industry shall mean total Members producers as a whole of the like or directly competitive products operating within the territory of Members, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.[616]

Moreover, both SA and GCC CLSM RoI insist on studying the effect of increased imports of the product under investigation in context of the domestic industry of like or directly competitive products. Therefore, the definition of 'domestic industry' is limited to only these two categories and closes the door to any attempts to broaden the definition. This stems from the drawbacks of the WTO- SA which is silent on defining the terminologies, and provides latitude to the Members to use their own discretions, which leaves the provisions of SA open to be misused. Several legal critics have criticised the SA for its lack of clarity on domestic industry, and some terms such as criteria to be used to declare whether products under investigation are competitive.[617] Therefore, it is concluded that GCC-CLSM and RoIs comply with WTO-SA 's provisions in defining the domestic market regardless of the depth of the definition which is not requirement of WTO-SA in itself.

A fluctuating meaning would impact the results of investigations regarding injury determination, and hence also final decisions on imposing SGM. In *US—Lamb Meat*, for e.g., the panel concluded that the US acted in a manner inconsistent with Article 4(1) due to its broad domestic industry definition. The term as used by the US includes packers and breakers of lamb meat, and growers and feeders of live lambs. US representatives claimed that they included these workers because they are part of a continuous production line, starting from the raw material and ending with the processed product, and that there is a shared economic interest between the growers and producers. The Appellate Body upheld the panel's conclusion that this definition was out of line with Article 4(1)'s intentions.[618] The Appellate Body further clarified by noting that the raw materials and intermediate products could only be included in the definition of the domestic industry if they were like or directly competitive with the end product, or the product under investigation. If the input

[616] GCC CLSM, art 3.

[617] Davis (n 199).

[618] Appellate Body Report, 'United States – SGM on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia' WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001: IX, 4051, para 94, fn 55.

products are not like or directly competitive with the end product, the distinction becomes irrelevant to the SA. The Appellate Body concluded that the focus should be on identifying the products under investigation, and like and directly competitive products, rather than on how the product is produced, hence the current definitions of these terms in determining the 'domestic industry' definition.

The definition of the domestic industry forms the basis for the analysis of serious injury for the following reasons:

a. It sets the terms of reference for the evaluation of serious injury, so that injury occurring outside of this scope is not evaluated.[619]

b. It establishes the domestic stakeholder who may protection, and avoids other individuals, such as workers or suppliers of downstream or upstream industries, from coming under the aegis of the SGM.[620]

c. It limits the parameters for data collection to the status of the domestic industry, and thereby avoids irrelevant information.[621]

d. It sets limitations on which kind of safeguard measure to apply, and rejects those that do not apply.[622]

5.4.4.1 Determination of serious injury and threat of serious injury

Article 1 of the RoI on SGM defines serious injury simply as 'injury which causes a significant overall impairment to the position of the concerned GCC industry'.[623] In many aspects, this definition is consistent with the SA's meaning of 'serious injury'. The definition requires identifying normal domestic industry conditions—i.e., at a time of no increased imports of the product under investigation—to be able to recognise significant impairment to the position of the domestic industry that results from increased imports of the product under investigation. A direct comparison would only allocate the difference between two situations, however, and might not result in a direct determination of whether there was significant overall impairment to the GCC domestic industry. There is no definition of 'significant overall impairment'. Article 71.2 (b) of the RoI on SGM states only that in

[619] Panel Report, 'Mexico—Antidumping Duties on Steel Pipes and Tubes from Guatemala' (n 235) paras 7.328-9.

[620] Appellate Body Report, United States—SGM on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001: IX, 4051, paras 89-96.

[621] Piérola (n 28) 'Serious Injury'.

[622] GATT 1994, art XIX:1(a) and art 5.1; first sentence of the SA.

[623] RoI on SGM, art 1.

determining a serious injury to the GCC industry, the impact of increased imports of the product on the GCC industry may be determined by objectively examining only economic facts about the sales level, production, productivity, capacity utilisation, inventory, profits, losses, labour, and market share.[624] Article 4.2(a) of SA lists these same injury factors referred to them as 'injury indicators'.[625]

As far as the threat of serious injury is concerned, Article 1 of the RoI on SGM defines the 'threat of serious injury' as that which is clearly imminent harm for the GCC domestic industry.[626] The GCC definition is consistent with Article 4.1(b) of the SA.[627] Both definitions establish that the 'threat of serious injury' is a serious injury that will soon but has not yet occurred; if no deterring actions are taken, the injury will happen and it will negatively impact the domestic industry. This understanding is based on the Oxford Dictionary definition of the term 'imminent'.[628] It appears that the Appellate Body in *US—Lamb* defined the threat of serious injury as stated in Article 4.1(b) of the SA, however, interpreting 'imminent' simply as a serious injury that is about to happen. It has not yet occurred, but it is 'ready to take place', or 'on the very verge of occurring'.[629] Determining the threat of serious injury should be based on facts and not allegations or estimations. Moreover, the determination should reflect whether such an injury was clearly foreseen and imminent.[630]

Article 72.2 of the RoI on SGM insists that the GCC-TSAIP should consider the following factors when investigating the presence of 'threat of injury':

a. The rate of increased imports of the product under investigation into the GCC market indicates the likelihood of an even greater rate of increased imports;

b. An increased production capacity in the exporting countries indicates the high possibility of substantially increased exports to the GCC market;

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[624] RoI on SGM, art 71.2(b).

[625] 'In the investigation to determine whether increased imports have caused or threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.' SA, art 4.2(a).

[626] RoI on SGM, art 1.

[627] Article 4.1(b) of SA establishes that 'threat of serious injury' shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility […].'

[628] Oxford Dictionary, 'Imminent' (2018) <https://en.oxforddictionaries.com/definition/imminent > accessed 25 March 2018.

[629] Appellate Body Report, 'United States—SGM on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia' WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001: IX, 4051, para 125.

[630] RoI on SGM, art 72.1.

c. The availability of other export markets, apart from the GCC, to absorb any additional exports;

d. Other relevant factors.[631]

The RoI on SGM neither specifies rules for determining serious injury or threat of serious injury, neither are the rules and methods specified in WTO-SA. It only establishes the general framework for such a determination and the factors to be taken into account during the determination process. Such behaviour is in line with WTO-SA. Thus, investigating authorities, including the GCC-TSAIP, may use the method they find most appropriate to forecast the industry situation in the very near future[632] without violating the general WTO-SA's framework or ignoring the factors required for consideration.

5.4.5 The Causal Link between Increased Imports and Serious Injury

The last substantive condition that should be met to apply SGM is the presence of a causal link between the increased imports of the product under investigation and serious injury or the threat of serious injury to the GCC industry. When factors other than increased imports cause, or threaten to cause, serious injury, then SGM are not the solution to be considered.[633] The wording of the related conditions cited in Article 71.3 of the RoI on SGM is the same as that of Article 2.1 of the SA.[634] The author, however, has not found articles in SA or the RoI on SGM that explain how to establish such a link. It is unclear how the WTO member is to carry out causal analysis, including which economic models provide the most appropriate tools to determine causality. The limited available data to carry analysis renders using this model to determine causal link.[635] Chapter 6 will analyse GCC safeguard cases and attempt to identify the method by which the GCC-TSAIP came to a determination of such a link.

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[631] RoI on SGM, art 72.2.

[632] Appellate Body Report, 'United States—SGM on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia' WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001: IX, 4051, para 7.184.

[633] RoI on SGM, art 71.3.

[634] 'The existence of the causal link between the increased imports of the product under investigation and serious injury or threat thereof shall be established. When factors other than increased imports are causing injury to GCC industry at the same time, such injury shall not be attributed to increased imports.'; Article 2.1 of SA stipulates 'A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.' RoI on AD Measures, art 71.3.

[635] C Stevenson, 'Are World Trade Organization Members Correctly Applying World Trade Organization Rules in Safeguard Determinations?' (2004) 38(2) Journal of World Trade 307.

While discussing the causation in the WTO-SA, Sykes clearly states that it does not provide the clear guidance on how to determine the causation link between the increased imports and factors contributing to the serious injury or which factors might play a role in causing the serious injury or threat to cause the serious injury. Though Appellate Body has endeavoured to address the issue of causation in several cases such as steel case, but none of it was able to clarify the conceptual difficulties relating to the imports as the cause of 'injury'. For example, in the case of *Argentina-Footwear*, the panel in the Appellate Body elucidated some proper method for measuring the imports as the cause of the injury in the following statement: "If causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors".[636]

Appellate Body agreed to some basic methodologies for deciding whether the imports cause the injury, which involve the '*relationship* between the *movement*s in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination.' Furthermore, with respect to a 'coincidence' between an increase in important and a decline in the relevant injury factors.[637] Looking carefully into the first statement from the Appellate body, it seems that correlation approach is suitable to determine the causation, in other words, it endorses that both causation and correlation are not the same, but they usually run in parallel with each other. It appears from the statements of Appellate Body that it ignores the issue of causal variables being endogenous and takes only exogenous variables such as imports in the territory for causing the serious injury.[638]

Additionally, the Appellate Body also found the faults with interpretation given by the competent authorities in many Members to the causal relationship of the imports to the serious injury. For example, it commented in the case of US-SGM on imports of fresh, Chilled or frozen lamb meat from New Zealand and Australia, that WTO-SA does not require the Members to only focus on the increased imports as a mere cause of injury or threatening to cause the injury. They further viewed that injury caused by 'factors other than increased imports' cannot be ascribed to the increased imports, as it is admitted that increased imports are not necessarily the sole factor accounting for the serious injury.

Taken together, the causation between the increased imports and the serious injury, and the causal relationship between the 'factors other than increased imports and the serious injury' needs to be established by competent bodies in GCC in order decide whether to take the

[636] 'Argentina—SGM on Imports of Footwear' WT/DS121/AB/R (1999).

[637] (Sykes 2007, p 28) (n 579) 28.

[638] ibid.

SGM. In this context, the decisions, and judgments of Appellate Body in relation to the errors in establishing the causal link between the increased imports and the serious injury may come in handy in illuminating the officials in GCC with the proper methods which can be used to determine and link the causal variables with the serious injury in domestic market. GCC's competent authorities in safeguard cases should employ the methods stipulated by Appellate Body, which involve '*relationship* between the *movement*s in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination, during safeguard investigations.

5.5 Applying SGM

5.5.1 Definitive SGM

Once the final investigation concludes the presence of a causal link between increased imports of the product under investigation and serious injury to the concerned GCC domestic industry, the GCC Members have the right to protect their domestic industry from such injury, per Article 75 of the RoI on SGM:

> The Permanent Committee, upon the GCC-TSAIP conclusions that the absolute or relative increase of the imports of the product under investigation caused or threaten to cause serious injury to the GCC industry, may recommend to the Ministerial Committee to apply a definitive safeguard measure in the form of quantitative restriction and/or increase in customs duties or any other measures, taking into consideration that the definitive safeguard measure shall be applied to the extent necessary to prevent or remedy the serious injury caused or threaten to be caused to the GCC industry.[639]

Hence, Article 75 of the RoI on SGM complies with the Article 5.1 of SA. The scope of the SGM and their extents will be discussed in the subsequent sections.

5.5.2 The Scope of a Safeguard

Before applying SGM, their scope should be established. To achieve scope fully, the appropriate scope of the product and the geographical scope of the affected imports must be determined. Article 2 of SA and Article XIX (a) GATT 1994 provide that SGM should be

[639] RoI on SGM, art 75.

imposed only against the product under investigation in situations where increased imports caused serious injury, irrespective of its source.[640]

Article 71.1 of the RoI provides that safeguards may be imposed on 'a product', irrespective of its source, if it is established that such a product has been imported in such increased quantities, absolute or relative, to Members' production, to cause serious injury. Therefore, a measure may only be applied to a product that has entered a GCC member state in increased quantities. Consequently, (i) the product scope of the safeguard investigation, and (ii) the product scope of the SGM,[641] should be the same, and the scope of the SGM depends on the scope of product under investigation. Hence, the definition of the product under investigation would itself determine the scope of the SGM.

In summary, if safeguard investigations cover one product, the safeguard measure would be applied against this one product. If the investigation covers a variety of products, the SGM could be applied to a variety of products under investigation. Article 71.1 mentions that a measure may be applied to an imported product, irrespective of its source; this provision establishes a non-discrimination requirement for imposing safeguard duties, which is in compliance with Article 2 of SA and Article XIX (a) GATT 1994.

5.5.3 The Extent of a Safeguard

After establishing the SGM, next to determine is the extent to which the WTO member can suspend obligations or concessions under GATT. Both Article XIX of GATT 1994 and the first sentence of Article 5.1[642] of the SA give the WTO member concerned the right to impose SGM only to the extent necessary to prevent serious injury and to facilitate adjustment. The final section of Article 75.1 of the RoI on SGM requires the same considerations from GCC countries:

> The Permanent Committee, upon the GCC-TSAIP conclusions that the absolute or relative increase of the imports of the product under investigation caused or threaten to cause serious injury to the GCC industry, may recommend to the Ministerial Committee to apply a definitive safeguard measure in the form of quantitative restriction and/or increase in customs duties or any other measures, taking into consideration that the definitive safeguard

[640] SA, art 2, and GATT 1994, art XIX(a).

[641] RoI on SGM, art 71.1.

[642] A Member shall apply SGM only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

measure shall be applied to the extent necessary to prevent or remedy the serious injury caused or threaten to be caused to the GCC industry.[643]

The article provides two criteria that define the extent of the safeguard measure: it must be necessary, and it must act as a prevention or remedy to the serious injury or the threat thereof to the GCC industry.

There is, however, no definition of 'necessary term' in the context of SGM, either in the RoI or the SA and Article XIX of GATT of 1994. The author has noted that this term may be interpreted within the context of other WTO provisions.[644] In discussions of SGM, the necessary term has often been interpreted as 'indispensable', for example. The ambiguity, however, is problematic, as SGM may have strong bearings on fair trade, and a more definitive understanding of 'necessary term', with limitations and recommendations, would be more just and useful.

In *US—Line Pipe (2002)*, the Appellate Body concluded that the necessary term means something closer to 'indispensable', i.e., by taking into consideration the objectives that should be met.[645] Once the need for SGM has been established, they should be applied to prevent or remedy the serious injury or threat thereof to the GCC domestic industry. The serious injury to be prevented is the same serious injury determined by the investigation process, and the safeguard measure should seek to respond to it and to no other type of injury.[646] Therefore, the purpose of preventing or remedying the serious injury limits the extent of the safeguard duties to only the injury resulting from increased imports of the products under investigation; and which is acknowledged in Article 75.1 of the RoI Any practice that aims to prevent or remedy more than one serious injury would be inconsistent with Article 75.1 of the RoI, and hence also inconsistent with Article XIX: 1(a) of GATT of 1994 and the first sentence of Article 5.1 of the SA.[647]

5.5.4 The Forms and Nature of SGM

The next step in determining the scope and extent of the SGM is to choose the form in which they will be applied. Article XIX: 1(a) of GATT of 1994 states that a WTO Member has the

[643] RoI on SGM, art 75.1.

[644] Appellate Body Report, 'United States—Definitive SGM on Imports of Circular Welded Carbon Quality Line Pipe from Korea' WT/DS202/AB/R, adopted 8 March 2002, DSR 2002: IV, 1403, para 80.

[645] ibid, paras 245–6.

[646] ibid, paras 249–50.

[647] 'A Member shall apply SGM only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.' SA, art 5.1.

right to suspend concessions and other GATT obligations.[648] Article 5.1 of the SA states that safeguards should be applied to the extent necessary to prevent or remedy serious injury and to facilitate the adjustment.[649] Interestingly, neither of these provisions clearly states the forms that the SGM may take. Article 75.1 of the RoI on SGM declares that SGM should be quantitative and restrict and/or increase customs duties.[650] The provision limits the safeguard forms based on the main objective of preventing or remedying the serious injury or threat thereof to the GCC industry.

5.5.4.1 SGM in the form of suspending GATT concessions and other obligations

Article XIX: 1(a) of GATT of 1994 provides a unique option regarding safeguards, namely in suspending obligations, or modifying or withdrawing concessions after assessing relevant circumstances and conditions. Thus, suspending a concession or obligation counts as a safeguard measure.[651]

Article 75.1 of the RoI on SGM states clearly that other forms could be adopted, and as such, GCC Member States may also suspend concessions or obligations which is in compliance with WTO-SA.

Furthermore, Article 85 of the RoI provides the right for the GCC-TSAIP to return to WTO provisions only in matters that are not addressed in the GCC CLSM. These are not mentioned in Article XIX of GATT of 1994, as can be noted in the text of Article 85:

The provisions of the WTO Agreement on Implementation of Article VI of the GATT 1994, the WTO Agreement on WTO SA shall be applied on matters which are not stated in these RoI. [652]

5.5.4.2 SGM in forms other than suspending GATT concessions and other obligations

If a reader reviewed only Article XIX of GATT of 1994, he or she would understand that any measures other than the suspension of obligations, or the modification or withdrawal of concessions, would not be SGM. Measures that do not affect the member's GATT obligations, like a tariff below the bindings, could be applied at any time, without having to

[648] GATT 1994, art XIX: 1(a).

[649] SA, art 5.1.

[650] RoI on AD Safeguard, art 75.1.

[651] Article XIX: 1(a) of GATT of 1994; Panel Report, Dominican Republic – SGM on Imports of Polypropylene Bags and Tubular Fabric, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775, para. 7.64.

[652] RoI on AD Safeguard, art 85.

return to Article XIX: 1(a) of GATT of 1994.[653] Therefore, the member has the right to apply SGM without suspending its GATT obligations or concessions.

For this type of safeguard measure, however, neither Article XIX: 1(a) nor the SA would be relevant. Before the SA was enacted, Article XIX of GATT of 1994 was the only existing provision to control SGM. After the SA was enacted, the Appellate Body concluded that SGM must be consistent with the requirements of both Article XIX of GATT of 1994 and the SA.[654] Thus, authorities should consult Article XIX: 1(a) of GATT of 1994 and the SA to determine the nature of the SGM. Reviewing both provisions reveals that the nature of safeguards should be firstly determined from their purpose as cited in the SA—namely to relieve a serious injury or prevent a one from occurring due to increased imports. Secondly, it should be determined whether these measures result in, or necessitate, suspending obligations, or modifying or withdrawing concessions established under GATT.[655]

The above information leads to the conclusion that the RoI on SGM, i.e., Articles 75.1 and 85, do not allow the GCC-TSAIP to apply SGM in a legal manner that is incompatible with both the SA and XIX: 1 (a) of GATT of 1994. Incommensurate provisions are not acceptable, as the process should be compatible with both provisions.

5.5.5 The Process of Selecting the Appropriate Forms of SGM

With reference to Article XIX of GATT of 1994 and the SA, SGM might consist of various types of trade policy duties. The trade policy instrument should be determined based on GATT obligations or concession,[656] and the effects that lead to increased imports causing serious injury. The reference to GATT obligations in this context encompasses all provisions of GATT. In almost all cases, however, the suspension occurs in terms of only those GATT obligations that control market access, rather than all of them.

SGM usually take the following formats:

1. Tariff-Rate Quotas (TRQs);[657]

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[653] GATT 1994, art XIX: 1(a).

[654] Appellate Body Report, 'Argentina—SGM on Imports of Footwear' WT/DS121/AB/R, adopted 12 January 2000, DSR 2000: I, 515, para 83.

[655] The first sentence of SA, art 5.1; SA art 7, and the second sentence of SA art 4.2(b), sentence are key to determining the nature of SGM.

[656] Piérola (n 517).

[657] Panel Report, Dominican Republic – SGM, para. 7.90;

TRQ is a two-tiered international trade tariff that combines two policy instruments used historically to protect domestic production by restricting imports−import quotas and tariffs. It is related to relate to concessions and obligations under Article II).

2. Duties, including tariff increases;[658]

3. Quota restrictions.[659]

Apart from provisional SGM, which typically are tariff increases to enable easy refunds, if necessary, neither Article XIX of GATT of 1994 nor the SA establishes any specific form of measure.

The conclusion of the above is that a member is free to choose any form of safeguard measure that achieves the objective of relieving serious injury or facilitating adjustment. On the one hand, if a member decides that increasing the prices of the domestic industry is important, they could impose import duties. Such duties would result in increasing the price of imports, which then allows the domestic industry to benefit. On the other hand, if the member believes that the best option to counter serious injury is to increase domestic industry production, SGM in the form of applying quotas to imports would constitute the best choice. The member may also employ TRQ, where the member considers decrees on imports quantities and increases in cost, allowing them to use both quotas and duties from the same period time.

Article 75.1 of the RoI specifies that measures could take the form of quantitative restriction and/or an increase in custom duties or other forms.[660] Moreover, the Article insists that selecting from among these forms should be based on the objective preventing or remedying a serious injury, or threat thereof, to the GCC industry. This means that GCC safeguard measure selection methods fit nicely within the legal frameworks of the SA and Article XIX of GATT of 1994.

5.5.6 The Duration of Definitive SGM

The basis of SGM are their scope, extent, and form. It is also essential to determine their duration. The following section discusses three important features related to duration: firstly, the obligation to limit the duration of SGM; secondly, the requirement of liberalisation to ensure measures progresses over time; and thirdly, the reviewing and renewing measures.

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[658] Panel Report, 'Dominican Republic – SGM on Imports of Polypropylene Bags and Tubular Fabric' WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012: XIII, 6775, paras 7.74–88.

[659] This relates to Article XI:1 of GATT 1994 Obligation; Article 5.1, second sentence, of the SA provides that '[i]f a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.'

[660] RoI on SGM, art 75.1.

According to Article XIX: 1(a) of GATT of 1994, SGM must be applied for a certain extent and only within the time necessary to counteract serious injury. Article 7.1 of the SA also states,

> A Member shall apply SGM only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years unless it is extended under paragraph 2.[661]

Since the SGM should be applied only as long as necessary to prevent serious injury, they should be temporary. The maximum duration of the SGM including extension must not exceed 8 years as described in SA (WTO, 2022)

There are no specific methods or rules, however, to help determine this duration. The only factor that exists to determine this period is the objective to protect or adjust a domestic industry by, for example, impacting sales volume, market share, profit margin. The last sentence of Article 75.1 of the RoI on SGM does not refer to a specific period or mention a term that references time. Nonetheless, it restricts the duration of SGM to the objectives to be achieved, which implies their temporary nature: 'The definitive safeguard measure shall be applied to the extent necessary to prevent or remedy the serious injury caused or threaten to be caused to the GCC industry.'[662]

Article 77.1 of the RoI on SGM, however, clearly states that the duration of the definitive safeguard:

> The definitive SGM shall be applied for a period of no more than four (4) years, and they may be extended to ten (10) years. The total period of measures application should include the period of application of any provisional measures, the period of initial application, and any extension applied in accordance with these RoI.[663]

These time limits are consistent with Article 7.1 of the SA, which states that SGM should not be enacted for more than four years unless they are extended. This appears, however, that Article 77.1 of the RoI of the GCC CLSM is inconsistent with Article 7.3 of the SA. The latter states that the maximum duration of SGM, including the initial period and any extension, should not be longer than eight years,[664] while Article 77.1 of the RoI on SGM

[661] 'The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.' SA, art 72.

[662] RoI on SGM, art 75.1.

[663] ibid, art 77.1.

[664] SA, art 7.3.

determines the duration as ten years. This inconsistency could be justified by the facts that all GCC Members are considered 'developing countries', and thus they have the right under Article 9.2 of the SA to extend the maximum duration to ten years.[665]

5.5.7 The Requirement of Progressively Liberalising SGM

For the purpose of facilitating the adjustment process for the domestic industry, Article 7.4 of the SA states that, 'if the SGM last more than one year, they must be progressively liberalised'[666]. Thus, if the measures are applied for less than one year, there is no need to liberalise them.[667] There is potential confusion regarding how Article XIX of GATT of 1994 and the SA protect the domestic industry and, at the same time, seek progressive liberalisation during the period of a safeguard measure. The explanation is that this requirement is designed to push the domestic industry to work hard to make economic adjustments to handle competition from imports. Thus, the requirement for liberalisation is justified; it aligns with the objective of the SA, which aims for structural adjustment and to encourage competition among the international market, and not to limit competition.

GCC Member States appreciate the importance of the goal to encourage competition among their markets and among other WTO members, and they do not intend to use SGM to restrict or monopolise the GCC market by GCC producers. They clearly express via Article 78.2 of the RoI that, 'A definitive safeguard measure for which the period of application exceeds one year shall be progressively liberalised at regular intervals during the period of application.' Therefore, it can be concluded that both GCC-CLSM/RoI stood in line with the WTO-SA in the domain of progressive liberalisation of the SGM.

5.5.8 The Review and Renewal of SGM

Although SGM are temporally measured, the imposer is allowed under Article 7.2 of the SA to extend them. Article 7.2 of the SA provides,

> The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent

[665] ibid, art 9.2.

[666] ibid, art 7.4.

[667] According to the Oxford Dictionary, to *liberalise* means to 'remove or loosen restrictions' on something, typically an economic or political system. Panel Report, 'Ukraine – Definitive SGM on Certain Passenger Cars' WT/DS468/R and Add.1, adopted 20 July 2015, DSR 2015:VI, 3117, paras 7.358 and 7.360.

or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.[668]

One reason to enact this renewal is to continue the measures in force when the domestic industry is showing a good response to the stimulant and adjustment.

Therefore, the two bases for renewing measures are (1) seeking the main objective, i.e., to prevent or remedy serious injury, and (2) evidence that the domestic industry is adjusting.

However, the investigation for extending the measure should be based on:

- A new investigation period that should consist of the period following the application of the safeguard;[669]
- The same criteria mentioned in the first sentence of Article 5.1[670] and Article 7.1[671] of the SA.

Article 78.1 of the RoI on SGM indicates that the GCC Member States appreciate the purpose of such reviews and consider it important to carry out new investigations to continue imposing SGM. Extending the definitive safeguard measure depends on the result of this new investigation, conducted in accordance with the same provisions set forth in Chapters 2 and 5 of these RoI. These provisions demonstrate that continuing the SGM is necessary to prevent or remedy serious injury, and that there is evidence that the GCC industry is adjusting.[672]

5.6 Provisional Safeguard Duties

In agreement with the last sentence of Article XIX: 2[673] of GATT of 1994, and the first sentence of Article 6 of the SA,[674] the RoI state that GCC Member States have the right to apply provisional measures in specific circumstance. Article 73 of the RoI states,

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[668] SA, art 7.2.

[669] Appellate Body Report, 'United States – Definitive SGM on Imports of Circular Welded Carbon Quality Line Pipe from Korea' WT/DS202/AB/R, adopted 8 March 2002, DSR 2002: IV, 1403, para 261.

[670] A Member shall apply SGM only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

[671] A Member shall apply SGM only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

[672] RoI on SGM, art 78.1.

[673] The concluding sentence of Article XIX: 2 of GATT 1994 provides that 'In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be affected immediately after taking such action.'

[674] The first sentence of SA art 6 provides that 'In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury.'

> When there are critical circumstances, the Permanent Committee, upon a recommendation from the GCC-TSAIP, may adopt provisional safeguard duties, if it is determined that the product under investigation is being imported in such increased quantities, absolute or relative to production, and under such conditions as to cause or threaten to cause serious injury to the GCC industry and that the delay in taking action would cause damage that would be difficult to repair.[675]

Thus, the RoI of the GCC CLSM requires two conditions for provisional measures: (a) the presence of critical circumstances where a delay would cause damage and (b) the difficulty in repairing this damage.

There is no existing definition of these concepts, but both include the meaning of 'emergency' and the need for immediate relief; if no action is taken, the damage would be difficult to repair. It seems the text of Article 73 omits that one important requirement for provisional measures, namely the presence of clear evidence that increased imports cause, or threaten to cause, serious injury to domestic industry (as mentioned in Article 6 of SA). The first sentence of Article 6 of the SA suggests that such an article should not be predicated on the same quality of evidence to impose definitive measures, because any amount collected as a provisional safeguard duty must be promptly refunded if the subsequent investigation does not support such action.

Clear evidence that increased imports have caused, or threaten to cause, serious injury to a domestic industry should, however, be represented as one of the bases for determining the right to apply provisional SGM. Given these facts, it is not acceptable to impose provisional measures based only on recommendations from the GCC-TSAIP, i.e., as the author understood from the text of Article 73 of the RoI on SGM.

The RoI established the legal framework to apply such measures, as provided in Article 74:

> A provisional safeguard duty shall take the form of tariff increases and take into account the following:
>
> Provisional safeguard duties shall be applied for no more than two hundred (200) days, during which the pertinent requirement of the safeguard investigation according to these RoI shall be fulfilled.

[675] RoI on SGM, art 73.

> Any amount collected as a provisional safeguard duty shall be promptly refunded, if the subsequent investigation does not result in a determination that increased imports have caused or threaten to cause serious injury to the GCC industry.[676]

Based on this text, the provisional safeguard can only be in force for 200 days, and its only acceptable form is a tariff increase. In sum, apart from the requirement for clear evidence to impose SGM, the RoI of the GCC CLSM are consistent with the SA and Article XIX of GATT of 1994 about imposing provisional safeguards.

5.7 Procedures for Imposing SGM in the Context of the GCC's CLSM RoI

Article 11.1(a) of the SA states that

> A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.[677]

This Article clearly expresses that the member may take or seek safeguard action only if that action is consistent with both Article XIX of GATT of 1994 and the SA. This provision covers all procedural requirements stated in the SA, including investigations and all previously discussed relevant actions required to impose safeguards.

In the next subsections, the procedures set out by WTO-SA will be compared with the GCC-CLSM and RoIs.

5.7.1 The Obligation to Establish Competent Authorities and Procedures

Articles 3.1, 3.2 and 4.2 of the SA provide the basic procedural obligations; the investigation producers; the legal method to deal with the confidentiality of information; and the content of the determinations.[678] However, the main procedural provision is in Article 3.1 of the SA, and it contains various obligations:

> A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which

[676] RoI on SGM, art 74.

[677] SA, art 11.1(a).

[678] ibid, arts 3.1, 3.2 and 4.2.

> importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.[679]

This language suggests the following conclusions:

1. The investigation process should be carried out by a competent authority in accordance with provisions and rules already published for the public.
2. The investigation procedures should be initiated by a public notice to all interested parties.
3. The competent authority should provide the due time guarantees, including for the public hearing, and the opportunity for all interested parties to present evidence and their views, including responses to other parties' presentations, and to submit their views *inter alia*.
4. The competent authority should publish a report containing findings and a reasoned conclusion at the end of the investigation process.

As provided in the SA, and to ensure that the SGM are applied accurately, competent authorities should carry out the investigations.[680] The SA, unlike the ADA and GCC-CLSM agreements, does not oblige the member to notify or give details about the 'competent authorities' to the WTO or its members.[681] The investigation authorities' responsibility are (1) to determine the right to impose SGM, and (2) to determine the conditions under which SGM can be employed.

It is not necessary for the investigation authority to have the right to make the final decision on whether SGM should be applied or not. The GCC CLSM, under Article 10, assigned responsibility to the Bureau of the GCC-TSAIP for safeguard investigation processes.[682] The

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[679] ibid, art 3.1.

[680] Appellate Body Report, 'United States – Definitive SGM on Imports of Wheat Gluten from the European Communities' WT/DS166/AB/R, adopted 19 January 2001, DSR 2001: II, 717, paras 53.

[681] ADA, art 16.5; Agreement on Subsides and Countervailing Measures (SCM Agreement), art 25.12.

[682] Competences of the Bureau of the GCC-TSAIP:

Organizing the Permanent Committee activities and pre- paring for its meetings and agenda, as well as drafting its decisions and carrying out any other function that will be assigned to perform and it has to that effect to request information, studies, statistics and reports that may be useful for the work of the Permanent Committee.

Following up the implementation of the Ministerial and Permanent Committee decisions.

Permanent Committee's role,[683] under Article 9 of the GCC CLSM, is concerned with proposing definitive SGM to the Ministerial Committee and applying them. The Ministerial Committee[684] has the right to approve these SGM. Although the competence of each committee is well defined, there is no clear detail on how the final decision would be undertaken, as both the Ministerial and Permanent Committees are composed of undersecretaries from the concerned ministries and other ministries of the GCC Members,

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Providing consultancy and technical support to GCC producers and exporters who are facing dumping, subsidy and safeguards investigations in other countries and following the investigations' process in coordination with the concerned authorities of Members.

Participating in the activities of related organizations and international forums.

Providing quarterly reports to the Permanent Committee containing information and statistics regarding the activities of the Bureau of the GCC-TSAIP and all registered and examined investigations as well as their time frame and deadlines.

Receiving the complaints against injurious practices in international trade and related requirements.

Conducting investigations against injurious practices in international trade and all related reviews in accordance with this Law and its RoIs.

Preparing the annual budget project of the Bureau of the GCC-TSAIP and executing it upon its approval.

Working on developing knowledge and raising Members' awareness on the concepts of dumping, subsidy and increase in imports.

Any other duties or activities assigned to the Bureau of the GCC-TSAIP by the Ministerial Committee and Permanent Committee.

[683] The Permanent Committee is competent in the following matters:

Taking measures stated in this Law and its RoI, including imposing provisional measures and accepting price undertakings.

Proposing to the Ministerial Committee the imposition of definitive Antidumping measures, definitive countervailing measures and definitive SGM against increased imports.

Setting up committees and establishing specialized administrative units of the Bureau of the GCC-TSAIP.

Adopting the GCC-TSAIP's work strategies in compliance with its predetermined competences.

Proposing appropriate solutions to the Ministerial Committee for settlements of disputes that may arise between Members regarding the interpretation and implementation of this Law and its RoI.

Proposing amendments to this Law and its RoI.

Proposing amendments to the Internal Regulation of the Bureau of GCC-TSAIP.

Approving and amending its Internal Rules. Approving the proposed budget of the Bureau of GCC-TSAIP before its adoption in compliance with the regulatory proceedings.

Adopting financial, administrative and other regulations of the Bureau of the GCC-TSAIP.

Nominating the Director General of the Bureau of the GCC-TSAIP. Any other competence attributed by the Ministerial Committee.

[684] The Ministerial Committee is competent to take decisions in the following matters:

Approving the imposition of definitive measures against dumping, specific subsidy and increase in imports, extending, suspending, terminating, and increasing or reducing definitive Antidumping and countervailing measures.

Settling disputes that may arise between Members regarding the interpretation and implementation of this Law.

Issuing the RoI of this Law.

Deciding on the administrative reviews pertaining to the definitive decisions and determinations made in implementing this Law and its RoI

Adopting the Internal Regulation of the Bureau of the GCC-TSAIP.

Appointing the Director General of the Bureau of the GCC-TSAIP. Any other competence attributed by this Law and its RoI.

respectively. Thus, a question arises to whether the final decision is determined by voting or by meeting certain criteria. As these ambiguities do not add to the violation of WTO-SA in terms of competent bodies for conducting investigations, therefore, it can be concluded that GCC-TSAIP adheres to SA.

5.7.2 Investigation Procedures

Article XIX of GATT 1994 does not propose provisions for considering the process of domestic SGM. This omission, however, does not mean that each member has the freedom to overlook this requirement. Article 3.1 of the SA states clearly that the investigation must be carried out before any SGM are imposed, and this should be made public in accordance with Article X: 1 of GATT of 1994.[685] The procedures must be publicised to ensure transparency; guarantee all interested parties understand the situation; block the risk of introducing *ad hoc* procedural rules; and finally, prevent any abuse or misuse of the SGM.[686] Additionally the investigating authority should ensure that interested parties have good means to present their evidences and consult with interested parties; such consultation might proceed via responses to questionnaires.[687] To fulfil the transparency requirement, Article 12.6 of the SA obliges all members to notify the Committee on Safeguards of their laws, provisions, regulations, and administrative procedures for safeguards.[688]

The RoI on SGM detailed in Chapter 2, Section II, contain 25 Articles that cover all investigation procedures, starting with publishing the initiation of safeguard investigation, along with all investigation processes and confidentiality requirements, through to the end goal of publishing the final report that contains the legal findings and conclusions.[689] The RoI grants the interested parties the right to present their views and evidence by participating

[685] 'Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any [Member] and the government or governmental agency of any other [Member] shall also be published.' GATT 1994, art X.

[686] Appellate Body Report, 'United States – Definitive SGM on Imports of Wheat Gluten from the European Communities' WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717, paras 54.

[687] Appellate Body Report, 'United States – Definitive SGM on Imports of Certain Steel Products' WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117, paras 10.60 and 10.64.

[688] In the absence of such notification, Article 12.8 of SA entitles any other Member to notify these legal instruments and any measures or actions that have not been notified by the Members required to make such notifications.

[689] The RoI on SGM.

in the public hearing[690] and responding to questionnaires that the GCC-TSAIP sends.[691] GCC-TSAIP could collect additional evidence and verify information through in-spot visits.[692] All interested parties are allowed to see the information related to investigation upon written request.[693]

5.7.3 Public Notice of Investigation

According to the second sentence of Article 3.1 of the SA, the process starts with a public notice of initiating the investigation to all interested parties.[694] The SA does not outline specific requirements for the contents of the public notice. Similarly, The SA does not specify how the initiation of investigation notice should be made public, such as whether it should be published in the Official Gazette or on a website. The SA also does not provide information on the timing of the publication.

Based on the above, the panel on *Korea—Dairy (2000)* argued that the notice of investigation initiation is not a challengeable act.[695] This situation stands in contrast with the ADA's intentions, which suggests the notice and its contents as ways by which to assess the transparency of the investigation.

The RoI on SGM meet the requirement to offer a public notice of investigation under Article 9:

> The notice of the initiation of an investigation shall be published in the Official Gazette within ten (10) working days from the date on which the affirmative Permanent Committee decision was taken. The initiation of an investigation shall be effective on the date on which the notice of initiation is published in the Official Gazette. The notice of initiation of an investigation shall contain the following information:
>
> A description of the product under investigation, including its technical characteristics, end-uses, and its current tariff classification number.
>
> A description of the like domestic product(s) or directly competitive product(s), including their technical characteristics and end-uses.

[690] RoI on SGM, arts 15.2, 16 and 17.

[691] ibid, art 12.

[692] ibid, art 18.

[693] ibid, art 14.3

[694] Panel Report, 'Ukraine – Definitive SGM on Certain Passenger Cars' WT/DS468/R and Add.1, adopted 20 July 2015, DSR 2015:VI, 3117, paras 7.409-7.410.

[695] Panel Report, 'Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products' WT/DS98/R and Corr 1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000: I, 49, para 7.131.

The name and address of the complainant and all other known producers of the like domestic product(s) or directly competitive product(s).

Name(s) of the country(ies) of origin or export of the product under investigation.

A general summary of the factors related to the allegations of serious or material injury or threats thereof and practices under investigation.

The investigation's initiation date.

The address of the GCC-TSAIP, the GCC-TSAIP Director General's name, address and phone or the party to whom the interested parties shall submit information and comments.

The timetable for the investigation procedures, including:

The deadline for interested parties desiring to participate in the investigation to make themselves known in writing to the GCC-TSAIP;

The time frames within which interested parties shall present their arguments or information in writing;

The time limits within which interested parties have the opportunity to present their submissions in writing;

The period within which interested parties shall request a public hearing when necessary.[696]

5.7.4 Right of Defence and Information Collection

The investigation determines if the member has the right to apply SGM. To determine so, the investigating authority should provide answers to questions on the following factors:

- Unforeseen developments;
- The effect of GATT obligations;
- Increased imports;
- Serious injury;
- Causal link.

Because such answers are not straightforward, the investigation authority must collect as much information as possible. The second sentence of SA Article 3.1 lists a number of investigative methods[697] for collecting information, mainly from interested parties.[698] This

[696] RoI on SGM, art 9.

[698] Appellate Body Report, 'United States—Definitive SGM on Imports of Wheat Gluten from the European Communities' WT/DS166/AB/R, adopted 19 January 2001, DSR 2001: II, 717, para 53.

list may not, however, be adequate, and the investigating authorities may need to carry out additional steps to execute their role in light of legal conditions.[699]

Investigating authorities are requested to collect plenty of related information.[700] To do so, they seek information from different sources. Therefore, the RoI on SGM have determined different methods to gather information from different sources.

Firstly, upon initiating a safeguard investigation, which must be accompanied by an initiation notice published in the Official Gazette, the GCC-TSAIP sends questionnaires to parties who request them; they may also transmit these questionnaires to the diplomatic representatives of exporting countries.[701] The interested parties are expected to clearly and completely respond to the questionnaires within a time limit not exceeding forty (40) days from the date of receipt.[702]

The GCC-TSAIP obtains different kinds of information based on the nature of the interested party's response. For example, the importer may report on imports and the properties of the imported product; the GCC domestic industry will offer definition of the product under investigation; while the exporters may explain the reasons that drive them to export the product under investigation in large amounts to the GCC market.

Secondly, the GCC-TSAIP also arranges a public hearing to allow all interested parties to defend their interest under Article 14.1 of the RoI on SGM:

> All parties that request to participate in the investigation as interested parties within the time limit stated in the notice of initiation of the investigation shall have fair opportunity to defend their interests. Public hearings may be held to present their views and arguments, taking into consideration the need to protect confidential information.[703]

The SA does not require the oral information presented during the public hearing to be submitted in writing and made available for all interested parties to consider. In contrast, under Article 15.2, the RoI insists on meeting these two conditions within a predetermined time if oral information is to be considered during an investigation:

> All interested parties participating in the public hearing, providing a reasonable reason, have the right to provide other oral information related to the investigation, but it shall not be

[699] ibid, para 55.

[700] ibid, para 53.

[701] RoI on SGM, art 10.2.

[702] ibid, arts 12-1.

[703] ibid, arts 14-1.

considered in the investigation unless it is subsequently submitted in writing within a time-limit not exceeding ten (10) days after the date of public hearing. [704]

Thirdly, the GCC-TSAIP, under Articles 18.1[705] and 18.2 of the RoI, may carry out onsite visits in countries inside or outside the GCC Member States in order to verify information or to obtain further details related to the investigation.[706]

Fourthly and finally, in the event that the interested parties do not provide, or refuse to provide, the necessary information, or do not submit it within the pre-determined period of time or form, the GCC-TSAIP has the right under Article 26.1[707] of the RoI on SGM to use these available facts to reach its final conclusion. Article 26.2[708] also allows the GCC-TSAIP to disregard false or misleading information submitted by a party.

5.7.5 Reasoned and Adequate Findings, Conclusions, Explanations, and Analyses

The SA obliges investigating authorities to announce their findings and conclusions on all investigated issues of fact and law in a reasoned and detailed manner.[709] This tool is most essential in guaranteeing that the domestic investigating authority does not make biased determinations. This announcement not only provides a way to assess compliance with procedural obligations, but also to assess whether the essential requirement of Article XIX of GATT of 1994 and the SA have been met.[710]

The SA requires meeting two obligations regarding the determinations' appropriateness. Article 3.1 in the last sentence of the SA states, 'The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of

[704] ibid, art 15.2.

[705] Article 18.1 of the RoI on SGM provides that, in order to verify the information provided or to obtain further details related to the investigation, the GCC-TSAIP may carry out visits to countries outside the GCC Members, provided that it obtains the agreement of the firms concerned and receives no objection from the country concerned after notifying their representatives to the on the spot visit.

[706] Article 18.2 of the RoI on SGM states that, in order to verify the information provided or to obtain further details related to the investigation, the GCC-TSAIP may carry out on the spot visits inside GCC Members.

[707] 'If any interested party refuses access to, or otherwise does not provide necessary information or does not submit them within the period of time prescribed form or significantly impedes the investigation, preliminary and final determinations either affirmative or negative may be taken on the basis of the information available.' RoI on SGM, art 26.1.

[708] Article 26.2 of the RoI on SGM confirms that, if any interested party provides false or misleading information, such information shall be disregarded, and available information may be used.

[709] SA, art 3.1 (last sentence) and art 4.2(c).

[710] Appellate Body Report, 'United States – Definitive SGM on Imports of Certain Steel Products' WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117, paras 299.

fact and law'.[711] Article 4.2 (c) states, 'The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined'.[712] These two provisions establish the standard review of determining safeguard investigations, i.e., the final published report. For safeguard determinations to comply with both the last sentence of Articles 3.1 and 4.2 (c), therefore, the published report must show the reasoning and analysis behind how the investigating authorities resolved the issues and reached their conclusions.

The RoI on SGM Article 24 also establishes the necessity for a published report that contains the final findings and conclusions. It does not, however, oblige the GCC-TSAIP to publish its rationales for determinations and conclusions. Instead, it asks only for a summary:

> Upon the decision to impose measures, whether provisional or definitive, the GCC-TSAIP shall notify the complainant and issue a public notice of the application of the measures in the Official Gazette, which shall contain the following information, taking into consideration confidentiality requirements:
>
> - The identity of the parties' subject to the measures.
> - The identification of the products subject to the measures.
> - A summary of the reasons leading to the imposition of measures.
> - The form, level, and duration of the measures' application.[713]

Therefore, the GCC's determination of the term 'safeguard' complies with Article 3.1 of the SA in its obligation to publish the final report. It is in violation, however, of its obligation under Articles 3.1 and 4.2 (c) of the SA in failing to provide a full detailed account of the findings and reasons for reaching conclusions.

Different reasons might be attributed to the deviation of GCC from not making the accounts and findings of safeguard cases public. For example, in the first place, WTO does not oblige its member countries to reveal all information about the methodologies and legal procedures applied to reach certain conclusions in deciding upon the AD or safeguard cases. This represents the drawback in the legal structure of the WTO, as it cannot contain its members from hiding the gathering of factual information, methods used in applying the collected information to take the SGM and not publishing the reasoned judgments online or

[711] of Article 3.1, last sentence

[712] ibid, paras 285–9; SA, art 4.2(c).

[713] RoI on SGM, art 24.

communicating such data to the WTO-Secretariate. These conditions may lead to exploitation of the WTO-SA for promoting the vested interests of the businesses and to gain the political ends through the application of discriminatory methods while deciding upon the SGM-related cases. Many scholars have already indicated and highlighted the tilt of the WTO-SA to the protection of domestic industries at the cost of the curbing free trade.[714] Without transparency in the manner the WTO-SA is applied, there is a great risk of utilisation of WTO-SA as a protectionist weapon.[715]

Another reason for deviation of GCC from being transparent in terms of publication of full account of the reasoned judgements and findings on the safeguard cases is the lack of proper expertise and infrastructure for the publications of the reasoned judgements and findings. The economic cost of the implementation is quite high for the developing countries like Members of the GCC. This argument is supported by Faras,[716] who found that deviation of the Kuwait (a member of GCC) from implementing AD and safeguard laws in full-fledged form is that it incurs higher economic cost for establishment of infrastructure. Hence, it is important that WTO should consider the economic, knowledge, expertise and the establishment of infrastructure factors in pressurizing the GCC to implement the WTO-SA laws.

The WTO may recommend some international donors such as IMF to fund the establishment of infrastructure such as establishment of the European Union-styled Court of Auditors which may audit the cases of safeguard and AD and may be active player in making the findings and judgments public to the Supreme Council of GCC and WTO Secretariate. Another measure WTO may take is to use its learning mechanism employed by WTO Secretariate to organise workshops and short courses arranged for Members such as the GCC regarding the importance of the publishing results of cases and ways to publish the results without compromising the economic and political interests.

Moreover, by following an example of Eastern and Southern African countries which established the Trade Law Centre (TRALAC) for training and building capacity to implement trade remedies including AD and safeguard laws,[717] the GCC, with the cooperation of the WTO, may build the similar teaching and training centre as a capacity

[714] Alavi (n 110); WW Chang, 'Antidumping, Countervailing, and SGM' (2008) GITAM Review of International Business (forthcoming) <https://ssrn.com/abstract=1736735> accessed 05 August 2022; Nozomi (n 289).

[715] Nozomi (n 289).

[716] Faras (n 113).

[717] IG Andrew, 'Implementing Effective Trade Remedy Mechanisms: A Critical Analysis of Nigeria's AD and Countervailing Bill 2010' (doctoral thesis, University of Pretoria 2014).

building measure in implementation of this will lead to develop the trade law and policy capacities in GCC countries with production of critics and proponents of the implementation of WTO-promulgated trade remedies.

5.7.6 Confidential Information

As previously noted, investigating authorities obtain all relevant information from all possible sources. Given the fact that the interested parties are competitors, the information mainly concerns market competition and is sensitive in nature. As such, there should be guarantees that the information will remain confidential.[718] SA Article 3.2 first sentence establishes that

> any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[719]

The Article does not, however, define the term 'confidential',[720] thereby granting domestic investigating authorities enjoy more freedom in making this determination.[721] Article 19 of the RoI on SGM provides the same protection for confidential information:

- Any information which is by its nature confidential or which is provided on a confidential basis by interested parties shall be treated as confidential, if reasonable

[718] Panel Report, 'United States – Definitive SGM on Imports of Wheat Gluten from the European Communities' WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001: III, 779, para 8.20.

[719] SA, art 3.2 (first sentence).

[720] Wolfrum, Stoll and Koebele (n 364).

[721] Panel Report, 'United States – Definitive SGM on Imports of Wheat Gluten from the European Communities' WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001: III, 779, para 8.20.

cause being shown, such information shall not be disclosed without the specific permission of the party submitting it.

- Interested parties providing confidential information shall be required to furnish reasons supporting its confidential treatment and non-confidential summaries thereof. Such summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.
- In exceptional circumstances, interested parties may indicate that information is not susceptible of summary. In such cases, a statement of the reason must be provided.
- If it is found that the request for confidentiality is not warranted, and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, such information, may be disregarded unless it can be satisfactorily demonstrated by appropriate sources that the information is correct.[722]

The RoI also do not define 'confidential information', meaning that the burden falls on the GCC-TSAIP.

The legal critics have criticised that the lack of clarity about the confidential information may be problematic and cause the misuse of the SA by the competent authorities investigating the safeguard cases. The competent authorities in each Member State may define the parameters and boundaries surrounding the confidential information, which leaves latitude with Members to categorise different pieces of information for hiding or pursuing their vested business interests in their local markets.[723] Therefore, the freedom to define the confidential information promotes the protectionist approach espoused by the protectionist theory, which states that grey areas in the WTO-ADA and WTO-SA render the agreement to be misused for proliferation and completion of the specific industry, and one of such areas is the freedom of defining the confidential information.[724]

Therefore, it is vitally important that DSB and Appellate Body in the WTO should make a serious effort to pinpoint the freedom to define the confidential information as a grey area and should explicitly categorise the different pieces of information collected in the course of investigation and used in implementing SGM into two categories: public information and confidential information. Chang states this will help increase compliance with the true spirit

[722] RoI on SGM, art 19.

[723] V Prakash, AD, Countervailing and SGM in Multilateral Trade Regime (Bookwell 2007).

[724] Nozomi (n 289).

of the WTO SGM which is to protect the local market from injuries caused by the foreign imports and will promote the concept of fair-trade agreements between the Members.[725] Declaring what is confidential and what is non-confidential will also decrease the number of disputes arising from information held back by the competent authorities at DSB and Appellate Body.[726]

Additionally, DSB should work with the Supreme Judicial Council of GCC which is equivalent of European Court of Justice (ECJ), in order to obtain the reasoned judgements about confidential and non-confidential information collected and used during the SGM-related cases decided in GCC jurisdiction. This will enable DSB to understand true motives operating behind the information classed as confidential information by GCC headquarters.

5.8 Conclusion

In summary, this chapter's assessment of the compatibility between the GCC CLSM and its RoI with Article XIX of GATT of 1994 and the SA shows that GCC safeguard provisions are mostly in line with those of the SA. Nevertheless, there is some discrepancy between the two systems, particularly in terms of GCC-TSAIP's requirements for transparency in announcements of reasoned and adequate findings, conclusions, explanations, and analyses. Article 3.1 and 4.2 of the SA oblige the investigating authority to publish reports promptly, and to disclose within them their reasons for findings and conclusions. In contrast, Article 24 of the RoI on AD Measures obliges the GCC-TSAIP only to publish a report that contains a summary of reasons and final determinations.

GCC provisions thus do not meet the requirements for SGM as provided in Article XIX of GATT of 1994, such as unforeseen developments. This lack means that the GCC is violating its WTO obligation under Article XIX of GATT 1994. The situation makes possible the potential of other WTO members challenging the GCC's SGM. Thus, to impose SGM more effectively, it is essential that they are compatible with both Article XIX of GATT of 1994 and the SA. The GCC-CLADCSM and its RoI should be redrafted to establish the transparency requirement per Articles 3.1 and 4.2 of SA and the obligations under Article XIX of GATT of 1994.

[725] Chang WW, 'Antidumping, Countervailing, and SGM' (2008) GITAM Review of International Business (forthcoming) <https://ssrn.com/abstract=1736735> accessed 05 August 2022

[726] Bown and Hoekman (n 197).

Chapter 6: Analysis of Cases involving SGM in the GCC

6.1 Introduction

This chapter reviews three cases of SGM initiated by the GCC domestic industry to examine how the GCC-TSAIP interprets GCC safeguard provisions and whether it applies GCC CLSM and its RoI consistently with the principles of SA and Article XIX of GATT 1994. These three 'increased imports' cases are:[727]

1. Imposing provisional SGM against GCC imports of ferrosilicomanganese;
2. Imposing definitive SGM against GCC imports of rolled iron or steel (pre-painted flat steel);
3. Imposing a definitive safeguard investigation of GCC imports of prepared additives for cements, mortars, or concretes (chemical plasticizers).

6.2 Case 1: Provisional SGM against GCC Imports of Ferrosilicomanganese

6.2.1 Introduction and Background

On 22 June 2016, the Gulf Ferro Alloys Company (SABAYEK) lodged an increased imports complaint against GCC imports of ferrosilicomanganese, which is classified under GCC Unified Tariff Code (72023000). The GCC domestic industry claimed that this product was being imported into the GCC market in increased quantities on both an absolute and relative basis, thereby causing serious injury to GCC like products or directly competitive products.[728]

6.2.2 Defining the GCC's Domestic Industry

The GCC-TSAIP assumed that the 'domestic industry' was the industry initiating the complaint: the GCC domestic industry of ferrosilicomanganese comprises 'Gulf Ferro

[727] As noted in Chapter 1, there have been only five proceedings relating to increased imports. Three were chosen for analysis in this chapter after the last version of the GCC Common Law on Safeguard and its RoI were approved.

[728] GCC-TSAIP, No (2/2S/2016) 'Concerning the Initation of Safeguard Investigation Against Ferrosilicomanganese' (2016) Official Gazette, V8, adopted 3 October 2016, para 1.

Alloys Company (SABAYEK)' from Saudi Arabia and produces a major proportion of the total GCC domestic production of the like or directly competitive product.[729]

6.2.3 The GCC's Allegations of Increased Imports

The complaint evidence alleged that the imports of the product under investigation had increased sharply and suddenly in absolute and relative regard to the GCC domestic industry from 2012 to 2015.[730] The GCC-TSAIP, however, did not obligate the complainants to gather evidence from specific sources.

6.2.4 The GCC's Allegations of the Presence of Serious Injury

The GCC domestic industry claimed that variations in several economic factors, such as an increase in inventory volume and a decrease in capacity utilisation and imports, led to serious injury.[731]

6.2.5 The Investigation Procedure

Once the complaint was received, the GCC-TSAIP examined the accuracy and the adequacy of the data provided and prepared and submitted a report to the Permanent Committee. Ultimately, the Permanent Committee instructed the GCC-TSAIP to initiate the investigation and to publish the proceedings in the Official Gazette on 3 October 2016.[732] Additionally, Saudi Arabia, on behalf of the GCC Members and pursuant to Article 12.1(a) of the SA, notified the WTO Committee on Safeguards that the GCC-TSAIP had initiated a safeguard investigation on imports of ferrosilicomanganese.[733]

The GCC-TSAIP should have finished the investigation process within twelve months, but the period was extended to eighteen months from the date of announcement in the Official Gazette in particular circumstances. The data collection period for the serious injury investigation extended from 2012 to 2015.[734] In order to collect the data, questionnaires were

[729] ibid, para 2.

[730] ibid, para 3.

[731] ibid, para 5.

[732] ibid, preamble.

[733] WTO, WTO doc G/SG/N/6/ARE/2, G/SG/N/6/BHR/2, G/SG/N/6/KWT/2, G/SG/N/6/OMN/2, G/SG/N/6/QAT/2, G/SG/N/6/SAU/2, 'Notification under Article 12.1(A) of the Agreement on Safeguards on Initiation of an Investigation and the Reasons for It in the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom Saudi Arabia, and the United Arab Emirates' (Cooperation Council for the Arab States of the Gulf 'GCC') (Ferrosilicomanganese)'.

[734] GCC-TSAIP, No (2/2S/2016) 'Concerning the Initation of Safeguard Investigation Against Ferrosilicomanganese' (2016) Official Gazette, V8, adopted 3 October 2016, paras 1 and 6.1.

sent to foreign producers/exporters, GCC producers, and GCC importers. Furthermore, all parties who were interested in but not known to GCC's GCC-TSAIP had the opportunity to express their interest and provide their own data via the questionnaire that was published ten days after the investigation announcement in the Official Gazette. Responders were required to submit their information within the time limit of 40 days after receiving the questionnaires.[735]

Furthermore, the GCC-TSAIP provided an opportunity for all interested parties to request to attend a public hearing to present their views and arguments. All interested parties were required to make themselves known within 21 days of the announcement of the initiation of the investigation.[736] The GCC-TSAIP had the ability to conduct an on-site verification visit both inside and outside of the GCC Member States to verify or collect additional information or data to aid the investigative process.[737] Moreover, under Article 12 of the RoI on SGM, the GCC-TSAIP was expected to keep all information provided by all interested parties confidential, if it were provided on confidential basis and there was reasonable cause.[738]

6.2.6 Preliminary Determination and Imposition of Provisional SGM against GCC Imports of Ferrosilicomanganese (17 October 2016)

After examining and reviewing the application, the GCC-TSAIP announced an investigation would commence regarding this case by publishing a statement on 3 October 2016 in the Official Gazette. On 17 October 2016, the Permanent Committee decided to impose SGM against the GCC imports of the product under investigation.[739] These measures took the form of a 200-day tariff increase (21%) of the CIF value against GCC imports of

[735] ibid, para 6.2.

[736] ibid, para 6.3.

[737] ibid, para 6.4.

[738] ibid, para 6.5.

[739] GCC-TSAIP. No (3/2S/2016) 'Imposition of a Provisional Safeguard Measure Against the GCC Imports of Ferrosilicomanganese' (2016) Official Gazette, V9, adopted 17 October 2016, para 1; World Trade Organisation, WTO doc G/SG/N/7/ARE/1, G/SG/N/11/ARE/1, G/SG/N/7/BHR/1, G/SG/N/11/BHR/1, G/SG/N/7/KWT/1, G/SG/N/11/KWT/1, G/SG/N/7/OMN/1, G/SG/N/11/OMN/1, G/SG/N/7/QAT/1, G/SG/N/11/QAT/1, G/SG/N/7/SAU/1, G/SG/N/11/SAU/1, 'Notification under Article 12.4 of the Agreement on Safeguards Before Taking Provisional Measures referred to in Article 6, Notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards, Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom Saudi Arabia, and the United Arab Emirates (Cooperation Council for the Arab States of the Gulf 'GCC') (Ferrosilicomanganese)'. The Kingdom of Saudi Arabia notifies the Committee on Safeguards, on behalf of GCC Members, pursuant to Article 12.4 of the Agreement on Safeguards, and footnote 2 of Article 9 of the Agreement on Safeguards that the GCC Bureau of Technical Secretariat for Anti Injurious Practices in International Trade (GCC-TSAIP) hereafter referred as 'the Competent Authority' submits its notification before taking a provisional safeguard measure on GCC imports of Ferrosilicomanganese.

ferrosilicomanganese.[740] The Permanent Committee reached this decision based on the factors discussed below.

6.2.6.1 Increased imports in absolute and relative terms

Imports of ferrosilicomanganese were significant in both absolute terms and relative to the production of the complainant industry during the 2012 to 2015 period. The imports increased by 267.01% during 2015 compared to 2012. Relative to production, the imports increased in 2015 by 351.48% compared to 2012 (see Table 4).[741]

Table 4: Increases in GCC imports of Ferrosilicomanganese from 2012 to 2015

	2012	2013	2014	2015
Import Volume in Tonnes	34,273.74	40799.08	112,673.15	125,786.84
Index	100	119.04	328.74	367.01
Imports/Production Ratio	100	154.11	299.97	451.58

6.2.6.2 Serious injury

Table 5 demonstrates the effect of increased imports of the product under investigation and its impact on the most essential economic financial indicators of the GCC domestic industry, covering the period from 2012 to 2015.[742]

Table 5: The Effect of Increased Imports of Ferrosilicomanganese on the GCC Domestic Industry, 2012–2015

	2012	2013	2014	2015
Production Volume	100	77.24	109.59	81.29
Sales Volume	100	90.96	120.76	91.53
GCC Market Index	100	100.72	186.76	181.22

[740] GCC-TSAIP, paras 2-3.

[741] GCC-TSAIP, No (3/2S/2016) 'Imposition of a Provisional Safeguard Measure Against the GCC Imports of Ferrosilicomanganese' (2016) Official Gazette, V9, adopted 17 October 2016, para 4.1.

[742] ibid, para 4.2.

Market Share of Domestic Sales	100	90.31	64.77	50.51
Market Share of Imports	100	118.19	176.34	202.52
Profit & Loss	100	43.92	32.56	-225.92
Inventory Volume	100	117.21	123.96	144.63
Employees	100	93.49	92.09	60.93
Return on Investment	100	43.93	33.05	-247
Cash Flow	100	-260.90	-74.10	-411.16

Table 5 illustrates that increased imports of the product under investigation in absolute terms and relative to the GCC domestic industry caused serious injury to the GCC domestic industry, and that delays in delivering a decision would lead to damage that would be difficult to fix.

In summary, domestic sales decreased by 8.47% compared with those of 2012. The GCC market share dropped by 49.49% from 2012 to 2015, whilst the production volume decreased by 18.17%. Furthermore, the inventory volume increased by 44.63%, and the cash flow, profitability of the industry and its return on investment decreased by -511.16%, -325% and -347%, respectively. In 2015, the percentage of employment dropped by 39.07% compared to that of 2012.[743]

6.2.6.3 Causal link

The GCC-TSAIP found a causal link between the increased imports of the product and serious injury to the complainant, i.e., the GCC industry, due to two reasons:

- The serious injury suffered by the GCC industry was concomitant with the recent, sharp, and sudden significant increase in the product under investigation, both in absolute terms and relative to total GCC production.
- Other factors, such as a contraction in demand and changes in patterns of consumption, trade-restrictive practices, developments in technology, or export

[743] ibid.

performance, did not contribute to the serious injury evident in the complainant industry.[744]

6.2.6.4 Critical circumstances

Given that the serious injury indicators showed the overall deterioration of the economic status of the complainant industry, the GCC industry sold its product at lower prices than before. At this price, it was impossible for manufacturers to recover production costs, and hence debt accumulated in the short term, rendering the company unable to meet its financial obligations. The board of directors decided on 5 February 2015 to suspend production and manufacturing in case no action was taken. Having considered all evidence and economic indicators of the GCC industry, and the financial crises of the complainant during the period of 2012 to 2015, the GCC-TSAIP concluded that there were critical circumstances which necessitated rapid action to protect the GCC industry from damage. They did, however, exclude all developing countries from this safeguard measure.[745]

6.2.7 Final Determinations and Refunding Provisional Duties

Interestingly, the GCC-TSAIP announced the termination of the safeguard investigation of GCC imports of ferrosilicomanganese on 3 May 2017, without imposing definitive measures or refunding provisional duties. The GCC-TSAIP explained this decision based on the absence of a causal link between the increased imports of the product under investigation and the serious injury GCC industry suffered.[746]

6.2.7.1 Causal link

To establish the causal link between increased imports of the product under investigation and the occurrence of serious injury to the GCC industry, the GCC-TSAIP examined and studied all other factors which might play a role in the presence of serious injury. These factors included export performance, a contraction in demand, a change in the pattern of consumption, developments in technology, and trade-restrictive practices.

Based on these findings, the GCC-TSAIP concluded that none of factors did not contribute to serious injury affecting the domestic industry, but the recent, sharp, and significant

[744] ibid, para 4.3.

[745] ibid, para 4.4.

[746] GCC-TSAIP, No (8/2S/2016) 'Termination of the Safeguard Investigation Against the GCC Imports of Ferrosilicomanganese Without Imposition of Definitive Measures and Refunding of Provisional Duties' (2017) Official Gazette, V12, adopted 3 May 2017.

increase in imports of the product under investigation in both absolute terms and relative to the production of GCC like and directly competitive products. Thus, it became clear to the GCC-TSAIP that there was enough evidence to justify the causal link between the increased imports and serious injury to the GCC domestic industry.[747]

6.2.8 Key Legal Issues Regarding the Investigation Process and Analysis

6.2.8.1 Receipt of complaint and announcement of investigation

Both the SA and Article XIX of GATT 1994 do not oblige or provide any details for how a member should receive an increased imports complaint or how investigating authorities should deal with the complaint from the date of receipt until the announcement of initiating an investigation. The first sentence of Article 3.1 of the SA, however, obliges investigating authorities to conduct an investigation 'pursuant to procedures previously established and made public in consonance with Article X of GATT 1994'.[748] Therefore, the GCC-TSAIP has to follow its published investigation procedures precisely. The GCC RoI outlines the process in three steps:

First, Article 3 provides that

> the GCC-TSAIP shall, within a period not exceeding thirty (30) working days starting from the first working day sub- sequent to the receipt of the complaint, examine the accuracy and adequacy of the evidence provided in the complaint and pre- pare an initial report that will be transmitted to the Permanent Committee together with its recommendations whether to reject the complaint or initiate the investigation.[749]

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[747] ibid, para 2.

[748] The first sentence of Article 3 provides that 'A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994; The Relevance of Article X of GATT 1994

Article X of GATT 1994 is the oldest WTO article to establish the transparency principles.

Article X is important because it deals with the core of the country's legal infrastructure. Simply stated, it is concerned with the quality and implementation of the administrative law regime. The United States proposed the Article for the first time in 1947. Article X was impacted by the legalisation of the US Administrative Procedures Act (APA). However, Article X remained negligible and was treated as supplementary to other essential GATT provisions.

However, upon the establishment of WTO in 1994, Article X was given priority and developed into an article on the essential provisions of the principles of transparency and due process.

Thus, Article X establishes the two main principles of the international trade system: the transparency of current published trade provisions and regulations and the uniform implementation of these laws.

Article X:1 requires 'all laws, regulations, judicial rulings, and administrative rulings of general application [(collectively 'measures') to be] published promptly in such manner as to enable governments and traders to become acquainted with them'. Article X:2 prohibits the implementation of such measures before legal publication. Article X: 3(a) requires all measures to be imposed in a 'uniform, impartial and reasonable manner.'

[749] RoI on SGM, art 3.

Second, the first sentence of Article 4 establishes that 'the Permanent Committee shall within a period not exceeding fifteen (15) working days from the date of receipt of the initial report take one of the following decisions…'.[750]

Third and finally, Article 9 first sentence states that 'the notice of the initiation of an investigation shall be published in the Official Gazette within ten (10) working days from the date on which the affirmative Permanent Committee decision was taken.'[751]

Pursuant to Article 3, and the first sentences of Articles 4 and 9 of the RoI on SGM, the period between filing the complaint and announcing the initiation of the investigation, should not exceed 55 working days. As the GCC-TSAIP received the complaint on 23 June 2016 and announced the initiation of the investigation on 3 October 2016, it actually took 72 days to fulfil this step, a 17-working day delay.

It is not clear where the delay occurred; however, the GCC-TSAIP acted in a manner inconsistent with Article 3 and the first sentences of Articles 4 and 9 of the RoI of the GCC CLSM. Moreover, GCC Members and their investigating body were at the added risk of violating their commitment towards the WTO under the first sentence of SA Article 3.1 due to their failure to initiate an investigation as per the published provisions. These complications raise questions about the transparency of the GCC-TSAIP when investigating, for the violation of Article 3.1 of the SA also implies the violation of Article X of GATT 1994.

6.2.8.2 Definition of the product under investigation

Both Article 2.1 of the SA and Article XIX: 1(a) of GATT 1994 define the product under investigation as a product is being imported into a state 'at increased quantities [that are] absolute or relative to domestic production and causes, or threatens to cause, serious injury to the domestic industry of the like or directly competitive products'. The product 'being imported' is the subject of the safeguard investigation'.[752] Determining this product is of legal importance due to the following aspects:

- It sets the basis for determining if imports increased in accordance with the meaning of Article XIX and Article 2.1 of the SA.

[750] RoI on SGM, art 4 (first sentence).

[751] ibid, art 9 (first sentence).

[752] SA, art 2.1; GATT 1994 art XIX: 1(a).

- It establishes the basis of "increase" which allows the nation to impose provisional SGM under Articles 6, 12.1(b) and 12.2 of SA.
- The same definition will apply in analysing 'serious injury' per Article 4.2(a) and causal link under Article 4.2(b).
- It determines the scope of 'unforeseen development analysis'. As mentioned in *US–Steel Safeguards*, determining unforeseen developments must proceed with respect to the specific products that will be subjected to the SGM, that is, the investigated product.
- It determines the scope of the SGM. According to both Article XIX and Article 2.1, the investigated product should be the same as the product on which the SGM are imposed.[753]

Upon carefully reviewing the entire GCC CLSM and RoI, however, it became evident that they provide no guidelines or provisions regarding how to define 'the product under investigation'. Even the WTO-SA does not contain any provisions or guidelines for the GCC-TSAIP to follow in this aspect.

The panel in *Dominican Republic–SGM (2012)* noted that

> the SA does not contain guidelines on how to define the product under investigation.' Furthermore, the panel also noted that there is no provision in the SA that governs the selection, description, analysis, and determination of the product being imported.[754]

Despite the lack of guidelines governing how to define the product under investigation, the GCC-TSAIP would be well advised to bear all these legal implications in mind and define the product of investigation in a manner that may function coherently under all these different scenarios.

In this underlying investigation, the product under investigation is defined as ferrosilicomanganese and classified under GCC Unified Tariff Code (72023000). However, the GCC-TSAIP did not define the product under investigation properly, as it relied on the allegation of the complainant. Essentially, the product under investigation was defined by either the industry or the country that was going to impose the SGM.

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[753] Piérola (n 592).

[754] Panel Report, 'Dominican Republic—SGM on Imports of Polypropylene Bags and Tubular Fabric' WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add 1, adopted 22 February 2012, para 7.177.

The industry, however, was the best party to define it. This approach is especially acceptable if the country is seeking protection from the increased imports of a single product rather than a group of products, since there is no debate about the scope of the SGM.

There is potential for the GCC-TSAIP to take advantage of this fact. To define the product under investigation, the industry should define its like product or directly competitive product against the product under investigation and show that there is competition between them. The Gulf Ferro Alloys Company (SABAYEK) failed to do so, as it did not cite its like or directly competitive product(s) that were suffering from increased imports of the product under investigation.

6.2.8.3 Definition of the GCC's domestic industry

The GCC-TSAIP did not define the GCC domestic industry properly for the reasons outlined in this section. The first step in the proper definition of the domestic industry is to provide a definition of a like product or a directly competitive product. Based on that definition, the GCC's producers would be identified, serious injury would be assessed, and SGM might be applied.[755]

> In the matter of the determination of domestic industry, the Panel noted that the text of Article 4(c) of the SA establishes that the domestic industry has to be defined by reference to 'products' that are 'like or directly competitive' with respect to imported product.[756]

In this case, the GCC-TSAIP did not provide any definition of a GCC like or directly competitive product, and it was difficult to interpret the basis of the GCC-TSAIP decision. Hence, the definition of 'GCC domestic industry' under both Article 3 of the GCC CLSM[757] and Article 4.1(c) of SA implies that the like or directly competitive product(s) should be identified. This means that the GCC domestic industry becomes partially about the definition of those two terms. Only producers of like or directly competitive product(s) should be included in the GCC domestic industry. Thus, no domestic industry could be defined without a definition of like or directly competitive product(s).

As stated in Article 3 of the GCC CLSM, the GCC domestic industry should be defined with reference to the domestic producers of like product(s) or directly completive product(s) as a

[755] Y-S Lee, SGM in World Trade: The Legal Analysis (3rd edn, Edward Elgar 2014).

[756] Panel Report, 'Dominican Republic—SGM on Imports of Polypropylene Bags and Tubular Fabric' WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add 1, adopted 22 February 2012, DSR 2012: XIII, 6775, para 7.191.

[757] Article 3 of the GCC CLSM determines the legal elements to define the GCC domestic industry as follows: 'The GCC domestic industry should be determined in reference to all producers of like or directly competitive products or alternatively in reference to the producers of like or directly competitive products representing a major proportion of the total GCC domestic industry.'

whole, or alternatively based on those whose production constitutes a major proportion of domestic production. Here, the GCC-TSAIP referred to the complainant, SABAYEK, as the representative of the GCC domestic industry, for the company manufactures a major proportion of the GCC production of like or directly competitive product(s).

This process of defining the GCC domestic industry does not align with the text of Article 3 of the GCC Common Law and Article 4 (1) of the SA, for it primarily relies on an alternative way rather than the original method to define the GCC domestic industry. Moreover, the GCC-TSAIP did not provide explanation as to why it used the alternative method, or the major proportion of GCC domestic production of like or directly competitive product(s) produced by the SABAYEK. In summary, the GCC-TSAIP did not define like or directly competitive product(s), thereby raising a question concerning the validity of the GCC domestic industry being considered in this case.

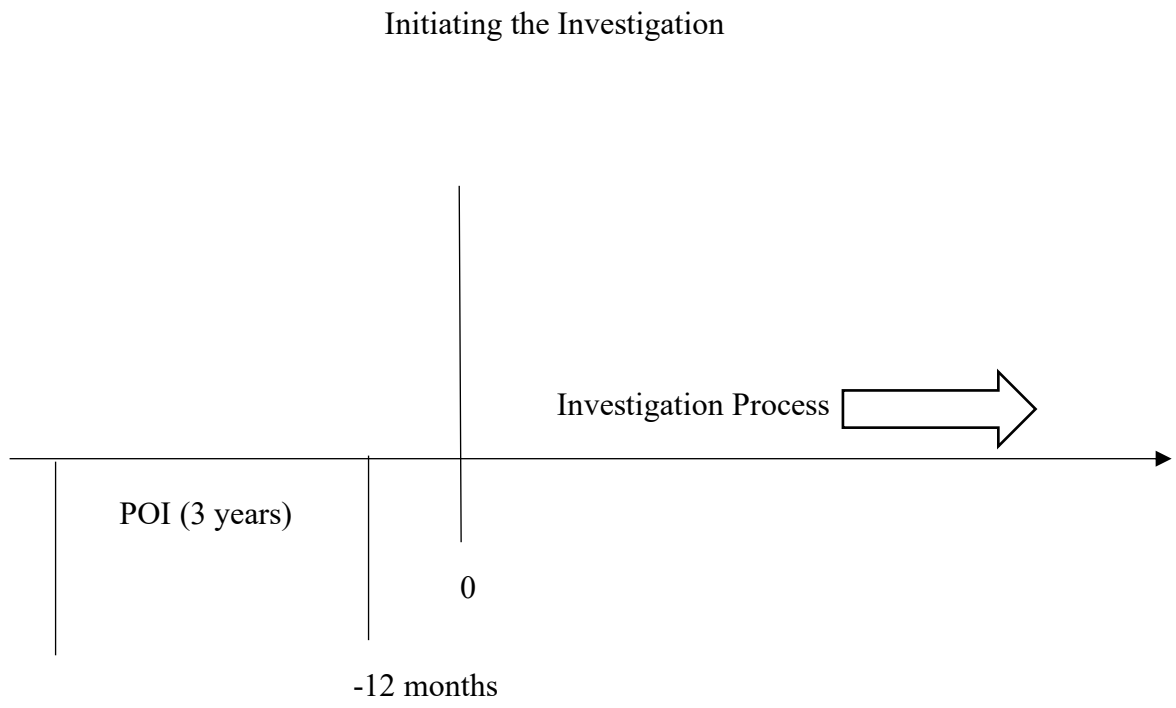
Finally, the GCC-TSAIP failed to employ the two principles of objective examination of positive evidence which should be used in serious injury analysis. The GCC domestic industry is the required basic factor for analysing 'serious injury'. This analysis examines the negative effect of increased imports of the product under investigation on the GCC domestic industry. The GCC-TSAIP in this case defined the GCC domestic industry based on Article 3 of the GCC CLSM.[758] It is unclear whether the GCC-TSAIP also used this definition to analyse injury, as there is published information on how it proceeded. There is, however, a question of whether the definition of the GCC domestic industry is legally meaningful, for the GCC domestic industry should be based on the definition of like and directly competitive products. The GCC-TSAIP did not provide details or mention like or directly competitive product. It simply mentioned the name of the company that initiated the complaint and produced the product.

6.2.8.4 Period of investigation

Firstly, the difference must be established between the period of investigation that the investigating authority required to finish the investigation, and the actual period of investigation (POI), which is the period during which all relevant facts and evidence occurred. Figure 2 explains the relationship between the POI and the period that the investigating authority requires to complete investigation process.

[758] Article 3 of the GCC CLSM provides that, for the purpose of safeguard investigations, the term 'GCC industry' shall mean the total Members producers as a whole of the like or directly competitive products operating within the territory of the Members, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

Figure 2: Defining the Period of Investigation in the Context of the Investigation Process



- The effect of GATT obligations
- Unforeseen developments
- Increased imports
- Serious injury
- Causal link

As Figure 2 shows, there is no limit on the time the investigating authority devotes to completing an investigation.[759] Since the POI sets up the period during which data and evidence should be collected and also determines for which arguments, the facts and conclusion should relate. Events that occurred before and after the POI are considered irrelevant. Thus, the POI is important in determining the right to impose SGM. Attention should be devoted to three elements: (1) the beginning of the POI, (2) the end of the POI and (3) the internal continuity within the POI.

Various determinations of these three elements would result in different outcomes; the SA and Article XIX of GATT 1994 do not contain any provisions or rules governing the

[759] By contrast, Article 5.10 of ADA and Article 11.11 SCM Agreement impose a maximum of one year or, in special circumstances, eighteen months.

determination of POI.[760] The same observation was evident in this study based on the review of the GCC CLSM and its RoI.

Based on the general requirements of the WTO case, however, it seems evident that the investigating authorities, including the GCC-TSAIP, should act accordingly. This study will verify whether the GCC-TSAIP considered these requirements during its determination of the POI.

1) The POI should focus on the most recent past.[761]

Article XIX and Article 2.1 of the SA establish that a determination is required on whether the product under investigation 'is being imported' in a way that causes serious injury. The Appellate Body in *Argentina–Footwear* noted that the use of the simple present tense, 'indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years—or, for that matter, during any other period of several years'.[762]

The language of Article 4.2(a) of the SA requires examining all factors that have bearing on the industry situation. The same requirement has been noted in Article 4.2(b), which governs the 'existence' of causal links and the exclusion of other factors that may also 'cause injury' to the domestic industry.

In summary, the language of all articles using the simple present tense supports the fact that the POI should focus on the recent past. With reference to other AD cases, the Appellate Body of *Mexico–Rice* upheld the panel decision, and in *Argentina–Footwear*, the use of the present tense regarding relevant AD-related provisions established that the POI should be based on the recent past. The appellate body indicated that 'the determination of whether injury exists should be based on data that provide indications of the situation prevailing when the investigation takes place'. Moreover, determining the POI based on the recent past makes sense because the purpose of imposing SGM is to deal with 'emergency' situations.

2) The POI should be long enough to fit the facts.

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[760] Panel Report, 'United States–Definitive SGM on Imports of Certain Steel Products' WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 11 July 2003, DSR 2003:VII, 3117, para 10.159; Panel Report, 'United States—Definitive SGM on Imports of Circular Welded Carbon Quality Line Pipe from Korea' WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/, DSR 2002:IV, 1473, para 7.196.

[761] Appellate Body Report, 'Argentina–SGM on Imports of Footwear' WT/DS121/AB/R, adopted 12 January 2000, DSR 2000: I, 515, para 130, fn 130 (original emphasis).

[762] ibid, para 130.

The Appellate Body in *Argentina–Footwear* indicated that examining the important trends over a five-year period was unreasonable and declared that the POI should concern only the 'recent past'.[763] The panel in *US–Lamb* relied on this approach and found that 'by basing its determination on events at the end of the investigation period, rather than those over the course of the entire investigation period, [the United States] analysed sufficiently recent data for making a valid evaluation of [the threat of serious injury].'[764]

The Appellate Body in the same case criticised the panel approach, however, and stated clearly that the recent past is important but cannot be separated from the entire POI. It clarified that an evaluation based on a 'most recent past' that is isolated from the entire POI may be misleading. Therefore, the Appellate Body concluded that Article 4.2(c) requires an evaluation of the most recent past in the context of the POI. Moreover, it indicated that the message from the *Argentina–Footwear* case is to compare the importance of the most recent past against the beginning of the POI. The Appellate Body concluded that 'the period of investigation must, of course, be sufficiently long to allow appropriate conclusions to be drawn regarding the state of the domestic industry.'[765]

Concerning the beginning and end points of the POI, the Appellate Body in *Mexico–Rice* asserted that the choice to conclude the POI more than fifteen months before the date of the initiation of the investigation was inconsistent with the AD Agreement (ADA). This is because Article 3.1 of the ADA requires comprehensively examining the current status of the domestic industry; the same is also true in cases where the investigating authority did not examine whether the outdated POI suggested by the petitioner was suitable for this purpose.[766] There is no reason that prevents apply this reasoning if the same circumstance arise in a safeguard case.

There is, therefore, a significant debate regarding the date of the end, and importance of the date of the end of the POI, as decisions about these factors contain data and facts of the most recent past. There is, however, no debate about the starting point of the POI.

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[763] ibid, para 130 and fn 130.

[764] Panel Report, 'United States–SGM on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia' WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, 4107, paras 7.192–3.

[765] Appellate Body Report, 'United States–SGM on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia' WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001: IX, 4051, para 138 and fn 88.

[766] Appellate Body Report, 'Mexico—Definitive Antidumping Measures on Beef and Rice, Complaint with Respect to Rice' WT/DS295/AB/R, adopted 20 December 2005, DSR 2005: XXII, 10853, paras 165–72; Panel Report, 'Mexico—Definitive Antidumping Measures on Beef and Rice, Complaint with Respect to Rice' WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007, paras 7.53–65.

In summary, the above legal debate on the WTO case leads this study to conclude that using a relatively long POI should pose no problems as long as the analysis includes the 'most recent past' period. This period should be a portion of the entire POI, but not its entirety. The POI ought not end more than fifteen months before the date of initiating of the investigation. Indeed, in the absence of clear guidelines on the determination of the POI, Sykes noted that the five-year POI, which is standard US practice, seems to function well.[767]

In this case, the GCC-TSAIP determined the period of investigation to be from 2012 to 2015 based on the complaint raised by SABAYEK. The complaint stated that there was a sharp and sudden increase in the imports of products under investigation during 2012–2015. This approach was acceptable as a starting point to determine the POI. Nevertheless, the GCC-TSAIP should not be passive recipients of suggested GCC domestic industries. It must ensure that the POI is consistent with the general requirements drawn from WTO case law.

In this case, it seems as if the GCC-TSAIP adhered to the WTO general requirements regarding the POI:

- The GCC-TSAIP determined the POI, which focused on the most recent past.
- When imposing provisional SGM, the GCC-TSAIP based its conclusion on the entire POI (2012-2015) and focused its analysis on 2015.
- The POI should have ended not more than fifteen months from the initiation of the investigation. The end of POI was 31 December 2015, and the investigation was initiated on 3rd October 2016.
- The entire POI period seems adequate to reach a meritorious final decision, as it offers the opportunity to study the increased imports and their injurious effect on the GCC's domestic industry over a long period of time; deterioration thus has to be due to a 'sudden and sharp increase in product imports under investigation' rather than other factors.

Although it seems here that the POI fulfilled all requirements, the GCC-TSAIP limited this timeframe to collecting the evidence and analysing the serious injury. This decision is in clear conflict with the purpose of the investigation period, which is to collect evidence to reach a final conclusion on the whole process, including unforeseen developments; increased imports; the effect of GATT obligations; serious injury; and causal link.

[767] Sykes, The WTO Agreement on Safeguards (n 524).

6.2.8.5 Provisional SGM

Under Articles 71-1[768] and 73 of the RoI on SGM,[769] and consistent with the last sentences of Article XIX2[770] of GATT 1994 and Article 6 of SA,[771] the GCC-TSAIP should meet the following substantial requirements to justify its recommendation to impose provisional SGM:

- An increase in imports of the product under investigation in absolute and relative terms to the GCC domestic industry;
- Serious injury to the GCC domestic industry;
- Unforeseen developments;
- The effect of GATT obligations;
- A causal link between the first and second bullets in this list;
- Critical circumstances that can push the GCC domestic industry to go bankrupt or to close.

The GCC-TSAIP seemed to apply most of these requirements to impose safeguards, as cited in Articles 71-1, 71-2, and 73 of the RoI on SGM.[772] Nonetheless, the GCC-TSAIP failed to

[768] 'A safeguard measure may be applied to a product being imported irrespective of its source, if it is established that such product is being imported in such increased quantities, absolute or relative to Members production, and under such conditions as to cause or threaten to cause a serious injury to the GCC industry that produced like or directly competitive products.' RoI of Safeguards Measures, art 71.

[769] 'When there are critical circumstances, the Permanent Committee, upon a recommendation from the GCC-TSAIP, may adopt provisional safeguard duties, if it is determined that the product under investigation is being imported in such increased quantities, absolute or relative to production, and under such conditions as to cause or threaten to cause serious injury to the GCC industry and that the delay in taking action would cause damage that would be difficult to repair.' RoI of Safeguards Measures, art 73.

[770] The last sentence of Article XIX2 of GATT 1994 stipulates that 'In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.'

[771] 'In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Articles 2 through 7 and 12 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 2 of Article 4 does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Article 7.' SA, art 6.

[772] Article 71.1 of the RoI on SGM provides that 'A safeguard measure may be applied to a product being imported irrespective of its source, if it is established that such product is being imported in such increased quantities, absolute or relative to Members production, and under such conditions as to cause or threaten to cause a serious injury to the GCC industry that produced like or directly competitive products.' Article 71.2 of the RoI on SGM provides confirms that 'A determination of whether the increase of imports has caused or are threatening to cause serious injury to the GCC industry shall be based on objective evidence and facts and an existence of a causal link between increased imports and serious injury or threat thereof, and by the evaluation of all relevant, objective and quantifiable factors having a bearing on the situation of the GCC industry, taking into consideration the following factors:

apply these requirements to the GCC domestic industry and instead based their application on in the complainant's domestic industry, as written in the Official Gazette, hence violating both Articles. There is nothing in the GCC CLSM and its RoI, or even the published Gazette, to indicate that the provisional SGM could be imposed based on the complainant's domestic industry.

Moreover, the GCC-TSAIP violated the requirements cited in WTO case law; as the Appellate Body in *Argentina–Footwear* indicated

> It is not enough for an investigation to show simply that imports of the product this year were more than last year—or five years ago. Again, and it bears repeating, not just any increased quantities of imports will suffice. There must be 'such increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure.[773]

The GCC-TSAIP failed to evaluate all relevant, objective, and quantifiable factors with a bearing on the GCC industry, as listed in Article 71-2(a) and (b) of the RoI on SGM:

a. The ratio and volume of the increase in imports of the product under investigation, in absolute or relative terms to GCC production;
b. The impact of such increased imports on the GCC industry, including sales level, production, productivity, capacity utilisation, inventory, profits, losses, and labour and market share.

The GCC-TSAIP failed to meet these requirements for the following reasons. First, the GCC-TSAIP did not evaluate all relevant, objective, and quantifiable factors with a bearing on the GCC domestic industry. It evaluated these factors based on the complainant's domestic industry. Secondly, the GCC-TSAIP failed to evaluate two of the listed factors—capacity utilisation and productivity—and indicated in the published Official Gazette that it had only evaluated 'most' but not 'all' of them (see Table 5 above). This action not only violated the legal requirements of Article 71-2(a and b) of the RoI on SGM, which stipulates the inclusion of all listed relevant, objective, and quantifiable factors with a bearing on the

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a. The ratio and volume of increase in imports of the product under investigation, in absolute or relative terms to GCC production.

b. The impact of such increased imports on the GCC industry, including sales level, production, productivity, capacity utilization, inventory, profits, losses, labors and market share.' ; Article 73 the RoI on SGM stipulates that 'When there are critical circumstances, the Permanent Committee, upon a recommendation from the GCC-TSAIP, may adopt provisional safeguard duties, if it is determined that the product under investigation is being imported in such increased quantities, absolute or relative to production, and under such conditions as to cause or threaten to cause serious injury to the GCC industry and that the delay in taking action would cause damage that would be difficult to repair.'

[773] Appellate Body Report, 'Argentina – SGM on Imports of Footwear' WT/DS121/AB/R, adopted 12 January 2000, DSR 2000: I, 515, para 131.

GCC domestic industry, but also violated the GCC countries' obligations under Article 4.2(a) of the SA.[774] The panel in *Argentina–Footwear (2000)* indicated that reading Article 4.2(a) literally means that all the listed factors, including 'changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment', must be evaluated in every investigation. In addition, the panel stated that all other relevant factors with a bearing on the industry must also be evaluated. As the panel found that Argentina had not evaluated two of the listed factors—capacity utilisation and productivity—the panel concluded that Argentina's investigation was not consistent with the requirements of Article 4.2(a).[775]

6.2.8.6 Causal link

The GCC-TSAIP relied on Article 71-3 of the RoI on SGM to determine the causal link[776] and applied the cited requirements in a literal manner. The GCC-TSAIP cited other factors that may contribute to serious injury as export performance, a contraction in demand, or a change in the patterns of consumption, developments in technology, and trade-restrictive practices. Since the GCC-TSAIP applied the requirements to the complainant's industry status rather than to the entire GCC domestic industry, however, the causal link analysis provided did not meet the purpose of assessing safeguards.

Moreover, the GCC-TSAIP failed to provide an analysis of the conditions of competition in the GCC market regarding ferrosilicomanganese, namely, the differences between imports and the GCC domestic market. Hence, the GCC country violated its commitment towards the WTO under Article 4.2(b) of the SA.[777]

With respect to Article 4.2(b) of the SA, which contains the following requirements of causation, the panel in *Argentina–Footwear* interpreted the provisions by stating,

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[774] With respect to the requirement relating to 'serious injury', Article 4.2(a) of the SA provides: 'In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, [...] the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.'

[775] Panel Report, 'Argentina–SGM on Imports of Footwear' WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000: II, 575, para 134.

[776] 'The existence of the causal link between the increased imports of the product under investigation and serious injury or threat thereof shall be established. When factors other than increased imports are causing injury to GCC industry at the same time, such injury shall not be attributed to increased imports.' RoI on SGM, art 71.3.

[777] With respect to the requirement of causation, Article 4.2(b) of the SA provides that a determination of serious injury 'shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports'.

> We will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.[778]

6.2.8.7 Unforeseen developments and the effect of GATT obligations

As established in Chapter 6, each Member is expected to impose preliminary or definitive SGM in accordance with both Article XIX of GATT 1994 and SA. This chapter demonstrated that GCC CLSM and its RoI do not comply with the requirement of Article XIX: 1(a) of GATT 1994, which states that a safeguard measure may be imposed,

> if, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic producers in that territory of like or directly competitive products.[779]

The GCC-TSAIP evidently did not act consistently with the Article. It did not demonstrate unforeseen developments or analyse the effect of GATT obligation before imposing preliminary SGM and announcing them in the published Official Gazette; it also did not offer findings or explanations about 'unforeseen developments'.

The same question arose in *Dominican Republic–SGM*. The complainants alleged that the Dominican Republic had violated Article XIX: 1(a) of GATT 1994 in applying provisional and definitive SGM. The Dominican Republic declared that such a claim was not relevant in the context of SA provisions; however, the panel upheld the complainant's claim regarding unforeseen developments:

> The Appellate Body has made it clear that Article XIX of GATT 1994 and the SA must be applied cumulatively, because the 'unforeseen developments' condition is one whose

[778] Panel Report, 'Argentina – SGM on Imports of Footwear' WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000: II, 575, para 8.229.

[779] GATT 1994, art XIX: 1(a).

existence must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with Article XIX of GATT 1994.[780]

Unforeseen developments must be demonstrated before the safeguard measure is applied; this demonstration must be featured in the published report of the competent authority, and this public report must rationalise why the factors mentioned therein function as 'an unforeseen development'.[781] The report must also explain how the unforeseen developments resulted in the increase in imports causing the serious injury in question.'[782]

6.2.8.8 Critical circumstances

The GCC-CLADCSM and its RoI define 'critical circumstances' as 'such conditions as to cause or threaten to cause serious injury to the GCC industry and that the delay in taking action would cause damage that would be difficult to repair.'[783] Indeed, WTO provisions agree with the same generally, and Fernando Piérola noted that 'a critical circumstance refers to an abrupt situation of immediate impact on demand or import supply, which would lead to the imminent displacement of domestic products unless the safeguard was taken'.[784]

In imposing provisional SGM in response to the imports of certain steel products, the EU Commission provided that '[European] Union steel producers are globally in a situation of threat of injury and serious injury is clearly imminent. For some individual product categories, there are already indications pointing towards serious injury. A further increase of imports will likely have significant adverse effects on the economic situation of the industry overall.'[785]

The GCC-TSAIP, however, defined the critical circumstances as the deterioration of economic indicators and the worsening financial conditions of the complainant industry. Its decision, sent to the board of directors and dated 5 February 2015, confirmed the suspension of production and closure of a plant in question, but offered no resolution.

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[780] *Dominican Republic—SGM on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add 1, adopted 22 February 2012, DSR 2012: XIII, 6775, para 7.66.

[781] Appellate Body Report, 'United States–SGM on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia' WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001: IX, 4051, paras 72-73.

[782] Appellate Body Report, 'United States–Definitive SGM on Imports of Certain Steel Products' WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117, paras 316-323; Panel Report, 'Dominican Republic–SGM on Imports of Polypropylene Bags and Tubular Fabric' WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add 1, adopted 22 February 2012, DSR 2012:XIII, 6775, para 7.128.

[783] RoI on SGM, art 73.

[784] Piérola (n 28) 'Temporal Application and Provisional Safeguards'.

[785] European Commission, 'Imposing Provisional SGM with Regard to Imports of Certain Steel Products' L 181 Official Journal of the European Union 39, para 82.

The GCC-TSAIP decision depended on the internal situation of the complainant industry but did not fulfil the legal requirement to define critical circumstances. Hence, the GCC-TSAIP's interpretation of 'critical circumstances' from Article 73 of the RoI on SGM rendered the GCC countries' actions in clear conflict with the meaning of the last sentences of Article XIX2 of GATT 1994 and Article 6 of the SA.

6.2.8.9 Reasoned and adequate findings, conclusions, explanations, and analyses

As indicated in Chapter 6, investigating authorities are obliged by the last sentence of Articles 3.1[786] and 4.2 of the SA[787] to announce the investigation findings and conclusion along with adequate findings and analyses. Articles 22[788] and 24[789] of the RoI of the GCC CLSM establish that the GCC-TSAIP only has to publish a summary of the reasons the led to the conclusion. In light of this clear conflict between the two laws, a close look at issues of the published Official Gazette on this case reveals presence of reasonable detail about the basis of imposing provisional measures, which may indicate a good effort by the GCC-TSAIP to consider the obligation of the SA.

The GCC-TSAIP, however, only adheres to the literal meaning of Article 22 of the RoI on SGM when it provides only a summary of why the investigation was terminated and concludes that the collected provisional duties should be refunded, without devoting any attention to its obligation under Article 3.1 of the SA.

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[786] 'The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.' SA, art 3.1.

[787] Article 4.2 of the SA also provides that 'the competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined'.

[788] Article 22 of the RoI on SGM provides that:

'Upon the decision of the Permanent Committee to terminate the investigation without imposing measures, the GCC-TSAIP shall notify the complainant and publish a public notice in the Official Gazette along with the decision, including the following information:

Identity of the complainants and the domestic products that requested the investigation;

Identifying the products under investigation;

Reasons for termination.'

[789] Article 24 of the RoI on SGM provides that, 'upon the decision to impose measures, whether provisional or definitive, the GCC-TSAIP shall notify the complainant and issue a public notice of the application of the measures in the Official Gazette, which shall contain the following information, taking into consideration confidentiality requirements:

The identity of the parties' subject to the measures

The identification of the products subject to the measures

A summary of the reasons leading to the imposition of measures

The form, level and duration of the measures' application'

In summary, the failure of the GCC-TSAIP to publish the full details of the final conclusions of its investigation may raise questions about the transparency and fairness of this and other ongoing investigations.

6.2.8.10 The GCC's substantial interests as exporters of the products; adequate opportunity for consultation prior to the adoption of the definitive measure

Per Article 12.3 of the SA,[790] the GCC Member States have the right to immediate notification complete with relevant information and to be provided with adequate opportunity for prior consultation with those members with a substantial interest as exporters of the concerned product within 10 days from the date of the circulation of this notification.[791]

Under Article XIX: 2 of GATT 1994,[792] the GCC Member States failed to give notice in writing to WTO members in advance as may be practical and to afford WTO Members with substantial interest as exporters of the concerned product the opportunity to consult on the proposed action.

6.3 Case 2: SGM against GCC Imports of Rolled Iron or Steel (Pre-Painted Flat Steel)

On 31 March 2016, the GCC-TSAIP received a complaint by Universal Metal Coating Company Ltd. The complainant alleged that, due to the unforeseen development of flat rolled iron steel of 600 mm width or more, painted V or plastic coated and other pre-painted flat steel that is classified under the GCC Unified Tariff Code, the product was imported into the GCC market in increased quantities in both absolute terms and relative to the GCC domestic production of like or related competitive products; this increase, they alleged, resulted in

[790] 'A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under Article 12.2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in Article 8.1.' SA, art 12.3.

[791] WTO, WTO doc G/SG/N/7/ARE/1, G/SG/N/11/ARE/1, G/SG/N/7/BHR/1, G/SG/N/11/BHR/1, G/SG/N/7/KWT/1, G/SG/N/11/KWT/1, G/SG/N/7/OMN/1, G/SG/N/11/OMN/1, G/SG/N/7/QAT/1, G/SG/N/11/QAT/1, G/SG/N/7/SAU/1, G/SG/N/11/SAU/1., 'Notification under Article 12.4 of the Agreement on Safeguards before taking a provisional measures referred to in Article 6, Notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards , Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom Saudi Arabia, and the United Arab Emirates (Cooperation Council for the Arab States of the Gulf 'GCC') (Ferrosilicomanganese)'.

[792] 'Before any contracting party shall take action pursuant to the provisions of Article XIX:1, it shall give notice in writing to the contracting parties as far in advance as may be practicable and shall afford the contracting parties and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under Article XIX:1 may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.' GATT 1994, art XIX:2.

serious injury to the GCC domestic industry. The GCC-TSAIP initiated the investigation on 9 June 2016.[793]

6.3.1 The GCC Domestic Industry

The complainant is Universal Metal Coating Company Ltd from Saudi Arabia, which produces a major proportion of the total GCC domestic production of the like or directly competitive product. Therefore, the company is the representative of the GCC domestic industry under Article 3 of the GCC CLSM.[794]

6.3.2 Allegations of Increased Imports and Serious Injury

The GCC industry claimed that the product under investigation was imported to the GCC market in increased amounts, both in absolute terms and relative to GCC production of the like product during the 2012 to 2015 period. The complaint explained that global exportation to the GCC market had increased by 55% in 2015 compared to 2012 and had increased relative to domestic production by 100% during the same year.[795] The domestic industry alleged that the increased imports negatively affected the GCC domestic industry and caused serious injury evident in a number of economic inductors, such as a decline in the volume of production and a drop in capacity utilisation.[796]

6.3.3 The Investigation Procedure

Once the complaint was raised by GCC's domestic industry, the GCC-TSAIP examined and verified it. The GCC-TSAIP wrote a report about the results and sent it to the Permanent Committee, which provided approval to initiate the investigation and published an announcement in the Official Gazette on 9 June 2016;[797] the period of investigation for injury covered calendar years 2012–2015. The Gazette stated that the investigation process should

[793] GCC-TSAIP 'Concerning the Initation of SGM Against the GCC Imports of Rolled Iron or Steel, 600mm Width or More, Painted, Varnished or Plastic Coated and Other (Pre-Painted Flat Steel)' (2016) Official Gazette, V7, adopted in 19 th June 2016, para 1.; World Trade Organisation, WTO doc G/SG/N/6/BHR/1, G/SG/N/6/KWT/1 G/SG/N/6/OMN/1, G/SG/N/6/QAT/1 G/SG/N/6/SAU/1, G/SG/N/6/ARE/1, 'Notification under Article 12.1(A) of the Agreement on Safeguards on initiation of an investigation and the reasons for it, Kingdom of Bahrain, the State of Kuwait, The Sultanate of Oman, The State of Qatar, Kingdom Saudi Arabia, and the United Arab Emirates (Cooperation Council for the Arab States of the Gulf 'GCC') (Flat-rolled products of iron or non-alloy steel)'.

[794] Article 3 of GCC CLSM states that 'for the purpose of safeguard investigations, the term GCC industry shall mean total Members producers as a whole of the like or directly competitive products operating within the territory of Members, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products'; GCC-TSAIP, para 2.

[795] ibid, para 4.

[796] ibid, para 5.

[797] ibid , para 6.

be finished within one year but could be extended to 18 months if special circumstances arose.[798]

Questionnaires were sent to the foreign producers/exporters, GCC producers, and GCC importers. The Gazette announcement invited interested parties not known to the GCC-TSAIP to request questionnaires within 10 days of the announcement's publication.[799]

6.3.4 Final Determination and Imposition of Definitive SGM

The GCC-TSAIP announced that the end of the investigation, and imposed definitive measures, would occur within three years, starting from 15 May 2018.[800] The measures would take the form of specific duties, as detailed in (Table 6).[801]

Table 6: Specific Safeguard Duties Applied over a Three-Year Period Against GCC Imports of Pre-Painted Flat Steel

Duration	Specified duty value (USD/tonne)
First year	169
Second year	153
Third year	137

The GCC-TSAIP justified this decision by declaring a causal link between the increased imports of the product under investigation and the serious injury to the GCC domestic industry for like and related competitive products. The GCC-TSAIP insisted that no other factors could have contributed to such an injury and the sole reason for the injury was the sudden and sharp increase of imports of the product under investigation.[802]

[798] ibid, para 6.1.

[799] ibid, para 6.2.

[800] GCC-TSAIP, No (9/1S/2017) 'Imposition of Definitive SGM Against the GCC Imports of Rolled Iron or Steel, 600mm Width or More, Painted, Varnished or Plastic Coated and Other (Pre-Painted Flat Steel)' (2018) Official Gazette, V15, adopted 19 April 2018, para 2.

[801] ibid, para 3.

[802] ibid, para 4.2.

6.3.5 Key Legal Issues Regarding the Investigation Process

6.3.5.1 Receipt of complaint, announcement of investigation, completed investigation, and timelines

Like the previous case, the GCC-TSAIP and Permanent Committee continued to violate the GCC Common Law regarding initiating and publishing the notice of the initiation of investigation in this case. Information on the investigation and publication of notice should have been issued by 16 May 2016 rather than 9 June 2016, meaning a delay of 18 days. It seems that both the GCC-TSAIP and the Permanent Committee faced difficulties in adhering to the provision, and that the delay was not a coincidence. It also seemed that GCC-TSAIP suffers from difficulty in adhering to all timelines identified in GCC CLSM and its RoI in this proceeding, for it took 23 months rather than the permitted 18 to reach final determinations.[803] The GCC countries sent notification on 15 June 2017 to the WTO Committee of a proposal to impose SGM against GCC imports of rolled iron or steel.[804] The GCC-TSAIP announced imposing definitive SGM only on 15 June 2018, i.e., 11 months after informing the WTO.

6.3.5.2 Definition of domestic industry

The GCC-TSAIP seemed to continue to use the same approach to define the GCC domestic industry in this case as the prior one; the approach, to reiterate, relies on assumptions that the complainant company represents the major proportion of the GCC domestic industry that produces the like or directly competitive product(s). The GCC-TSAIP did not follow the implied obligations cited in Article 3 of the GCC Common Law on Safeguards Article 4.1(c) of A, again like the previous case.

[803] 'The investigation shall be completed within twelve (12) months from its date of initiation. The Permanent Committee may in special circumstances extend this period for no more than six (6) months.' RoI on SGM, art 23.

[804] WTO, WTO doc G/SG/N/10/ARE/1, G/SG/N/11/ARE/2, G/SG/N/10/BHR/1, G/SG/N/11/BHR/2 G/SG/N/10/KWT/1, G/SG/N/11/KWT/2, G/SG/N/10/OMN/1, G/SG/N/11/OMN/2, G/SG/N/10/QAT/1, G/SG/N/11/QAT/2, G/SG/N/10/SAU/1, G/SG/N/11/SAU/2, 'Notification under Article 12.4 (B) of the Agreement on Safeguards on finding a serious injury or threat caused by increase imports, notification of a proposal to impose measures notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards. Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom Saudi Arabia, and the United Arab Emirates (Cooperation Council for the Arab States of the Gulf 'GCC') (Flat-rolled products of iron or non-alloy steel)'.

6.3.5.3 The period of investigation (POI)

The GCC-TSAIP defined the period of investigation based on the suggestion of the GCC's domestic industry cited in the complaint. A cross-check of the definition of the POI against the WTO case law requirements again found that the GCC-TSAIP violated the definition of a POI. It limited it only to analysing the serious injury and did not disclose POI to analyse other required legal parameters such as unforeseen developments, increased imports, and so forth.

6.3.5.4 Final determination and imposition of SGM

To impose definitive SGM, the GCC-TSAIP should be able to show that there were increased imports of the product under investigation in absolute or relative terms to GCC production, and that such increases were due to unforeseen developments. The GCC domestic industry have demonstrated that it suffered serious injury, and a causal link between the increased imports and the serious injury.

6.3.5.5 The GCC-TSAIP's continuing neglect of unforeseen development requirements and the effects of GATT obligations

The GCC-TSAIP's conclusions relied only on the presence of 'increased imports' of the product under investigation, the presence of 'serious injury' in the concerned GCC domestic industry, and a 'causal link' between these two factors. The GCC-TSAIP did not identify 'unforeseen development' as a condition that should be met; therefore, the GCC continued to violate its WTO obligation under GATT Article XIX: 1 (a).

The complaint does, however, mention the presence of 'unforeseen development' in the following phrase: 'The GCC domestic industry, according to the provisions of Article (2-2) of regulation, alleging that as result of unforeseen development the product of Flat Rolled Iron or Steel 600 mm width or more…'.[805] The GCC-TSAIP identified these 'unforeseen developments' only in a proposal sent to the WTO Committee on Safeguards, the purpose of which was to detail the reasons behind the GCC Member States' intentions to impose SGM against the imported product. These unforeseen developments are

- The increased rate of world steel production, especially from China.

[805] GCC-TSAIP 'Concerning the Initation of SGM Against the GCC Imports of Rolled Iron or Steel, 600mm Width or More, Painted, Varnished or Plastic Coated and Other (Pre-Painted Flat Steel)' (2016) Official Gazette, V7, adopted 19 June 2016, para 1.

- The decrease of demands for steel concomitant with SGM imposed by number of WTO members; hence other countries with excess were exporting their supply to GCC market, where there were no SGM in force.
- The retraction of many currencies against the US dollar.
- The recession in China's economy, which bore a negative impact on the economies of other countries with excessive steel supplies.[806]

Notably, the final determinations and imposing SGM were only based in presence of a causal link between the increased imports of the product under investigation and the serious injury to the GCC domestic industry and never refereed to unforeseen developments leading to such increase in imports.

6.3.5.6 Reasoned and adequate findings, conclusions, explanations, and analyses

The GCC-TSAIP fulfilled the requirements of Article 24 of the RoI on SGM in the literal sense when it published the final report. The report, however, contains only the result, without details, reasons, or explanations. At the same time, the GCC-TSAIP continued to violate its obligations under the last sentence of Article 3.1 and Article 4.2 of the SA.

6.4 Case 3: Definitive Safeguard Investigation of GCC Imports of Prepared Additives for Cements, Mortars, or Concretes (Chemical Plasticizers)

6.4.1 Introduction and Background

This case concerns the safeguard investigations conducted on the GCC's increased imports of prepared additives for cements, mortars, or concretes (i.e., chemical plasticizers). The investigations were terminated pursuant to an investigation carried out by GCC-TSAIP due to the absence of serious injury.

[806] World Trade Organisation, WTO doc G/SG/N/10/ARE/1, G/SG/N/11/ARE/2, G/SG/N/10/BHR/1, G/SG/N/11/BHR/2 G/SG/N/10/KWT/1, G/SG/N/11/KWT/2, G/SG/N/10/OMN/1, G/SG/N/11/OMN/2, G/SG/N/10/QAT/1, G/SG/N/11/QAT/2, G/SG/N/10/SAU/1, G/SG/N/11/SAU/2, 'Notification under Article 12.4 (B) of the Agreement on Safeguards on finding a serious injury or threat caused by increase imports, notification of a proposal to impose measures notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards. The Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom Saudi Arabia, and the United Arab Emirates (Cooperation Council for the Arab States of the Gulf 'GCC') (Flat-rolled products of iron or non-alloy steel)', para 1(h).

6.4.2 Initiation of the Safeguard Investigation

The GCC-TSAIP announced on 20 September 2017 that it had received a properly documented complaint from Methanol Chemicals Company (CHEMANOL) of the Kingdom of Saudi Arabia that alleged unforeseen developments in the imports of prepared additives for cements, mortars, or concretes (i.e., chemical plasticizers) in liquid or powder form, using different commercial names, like SNF/NSF/PNS, SMF or PCE. The product under investigation was classified under the GCC Unified Tariff Code item 38244000 and imported into the GCC market both in large quantities in absolute terms and relative to GCC domestic production, resulting in a claim of serious injury to both the GCC industry for like and directly competitive products.[807]

6.4.3 The GCC Domestic Industry

CHEMANOL, from Saudi Arabia, represented the domestic industry; it produces a 'major proportion' of the total GCC production of 'like or competitive products.[808] It is worth noting that the complainant company was used to define the domestic industry.

6.4.4 GCC Like Products

The like products in this case were also prepared additives for cements, mortars, or concretes (i.e., chemical plasticizers) used for all types of concrete, including ready-mix, precast, pre-stressed, and those employed in areas of congested reinforcement where higher workability is beneficial by reducing the water in concrete. This reduction improves permeability and durability. These categories within the product include marine, gunite, architectural, special, and pumpable concrete.[809]

6.4.5 Increased Imports and Serious Injury

CHEMANOL, the GCC industry, provided evidence that imports of the product increased in absolute terms and relative to GCC production during 2012–2016.[810] It alleged that this increase led to serious injury of like or directly competitive products in the following forms:

[807] GCC-TSAIP. No (11/3S/2017) 'Initiation of Safeguard Investigation Against the GCC Imports of Prepared Additives for Cements, Mortars or Concretes' (Chemical Plasticizers) (2017). Official Gazette, V14, adopted in 20 September 2017, para 1.

[808] ibid, para 2.

[809] ibid, para 4.

[810] ibid, para 5.

- A decrease in the volume of production and rate of capacity utilisation;
- A decline in the volume of sales and the market share, and an increase in inventory volume;
- A decline in the rate of return on investment and an inability to grow;
- Price undercutting between the GCC like and imported products;
- A decline in revenues and cash flows.[811]

6.4.6 The Investigation Procedure

Upon receiving the complaint lodged by the GCC domestic industry, the GCC-TSAIP examined and verified the submitted information. Next it prepared an initial report and sent it to the Permanent Committee. Finally, the Permanent Committee instructed the GCC-TSAIP to commence an investigation and to publish an announcement regarding that investigation in the Official Gazette on 20 September 2017.[812] The GCC-TSAIP also sent notification to the WTO Committee on Safeguards regarding the investigation initiation on 3 October 2017.[813] The investigation was anticipated to last one year but could be extended to eighteen months. The injury investigation period or POI was from 2012 until the first half of 2017.[814] In order to collect and obtain the necessary information for the investigation, the GCC-TSAIP sent questionnaires to all known foreign producers/exporters, GCC producers, and importers, and invited interested parties who made themselves known within ten days of the Official Gazette's announcement to complete it too.[815]

6.4.7 Final Determination

On 15 May 2019, the GCC-TSAIP announced the end of the investigation and the GCC's Ministerial Committee approval to impose 'definitive SGM' against the product under investigation for three years, starting from 21 June 2019.[816] On 5 April 2019, the GCC

[811] ibid, para 6.

[812] ibid, para 7.

[813] WTO, WTO doc G/SG/N/6/BHR/3'Notification under Article 12.1(A) of the 'Agreement on Safeguards on Initiation of an Investigation and the Reasons for It' The Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom Saudi Arabia, and the United Arab Emirates (Cooperation Council for the Arab States of the Gulf ('GCC') (Chemical Plasticizers)' 3, para 1.

[814] GCC-TSAIP, para 8.

[815] ibid, para 9.

[816] GCC-TSAIP. No (20/3S/2018) 'Imposition of Definitive SGM Against the GCC Imports of Prepared Additives for Cements, Mortars or Concretes (Chemical Plasticizers)' (2019) Official Gazette, V21, adopted in 15 May 2019, para 2;

Members sent notification to the WTO Committee on Safeguards that detailed proposed definitive duties per Article 12.B of SA.[817] The definitive measures consisted of an additional specific duty of 221 USD/tonnes applicable to imports exceeding the annual quota of 250,354 tonnes.[818] For liberalisation purposes, the duty would decrease annually, as indicated in Table 7):[819]

Table 7: Specific Duty Value (USD/Tonne) Over a Three-Year Period Against GCC Imports of Chemical Plasticizers

Duration	Specific duty value (USD/Tonne)
First year	221
Second year	199
Third year	177

6.4.8 Reasons for Imposing Definitive SGM

The GCC-TSAIP's investigation showed that the GCC industry had suffered from serious injury that manifested as a sharp decline in sales and market share, and the deterioration of the economic and financial factors of the GCC industry.[820] This was concomitant with the presence of a recent, sudden, sharp, and significant increase in GCC imports of the product under investigation.[821] Moreover, there were no other factors that could have caused serious

World Trade Organisation, WTO doc G/SG/N/8/ARE/2, G/SG/N/8/BHR/2 G/SG/N/8/KWT/2, G/SG/N/8/OMN/2 G/SG/N/8/QAT/2, G/SG/N/8/SAU/2, 'Notification under Article 12.4 (B) of the 'Agreement on Safeguards on Finding a Serious Injury or Threat Caused by Increase in Imports in the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom Saudi Arabia, and the United Arab Emirates (Cooperation Council for the Arab States of the Gulf) (Chemical Plasticizers)'.

[817] WTO, WTO doc G/SG/N/10/ARE/2, G/SG/N/11/ARE/3,G/SG/N/10/BHR/2, G/SG/N/11/BHR/3 G/SG/N/10/KWT/2, 'Notification under Article 12.4 (B) of the Agreement on Safeguards on finding a serious injury or threat caused by increase imports, notification of a proposal to impose measures notification pursuant to Article 9, footnote 2 of the 'Agreement on Safeguards' in the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom Saudi Arabia, and the United Arab Emirates (Cooperation Council for the Arab States of the Gulf)' 'GCC') (Chemical Plasticizers).

[818] These duties will not be applied against the GCC imports originating from developing countries, listed in the paragraph no. (5), whose share of imports in GCC imports of the product under investigation is less than 3% individually and less than 9% collectively.

[819] GCC-TSAIP, para 3.

[820] ibid, para 4.2.

[821] ibid, para 4.1.

injury other than the increased imports, and there was sufficient evidence of a causal link between the increased imports and the serious injury.[822]

6.4.9 Key Legal Issue and Analysis

6.4.9.1 Complaint receipt and announcement of investigation

In this safeguard investigation, the Gazette announcement omitted the date that the GCC-TSAIP received, and thus it is unclear if there was a violation of legal timing, as had occurred the other two cases. The announcement simply stated, 'The GCC-TSAIP received a properly documented complaint submitted by the GCC industry, according to the provisions of Article (2)'.[823] The announcements of the two other cases under discussion by this chapter clearly published the dates of complaint.

Article 9 of the RoI on SGM, which details the information that should be included in Official Gazette, actually contains no requirement to publish the date. Thus, both the GCC-TSAIP and Permanent Committee took advantage of this omission to continue violating the law without any challenge from the complainants.

6.4.9.2 The period of investigation (POI)

Although the GCC domestic industry's complaint against the increased imports and their injurious effect on industry covered the period of 2012–2016, the GCC-TSAIP only announced initiating the investigation on 20 September 2017. The reasons for this delay are not clear. Did it stem, for example, from the actions of the GCC domestic industry representatives in raising the complaint, or from the GCC-TSAIP in starting the investigation process?

The GCC's domestic industry proposed the POI to cover 2012 to 2016, meaning the proposed end was more than fifteen months from initiating the investigation; indeed, it was 21 months later. The fact that it was non-compliant might be the reason why the GCC-TSAIP did not rely on the GCC's domestic industry determination of the POI, and instead re-determined it to be from 2012 to the first half of 2017. As a result, the POI ended up being

[822] ibid, para 4.2.

[823] GCC-TSAIP, No (11/3S/2017) 'Initiation of Safeguard Investigation Against the GCC Imports of Prepared Additives for Cements, Mortars or Concretes' (Chemical Plasticizers) (2017) Official Gazette, V14, adopted in 20 September 2017, para 1.

less than fifteen months before the investigation commenced; in fact, it was three months. However, the GCC-TSAIP continued to apply its limited POI to injury analysis.

6.4.9.3 Definition of domestic industry

The GCC-TSAIP violate other requirements in offering an efficient GCC domestic industry definition. The definition of a like product forms the basis of the definition of the GCC domestic industry under Article 4.1(c) of the SA and Article 3 of the GCC CLSM. The GCC-TSAIP, however, provided an improper definition, which affected the overall GCC domestic industry.

6.4.9.4 Criteria for determining and applying 'likeness' under Article III of GATT 1994

Certain criteria to identify 'likeness' are well established in Article III of GATT 1994. In *EC–Asbestos*, the Appellate Body asserted that likeness under Article III: 4 of GATT 1994 concerns competition between products and among like products in the marketplace.[824] Moreover, in referring to *Japan–Alcoholic Beverages II*, which was an Article III case, four criteria determined likeness:

i. The properties, quality, and nature of the products;

ii. Consumer tastes and habits;

iii. End uses in each market;

iv. Tariff classification.[825]

Using these criteria is not compulsory; however, if the investigating authority uses at least one of the criteria to determine likeness, it should also apply and analyse the remaining three.[826]

In this case, the GCC-TSAIP's investigation relied on the GCC industry complainant to define the product under investigation, but it failed to show that there was competition between the product under investigation and the GCC like product. Instead, the GCC-TSAIP

[824] Appellate Body Report, 'European Communities–Measures Affecting Asbestos and Asbestos–Containing Products' WT/DS135/AB/R, adopted 5 April 2001, DSR 2001: VII, 3243, paras 99 and 117.

[825] Appellate Body Report, 'Japan–Taxes on Alcoholic Beverages' WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996: I, 97, pp 20.

[826] Appellate Body Report, 'European Communities–Measures Affecting Asbestos and Asbestos-Containing Products' WT/DS135/AB/R, adopted 5 April 2001, DSR 2001: VII, 3243, para 109.

provided only a brief description of the product and its uses but failed to analyse the other three criteria.

The GCC-TSAIP even failed to follow the criteria cited in Article 1 of the RoI on SGM;[827] the Article implies that the GCC like product should be identical or like the product under investigation in all aspects and not only share the same consumer end uses.

The GCC-TSAIP did not apply the principle of the GCC domestic industry definition provided under Article 3 of the GCC CLSM and Article 4.1 (c) of that WTO-SA. It directly defined the GCC domestic industry as the complainant who produced a major proportion of the total GCC production of like or directly competitive products—rather than relying on GCC producers of like or directly competitive products—without offering any justification for this approach. This choice fosters doubts whether the GCC-TSAIP applied the principle of 'objective examination of positive evidence' to define the GCC domestic industry.

6.4.9.5 Final determination and imposition of definitive SGM

The GCC-TSAIP imposed safeguards based on the presence of an increase in GCC imports of the product under investigation linked to serious injury. The final determination declared that the increases in GCC imports were in absolute terms and relative to GCC production during the entire period of investigation, but without emphasising the most recent data. Moreover, the GCC-TSAIP failed to consider the 'unforeseen developments' that may have led to the increased imports, although the same body seems to have considered them in the preliminary determinations and notification sent to WTO Committee on Safeguards. In this preliminary determinations and report dated 17 May 2018, the GCC-TSAIP considered the following 'unforeseen developments':

- Increase in GCC imports of Chemical Plasticizers due to developments in the steel industry worldwide in terms of excess production, particularly in China;
- The availability of huge quantities of raw naphthalene at competitive prices which can be utilized to produce the product under investigation.[828]

[827] Article 1 of the RoI on SGM provides that GCC products which are identical or alike in all respects to the product under investigation, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under investigation.

[828] WTO, WTO doc, G/SG/N/8/ARE/2, G/SG/N/8/BHR/2 G/SG/N/8/KWT/2, G/SG/N/8/OMN/2 G/SG/N/8/QAT/2, G/SG/N/8/SAU/2 'Notification under Article 12.4 (B) of the 'Agreement on Safeguards on Finding a Serious Injury or Threat Caused by Increase in Imports in the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom Saudi Arabia, and the United Arab Emirates' (Cooperation Council for the Arab States of the Gulf 'GCC') (Chemical Plasticizers)', para 2(a).

When it came to announcing the definitive SGM on 15 May 2019, one year later, however, the GCC-TSAIP did so without any reference to unforeseen developments.

6.4.9.6 Reasoned and adequate findings, conclusion, explanations and analyses

As shown in the previous two cases, the GCC-TSAIP continues to act in a manner that is inconsistent with Article 24 of the RoI on SGM when it published its final report and the results of its investigation. In parallel, the GCC-TSAIP also continues to violate its obligation under the last sentence of Article 3.1 and Article 4.2 of the SA. Therefore, this phenomenon does not seem random, but more of a systematic procedure that the GCC-TSAIP employs for final reports and investigation results. Hence, one may conclude that the investigation process was carried out in non-transparent manner, as the published report is the only way to assess the transparency level of investigation.

6.5 Analysis and Discussion

Most of SGM (safeguard measures) were taken by GCC-TSAIP in line with the WTO-SA and GATT Article XIX, however, in some key areas it struggled to implement the provision of SA and GATT. Transparency in the matters of execution of SA and GATT was observed to be a serious issue along with the lack of definition of the domestic markets and the unclarity about the role of unforeseen circumstances in increasing the imports. These issues need to be resolved for enhancing the compliance of the GCC-TSAIP with GATT and WTO-SA.

For improving the compliance, WTO needs to take solid steps and carry out reforms in their provisions of SA and GATT which does not provide a clear roadmap to the Members for conducting the investigations of SA. Furthermore, Members should use various instruments developed by WTO in order to train the competent authorities, so that they could interpret the methods employed for determination of the causal link between the increased imports and serious injury.

Furthermore, the encouragement of the grieved parties in the cases of SA in developing countries, especially the ones located in the low-income countries, may help them to seek the legal assistance and file a complaint against the unfair practices implemented by GCC while deciding on cases of SGM. Currently, the litigations costs and time are quite hindering factors for developing countries to file complaints at DSB, which is why the malpractices or misuses of the WTO-SA for the vested interests of businesses in developing countries remained unnoticed. In addition to that, the grieved parties belonging to the developing part

of the world faces the political costs in the event of challenging the decisions of the developed countries. Therefore, WTO needs to activate the role of ACWL in contacting developing countries, asking them about their experiences in the SGM cases with other countries, and offering them instructions regarding the SGM and financial help in order to proceed with the complaints against the rather developed countries which had not decided upon the cases in line with WTO-SA and GATT provisions. Similarly, the grieved developing countries may also apply for the ACWL to report the malpractices of the developed countries by lodging complaints at DSB. Bangladesh, a developing country, has already set a precedent to challenge the unfair AD practices pursued by India – a comparatively developed country in DSB (DS306, *India-Antidumping Measures on Batteries from Bangladesh,* ACWL, 2006) through the legal aid offered by ACWL.

The establishment of ACWL-like instruments within each Member of WTO may another positive development towards providing the assistance academically for clarifications on provisions of the GATT and WTO-SA and financially for reporting the malpractices at the legal platforms such as DSB and Appellate Body within WTO-SA[829]. The private pro bono attorneys in collaboration with NGOs may be involved to develop the ACWL-like instruments at regional and local levels. This will not only help gain a deep understanding of the ways Members implement the GATT and WTO-SA, but t will also help identify the non-complaint behaviour and malpractices exercised by Members while deciding on the SMG cases. As ACWL instrument is commissioned to clarify confusion, train the competent authorities to conduct the SGM fairly, and remove any confusions regarding the interpretations of the SA provisions; so ultimately this will assist the GCC to define the domestic industry and admit the role of unforeseen circumstances while establishing a link between increased imports and the injury. Hence, better quality of transparency in matters of execution of GATT and WTO-SA may be observed through the above-mentioned measures.

The TPRM is another instrument based within WTO can be used for training the competent authorities within GCC as to how increase the transparency, define the domestic industry and acknowledging the role of unforeseen circumstances in cases of SGM for establishment of causal link between the domestic injury and increased imports. The function of TPRM is to review biannually the rules of AD and SGM, and provides suggestions to countries to align them in accordance with WTO-SA and GATT.[830] This forum can come in handy when

[829] Bown and Hoekman (n 196).

[830] ibid 266, p 17.

the malpractices or misuses of the SA and GATT provisions are due to the lack of knowledge and common understanding about the objectives and goals of these provisions in the context of international trade remedies. WTO should reform the functionalities of the TPRM to increase its role in increasing the periodicities of the reviews for developing countries, so that events of malpractices and unfair treatments by GCC to other Members can be detected and corrected for the sake of promotion of the trade liberation.[831]. Otherwise, functionalities of TPRM may be compromised, if the excessively focus is placed on the reviewing of AD and SGM from developing countries rather than shifting it to the alignment of SGM regulations within developing countries to the WTO-SA and GATT provisions.[832]

Transparency and accountability in terms of fair practices in implementation of the WTO-SA and GATT can also be ensured through the development of legal frameworks within the Members of WTO, which offer assistance to the grieved parties in SGM cases locally rather than going through the costly and lengthy proceedings at DSB. This measure can also reduce the overall burden of cases at DSB in WTO. Such an example can be found within EU territories.[833]. The EU had established the European General Court which hears the complaints about the issues encountered by Members of EU and other transacting parties surrounding the international trade. It serves as a cheap alternative to DSB for the grieved parties to seek the justice in matters of international trade by the affected parties in AD and SGM.[834] Similar steps can be taken by GCC which can formulate GCC-DSB like platform working on the principles of European General Court; it may help grieved parties to lodge their complaints, oversee the methodologies used for interpretation and implementation of the SGM provisions in GATT and WTO-SA, detect the inconsistencies and opacities in applications of the SGM provisions, thereby creating a greater level of transparency in reporting and implementing the WTO-SA and GATT provisions across SGM cases involving the relatively developing or least developed countries.

6.6 Conclusion

This chapter answers the SQR:4, which looks at how the GCC-TSAIP interpreted and applied the GCC CLSM and its RoI in increased imports cases. Analysing three cases that imposed SGM on GCC imports of ferrosilicomanganese, pre-painted flat steel, and chemical

[831] ibid 266, p.. 18.

[832] ibid 266, p 18.

[833] Davis (n 199).

[834] Bown and Hoekman (n 43).

plasticizers, showed that the GCC-TSAIP interpreted and applied the GCC CLSM literally, without consideration of WTO case law or the provisions of Article XIX of GATT 1994. As two examples, the GCC-TSAIP did not analyse unforeseen developments or the effect of GATT obligations, essential requirements for WTO members during investigations to impose SGM, as established in Article XIX of GATT 1994.

Furthermore, in the process of defining the GCC domestic industry, the GCC-TSAIP did not refer at all to the principles and requirements established in the WTO case to properly define the domestic industry, such as those that define 'like or directly competitive products' against the product under investigation. The GCC-TSAIP failed to define the product under investigation in a manner consistent with the WTO criteria.

Furthermore, even when the GCC-TSAIP referred to legal requirements from the WTO case, the reference was not adequate to consider in the context of the investigation, such as in determining the POI. The Secretariat did not fulfil the criteria established by the WTO to determine the POI for many reasons, such as limiting the use of the POI to collecting data on the serious injury rather than collecting all data for the purpose of the investigation. The GCC Member States failed to provide the WTO Members with substantial interest as exporters of the concerned products an adequate opportunity for consultation prior to adopting the definitive SGM. This is because there is no such provision in the GCC CLSM, and its RoI govern this right.

The GCC-TSAIP did not refer to SA provisions as per Article 85 of the RoI of GCC CLSM to grant such rights to WTO Members.[835]

Moreover, as demonstrated in Chapter 6, the GCC-TSAIP continued to face the same problem of adhering to prescribed timelines to reach their conclusions, hence violating its obligation under Article 3.1 of the SA and Article X of GATT 1994. The failure of the GCC-TSAIP to publish reasoned and adequate findings, conclusions, explanations, and analyses in its final report emerges from its literal interpretation of Article 24 of the GCC CLSM and its RoI, without reference to the legal requirement of the last sentence of Articles 3.1 and 4.2 of the SA.

[835] Article 85 of the RoI on SGM provides that the 'WTO SA shall be applied on matters which are not stated in these RoI'.

Chapter 7: Conclusion and Recommendations

7.1 Introduction

The chapter presents the conclusion and recommendations. The findings are summarised and conclusions are drawn in the Section 7.2, and recommendations based on the results and analysis chapters are offered in Section 7.3. The relevance of the findings for key stakeholders is discussed in Section 7.4. The chapter concludes by presenting the direction of future work in Section 7.5.

7.2 Main Findings and Conclusion

This study explored the compatibility of the GCC-CLADCSM and its RoI with the WTO's ADA, Safeguard Agreement, and Article XIX of GATT 1994. The project first legally analysed WTO-related provisions and WTO case law to extract the substantial legal requirements that WTO members must meet to be granted the right to impose measures. Next, it examined GCC provisions to determine whether these relevant WTO requirements had been met. Based on these factors, it also evaluated and analysed several investigations conducted by the GCC-TSAIP that led to implementing either safeguard or AD measures, or which were terminated without measures. Through these analyses, this study identified areas of incompatibility between, on the one hand, GCC provisions or the way the GCC-TSAIP interprets the provisions, and on the other hand, relevant WTO provisions and case law.

This study sought to answer the following research questions:

To what extent are the GCC's AD and SGM system's provisions and interpretations, and how the GCC-TSAIP applies them, consistent with WTO laws?

This main research question subdivided into four others:

- SRQI: Is the GCC Common Law on AD (CLAD) and its RoI compatible with the provisions of the Agreement of Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, now referred to WTO-ADA?
- SRQII: How has the GCC-TSAIP interpreted and implemented the GCC CLAD and its RoI in AD cases in reference to the WTO-ADA?
- SRQIII: Is the GCC Common Law on SGM (CLSM) and its RoI compatible with the provisions of the WTO SA and Article XIX of GATT 1994?

- SRQIV: How has the GCC-TSAIP interpreted and implemented the GCC CLSM and its RoI in safeguard cases in reference to WTO SA and Article XIX of GATT 1994?

No previous research exists that reviews the compatibility of these GCC and their relevant WTO laws. This thesis therefore contributes original research to existing knowledge by evaluating the texts of the GCC's provisions and calculations as well as the findings of the GCC-TSAIP through selected investigations.

This chapter is divided into four sections, starting with the introduction. The second section summarises the main findings and recommendations of the study. Section three sheds light on the limitations of the study, and the fourth proposes the future prospects of this research's implications.

7.2.1 The Compatibility of the GCC's AD Laws and Regulations with the WTO's AD System

The compatibility assessment indicates that the texts of the GCC CLAD and its RoI are mostly compatible with the text of the WTO AD Agreement (ADA) and existing jurisprudence. Nevertheless, there are some discrepancies between the two frameworks which arise mainly from the GCC-TSAIP's interpretations and implementations of GCC CLAD and its RoI. These areas of incompatibility are summarised in the following sections.

7.2.1.1 The GCC-TSAIP violates Article 4.1 of the ADA when defining GCC domestic industry for the purpose of injury analysis

Chapter 3 showed that the text of Article 3 of GCC CLAD to domestic industry is the same as that in Article 4.1 of ADA: 'Members producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products…'.[836]

Since both contain the same principles and requirements, there should be no doubt when interpreting the 'whole of the like product' to define the domestic industry. The majority of investigating authorities may, however, use producers when they only create only a proportion of the total domestic output of a like product. There is no specific definition of a 'major proportion', which restricts fully identifying 'domestic industry'. Given that the GCC domestic industry is the basis of injury analysis and determination, this study proposes that such a determination may proceed from the GCC's GCC-TSAIP employing the principles

[836] GCC Common Law on Antidumping Measures, art 3.

of ‘objective examination of all positive evidence’. Furthermore, the definition does not turn on the *higher* proportion; instead, it turns on using the lower and more sensitive proportion to substantially reflect the total production of all producers.

This project’s analyses of three AD cases demonstrated that the GCC-TSAIP defined ‘domestic industry’ by interpreting and applying Article 3 of the GCC CLAD in a way that contradicted Article 4.1 of the ADA. The following reasons show that the GCC-TSAIP:

- Determined the GCC producers who lodged the AD complaint, as per Article 6 of the GCC’s CLAD and its RoIs as the GCC domestic industry;
- Defined ‘domestic industry’ without referring to its purposes, which opposes the conditions that GCC producers must fulfil to lodge a complaint;
- Did not employ the principles of ‘objective examination of all positive evidence’;
- Did not seem to have chosen a percentage that reflects the total production as whole.

7.2.1.2 The CLAD RoI violate Article 3.1 of ADA when analysing injury

As has been pointed out in Chapter 3, the CLAD RoI does not clearly define injury, nor does it clearly indicate the forms of injury. Additionally, there is no consistency in the terms that refer to injury, which are sometimes called ‘material injury’, ‘threat to material injury’, or ‘injury’. The ADA, however, contains a cumulative definition of injury for all possible injury forms and uses ‘injury’ as shorthand for all injury forms.[837] The analysis of the CLAD RoI, however, proposed that the CLAD RoI’s lack of specificity may possibly be due to a simple technical writing mistake.

Article 3.1 of the ADA requires that ‘injury’, including ‘material injury to a domestic industry’, ‘threat of material injury to a domestic industry’, or ‘material retardation of the establishment of such an industry’, should be determined based on ‘objective examination of all positive evidence’.[838] By contrast, Article 31 of the RoI limits the principles of ‘objective examination of all evidence’ to determine the presence of material injury.[839]

[837] ADA, fn 9.

[838] ibid, art 3.1.

[839] RoI on AD Measures, art 31.

7.2.1.3 The GCC-TSAIP fails to obey the non-attribution rule under Article 3.5 of ADA for causal link analysis

Both Articles 3.5 of the ADA and Articles 33.1 and 33.2 of the CLAD RoI require determining a causal link between the presence of dumping and injury. The investigating authorities should therefore carry out a non-attribution analysis. Factors other than dumped imports that are also injuring domestic industry should be not attributed to dumped imports.[840]

Surprisingly, the GCC-TSAIP completely overlooked this substantial requirement and relied on a causal link between the presence of dumping and injury; no clear non-attribution analyses seem to have been carried out. The GCC-TSAIP did not show this in its final determination of definitive AD on the imports of automotive batteries from the Republic of South Korea. The GCC-TSAIP determined that the material injury suffered by the GCC industry during the investigation period was caused by the dumped imports and not related to other reasons.[841]

7.2.1.4 The GCC-TSAIP violates principles of transparency and confidentiality of information cited by Articles 6.5 and 12 of the ADA in published notices

Article 12 of ADA states that the purpose of public notices published by a WTO member is to enhance the transparency of investigations and to encourage investigating authorities to reach final conclusions via reasoning techniques. The article requires that public notices contain all rationalizing details and evidence used by investigating authorities in reaching their final determinations.[842] However, Articles 9, 22, and 24 of the CLAD RoI, i.e., those which govern and determine published information in the Official Gazette, require that the Gazette provide only summaries rather than the details required by Article 12 of the ADA.[843] The GCC-TSAIP follows Articles 9, 22 and 24 literally, as is clear from the published Official Gazette (see Appendix 1 for examples). Therefore, the GGCC-TSAIP acted inconsistently with Articles 6.5 and 12 when they failed to detail how they applied the principles of transparency and confidentiality.

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[840] ADA, art 3.5; RoI on AD Measures, arts 33.1 and 33.2.

[841] GCC-TSAIP, No (5/1 AD/2016) 'Imposition of Definitive E Antidumping in Duties Against the GCC Imports of Electric Lead-Acid Accumulators of Capacity of 35 up to 115 Amp-Hours, Whether or Not Rectangular (Including Square) of a Kind Used for Starting Piston Engines (Automotive Batteries)'(2017) Official Gazette, V10, adopted 23 April 2017, para 4.

[842] ADA, art 12.

[843] RoI on AD Measures, arts 9, 22 and 24.

7.2.1.5 The GCC-TSAIP fails to fulfil the requirements to disclose essential facts to interested parties as per Article 6.9 of the ADA

Chapter 4 demonstrated that Article 6.9 of the ADA requires investigating authorities to inform all interested parties about the essential facts on which it relied to reach its final conclusions. Furthermore, such disclosure should be made in sufficient time before making the final decision so that interested parties may avail themselves of their right to define their position and review the facts.[844] In contrast, Article 24[845] of the RoI clearly state that the GCC-TSAIP is required to notify the complainant of the final decision and only after it has been made.

7.2.1.6 The GCC-TSAIP violates Articles 3, 4, and 9 of the CLAD RoI regarding receiving complaints and initiating AD investigations

Articles 3, 4 and 9 of the GCC RoI indicate that the GCC-TSAIP has 55 working days from receiving an AD complaint to accept it and initiate an investigation, or to reject it.[846] Chapter 4's legal analysis and examination of the GCC's AD proceedings clearly showed that the GCC-TSAIP barely adhered to this timeframe in one case. It also failed to adhere to this timeframe in other cases, and it seems to have started omitting the date the complaint was received altogether, further obscuring the fact that it did not adhere to the Articles.

Sections of the Official Gazette evidences this phenomenon. In the case of an AD proceeding against the imports of automotive batteries originating in or exported from the Republic of South Korea, the publication states, 'On November 12, 2015, the GCC's Technical received a properly documented complaint submitted by the GCC industry'.[847] But in a later case involving an AD investigation on uncoated paper and paperboard originating in Spain, Italy, and Poland, the Gazette provides, 'The GCC-TSAIP received a properly documented complaint submitted by the GCC industry…'.[848]

Although the ADA does not require any timeframe regarding the time between the complaint and the announcement of an investigation, the GCC-TSAIP must nevertheless adhere to its

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[844] ADA, art 6.9.

[845] RoI on AD Measures, art 24.

[846] GCC RoI on AD Measures, arts 3, 4 and 9.

[847] GCC-TSAIP, 'Concerning the Initiation of an Antidumping Investigation Against the Import of Electric Lead-Acid Accumulators (n 473) para 1.

[848] GCC-TSAIP, No (10/AD3/2017) 'Concerning the Initation of Antidumping Investigation Against Imports of Uncoated Paper and Paperboard (Kraft Liner or Fluting or Test) in Rolls or Sheets, Other than that of Heading 4802 or 4803 (Cotainer Board) Originating in Spain, Italy, and Poland' (2017) Official Gazette, V13, adopted 25-31 July 2017, para 1.

public announcement laws and regulations and implement them in a uniform manner that fulfils the transparency requirements of Article X of GATT 1994.7.2.3 The Compatibility of the GCC's Safeguard Laws and Regulations with the WTO's Safeguard System

The compatibility study conducted in this thesis shows that the text of the GCC CLSM and its RoI are mostly compatible with the text of the WTO's Safeguard Agreement (SA) and the existing jurisprudence. However, the texts are completely incompatible with the legal requirements of imposing SGM provided by Article XIX of GATT 1994. The areas of incompatibility are summarised in the following sub-sections.

7.2.1.7 The GCC Common Law on Safeguard and its RoI do not refer to the legal requirements provided in Article IXI of GATT 1994

Chapter 4 shows that both the SA and Article XIX of GATT 1994 contain legal framework that each WTO member, including GCC countries, is required to follow when establishing their domestic provisions and regulations on safeguards. In *Argentina—Footwear (EC)* the Appellate Body held that 'any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the SA and Article XIX of GATT 1994'.[849] Interestingly, textual analysis and interpretation of the GCC CLSM and its RoI suggest that GCC provisions do not refer to any of the requirements cited in Article XIX of GATT 1994. For example, both the SA and Article XIX identify four conditions a member must establish to demonstrate eligibility for imposing SGM: unforeseen developments; the effect of GATT obligations; increased imports; serious injury; and causal link between increase imports and serious injury. In contrast, the RoI completely omit 'unforeseen developments' as a legal requirement to imposing SGM, as Article 71 clearly shows:

> A safeguard measure may be applied to a product being imported irrespective of its source, if it is established that such product is being imported in such increased quantities, absolute or relative to Members production, and under such conditions as to cause or threaten to cause a serious injury to the GCC industry that produced like or directly competitive products.[850]

[849] Appellate Body Report, 'Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products', WT/DS98/AB/R, adopted 12 January 2000, DSR 2000: I, 3, para 77; Appellate Body Report, 'Argentina – SGM on Imports of Footwear', WT/DS121/AB/R, adopted 12 January 2000, DSR 2000: I, 515, para 94.

[850] RoI on AD Measures, art 71.

7.2.1.8 The GCC-TSAIP fails to publish reports containing final findings and reasoned conclusions, as required by SA Articles 3.1 and 4.2

Investigating authorities are obliged, per Articles 3.1 and 4.2 of the SA, to announce their findings and conclusions on all related issues of facts and law in a reasoned and detailed manner.[851] Such an announcement provides a way to assess the compliance of investigating authorities with the legal requirements of Article XIX of GATT 1994, the SA, and the transparency obligations, as per Article X of GATT 1994. In contrast with these requirements, Article 24 of the RoI obliges the GCC-TSAIP to publish only a summary of the reasons leading to final findings and determinations.[852] This fact is borne out in the GCC's Official Gazette (see Appendix 2). Therefore, there is clear incompatibility between the WTO safeguard system and that of the GCC Members regarding the published details of reasons leading to final conclusions. Such an approach does not help the GCC-TSAIP to meet the transparency requirement of Article X of GATT 1994.

7.2.1.9 The GCC-TSAIP fails to conduct a safeguard investigation as per Article 3.1 and 4.2 of the SA and Article XIX of GATT 1994

The SA and Article XIX of GATT 1994 do not oblige WTO members to receive an increased imports complaint, nor do they provide any details or guidelines for how a WTO member should do so. Neither do they instruct investigating authorities on how to deal with a complaint from the date of receipt to the date of announcing initiating an investigation.

The first sentence of Article 3.1 of the SA obliges investigating authorities to investigate 'pursuant to procedures previously established and made public in consonance with Article X of GATT 1994.'[853] Therefore, the GCC-TSAIP must precisely follow its published investigation procedures. The GCC RoI outline the process for receiving a complaint of

[851] SA, arts 3.1 and 4.2.

[852] RoI on AD Measures.

[853] Article 3 of the SA provides that 'a Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994'. Article X of GATT 1994 is important because it deals with the core of the country's legal infrastructure. Simply stated, it is concerned with the quality and implementation of the administrative law regime. The United States proposed the Article for the first time in 1947. Article X was impacted by the legalisation of the US Administrative Procedures Act (APA). However, Article X remained negligible and was treated as supplementary to other essential GATT provisions. When the WTO was established in 1994, Article X was given priority and developed into an article on the essential provisions of the principles of transparency and due process. Thus, Article X establishes the two main principles of the international trade system: the transparency of current published trade provisions and regulations and the uniform implementation of these laws. Article X:1 requires 'all laws, regulations, judicial rulings, and administrative rulings of general application [(collectively 'measures') to be] published promptly in such manner as to enable governments and traders to become acquainted with them'. Article X:2 prohibits the implementation of such measures before legal publication. Article X:3(a) requires all measures to be imposed in a 'uniform, impartial and reasonable manner'.

increased imports and announcing the initiation of an investigation. The process includes three steps.

First, Article 3 of the RoI on SGM provides that:

> The GCC-TSAIP shall, within a period not exceeding thirty (30) working days starting from the first working day subsequent to the receipt of the complaint, examine the accuracy and adequacy of the evidence provided in the complaint and prepare an initial report that will be transmitted to the Permanent Committee together with its recommendations whether to reject the complaint or initiate the investigation.[854]

Second, the first sentence of Article 4 of the RoI on SGM establishes that,

> The Permanent Committee shall within a period not exceeding fifteen (15) working days from the date of receipt of the initial report take one of the following decisions ….[855]

Third and finally, the first sentence of Article 9 of the RoI states that,

> The notice of the initiation of an investigation shall be published in the Official Gazette within ten (10) working days from the date on which the affirmative Permanent Committee decision was taken.[856]

Pursuant to Article 3 and the first sentences of Articles 4 and 9 of the RoI on Safeguards Measures, respectively, the period between lodging the complaint and announcing the initiation of investigation must not exceed 55 working days.

Close examination of how the GCC-TSAIP has implemented Article 3 and the first sentences of Articles 4 and 9 showed that GCC Member States violated their obligations to the WTO—specifically with regards to the first sentences of Article 3.1 of the SA and Article X of GATT 1994—in their failure to initiate an investigation as per the related published provisions under the RoI on Safeguards Measures. For example, the GCC-TSAIP received a complaint against the increase of GCC imports of ferrosilicomanganese on 23 June 2016 and announced the initiation of the investigation on 3 October 2016. The GCC-TSAIP took 72 days to announce the investigation and publish the notice. This is a 17-working day delay in initiating he investigation and publishing the notice in the Official Gazette.[857]

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[854] RoI on SGM, art 3.

[855] ibid, art 4.

[856] ibid, art 9.

[857] GCC-TSAIP, 'Concerning the Initation of Safeguard Investigation Against Use of Ferrosilicomanganese' No (2/2S/2016) Official Gazette, V8, adopted on 3 October 2016, para 1.

7.2.1.10 The GCC-TSAIP fails to define the 'product under investigation' as per the scope and purpose of Articles 2.1, 4.2(a), 4.2(b), 6, 12.1(b), and 12.2 of the SA and Article XIX of GATT 1994

The previous chapters' legal analysis shows how both Article 2.1 of the SA and Article XIX: 1(a) of GATT 1994 establish that there is dumping when the product under investigation is imported into a member territory in such quantities, 'absolute or relative to domestic production' that it 'causes, or threatens to cause, serious injury to the domestic industry' of 'like or directly competitive products'. The product that 'is being imported' is subject to the safeguard investigation. The investigating authorities are required to consider the legal implications of the definition of the 'product under investigation', for

- It sets the basis for the determination of whether the imports of the product under investigation increased in accordance with the meaning of Article XIX and Article 2.1 of the SA;
- It establishes the basis of increased imports for the nation to impose provisional SGM under Articles 6, 12.1(b) and 12.2 of SA;
- It is the same definition to be used to analyse and assess 'serious injury' per Article 4.2(a), and 'causal link' per Article 4.2(b) of SA;
- It determines the scope of 'unforeseen developments' analysis. As mentioned in *US–Steel Safeguards*, 'unforeseen developments' must be determined within the context of the specific products that will be subject to SGM, i.e., the investigated product;
- It determines the scope of SGM. According to both Article XIX and Article 2.1, the investigated product should be the same as the product on which the SGM are imposed.[858]

Since there are no provisions governing the process for defining 'the product under investigation' in the WTO safeguard system, or indeed the GCC CLSM and its RoI, the only way to assess such a process result from defining the 'product under investigation' in a manner that may function coherently under all these different scenarios. The GCC-TSAIP relied on the allegations of the complainants in all the proceedings that this thesis analysed.[859]

[858] Piérola (n 390).

[859] GCC-TSAIP, No (3/2S/2016) 'Imposition of a Provisional Safeguard Measure Against the GCC Imports of Ferrosilicomanganese' (2016) Official Gazette, V9, adopted 17 October 2016; GCC-TSAIP. No (8/2S/2016) 'Termination of the Safeguard Investigation Against the GCC Imports of Ferrosilicomanganese Without Imposition of Definitive Measures and Refunding of Provisional Duties' (2017) Official Gazette, V12, adopted 3 May 2017; GCC-TSAIP. No (9/1S/2017) 'Imposition of Definitive SGM Against the GCC Imports of Rolled Iron or Steel, 600mm Width

Essentially, the 'product under investigation' is defined by either the industry or the country that is going to impose the SGM. To define the product well and more objectively, the industry should instead define a 'like or directly competitive product' against the product under investigation and show that there is competition between them. The GCC-TSAIP thus failed to apply the principle of 'objective examination' here.

7.2.1.11 The GCC-TSAIP fails to define the GCC's like product under Article III:4 of GATT 1994

Article III of GATT 1994 establishes certain criteria that define 'like'. In *EC–Asbestos*, the Appellate Body asserted that 'likeness' under Article III: 4 is about the competition between the product under investigation and like products in the marketplace. Furthermore, *Japan–Alcoholic Beverages II* found that Article III of GATT 1994 has four additional criteria that determine a 'like product': (i) the properties, quality, and nature of the products; (ii) consumers' tastes and habits; (iii) end uses in a given market; and (iv) tariff classification. These four define a like product, and if the investigating authorities use one to determine likeness, they are obliged to assess the remaining criteria.[860]

The main goal in defining a 'like product' is to show competition between the product(s) under investigation and the like product(s), thereby defining the GCC domestic industry. The GCC-TSAIP, however, defined 'products under investigation' solely based on the complainant industry, and they did not demonstrate consideration of competition between the product(s) under investigation and like product(s) in the GCC market. GCC-TSAIP tended to provide only a brief description and used, but failed, to analyse the other three criteria and never depend on the definition of like product as base to define GCC domestic industry.

7.2.1.12 The GCC-TSAIP does not define the GCC domestic industry to comply with Article 4(c) of the SA

Article 3 of the GCC Common Law and Article 4(c) of the SA have the same words and legal requirements for defining domestic industry.[861] However, as Chapter 7 showed, it

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or More, Painted, Varnished or Plastic Coated and Other (Pre-Painted Flat Steel)' (2018) Official Gazette, V15, adopted 19 April 2018.

[860] Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996: I, 97, pp 20–1[1] SEP

[861] Article 3 of the GCC CLSM and Article 4(c) of SA provide that 'for the purpose of safeguard investigations, the term 'GCC industry' shall mean the total Members producers as a whole of the like or directly competitive products operating within the territory of the Members, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.'

appears that the GCC-TSAIP does not define the GCC domestic industry according to these requirements. It failed to define the GCC's 'like or directly competitive product', and hence also failed to establish the basis of the GCC 'domestic industry'. In comparison, both Article 3 of the GCC-CLADCSM and Article 4(c) of the SA imply that the 'like or directly competitive product(s)' must be identified.[862] Only producers of like or directly competitive product(s) may be included in the GCC domestic industry. Thus, no domestic industry can be defined without also defining 'like or directly competitive product(s)'. The GCC-TSAIP also referred to the complainant as the 'representative' of the 'GCC domestic industry'. Hence, the GCC-TSAIP failed to employ the two principles of 'objective examination' and 'positive evidence', both of which are required in analysing 'serious injury', for the GCC domestic industry is a basic factor required to carry out a serious injury analysis.

7.2.1.13 The GCC does not follow the WTO's legal requirements when determining the period of investigation

Chapter 7 demonstrated how none of the SA, Article XIX of GATT 1994, or the GCC CLSM and its RoI include any provisions governing how to determine the 'Period of Investigation' (POI). Investigative authorities, however, including the GCC-TSAIP, are required to act according to WTO dispute case law; indeed, the latter determines the general requirements for the POI in WTO dispute settlement cases. To be in compliance, therefore, GCC POI should

- Focused the most recent past;[863]
- Last no longer than fifteen months before initiating the investigation;[864]
- Be long enough to fit the facts;[865]
- Be the period during which all relevant facts and evidence occur.[866]

The GCC-TSAIP generally adhered to these requirements, for example, when imposing provisional SGM against imports of ferrosilicomanganese. It established a POI that focused on the most recent past; it based its final conclusion on imposing provisional SGM on the

[862] GCC Common Law on Ant-Dumping Measures, art 3; SA, art 4(c).

[863] Appellate Body Report, 'Argentina–SGM on Imports of Footwear' WT/DS121/AB/R, adopted 12 January 2000, DSR 2000: I, 515, para 130, fn 130 (original emphasis).

[864] Appellate Body Report, 'Mexico—Definitive Antidumping Measures on Beef and Rice, Complaint with Respect to Rice' WT/DS295/AB/R, adopted 20 December 2005, DSR 2005: XXII, 10853, paras 165–72; Panel Report, 'Mexico—Definitive Antidumping Measures on Beef and Rice, Complaint with Respect to Rice' WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007, paras 7.53–65.

[865] Appellate Body Report, 'United States–SGM on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia' WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001: IX, 4051, para 138 and fn 88.

[866] ibid.

entire POI (2012–2015); and it focused its analysis on 2015. The proceedings considered the end of POI to be 31 December 2015, while the investigation was initiated on 3 October 2016.[867] Thus, the POI ended within no more than fifteen months from initiating the investigation; moreover, the length of the POI seemed long enough to make the final decision, as it offered the opportunity to study the increase of imports and its injurious effect on the GCC and domestic industry over a sufficient period of time. Any impairment had to be due to 'a sudden and sharp increase in imports of the product under investigation' rather than other factors.

While it appeared that the period met all the requirements, the GCC-TSAIP also limited this period to collecting evidence and analysing the serious injury. This understanding is in clear conflict with the purpose of the POI, which is to collect evidence to reach a final conclusion of the *process*, including any 'unforeseen developments', the presence of increased imports, serious injury, and a causal link. The GCC-TSAIP continued to determine the POI in the same manner when it assessed the definitive SGM against imports of pre-painted flat steel and chemical plasticizers.

7.2.1.14 The Permanent Committee imposed provisional SGM based on a GCC domestic industry complaint, hence violating its obligations under Article XIXI2 of GATT 1994 and Article 6 of the SA

As Chapter 6 showed, to be consistent with Article XIX:1 of GATT 1994, and Article 6 of SA,[868] Articles 71-1 and 73 of the GCC RoI should consider all legal requirements to grant the right to impose SGM. These requirements fit nicely with those of WTO:

- An increase in imports of the product under investigation in absolute and relative terms to the GCC domestic industry;
- Serious injury to the GCC domestic industry;
- Unforeseen developments;
- The effect of GATT obligations;
- A causal link between the first and second bullets in this list;

[867] GCC-TSAIP, No (2/2S/2016) 'Concerning the Initation of Safeguard Investigation Against Ferrosilicomanganese' (2016) Official Gazette, V8, adopted 3 October 2016, preamble.

[868] GATT 1994, art XIX:1; SA, art 6; RoI on SGM, arts 71.1 and 73.

- Critical circumstances that can cause the GCC domestic industry to become bankrupt or plan to close. (This last requirement is only essential in cases of imposing provisional SGM.)

The GCC-TSAIP and Permanent Committee consider most but not all of these legal requirements to justify decisions to impose provisional SGM; they consistently seem to overlook their need to analyse 'unforeseen developments' and 'the effect of GATT obligations'. For this reason, the GCC-TSAIP fails to comply with the requirement to consider all factors.

The GCC-TSAIP also seemed to apply most of these requirements to impose SGM as cited in Articles 71-1, and 73 of the RoI.[869] It, however, failed to address them to the GCC domestic industry, and instead applied them based on the complainant's domestic industry; this, at least, is what the Official Gazette's publications imply. Doing so actually violates both Articles. There is nothing in the GCC CLSM and its RoI to indicate the provisional SGM which could be imposed based on the complainant's domestic industry, or which permit skipping the analysis of 'unforeseen developments' and the 'effect of GATT obligations' under Article XIX of GATT 1994.

7.2.1.15 The GCC-TSAIP does not define critical circumstance within Article XIX:2 of GATT 1994 and Article 6 of the SA

It has been concluded that both the GCC Common Law on Safeguard and its RoI and WTO provisions defined 'under such conditions as to cause or threaten to cause serious injury to

[869] 'A safeguard measure may be applied to a product being imported irrespective of its source, if it is established that such product is being imported in such increased quantities, absolute or relative to Members production, and under such conditions as to cause or threaten to cause a serious injury to the GCC industry that produced like or directly competitive products.' RoI on Safeguards Measures, art 71.1.

Article 71.2 of the RoI on Safeguards Measures provides that: 'A determination of whether the increase of imports has caused or are threatening to cause serious injury to the GCC industry shall be based on objective evidence and facts and an existence of a causal link between increased imports and serious injury or threat thereof, and by the evaluation of all relevant, objective and quantifiable factors having a bearing on the situation of the GCC industry, taking into consideration the following factors:

a. The ratio and volume of increase in imports of the product under investigation, in absolute or relative terms to GCC production.

b. The impact of such increased imports on the GCC industry, including sales level, production, productivity, capacity utilization, inventory, profits, losses, labors and market share'.

Article 73 of the RoI of the GCC Common Law on Safeguards states that 'When there are critical circumstances, the Permanent Committee, upon a recommendation from the GCC-TSAIP, may adopt provisional safeguard duties, if it is determined that the product under investigation is being imported in such increased quantities, absolute or relative to production, and under such conditions as to cause or threaten to cause serious injury to the GCC industry and that the delay in taking action would cause damage that would be difficult to repair.'

the GCC industry and that the delay in taking action would cause damage that would be difficult to repair'.[870]

The GCC-TSAIP, however, defined the term 'critical circumstances' based only on deterioration of economic indicators, such as worsening financial conditions of the complainant industry, and the complainant industry's board of directors having to suspend production and force plant closures in case no solution is found. The GCC-TSAIP does not consider the economic situation of the whole GCC industry. Thus, the GCC-TSAIP not only violates their obligation under Article 73 of the RoI on AD Measures, but also its obligations towards Article XIX:2 of GATT 1994 and Article 6 of the SA.

7.3 Recommendations

Based on the results and analysis presented in this thesis, it was clear that GCC-CLAD and CSLM and WTO-ADA and SA were not without weaknesses and laws. This section concentrates in the weaknesses and flaws detected in both legal systems echoed throughout this research. The recommendations are drafted for GCC and WTO, and if these recommendations are considered and implemented, it is expected the improvements in compliance level of developing countries like GCC with the WTO-ADA and SA provisions.

7.3.1 Recommendations for the GCC-CLAD and CLSM System

The GCC-TSAIP could use the following recommendations for improving its legal system in areas AD and SA in order to reduce the non-compliance issues with the WTO-ADA and SA.

7.3.1.1 Establishing the Court of Auditors

The GCC court of auditors on the design of the European court of auditors to ensure high level of transparency in AD- and safeguard-related investigations. The GCC-court of auditors will be instrumental in publishing the yearly or bi-annual reports on the cases filed, time taken to conclude the cases and methodologies used to determine the dumping and development and implementation of SGM.

Also, it will also report on the enforcement of the GCC-CLAD and RoIs in line with the ADA. Like, the European Court of Auditors, the GCC-court of auditors will finally put forth recommendations in relation to compliance with ADA provisions and establishment of

[870] RoI on Safeguards Measures, art 73.1.

communication channels between the GCC and WTO-TPRM and between GCC and DSB in order to ensure that all provisions in GCC-CLAD and RoI stand in line with the interpretations from legal experts and professionals based at WTO.

Taken together, the establishment of GCC-Court of Auditors may help to ensure the high level of transparency in the application and implementation by GCC-CLAD and RoI by the GCC-TSAIP and relevant competent authorities. Also, it will be helpful in improving the compliance level of GCC-CLAD and RoI with the ADA and SA. Similar arrangements can be followed by other developing countries such as China struggling for the compliance with the ADA and SA.

7.3.1.2 Learning and training system

GCC, with cooperation of WTO, may build the Trade Law Centre by following suit of the Eastern and Southern African countries promotes the teaching and training to the professionals (e.g., economists, law-makers, policy-makers and competent authorities dealing with AD and safeguard cases) in the area of implementation of AD and safeguard laws effectively at regional level. The Trade law Centre will serve as a as a capacity building measure in implementation of WTO trade remedies in GCC countries and will also serve as an example of developing countries in the Middle East.

GCC may also collaborate with ACWL[871] which is WTO-based training institute, and seeks help and assistance in establishing the structure and functioning of the Trade Law Center which may offer the tutorials and trainings to the GCC Member States by following the curricula recommended by ACWL. This may come in handy to improve the competencies of GCC Member States in understanding and interpreting the ADA/SA laws consistent with the standards and norms demanded by the WTO.

7.3.1.3 Communication channels between the GCC-TSAIP and the WTO-Appellate Body/DSB

According to Article 3.2 Dispute Settlement Understanding (DSU), the Appellate Body and DSB are integral parts of the security and predictability of the multilateral trading system, and performs key functions of clarification and interpretations of ADA/SA provisions in

[871] United Nations, 'LDC Portal – International Support Measures for Least Developed Countries: Advisory Center on WTO Law (ACWL)' (United Nations, 2023) < https://www.un.org/ldcportal/content/advisory-centre-wto-law-acwl#:~:text=The%20ACWL%20advises%20its%20developing,settlement%20proceedings%20at%20discounted%20rates.> Accessed on 10 Feb 2023.

textual and practical contexts[872]. Therefore, communication between the GCC-TSAIP and WTO-Appellate Body holds a great value in enhancing the compliance with ADA and SA and enhancing the transparency and due process in ADA/SA proceedings.

This study recommends that interpretations issues should be solved through building communication channel between Appellate Body for AD and Safety Measures in GCC, which should liaise with the WTO Trade Remedy Dispute, DSB and decisions made by WTO's Appellate Body for interpreting the provisions of ADA in the right context, this will improve the compliance level. This should help in interpreting the use of other factors while determining the causal link between the dumped products and the injury to the domestic industry. Of note, the recommendations from Appellate Body and DSB which either diminish the existing ADA/SA provisions or adds to the ADA/SA provisions not covered in ADA and SA should not be implemented by GCC-TSAIP, as mentioned in Article 3.2 DSU[873].

7.3.1.4 Consultation with Appellate Body rulings for interpretation of issues

The causation between the increased imports and the serious injury, and the causal relationship between the 'factors other than increased imports and the serious injury needs to be established by competent bodies in GCC in order decide whether to take the SGM. In this context, the decisions, and judgments of Appellate Body in relation to the errors in establishing the causal link between the increased imports and the serious injury may come in handy in illuminating the officials in GCC with the proper methods which can be used to determine and link the causal variables with the serious injury in domestic market. GCC's competent authorities in safeguard cases should employ the methods stipulated by Appellate Body and DSB, which involve 'relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination, during safeguard investigations'. Cautiously, while seeking the support and assistance from the decisions and judgements of Appellate Body and DSB, GCC-TSAIP should set the criterion of whether these judgements reflect the spirit of ADA/SA provisions

[872] World Trade Organization, 'Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement' (World Trade Organization, 2023) < https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> Accessed 10 Feb 2023.

[873] Ibid

without adding to or diminishing the effects of the existing ADA/SA provisions, in accordance with Article 3.2 DSU[874].

7.3.1.5 The GCC's collaboration with the learning support in WTO

GCC should send officials to ITTC or avail the opportunity of E-Campus programs at ITTC in order to gain knowledge about trade remedies including AD and safeguard regulations.[875] This measure will help build a strong and competent investigating authority in GCC with knowledge of gist and spirit of the provisions in ADA and SA, thereby resulting in better interpretation of the provisions in ADA and SA, more transparent approach towards defining and implementing the legal procedures enshrined in the WTO trade remedies.

Furthermore, the debates and sessions held by Committee on ADP biannually for the Members of WTO can be a useful learning platform for the GCC[876]. The members of competent body in GCC-TSAIP may be sent as representatives to the meetings of Committee on ADP which provide lectures on the areas of ambiguities, non-clarifications, questions about the modalities of implementation of ADA. This will help them to gain a better insight into the interpretations and implementation of ADA laws.

GCC also look for training support from WTO-sponsored Institute ACWL, which is dedicated to offer the free legal advice, arrange training sessions for both developing and least developed countries on the ADA/SA laws. The training sessions offered by ACWL are recommended by the United Nations to its Members which are also Members of WTO[877].

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[874] World Trade Organization, 'Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement' (World Trade Organization, 2023) < https://www.wto.org/english/tratop e/dispu e/dsu e.htm> Accessed 10 Feb 2023.

[875] Kazzi, 'Arab Countries and the Doha Round' (n 69).

[876] Inama, Stefano, 'Negotiating AD and setting priorities among outstanding implementation issues in the post-Doha scenario: first examination in light of recent practice and DSU jurisprudence' (2002) (UNCTAD/ITCD/TSB/Misc. 72) < https://unctad.org/system/files/official-document/psitcdtsbm72.en.pdf> Accessed 02 Feb 2023.

[877] United Nations, 'LDC Portal – International Support Measures for Least Developed Countries: Advisory Center on WTO Law (ACWL)' (United Nations, 2023) < https://www.un.org/ldcportal/content/advisory-centre-wto-law-acwl#:~:text=The%20ACWL%20advises%20its%20developing,settlement%20proceedings%20at%20discounted%20rates.> Accessed on 10 Feb 2023.

7.3.1.6 Building the GCC-DSB for resolving issues locally

The GCC should consider developing a GCC-based dispute settlement body (GCC-DSB) which should work on the style of the WTO-DSB to implement the ADA and SA in the jurisdiction of GCC. This can be designed and operationalised by following suit of the European General Court which hears appeals from the third parties showing resentment with the decisions and judgments of the European Commission (EC) in relation to AD and safeguard regulations. Third parties dissatisfied with these decisions may challenge them in the European General Court.

The legal experts in European General Court panel liaise with DSB to seek the consistency of ECFI's decisions and judgements in line with the precedents available in DSB. This not only reduces the burden of cases on the WTO-DSB, but it will also reduce the economic costs involved in litigations at WTO-DSB. The GCC-DSB may work as part of Supreme Judicial Council, and legal experts recruited in the panel must be trained by WTO-DSB and ITTC governed by WTO Secretariate.

Taken together, the establishment of GCC-DSB will serve as great instrument in the effective application and enforcement of ADA and SA in the jurisdiction of GCC, and will be a step towards enhanced transparency and better compliance of the GCC-TSAIP with the ADA and SA.

7.3.1.7 Recommendations for developing countries

The adversely affected poor countries may take up the opportunity of ACWL' legal assistance in pursuing the case against the non-compliant AD practices (e.g., lack of clarity about currency conversion factor in calculating dumping margins) to ADA followed by the comparatively developed country. This will help the poor countries to report the non-complaint practices followed by GCC-TSAIP to DSB, where review of the current AD practices in GCC-TSAIP will be done in the context of their legal connotations and implications; and DSB decisions may be instrumental in either updating the current GCC-TSAIP to be compliant to ADA in the areas where it does not comply.

The findings of this research work may be useful for the developing countries and least developing countries who are trying to improve their compliance with ADA and SA or on their way to build the infrastructure for gaining the WTO accession to the AD and Safeguard Agreement. This study offers them solutions for building the local market-based DSB structure for resolving the disputes in relation to dumping and SGM, thereby building legal mechanism for alleviation of the resenting third parties with the decisions of the investigating

authorities. This thesis also offers them a learning platform for training their personnel and officials in international trade through participation in the WTO-offered courses, workshops for learning potential methods for determining the dumping margin, price comparisons, currency conversions etc. Moreover, the recommendations suggested for the GCC countries in this thesis may also be appliable to other developing countries sharing similar economic and geographical characteristics with GCC countries.

7.3.2 Recommendations for Reforming the WTO's Trade Remedies

Throughout the results and discussions in this thesis, it was evident that ADA and SA are not free of weaknesses and need to be improved through organizing the reforms and amendments for creating more clarity about the procedures, definitions of terminologies, and language of provisions associated with the AD and SA. Therefore, this study provides, based on the results and analyses of this thesis in preceding chapters, provides the following recommendations for reforming ADA and SA with focus on alleviation of ambiguities and leeway for the Members.

WTO may follow the following recommendations for reforming ADA and SA in order to increase compliance of the developing countries like GCC with the international trade remedies.

The recommendations for reforms in WTO trade remedies are in consonant with the suggestions made by Negotiating Group on Rules and FANs which have already put forth the proposals as indicated in 'Senior Official' Statement on AD Negotiations, which emphasized inclusion of negotiations on regular basis to reform the ADA rules due to the increased cases of abuse/misuse of ADA provisions for protectionism rather than the promotion of market liberalization (UN, 2006). They further stressed on the reforms or improvements in the existing rules for tackling the issue of excessive abuse of ADA measures by the Members of WTO, enhancement of transparency in the investigation and post-investigation procedures, predictability and fairness in the exercise of the AD practices and measures, and addressing the special needs (training, allocation of resources for compliance) of the developing countries (Kazeki, 2010).

7.3.2.1 Explicit descriptions of terms and methods in ADA/SA

It is vitally important that DSB and Appellate Body – the security and predictability tools as specified by Article 3.2 DSU - in the WTO should make a serious effort to pinpoint the leeway in provisions of ADA and SA in relation to defining the confidential information as

a grey area[878]. They should explicitly categorise the different pieces of information collected in the course of investigation and used in implementing SGM into two categories: public information and confidential information. This will help increase compliance with the provisions in the ADA and SA which serve a main objective of protecting the local market from injuries caused by the foreign imports while simultaneously fostering the free and fair trade among Members and will promote the concept of fair-trade agreements between the Members. Declaring what is confidential and what is non-confidential will also decrease the number of disputes arising from information held back by the competent authorities at DSB and Appellate Body.

Compliance may increase through reforming the existing provisions where lack of definition of core terminologies and procedures for investigation and AD measures, such as universal methodologies for calculating the price, injury. WTO needs to define the injury, material injury and other related concepts used in line with the injury in order to assess the level of compliance of the Members including the GCC with the ADA and the GCC's current ADA legislation. The lack of definitions of these key terms gives latitude to the investigators to use the ADA as a protectionist weapon and leaves it open to misuse by Members. These suggestions are supported by the publications and reports issued by the Negotiating Group on Implementation and FANs which clearly described the areas of ambiguities in the foregoing areas, and championed the reforms in the several Ministerial Conferences[879].

The lack of description of clearcut methods for calculation of volume of dumped imports in the ADA provides leeway to the administrative authorities of GCC and other Members to invent their own methods for calculation of volume of dumped imports, and leaves the ADA provision in Article 3 prone to be misused and open for the protectionist discretions. The whole purpose of the ADA is to restrict the use of dumping practices with development of restrictive rules promoting the competition, and not limiting the chances of fair competition between the imported products and the domestic goods. Therefore, more reforms are needed in the ADA provisions in relation to defining suitable methodologies for calculation of the volume of dumped imports. The recommendations for reforms in the ambiguous areas of

[878] World Trade Organization, 'Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement' (World Trade Organization, 2023) < https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> Accessed 10 Feb 2023.

[879] Kazeki, Jun., 'AD Negotiations under the WTO and FANs' (2010) 44(5) Journal of World Trade.

ADA provisions are in accordance with the arguments of Kazeki, a legal expert, who pointed to the essential reforms for prevention of abuse and misuse of the ADA provisions for promotion of self-interests on the behalf of Members of WTO[880].

7.3.2.2 Cooperation between the WTO-DSB and Supreme Judicial Council in the GCC

Additionally, DSB should work with the Supreme Judicial Council of GCC, which is equivalent of European Court of Justice (ECJ), to reveal the reasoned judgements about confidential and non-confidential information collected and used during the SGM to the WTO's Appellate Body and DSB. This will enable DSB to understand true motives operating behind the information classed as confidential information by GCC headquarters.

7.3.2.3 Cooperation between Committee on AD Practices and GCC-TSAIP

The basic function of Committee on ADP is to remove the confusions faced by WTO Members in terms of interpretation, clarifications and implementations of ADA provisions, and hold biannual meetings with Members[881]. GCC-TSAIP should attend such meetings in order to create better clarity in its vision towards interpretation and implementation of ADA provisions. This will not only help GCC-TSAIP to increase its compliance with ADA provisions, improve transparency and due process in the AD proceedings. The major concern among the FANs and Negotiating Group on Rules is that Members of WTO are struggling to maintain the desired transparency and due process in the AD proceeding[882].

7.3.2.4 Measure for increasing transparency

Along with measure stated in subsection of 'explicit descriptions of terms and methods in ADA/SA, WTO's DSB may engage with the GCC authorities on the request of importing agencies of allegedly dumped products with the aim to increase transparency in AD investigations and procedures used for employing submitted data from the concerned parties.

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[880] Ibid

[881] Inama, Stefano, 'Negotiating AD and setting priorities among outstanding implementation issues in the post-Doha scenario: first examination in light of recent practice and DSU jurisprudence' (2002) (UNCTAD/ITCD/TSB/Misc. 72) < https://unctad.org/system/files/official-document/psitcdtsbm72.en.pdf> Accessed 02 Feb 2023.

[882] United Nations, 'Training module on the WTO Agreement on AD' (United Nations, 2006) < https://unctad.org/system/files/official-document/ditctncd20046_en.pdf> Accessed on 10 Feb 2023.

This method has been proven effective in the case of increasing opaque areas in handling AD cases by EC.[883] Furthermore, GCC-TSAIP may also consider joining Negotiating Group on Rules in order to raise the voice against the transparency issues in matters of AD cases[884]. GCC-TSAIP may find the best platform in the form of Committee on ADP for clarifications and interpretations at the literal level and in the context of practical cases through participation in debates carried out between Members of WTO and Committee on ADP, so that suggestions for transparent proceedings can be drawn directly from the Committee on ADP[885].

WTO might consider the revision of Article 3.4 and Article 3.7 relating to the consideration of factors for objective examination of the positive evidence by admitting the complexity of the situation and may reform these Articles by adding the requirement of submission of documents explaining the factors and positive evidence considered during the objective examination of the dumping practices in ADA. This measure is more likely to create transparency in the procedures used by member countries of WTO and will enable the WTO to make the GCC and other developing countries to comply with the ADA in a better manner.

7.3.2.5 Engagement with private sector for legal assistance for developing countries

WTO should increase its engagement with the private sector such as NGO's Pro bono attorneys for development of ACWL-like some other platforms which may provide cheap or free legal assistance to the adversely affected poor countries for pursuing the legal cases against the comparatively developed countries for their unfair application of ADA while deciding upon AD investigations. This recommendation finds its support from the case DS306, *India-Antidumping Measures on Batteries from Bangladesh,* ACWL, 2006, where

[883] Davis (n 199).

[884] World Trade Organization, 'FANs push transparency, due process, but members reluctant to engage in rules negotiations' (World Trade Organization, 2015) < https://www.wto.org/english/news_e/news15_e/rule_25jun15_e.htm> Accessed on 10 Feb 2023.

[885] World Trade Organization, 2023, 'Technical Information on AD' (World Trade Organization, 2023) < https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm> Accessed 05 Feb 2023]

ACWL offered economic support and legal support to low-income country – Bangladesh to lodge a complaint with the DSB against a comparatively developed AD user - India[886].

7.4 Relevance of Findings to Stakeholders

The findings of this research work will be useful for the following parties:

7.4.1 GCC-TSAIP

The GCC-TSAIP and competent authorities dealing with AD and safeguard cases may benefit from the findings of this research work, as it highlights the areas of compliance and non-compliance of GCC-CLAD and RoI with the ADA and SA. From outcomes reported in this research work, GCC-TSAIP can build an infrastructure recommended by this study in order to develop an effective trade remedy system addressing the non-compliance or non-compatibility issues with the ADA and SA.

7.4.2 Importers of Foreign Produce

The developing countries as third parties alleged with dumping practices and subject to SGM in the GCC can also learn from the findings of this study, as this study recommends some legal avenues for them for lodging their complaints at WTO fora against the unfair decisions and practices followed by GCC-TSAIP during dumping and safeguard investigations, which are non-compliant with the provisions in ADA and SA. For example, they can use ACWL to gain some legal assistance to compensate for the high economic cost which is required for challenging AD decisions and pursuing the cases against the comparatively developed countries in DSB.

7.4.3 Legal Experts in NGOs

The NGOs working towards the free and fair trade under umbrella of WTO may also find the results reported in this work useful for their legal team. This research work enlightens the legal experts in NGOs as to how the GCC and other Members of ADA and SA may prone to use the provisions in ADA and SA for promotion of their own economic and political interests. Similarly, they can also learn of the local industries within the GCC and

[886] CP Bown and BM Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8(4) Journal of International Economic Law 861

other Members may resort to the ADA and SA for protecting their economic interests in the local market, which might be anti-free and fair-trade concepts. Therefore, NGOs may benefit to learn about how the ADA and SA may be exploited by the industries and countries to serve their own interests, and build a case in DSB to offer legal support and assistance to the adversely affected countries while implementing the WTO-trade remedy regime by the ADA and SA user countries.

7.4.4 Legal Reformists

The countries which championed the reforms in WTO trade remedies may also learn from the results in this research work, as it highlights the grey areas in ADA and SA where definitions, terminologies and language of the provisions are indirect and unclear, which gives leeway to the Members to use the ADA and SA as a protectionist weapon. The findings in this research work may be used by proponents of reforms in WTO's Members, NGOs and other international legal experts to develop arguments against the weaknesses inherent in the existing WTO Trade Remedy regime, thereby leading an evidence-based movement for reforming the ADA and SA for developing an effective trade remedy regime.

7.5 Future Research

The GCC countries' provisions for, and application of, their anti-subsidy measures have not been sufficiently explored, and research that considers them fully is called for, given that there have been no anti-subsidy proceedings or measures undertaken by GCC Member States at the date of concluding this thesis. Studies of the adequacy of GCC Common Law on AD, Anti-Subsidies, and SGM, and their RoI for protecting the GCC market from unfair trade practices, and the extent to which such provisions support economic transformation programmes, are also viable areas for examination. This area includes Saudi Vision 2030 and Abu Dhabi Economic Vision 2030, both of which aim to transform the GCC Member States from oil-dependent economies to more diverse markets.

Recent diplomatic conflicts between the GCC Members themselves, such as the conflict between Qatar on one side and Saudi Arabia, the UAE, and Bahrain on the other, and the effects of these conflicts on implementing the GCC-CLADCSM also requires significant

attention. It is worth mentioning that these diplomatic conflicts may be driving countries to initiate trade disputes against each other at the WTO,[887] rather than working together.

Such conflicts raise the interesting question about the validity of the concept of the GCC common market in practice,[888] and the positions of GCC Members in the WTO DSB, given that these countries should have the same political and economic interests.[889]

For this a future research work may planned with aim to revealing the insider information about timely submission of AD case-related information from the concerned parties and methodologies for manipulation of such data, which may use the qualitative research methodologies involving the interviews with authorities in charge of GCC-TSAIP and AD cases and with authorised access to documents held at GCC relating to AD investigation. This will provide more in-depth analysis of the methods used for deciding on cases involving AD and SGM.

[887] DS576: Qatar—Certain measures concerning goods from the United Arab Emirates; DS567: Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights; DS528: Saudi Arabia—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights DS526; United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights; DS527: Bahrain—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights.

[888] The GCC Common Market was established on 1 January 2008 with aims of realising a fully integrated single market. The main aim of the market is to facilitate the movement of goods and services among GCC countries. The establishment of a customs union began in 2003 and was completed and fully operational on 1 January 2015.

[889] GCC Members do not have one shared representative in the WTO, and each country had its own representative, even before the diplomatic conflict between them began in 2017. For example, Saudi Arabia, the UAE, and Bahrain have their own representatives at the WTO dispute settlement body and are taking part as third parties in a number of WTO dispute settlement cases, as was shown in Chapter 2 of this thesis.

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Appendix 1: Official Gazette

The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)

Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Official Gazette

GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Volume (16) | Date: 23 Safar 1440 Hijri | November 1, 2018

This Official Gazette is issued by the GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade in accordance with GCC Common Law of Anti-Dumping, Countervailing Measures and Safeguards,and its Regulation

In this Edition:

Concerning the termination of the anti-dumping proceeding against the GCC Imports of seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling

(Originating in the People's Republic of China.)

Subscription Fees

Single Edition: 100 SAR or its equivalent

Cooperation Council for the Arab States of the Gulf GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

P.O.Box 7153 Riyadh 11462 King Khalid st.

Tel: 00966112551388-Fax:00966112810093

Kingdom of Saudi Arabia

The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)
Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Official Gazette
The GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

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CONTENT:

Introduction

In compliance with the basic objectives of the Cooperation Council for the Arab States of the Gulf, and in conformity with the objectives of the GCC Unified Economic Convention seeking to achieve economic integration among GCC member states, and aware of the crucial role played by GCC industries in the economies of the GCC member states, it becomes vital for the member states to take necessary measures against dumping, subsidy and increase of imports, which cause injury, threat of injury, or retardation to GCC industries.

In conformity with the GCC Common Law on Anti-Dumping, Countervailing and Safeguard Measures and its Rules of Implementation, and pursuant to Article 86 of the Rules of Implementation of the GCC Common Law on Antidumping, Countervailing Measures and Safeguards which states, "The Technical Secretariat issues an Official Gazette where it publishes all publications required under this Common Law and its Rules of Implementation". Hereby, GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade pleased to publish the Notice Volume No (16) of the Official Gazette of GCC- Bureau of Technical Secretariat for Anti-Injurious Practices in International Trade

The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)

GCC- Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

The termination of the anti-dumping proceeding against the GCC Imports of seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling

Originating in the People's Republic of China.

Referring to the decision of the Permanent Committee for Anti Injurious Practices in International Trade (Permanent Committee) to initiate an antidumping investigation against the GCC Imports of seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling originating in the People's Republic of China (Product under Investigation)[2] and upon the Permanent Committee's decision No. (18/2D/2018) dated on 24th October 2018 concerning the termination of the investigation without imposing anti-dumping measures against the GCC imports of the product under investigation according to the provisions of article (21-1) of the Rules of Implementation .

Pursuant to the provisions of article (22) of the Rules of Implementation, the GCC Bureau of Technical Secretariat for Anti-injurious Practices in International Trade (GCC-TSAIP) hereby announces the termination of the anti-dumping proceeding against the GCC imports of the product under investigation without imposing anti-dumping measures according to the following:

1. GCC Domestic Industry:

The Complainant is "Jubail Energy Services Company (Jesco)" from the Kingdom of Saudi Arabia. The complaint is supported by "ArcelorMittal Tubular Products Al-Jubail Co." from the Kingdom of Saudi Arabia. These companies represent the GCC domestic industry in accordance with Article (6-1) of the Regulation.

(2) The notice of initiation published in the official gazette of the Bureau of technical secretariat for anti-injurious practices in international trade-volume (11).

2. Product under Investigation and the GCC Like Product:

Seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling, of circular cross-section, of an external diameter ranges from 4.5 inches (114.3 mm) and not exceeding 16 inches (406.4 mm) for Line pipes and 13 3/8 inches (339.72 mm) for OCTG that are manufactured according to the API specifications and other similar specifications.

The product under investigation is classified under the following GCC-Unified Tariff Codes (from items 73041900 , 73042900).

The GCC-TSAIP concluded that the GCC like product produced by the GCC industry has characteristics closely resembling to those of the product under investigation according to Article (1) of the Regulation.

3. Reasons for termination of the investigation without imposing final measures:

The permanent committee decided to terminate the proceeding without imposing final anti-dumping measures due to the fact that the permanent committee does not support the GCC-TSAIP's recommendation about the sufficiency of the causal link between dumping and injury According to Article (21-1) of the Regulation.

Appendix 2: Official Gazette

The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)

Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Official Gazette

GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Volume (11) | Date: 28 Rajab 1438 Hijri | April 25, 2017

This Official Gazette is issued by the GCC - Bureau of Technical Secretariat for Anti Injurious Practices in International Trade in accordance with GCC Common Law of Anti-Dumping, Countervailing Measures and Safeguards, and its Regulation (Amended)

In this Edition:

Concerning the initiation of an anti-Dumping Investigation against imports of seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling of circular cross-section, of an external diameter not exceeding 16 inches (406.4 mm).

(Originating in or Exported from the People's Republic of China)

Subscription Fees

Single Edition: 25 SAR or its equivalent.

Yearly Subscription: 250 SAR or its equivalent.

Cooperation Council for the Arab States of the Gulf GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

P.O.Box 7153 Riyadh 11462 King Khalid st.

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Kingdom of Saudi Arabia

The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)
Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Official Gazette

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CONTENT:

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TEL:00966112551388
FAX: 00966112810093
Kingdom of Saudi Arabia

Introduction

In compliance with the basic objectives of the Cooperation Council for the Arab States of the Gulf, and in conformity with the objectives of the GCC Unified Economic Convention seeking to achieve economic integration among GCC member states, and aware of the crucial role played by GCC industries in the economies of the GCC member states, it becomes vital for the member states to take necessary measures against dumping, subsidy and increase of imports, which cause injury, threat of injury, or retardation to GCC industries.

Pursuant to Article 86 of the Rules of Implementation of the GCC Common Law on Antidumping, Countervailing Measures and Safeguards (Amended) which states, "The Technical Secretariat issues an Official Gazette where it publishes all publications required under this Common Law and its Rules of Implementation". Hereby, GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade pleased to publish the Notice Volume No (11) of the Official Gazette of GCC- Bureau of Technical Secretariat for Anti-Injurious Practices in International Trade

The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)

GCC- Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Non-Official Translation of Notice

Volume No. (11)

Date: 25th April 2017

Concerning the initiation of an anti-dumping investigation against imports of seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling, of circular cross-section, of an external diameter not exceeding 16 inches (406.4 mm).

Originating in or Exported from the People's Republic of China

In conformity with the GCC Common Law on Anti-Dumping, Countervailing and Safeguard Measures and its Rules of Implementation (Amended), (hereinafter referred to as the Regulation), and upon the decision no. (2017/AD2/7) of the Permanent Committee of Anti Injurious practices in the International Trade (hereinafter referred to as the Permanent Committee) regarding accepting the complaint and approving the initiation, the GCC- Bureau of Technical Secretariat for Anti-Injurious Practice in International Trade (hereinafter referred to as the GCC-TSAIP) announces the initiation of an anti-dumping investigation concerning imports of seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling, of circular cross-section, of an external diameter not exceeding 16 inches (406.4 mm) originating in or exported from the People's Republic of China (the product under investigation) in the Official Gazette of the Bureau of the Technical Secretariat for the Injurious Practices in International Trade (hereinafter referred to as the Official Gazette) according to the following:

1. Complaint

On 2nd February, 2017 The GCC-TSAIP received a properly documented complaint submitted by the GCC domestic industry, according to the provisions of Article (2-2) of the Regulation, alleging that the imports of the product under investigation are imported into the GCC market at dumped prices and are thereby causing material injury to the GCC domestic industry of the like product.

2. GCC Domestic Industry

The Complainant is "Jubail Energy Services Company (Jesco)" from the Kingdom of Saudi Arabia. The complaint is supported by "ArcelorMittal Tubular Products Al-Jubail Co." from the Kingdom of Saudi Arabia. These companies represent the GCC domestic industry in accordance with Article (6-1) of the Regulation.

3. Product under Investigation

Seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling, of circular cross-section, of an external diameter not exceeding 16 inches (406.4 mm) according to the API specifications and other similar specifications.

The product under investigation is classified under the following GCC-Unified Tariff Codes (from items 73041900 , 73042900).

4. Like Product

Seamless pipes and tubes of iron or steel of a kind used for oil or gas pipelines and drilling, of circular cross-section, of an external diameter not exceeding 16 inches (406.4 mm) according to the API specifications and other similar specifications..

5. Allegation of Dumping

The GCC domestic industry based its allegation of the existence of dumping on a comparison between the export prices of the product under investigation imported from China into the GCC market, with the constructed normal value in the Chinese domestic market at the same level of trade. This comparison resulted in the existence of a dumping margin exceeding 2% which is not de minimis.

6. Allegation of Injury

The GCC domestic industry alleged that there has been a significant increase in the volume of the allegedly dumped imports of the product under investigation from China exceeding in absolute terms and relative to the domestic production, above 3% of the total imports of the product under investigation from all countries of the world into the GCC market, which caused material injury to the GCC domestic industry that was represented in the following factors:

- Decline in the volume of production,
- Decline in the rate of capacity utilization,
- Price suppression and price depression,

- Price undercutting between the like product and the imported product under investigation,
- Decline in the market share,
- Decline in profitability,
- Decline in labour, wages and productivity,
- Decline in cash flows,
- Decline in the rate of return on investment and inability to raise capital, and
- Inability to grow.

7. Procedures

The GCC-TSAIP examined the accuracy and adequacy of the data contained in the complaint and prepared the initiation report that has been submitted to the Permanent Committee, which in turn approved the initiation of the investigation and the publication of the notice of initiation in the Official Gazette, according to Article 9 of the Regulation in order to determine whether the imports of the product under investigation are imported at dumped prices into the GCC market and causing material injury to the GCC domestic industry. Furthermore, the embassy of the People's Republic of China in Riyadh was notified after receiving the complaint and before proceeding to initiate the investigation.

8. Investigation Period

The dumping investigation period is from 1st January to 31st December 2016.

The injury investigation period covers the calendar years from 2013 to 2016.

Pursuant to Article 23 of the Regulation, The investigation shall be completed within (12) months from the date of initiation and this period may be extended, under special circumstances, for no more than six months.

9. Questionnaires and Collecting Information

In order to obtain necessary information for the investigation, the GCC-TSAIP will send questionnaires to known foreign producers and exporters (regarding the unknown foreign producers and exporters, the questionnaires will be submitted through the embassy of the People's Republic of China in Riyadh).

Questionnaires will also be sent to the GCC domestic industry and to the known importers of the product under investigation. Unknown foreign producers, exporters

and importers of the product under investigation shall declare themselves as interested parties to the GCC-TSAIP in order to receive a copy of the questionnaire within 21 days from the date of publication of this notice in the Official Gazette thus, they can submit their respective responses within the time limits.

All interested parties shall submit their responses to questionnaires to the GCC-TSAIP within 40 days from the date on which the questionnaires were sent to them or to the embassy of the People's Republic of China according to the provisions of Article 12 of the Regulation.

10. Sampling Techniques

Pursuant to Article 13 of the Regulation, the Investigating Authority may resort to apply sampling technique in case of the existence of large number of interested parties or number of products under investigation.

a) Sampling for Foreign Producers/Exporters

In case of using sampling techniques, all foreign producers/exporters, or legal representatives acting on their behalf, are requested to contact the GCC-TSAIP, and to provide the following information of their company or companies as per requested in attachment (1) within 21 days from the date of publication of this notice in the Official Gazette:

- Names, addresses, e-mail addresses, telephones, fax and contact person;
- Sales volume (Metric Tons-MT) and value of sales of the product under investigation exported into GCC market by the concerned company during the period from 1st January to 31st December 2016;
- Sales volume (Metric Tons-MT) and value of sales of the product under investigation sold in the domestic market of China by the concerned company during the period from 1st January to 31st December 2016;
- Activities of the company with regard to the production and sale of the product under investigation;
- Names and precise activities of all related companies involved in the production and/or selling (exported sales / domestic sales) of the product under investigation; and

- Any other relevant information that would assist the GCC-TSAIP in the selection of the sample.

By submitting all the above mentioned information, the concerned company agrees to its inclusion in the sample, and if the company is selected as part of the sample, this implies replying to questionnaires and accepting a possible on-the-spot verification visit. If the concerned company is unwilling to be included in the sample, it will be deemed non-cooperating with the GCC-TSAIP.

For the purpose of collecting information deemed to be necessary for the selection of the sample for foreign producers/exporters, the GCC-TSAIP may contact any known associations of foreign producers/exporters in the People's Republic of China.

b) Sampling for Importers

In case of using sampling techniques, all importers, or legal representatives acting on their behalf, are requested to contact the GCC-TSAIP and to provide the following information concerning their company or companies as per requested in attachment (2) within 21 days from the date of publication of this notice in the Official Gazette:

- Names, addresses, e-mail addresses, telephones, fax numbers and contact person;
- Sales volume (Metric Tons-MT) and value of company's sales of the product under investigation in the GCC market during the period from 1st January to 31st December 2016;
- Activities of the company with regard to the product under investigation;
- Imports volume (Metric Tons/MT) and value in Saudi Riyal or the local currency, that the company imported for the purpose of resale inside the GCC market during the period from 1st January to 31st December 2016;
- Names and activities of all related companies involved in the production and/or selling of the product under investigation; and
- Any other relevant information that would assist the GCC-TSAIP in the selection of the sample.

By submitting all the above mentioned information, the concerned company agrees to its inclusion in the sample. If the company is chosen as a part of the sample, that implies replying to questionnaires and accepting a possible on-the-spot verification visit. If the concerned company is unwilling to be included in the sample, it will be deemed non-cooperating with the Investigating Authority.

For the purpose of collecting the information deemed to be necessary for the selection of the sample of importers, the GCC-TSAIP may also contact any known associations of importers.

c) Final Selection of Samples

All interested parties wishing to submit any relevant information regarding the selection of the samples shall do so within the specified time limits.

The GCC-TSAIP intends to make the final selection of the samples after having consulted the interested parties that have expressed their willingness to be included in the sample.

Companies included in the samples shall reply to the questionnaire within the specified time limits in this notice and shall cooperate with the GCC-TSAIP.

If there is insufficient cooperation, the GCC-TSAIP may base its conclusions on the best information available.

11. Hearings

Pursuant to Article (14) of the Regulation, hearings may be held at the premises of the GCC-TSAIP for all interested parties to present their views and arguments, provided that they submit a written request to the GCC-TSAIP that includes specific reasons as to why they should be heard. Interested parties must express their wish to hold a hearing within a 30 days period from the date of publication of this notice in the Official Gazette.

12. On-the-Spot Verification Visits

Pursuant to Article (18) of the Regulation, the GCC-TSAIP may conduct verification visits at the premises of the interested parties to verify the accuracy of the information submitted and to collect any additional information or data required for the investigation.

13. Non-cooperation

In cases any interested party refuses access to or otherwise does not provide necessary information within the specified time limits or impedes the course of the investigation, the GCC-TSAIP will make its provisional and final determinations based on the best information available pursuant to Article (26) of the Regulation. In cases any interested party provided any misleading or wrong information, it will not be considered and best information available may be used.

14. Public File

The GCC-TSAIP, in the course of the investigation, makes available all relevant non-confidential information submitted by the interested parties through its public file. This information is available for all interested parties at the premises of the GCC-TSAIP in Riyadh.

15. Submission of Information

All relevant information is to be communicated to the GCC-TSAIP. All submissions and requests made by interested parties must be made in writing and in electronic format as practicable as possible and must indicate the name, address, e-mail address, telephone and fax of the interested parties. All written submissions, including the information requested in this notice, questionnaire replies and correspondence provided by interested parties on a confidential basis shall be labeled as "confidential" and shall be accompanied by a non-confidential version, which will be labelled "non-confidential". Such summaries shall be in sufficient details to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, interested parties may indicate that information is not susceptible of summary. In such cases, a statement of the reason must be provided according to Article 19 of the Regulation.

Correspondences to the Investigating Authority shall be made to the following address:

Secretariat General- Gulf Cooperation Council
Bureau of Technical Secretariat of Anti Injurious Practices in the International Trade
King Khaled Street, Riyadh, Kingdom of Saudi Arabia
P.O Box 7153 Code 11462
Phone: +966 112551388 – 966 112551399
Fax: +966 112810093
Email: tsad@gccsg.org

Attachment 1

A-Information for the selection of the sample of exporting producers in China.

Company Name	
Address	
Activities of the company with regard to the product under investigation,	
Contact Person	
E-mail Address	
Telephone	
Fax	
Name of Related Companies	
Activities of all related companies involved in the production and/or selling of the product under investigation.	

B-Turnover and Sales Volume of the Product under Investigation [1]
During the period from 1st January to 31st December 2016

	Country	Volume (Metric Tons-MT)	Value (specify Currency)
Export Sales of the Product under Investigation	Kingdom of Saudi Arabia		
	United Arab of Emirates		
	Sultanate of Oman		
	Kuwait		
	Qatar		
	Kingdom of Bahrain		
	Total		
Total Domestic Sales of the Product under Investigation	Domestic Market of China		
Add any other information where necessary.			

(1)This information is required for the purpose of sampling, and all the information provided will be treated as highly confidential by the Investigating Authority according to Article 12 of the GCC Common Law and its Regulation.

Attachment 2

Information for the selection of the sample of Importers in the GCC

A- Company detail

Company Name	
Activities of the company with regard to the product under investigation	
GCC country name	
Address	
Contact Person	
E-mail Address	
Telephone	
Fax	
Name of Related Companies	
Activities of all related companies involved in the production and/or selling of the product under investigation.	

B-Turnover and Sales Volume of the Product under Investigation [2]

During the period from 1st January to 31st December 2016

	Volume (Metric Tons-MT)	Value (specify Currency)
Total Sales of the Product under Investigation within GCC		
Total imports of the Product under Investigation into GCC		
.Add any other information where necessary		

(2)This information is required for the purpose of sampling, and all the information provided will be treated as highly confidential by the Investigating Authority according to Article 12 of the GCC common law and its regulation.

Appendix 3: Official Gazette

The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)

Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Official Gazette

GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Volume (14) | Date: 29/Dhul- Hijjah 1438 Hijri | September 20, 2017

This Official Gazette is issued by the GCC - Bureau of Technical Secretariat for Anti Injurious Practices in International Trade in accordance with GCC Common Law of Anti-Dumping, Countervailing Measures and Safeguards, and its Regulation (Amended)

In this Edition (NON OFFICIAL TRANSLATION)

Initiation of Safeguard Investigation against the GCC imports of Prepared Additives for cements, mortars or concretes.

(Chemical plasticizers)

Subscription Fees

Single Edition: 25 SAR or its equivalent.

Yearly Subscription: 250 SAR or its equivalent.

Cooperation Council for the Arab States of the Gulf GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

P.O.Box 7153 Riyadh 11462 King Khalid st.

Tel. 00966112551388-Fax:00966112810093

Kingdom of Saudi Arabia

The Official Gazette for the GCC- Bureau of Technical Secretariat For Anti Injurious Practices in International Trade

The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)
Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Official Gazette

The GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

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TEL:00966112551388
FAX: 00966112810093
Kingdom of Saudi Arabia

Introduction

In compliance with the basic objectives of the Cooperation Council for the Arab States of the Gulf, and in conformity with the objectives of the GCC Unified Economic Convention seeking to achieve economic integration among GCC member states, and aware of the crucial role played by GCC industries in the economies of the GCC member states, it becomes vital for the member states to take necessary measures against dumping, subsidy and increase of imports, which cause injury, threat of injury, or retardation to GCC industries.

Pursuant to Article 86 of the Rules of Implementation of the GCC Common Law on Antidumping, Countervailing Measures and Safeguards (Amended) which states, "The Technical Secretariat issues an Official Gazette where it publishes all publications required under this Common Law and its Rules of Implementation". Hereby, GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade pleased to publish the Notice Volume No (14) of the Official Gazette of GCC- Bureau of Technical Secretariat for Anti-Injurious Practices in International Trade

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The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)

GCC- Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Initiation of safeguard investigation against the GCC imports of prepared additives for cements, mortars or concretes (Chemical plasticizers).

In conformity with the GCC Common Law on Anti-Dumping, Countervailing and Safeguard Measures and its Rules of Implementation (Amended), (hereinafter referred to as the Regulation), and upon the decision no. (11/3S/2017) of the Permanent Committee of Anti Injurious practices in the International Trade (hereinafter referred to as the Permanent Committee) regarding accepting the complaint and approving the initiation of the investigation, the GCC- Bureau of Technical Secretariat for Anti-Injurious Practice in International Trade (hereinafter referred to as the GCC-TSAIP) announces the initiation of safeguard investigation against the GCC imports of prepared additives for cements, mortars or concretes (Chemical plasticizers) (the product under investigation) from the date of the publication of this notice in the Official Gazette of the Bureau of the Technical Secretariat for the Injurious Practices in International Trade (hereinafter referred to as Official Gazette) according to the following:

1. Complaint

The GCC-TSAIP received a properly documented complaint submitted by the GCC industry, according to the provisions of Article (2) of the Regulation, alleging that as a result of unforeseen development the imports of the product under investigation are imported into the GCC market in such increased quantities in absolute and relative to domestic production and are thereby causing serious injury to the GCC industry that produces like of directly competitive products.

2. GCC Industry

The Complainant is "Methanol Chemicals Company (CHEMANOL)" from the Kingdom of Saudi Arabia and produces a major proportion of the total GCC production of the like or directly competitive product. Thus, the company represents the GCC industry in accordance with the expressions specified in Article (3) of the GCC Common Law (Amended).

3. Product under Investigation

Prepared Additives for cements, mortars or concretes (chemical plasticizers) known as superplasticizers or hyperplasticizers in liquid or powder form and take different commercial names like SNF/NSF/PNS, SMF or PCE. These products are used for all types of concrete like ready-mix concrete, precast and pre-stressed concrete, in areas of congested reinforcement, where higher workability is of benefit, in reducing water concrete for the sake of improving impermeability and durability; marine concrete, gunite concrete, architectural concrete, special concrete,

pumpable concrete.

The product under investigation is classified under the following GCC-Unified Tariff Codes from items: (38244000).

4. GCC like Product

Prepared Additives for cements, mortars or concretes (chemical plasticizers) that used for all types of concrete like ready-mix concrete, precast and pre-stressed concrete, in areas of congested reinforcement, where higher workability is of benefit, in reducing water concrete for the sake of improving impermeability and durability, marine concrete, gunite concrete, architectural concrete, special concrete; pumpable concrete.

5. Increase of Imports

The domestic industry provided information alleged that imports into GCC Market of the product under investigation have been «sharply and suddenly» increased in both absolute and relative to domestic production during the period from 2012 to 2016.

6. Allegation of serious Injury

The domestic industry alleged that the increased imports of the product under investigation in absolute terms and relative to domestic production have caused serious injury to the domestic industry that was represented in the following factors:

- Decline in the volume of production,
- Decline in the rate of capacity utilization,
- Decline in the volume of sales and the market share,
- Increase in inventory volume,
- Decline in the rate of return on investment,
- Inability to grow
- Price undercutting between the GCC like product and the imported product under investigation,
- Decline in revenues,
- Decline in cash flows.

7. Procedures

The GCC-TSAIP examined the accuracy and adequacy of the data contained in the complaint and prepared the initiation report that has been submitted to the Permanent Committee, which in turn approved the initiation of the investigation and the publication of the notice of initiation in the Official Gazette, according to Article (9) of the Regulation, in order to determine whether the imports of the product under investigation is being imported into the GCC market in such increased quantities, absolute and relative to domestic production, and in such conditions as to cause serious injury to the GCC industry that produces like or directly competitive product.

8. Investigation Period

The injury investigation period covers the calendar years from 2012 to first half of 2017.

9. Questionnaires and Collecting Information

In order to obtain necessary information for the investigation, the GCC-TSAIP will send questionnaires to the foreign producers/exporters, GCC producers and GCC importers known to GCC-TSAIP. In order to receive a copy of the questionnaires, all the unknown interested parties to GCC-TSAIP shall request a copy of the questionnaires within 10 days from the date of publication of this notice in the Official Gazette thus, they can submit their respective responses within the time limits.

All interested parties shall submit their responses to the questionnaires to the GCC-TSAIP within (40) days from the date on which the questionnaires were sent to them or to the embassies of the countries concerned according to the provisions of Article (12) of the Regulation.

10. Public Hearings

A hearing will be held at the premises of the GCC-TSAIP for all interested parties to present their views and arguments, provided that all interested parties shall make themselves known to GCC-TSAIP within (21) days period from the date of publication of this notice in the Official Gazette.

11. On-the-Spot Verification Visits

Pursuant to Article (18) of the Regulation, the GCC-TSAIP may conduct verification visits at the premises of the interested parties inside or outside GCC countries to verify the accuracy of the information submitted and to collect any additional information or data required for the investigation.

12. Confidentiality

Any information provided by interested parties on a confidential basis, upon a reasonable cause, shall be treated as confidential and shall not be disclosed without the specific permission of the party submitting it pursuant to Article (12) of the Regulation.

Interested parties providing confidential information shall furnish a non-confidential summary with sufficient details to permit a reasonable understanding of the substance of the information submitted in confidence. If that information is not susceptible of summary, the concerned parties shall provide a statement of the reason according to Article (19) of the Regulation

13. Non-cooperation

In cases any interested party refuses access to or otherwise does not provide necessary information within the specified time limits and the prescribed form or impedes the course of the investigation, the GCC-TSAIP will make its preliminary and final determinations based on the best information available pursuant to Article (26) of the Regulation.

In cases any interested party provided any misleading or wrong information, it will not be considered and best information available may be used.

14. Public File

The GCC-TSAIP makes available all relevant non-confidential information submitted by the interested parties through its public file. This information is available for all interested parties at the premises of the GCC-TSAIP in Riyadh during the investigation and before reaching the final determinations.

15. Submission of Information

All relevant information including the information requested in this notice, questionnaire replies and correspondence provided by interested parties, must be communicated to GCC-TSAIP in writing and in electronic format and must indicate the name, address, e-mail address, telephone and fax of the interested parties.

Correspondences to the GCC-TSAIP shall be made to the following address:

Rihan Mubark Fayez

General Director of GCC-TSAIP

Secretariat General- Gulf Cooperation Council

Bureau of Technical Secretariat of Anti Injurious Practices in the International Trade

King Khaled Street, Riyadh, Kingdom of Saudi Arabia

P.O Box 7153 Code 11462

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Email: tsad@gccsg.org

Appendix 4: Official Gazette

The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)

Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Official Gazette

GCC–Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Volume (21) | Date: 10 Ramadan 1440 Hijri | May 15, 2019

This Official Gazette is issued by the GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade in accordance with GCC Common Law of Anti-Dumping, Countervailing Measures and Safeguards,and its Regulation

In this Edition(NON OFFICIAL TRANSLATION)

Imposition of definitive safeguard measures against the GCC imports of Prepared Additives for cements, mortars or concretes

(Chemical plasticizers)

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The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)
Secretariat General

Official Gazette

The GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

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Official Gazette is issued by The GCC - Bureau of Technical Secretariat for Anti Injurious Practices in International Trade in accordance with the GCC Common Law of Anti-Dumping, Countervailing Measures and Safeguards, and its Regulation

CONTENT:

Introduction

In compliance with the basic objectives of the Cooperation Council for the Arab States of the Gulf, and in conformity with the objectives of the GCC Unified Economic Convention seeking to achieve economic integration among GCC member states, and aware of the crucial role played by GCC industries in the economies of the GCC member states, it becomes vital for the member states to take necessary measures against dumping, subsidy and increase of imports, which cause injury, threat of injury, or retardation to GCC industries.

Pursuant to Article 86 of the Rules of Implementation of the GCC Common Law on Antidumping, Countervailing Measures and Safeguards which states, "The Technical Secretariat issues an Official Gazette where it publishes all publications required under this Common Law and its Rules of Implementation". Hereby, GCC-Bureau of Technical Secretariat for Anti Injurious Practices in International Trade pleased to publish the Notice Volume No (21) of the Official Gazette of GCC- Bureau of Technical Secretariat for Anti-Injurious Practices in International Trade

The Secretariat General of the Cooperation Council for the Arab States of the Gulf (GCC)

GCC- Bureau of Technical Secretariat for Anti Injurious Practices in International Trade

Imposition of definitive safeguard measures against the GCC imports of Prepared Additives for cements, mortars or concretes.

(Chemical Plasticizers)

In conformity with the GCC Common Law on Anti-Dumping, Countervailing and Safeguard Measures (The GCC Common Law) and its Rules of Implementation, and upon the decision no.(11/3S/2017) of the Permanent Committee for Anti Injurious Practices in International Trade (Permanent Committee) to initiate a safeguard investigation against the increase in GCC Imports of Prepared Additives for cements, mortars or concretes (Chemical Plasticizers), which is classified under HS code (38244000) (Product under Investigation) and the Permanent Committee's decision No. (20/3S/2018) proposing the imposition of definitive safeguard measures against the increase in GCC imports of the product under investigation pursuant to the provisions of Article (9) of the GCC Common Law and Paragraph (1) of article (75) the Rules of Implementation, and referring to the Ministerial Committee's approval of the Permanent Committee's decision No. (20/3S/2018) pursuant to the provisions of article (8) of the GCC Common Law and, the GCC Bureau of Technical Secretariat for Anti-injurious Practices in International Trade (GCC-TSAIP) hereby announces the imposition of definitive safeguard measures against the GCC imports of the product under investigation according to the following:

1. Product under investigation subject to the definitive safeguard measures

Prepared Additives for cements, mortars or concretes (Chemical Plasticizers) known as superplasticizers or hyperplasticizers in liquid or powder form and take different commercial names like SNF/NSF/PNS, SMF or PCE. These products are used for all

(1) The notice of initiation published in the official gazette of the Bureau of technical secretariat for anti-injurious practices in international trade-volume (14).

types of concrete like readymix concrete, precast and pre-stressed concrete, in areas of congested reinforcement, where higher workability is of benefit, in reducing water concrete for the sake of improving impermeability and durability; marine concrete, gunite concrete, architectural concrete, special concrete.

The product concerned is classified under the following GCC-Unified Tariff Code (38244000).

2. Duration of the definitive safeguard measures:

The definitive safeguard measures shall enter into force for three years starting from the date: 21 June 2019.

3. Form of the definitive safeguard measures:

The definitive safeguard measure will consist of an additional specific duty of the order of 221 USD/Ton applicable to imports exceeding the annual quota of 250,354 ton. For the purpose of liberalizing the definitive safeguard measure, the specific duty will be decreased according to following table:

Duration	Specific duty value (USD/Ton)
First year	221
Second year	199
Third year	177

These duties will not be applied against the GCC imports originating from developing countries, listed in the paragraph no. (5), whose share of imports in GCC imports of the product under investigation is less than 3% individually and less than 9% collectively.

4. The reasons leading to the imposition of the definitive safeguard measures:

4. 1 Determination of the increase of imports:

During the period of investigation, there has been recent, sudden, sharp and significant increase in GCC imports of the product under investigation during the period of investigation either in absolute terms or in relation to the GCC production.

4. 2 Determination of serious injury and causal link:

Based on the analysis and evaluation of the serious injury factors during the period of investigation, The GCC-TSAIP concluded that the GCC industry has suffered from the existence of serious injury such as sharp decline in sales, market share, and deterioration of the economic and financial factors of the GCC industry, which coincided with the existence of recent, sudden, sharp and significant increase in GCC imports of the product under investigation, and found that there are no other reasons for serious injury other than the increased imports, and there is sufficient evidence of the existence of causal link between the increased imports and the serious injury suffered by the GCC industry.

5. Developing countries exempted from the definitive safeguard measures against the GCC imports of Prepared Additives for cements, mortars or concretes (Chemical Plasticizers):

Afghanistan, Albania, Indonesia, Angola, Antigua and Barbuda, Argentina, Armenia, Bangladesh, Barbados, Barbados, Belize, Pakistan, Panama, Papua New Guinea, Paragua, Peru, Benin, Bolivia, Botswana, Brunei Darussalam, Burkina Faso, Burundi, Tanzania, Thailand, Togo, Tonga, Chad, Chile, Trinidad and Tobago, Tunisia, Turkey, Cambodia, Cameroon, Cape Verde, Central African Republic, Colombia, Democratic Republic of the Congo, Congo, Costa Rica, Croatia, Djibouti, Dominican Republic, Ecuador, Egypt, Fiji, Gabon, Gambia, Georgia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Jamaica, Jordan, Kenya, Kyrgyzstan, Laos, Lesotho, Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritania, Mauritius,

Macau, Mexico, Moldova, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Niger, Nigeria, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Senegal, El Salvador, Sierra Leone and the Solomon Islands, South Africa, Cŭte d'Ivoire, Sri Lanka, Suriname, Swaziland, Taiwan, Tajikistan, Philippines, Vanuatu, Venezuela, Vietnam, Uganda, Ukraine, Uruguay, Yemen, Zambia, Zimbabwe, Cuba, Hong Kong.

For inquiries, please send correspondences to the GCC-TSAIP to the following

Secretariat General- Gulf Cooperation Council
Bureau of Technical Secretariat of Anti Injurious Practices in the International Trade
6725 Jeddah Rd - Al Hada Dist.
Unit No. 1
Riyadh 12324 - 3147
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Appendix 5: Subscription Form of Official Gazette

Subscription Form of Official Gazette

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اسم المشترك: محمد علي العمري
العنوان: أبها ، السعودية
صندوق البريد: 61411
رقم الهاتف: 00966 555211394
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رمز SWIFT: ARNBSARI

- لتفعيل الاشتراك :

الرجاء إرسال نموذج الاستمارة ووصل الإيداع على البريد الالكتروني
infotsaip@gccsg.org

الشروط والأحكام

نرحب بكم في عضوية النشرة الرسمية لمكتب الامانة الفنية، نرجو منكم قراءة الشروط والأحكام التي سوف تحدد نوع عضويتك معنا:

1. تتم عملية الاشتراك من خلال إرسال نموذج طلب التسجيل ونسخة من إيصال إيداع مبلغ الاشتراك الى العنوان البريدي infotsaip@gccsg.org ، وعند استلام نموذج الاشتراك وإيصال الايداع سيتم إرسال العدد المطلوب بصيغة (PDF) للمشترك على بريده الالكتروني الموضح في نموذج الاشتراك .
2. يشمل الاشتراك السنوي حصول المشترك على كافة الاعداد الصادرة من النشرة الرسمية لمكتب الأمانة الفنية خلال سنة الاشتراك حتى نهاية تاريخ الاشتراك و ذلك على البريد الالكتروني الموضح في نموذج الاشتراك .
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