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'EX-OFFICIO' TRADE REMEDY INVESTIGATIONS: JURISPRUDENCE AND PRACTICE

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The starting point of any trade remedy investigation is the formal initiation of the investigation by the investigating authorities. Predominantly, investigations have been initiated based on a complaint filed by the aggrieved domestic industry of the importing country. However, an exception exists to this general rule, allowing an Investigating Authority (IA) to ex-officio initiate an investigation without receiving a formal application from the domestic industry.

Ex-officio initiation is an attractive alternative for domestic industries seeking protection, as it avoids the usual, time and resource-consuming application process. Yet, historically, the self-initiation process has been used infrequently by IAs and has seldom been supported by domestic industries.

There is limited interpretation on the issue of ex-officio initiations by the General Agreement on Tariffs and Trade (GATT) Panels and the World Trade Organization (WTO) Dispute Settlement Body (DSB). However, with ex-officio initiations becoming more pronounced recently, and one ex-officio initiation pending adjudication before the DSB,[1] *this rarely used provision is becoming prominent.*

The current paper carefully traces early legislation on trade remedies, especially initiation procedures, in GATT and Uruguay Round negotiation documents and available literature and attempts to identify the object and purpose behind enacting such a rarely used ex-officio initiation provision. The paper observes the shift of trade remedy investigations from a legal to

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[1] Request for Consultations by China, *European Union — Definitive Countervailing Duties on New Battery Electric Vehicles from China*, WT/DS630/1 (Nov. 06, 2024) [hereinafter Request for Consultation on New Battery Electric Vehicles].

an administrative nature and its impact on the subsequent development of evidentiary requirements and looks at the views of the Contracting Parties to the GATT on the issue of self-initiation and how the discussions influenced the drafting of the provision. The paper then looks at the jurisprudence developed on the key components of the provision, namely, the existence of 'special circumstances', and second, sufficient evidence of dumping/subsidisation, injury, and causal link. The paper finally turns to the practices of key users of trade remedy investigations and to how Members have enacted the provision and used the ex-officio procedures.

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I. INTRODUCTION

The *ex-officio* initiation procedures have been rarely invoked in the past in trade remedy investigations. However, the trend appears to be changing with a renewed focus on *ex-officio* investigations. For example, the European Union (EU), in its Clean Industrial Deal, noted that "to protect our industries from unfair competition and ensure that our market does not serve as an export destination for state-induced excess global capacity, we will sharpen existing Trade Defence Instruments, including . . . 'making greater use of *ex-officio* procedures'(emphasis added).[2] Similarly, the United Kingdom is currently debating proposed changes to its trade remedies system, including a greater government role and broader ministerial discretion in launching investigations without an industry application.[3] The high-profile *ex-officio*

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[2] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The Clean Industrial Deal: A Joint Roadmap for Competitiveness and Decarbonisation, PARL. EUR. DOC. COM (2025) 85 final (Feb. 26, 2025).
[3] Ilze Jozepa, *Changes to the UK Trade Remedies System*, HOUSE OF COMMONS LIBR. (Jan. 12, 2026), https://commonslibrary.parliament.uk/research-briefings/cbp-10457/.

countervailing duty (CVD) investigation initiated and conducted by the EU on Electric Vehicles from China,[4] buttresses the approach considered in the European Union's Clean Industrial Deal. Similarly, in 2023, there was a sudden spurt in *ex-officio* trade remedy investigations by India against various products from China.[5]

Prior to 2023, countries rarely invoked self-initiation procedures, although Members of the WTO, as well as Contracting Parties to the GATT, have used 'normal' anti-dumping and countervailing duty procedures to safeguard their domestic producers from injury caused by dumped or subsidised imports.

Trade remedy measures traditionally take three forms—anti-dumping (AD) measures, countervailing (CVD) measures, and safeguard (SG) measures,[6] which are enforced based on domestic regulations. These domestic regulations contain basic principles similar to those of the WTO agreements, though the phrasing varies between Members. The investigation procedures, including initiation procedures, align with the WTO provisions to a greater or lesser extent.

In AD and CVD investigations, the initiation procedure typically entails a written request, filed by or on behalf of an eligible domestic industry, in a prescribed form. Such applications allow an investigating authority (IA) to determine whether a 'prima facie' case exists to initiate an investigation. However, the AD and CVD provisions

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[4] Notice of Initiation of an Anti-Subsidy Proceeding Concerning Imports of New Battery Electric Vehicles Designed for the Transport of Persons Originating in the People's Republic of China, 2023 O.J. (C 160) 1; *See also* Commission Implementing Regulation (EU) 2024/2754 of 29 October 2024 Imposing a Definitive Countervailing Duty on Imports of New Battery Electric Vehicles Designed for the Transport of Persons Originating in the People's Republic of China, 2024 O.J. (L 2754) (EU).

[5]Anti-dumping investigation concerning imports of Unframed Glass Mirror from China, AD(OI)-12/2023 (Directorate Gen. of Trade Remedies Sept. 21, 2023) (India) [hereinafter Unframed Glass Mirror AD from China]; Suo-Moto initiation of anti-dumping investigation concerning imports of Fasteners originating in or exported from China PR, AD-OI (15/2023) (Directorate Gen. of Trade Remedies Sept. 22, 2023) (India) [hereinafter Suo-Moto investigation of Fasteners from China]; Initiation of Anti-dumping investigation concerning imports of Telescopic Channel Drawer Slider from China, ADD(OI)–13/2023 (Directorate Gen. of Trade Remedies Sept. 20, 2023) (India) [hereinafter Telescopic Channel Drawer AD from China]; Anti-dumping investigation concerning imports of Roller Chains originating in or exported from China, OI-23/2023 (Directorate Gen. of Trade Remedies Sept. 30, 2023) (India) [hereinafter Roller Chains AD from China] [hereinafter collectively referred as Anti-Dumping Cases].

[6] Please note that safeguard measures do not form part of the present Paper.

also provide for an *ex-officio* procedure, allowing an IA to initiate an investigation without receiving a written request from the domestic industry.

While much has been written and decided on the normal initiation procedures, there is limited literature on the legal nature of *ex-officio* trade remedy investigations. This paper begins by tracing the origins of the trade remedy laws, focusing on *ex-officio* investigations. Thereafter, the paper delves into important questions, including (a) what constitutes an *ex-officio* initiation, and (b) what are the conditions for *ex-officio* initiating an investigation? Lastly, the paper briefly looks at the law and practice in some of the major proponents of trade remedies.

II. TRACING THE HISTORY AND JURISPRUDENCE

In his writings, Jacob Viner noted instances in which a sixteenth-century English writer charged foreigners with selling paper at a loss to smother the infant industry.[7] In the seventeenth century, the Dutch were accused of selling in the Baltic regions at ruinously low prices to drive out French merchants.[8] Alexander Hamilton used a similar argument against English manufacturers exporting to America.[9] The action described was not specific to foreign dumping in all these instances.[10] These actions were precursors to the modern legislation on foreign dumping that followed in the early twentieth century.

A. 1900s to the Kennedy Round

Canada enacted the first modern legislation to counter foreign dumping in 1904 by amending its Customs Tariff Act of 1897.[11] The relevant extract of the law provided:

> Whenever it appears to the satisfaction of the minister of customs, or of any officer of customs authorized to collect customs duties, that . . . the export price or the actual selling price to the importer in Canada of any imported dutiable article, of a class or kind made

[7] J. Michael Finger, *Dumping and Antidumping: The Rhetoric and the Reality of Protection in Industrial Countries*, 7 WORLD BANK RES. OBSERVER 121, 123 (1992) [hereinafter Finger].
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] U.S. INT'L. TRADE COMM'N, INFORMATION CONCERNING DUMPING AND UNFAIR FOREIGN COMPETITION IN THE UNITED STATES AND CANADA'S ANTI-DUMPING LAW 21 (1919), https://play.google.com/books/reader?id=j8cpAAAAYAAJ&pg=GBS.PA20&hl=en_GB [hereinafter U.S. TARIFF COMM'N].

> or produced in Canada, is less than the fair market value thereof, . . . be subject to a special duty of customs equal to the difference between such fair market value and such selling price.[12]

As opposed to a tariff increase all along the line, the legislation provided a temporary remedy to address the temporary situation of dumping.[13] The above provision, being the first piece of global legislation on dumping, was more about substance than laying down the procedure. The opening sentence of the provisions indicates that the imposition of additional or special duty is based on the 'satisfaction' of the minister of customs or any officer of customs, indicating early use of *ex-officio* procedures. However, it was clarified later that in most cases, the government relied upon the domestic manufacturer to come forward and present its case before the government took action.[14]

The Union of South Africa also enacted legislation in 1914 to counteract dumping and subsidy, but available documents do not reveal provisions or discussions on the initiation procedure.[15]

Australia was likely the first to bring elaborate legislation with procedures for investigating unfair import competition in 1906.[16] While treating dumping as one of many aspects of unfair competition, the Act required receipt of a written complaint by the Comptroller-General about importing goods, intending to destroy or injure any Australian industry, before certifying to the Minister about his investigation into the complaint. As a show-cause, the procedure allows for fair notice to parties and due process for gathering information. The Australian law, which was more of administrative, was instrumental in prompting Canada and the US to revise their dumping regulations.

The United States first dealt with dumping in the Tariff Bill of 1913, followed by the Anti-Dumping Law of 1916, which made importing goods at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, unlawful.[17] These investigations were more legal

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[12] *Id.*
[13] *Id.*, at 22–23.
[14] *Id.*, at 24.
[15] *Id.*, at 38; *see also* Customs Tariff Act 26 of 1914 (S. Afr.).
[16] U.S. TARIFF COMM'N*, supra* note 11, at 40.
[17] *Id.*, at 42; *see also* Revenue Act of 1916, ch. 463, §§ 800–801, 39 Stat. 756 (1916).

than administrative, including remedy provisions for imprisonment and fines.[18] However, the early legislation did not clearly state whether they allowed *ex-officio* investigations. In 1921, the US Congress passed the anti-dumping law, which formed the bedrock for future dumping laws in the United States. Compared to the 1916 Act, the criteria shifted from an antitrust standard to an injury-from-imports standard, as the provisions removed any references to conspiracy, combination, or restraint of competition.[19] Further, the enforcement was now an administrative matter, not a legal one.[20] The Act required the Secretary of the Treasury to authorize the withholding of appraisement reports as to imported merchandise sold or likely to be sold in the United States at less than its fair value—whenever there is a reason to believe or suspect that the purchase price is less than the foreign market value.[21] Section 201(b) allowed the above-mentioned belief or suspicion to be based on invoices or other papers or from information presented to him or any person to whom authority under the section was delegated.[22] The entire investigation and determination were *ex-officio*.

Regarding subsidisation, the United States was the first to bring out a regulation in 1891, though the focus was only on sugar.[23] The regulation extended to all dutiable imports by the Tariff Act of 1897.[24] The regulations assessed countervailing duty on dutiable goods, did not involve the conduct of an investigation or administrative procedures, and did not prescribe injury tests to the domestic producers from the payment of export 'bounty or grant.'[25] The said regulation continued until the beginning of the Tokyo Round negotiations.

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[18] *Id.* (for the purpose of this paper, "legal" investigations refer to proceedings undertaken typically through judicial or quasi-criminal processes, requiring higher evidentiary thresholds such as proof of intent or anti-competitive conduct, and permitting penal remedies including fines or imprisonment. "Administrative" investigations, by contrast, could refer to determinations conducted by executive authorities under delegated statutory powers, characterised by ex officio initiation, more flexible or inquisitorial procedures, lower evidentiary thresholds, and the imposition of duties rather than criminal sanctions.)
[19] Finger, *supra* note 7.
[20] *Id.*, at 129.
[21] Anti-Dumping Act, 1921, *reprinted in* GATT Doc. L/479/Add.9, at 5 (July 18, 1956), https://www.wto.org/gatt_docs/English/SULPDF/90690299.pdf.
[22] *Id.*
[23] U.S. INT'L. TRADE COMM'N., PUB. NO. 4744, A CENTENNIAL HISTORY OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION 238 (2017), https://www.usitc.gov/publications/other/centennial.
[24] *Id.*
[25] *Id.*

The shift from legal to administrative investigation among countries had important implications for the future development of anti-dumping regulations. Most importantly, there was a significant impact on the nature of evidence and proof required from the party seeking relief. For example, the 1916 Act provided for a higher threshold for relief as it required the imported products to be sold "at a price substantially less than the actual market value or wholesale price of such articles" and that "such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States" (emphasis added).[26] In US-1916 Act (EC), the Appellate Body also confirmed panel's determination that elements such as intent, along with remedies like fines or imprisonment, under the 1916 Act were inconsistent with Article VI:2 and the Anti-Dumping Agreement to the extent that it provides for "specific action against dumping" in the form of civil and criminal proceedings and penalties.[27]

Compared to strict evidence and strict liability requirements in a legal action, an administrative action is more malleable and allows for broadening the scope of action by an investigating authority.[28] The shift to an administrative approach to regulations was important in the development of anti-dumping procedures, particularly in relation to initiation, as the quality and quantity of evidence required were watered down.

The United States Tariff Act of 1930 reflected the said shift, which provided for procedures for initiating the CVD and AD investigations, respectively.[29] The first procedure allowed the Administrating Authority to initiate a CVD investigation whenever it determined, "from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 701(a) exist."[30] The second procedure allowed an Administrating Authority to initiate an investigation "based on a petition filed by an interested party, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 701(a), and which is accompanied by

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[26] U.S. TARIFF COMM'N., *supra* note 11.
[27] Appellate Body Report, United States — Anti-Dumping Act of 1916, ¶ 137, WTO Doc. WT/DS136/AB/R.
[28] Finger, *supra* note 7.
[29] Tariff Act of 1930, ch. 497, § 654, 19 U.S.C. § 1654; *See also Id.* tit. VII, §§ 702, 732.
[30] *Id.* §702(a).

information reasonably available to the petitioner supporting those allegations (emphasis added)."[31]

AD provisions also provided for two initiation procedures. The first general procedure is identical to the CVD self-initiation procedure. However, the other self-initiation procedure relating to persistent dumping was the Administering Authority establishing an import monitoring program with any additional supplier country for a period not exceeding one year. If such monitoring led the Administering Authority to determine that sufficient information exists to initiate a formal investigation, the Administering Authority may initiate an investigation immediately. The difference between the 1916 and 1930 regulations reflects the softening of requirements for initiating and conducting investigations, for ascertaining the existence of injury-causing unfair imports, and for determining the extent of the remedy to preserve fair competition in the market.

The above-mentioned regulations from the United States, Canada, and Australia laid the groundwork for negotiations on specific dumping and subsidy regulations during the GATT negotiating rounds.

B. Kennedy Round Negotiations (1964-1967)

The exchange of proposals on dumping provisions started before the Kennedy Round in the late 1950s, when the GATT published an analysis of national legislation of the Contracting Parties on dumping and subsidies,[32] and suggestions by the Contracting Parties for further action on key issues.[33] For example, Sweden suggested that the initiative should normally come from the party that has suffered injury, as anti-dumping duty levy presupposes not only the existence of dumping but also that the dumping causes or threatens material injury to an established industry. Sweden viewed that the authorities should intervene only in special cases where such an industry makes no complaint.[34] The United Kingdom clarified its stand against self-initiations and its practice of awaiting an application from the affected industry, expecting them to produce *prima facie* evidence of dumping and injury before the

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[31] *Id.* §702(b)(1).
[32] GATT Secretariat, *Anti-Dumping and Countervailing Duties—A New GATT Publication*, GATT Doc. No. Spec/208/58 (July 31, 1958).
[33] Contracting Parties, *Anti-Dumping and Countervailing Duties—Suggestions Submitted by Contracting Parties for Further Action*, GATT Doc. L/869 (Oct. 13, 1958).
[34] GATT Secretariat, *Anti-Dumping and Countervailing Duties - Memorandum Received from the Government of Sweden*, GATT Doc. Spec/278/58, at 1 (Oct. 23, 1958).

application is considered.[35] In the case of subsidisation, however, the Government was expected to participate in the inquiry at an earlier stage, since an industry could not be expected to obtain detailed information about another government's practices.[36]

The Draft Report of the Group of Experts recognised that initiatives relating to anti-dumping actions should normally come from injured domestic producers. However, in certain cases, the governments could, "quite conceivably, take such initiatives."[37] In the second report, the Group of Experts agreed that "since the criterion of material injury was one of the two factors required to allow anti-dumping action, the initiative for such action should normally come from domestic producers who considered themselves injured or threatened with injury by dumping. Governments would, however, have the right to take such initiative when the conditions set forth in Article VI existed."[38]

The Kennedy Round also saw an exchange between the United Kingdom and the United States over the latter's anti-dumping law. Regarding initiation procedures, the United Kingdom reckoned that the United States initiated as many as one-third of anti-dumping investigations through its customs officials and not based on the petition filed by the domestic producers. According to the United Kingdom, this practice was at variance with the fundamental principle of injury on which Article VI was based, and it called for abolishing such a provision or amending it to make initiations by the Government under the "most exceptional circumstances."[39] This document perhaps first recognised the need for government action to be 'exceptional'.

In the subsequent draft of the international code on anti-dumping procedures and practices circulated by the United Kingdom, two initiation methods were provided—first, based on an application made by or on behalf of the domestic producers, and second, 'in exceptional circumstances,' in which the Group on Anti-dumping Policies of the Non-Tariff Sub-Committee may decide that initiation of

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[35] GATT Secretariat., *Group of Experts on Anti-Dumping and Countervailing Duties - Memorandum by the United Kingdom Government*, GATT Doc. L/963, at 2 (Apr. 02, 1959).
[36] *Id.*, at 2–3.
[37] GATT, Draft, *Report of group of experts on Anti-Dumping and Countervailing Duties*, Spec (60) 12, at 1 (Jan. 20, 1960).
[38] Group of Experts on Anti-Dumping and Countervailing Duties, *Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties*, GATT Doc. L/1141, at 1 (Jan. 29, 1960).
[39] Group on Anti-Dumping Policies, *United States Anti-Dumping Legislation: Note by the United Kingdom Delegation*, GATT Doc. TN.64/NTB/38, at 6–7 (June 14, 1965).

action by the Government authorities in the importing country is necessary and justifiable.[40] The rationale suggested in the draft code was that since the injury criterion must be met before initiation, the initiative for such action should also come from the domestic producers, as only they can be aware firsthand of the effects that they attribute to the alleged dumping, and can provide evidence to the said effect.[41] A reading of the text and rationale suggests that initiation without an application by the domestic industry must be under an exceptional circumstance and that initiations based on a complaint by the domestic industry should be the basic rule.

The United States, while clarifying its position on its domestic anti-dumping law, agreed with the report of the GATT Group of Experts that 'initiation of anti-dumping action should normally come from the domestic producer"[42] but at the same time, also believed that it was reasonable to self-initiate anti-dumping proceedings in certain circumstances.[43]

The subsequent iteration of the Code, alia, provided that "investigations shall [be initiated, except in rare circumstances provided for in (d) below (normally be initiated) on the basis of a complaint by the industry affected, supported by evidence both on dumping and material injury" and that "the authorities concerned shall, in special circumstances, be able to initiate themselves anti-dumping investigations. Supporting evidence in respect of both injury and dumping shall also be required when action is initiated by governments."[44]

The proposed text used the words 'rare' and 'special' to signify the exceptional nature of self-initiations by the governments. The proposed text also clarified that even self-initiations must be based on supporting evidence concerning dumping and injury.

Despite the progress made, Contracting Parties differed on the inclusion of self-initiation provisions, with the 1966 Secretariat Note stating that:

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[40] GATT Secretariat, *Draft International Code on Anti-Dumping Procedure and Practice: Note by the United Kingdom Delegation*, GATT Doc. Spec(65)86, at 3 (Oct. 07, 1965).
[41] *Id.*
[42] Government of U.S., *Anti-Dumping Policies: Observations by the United States*, GATT Doc. TN.64/NTB/40, at 3 (Nov. 01, 1965).
[43] *Id.*
[44] GATT Secretariat, Group on Anti-Dumping Policies, *Possible Elements to be considered for inclusion in an Anti-Dumping Code, Note by the Secretariat*, GATT Doc. TN.64/NTB/W/13, at 7–8 (Aug. 23, 1966).

> most members of the Group held the view that the initiation of an anti-dumping investigation should in general be taken only on the request of domestic producers claiming injury. Such members also agreed that governments should, in special but rare circumstances, be able to initiate themselves anti-dumping investigations. Other delegations held the view that initiation by governments, while not routine, should also not be regarded as rare, and it was important that governments retain authority to initiate action on their own motion. It was particularly pointed out by those holding this view that it would frequently be difficult for small industries to establish whether dumping by foreign competitors was the cause of their market difficulties or to produce sufficient background material to justify an investigation; in such cases it would be reasonable to provide for action by governments. Moreover, in deciding whether to initiate an investigation, the authorities should not be unduly severe in judging the evidence submitted by complaining producers. Here, too, is an important area in which significant differences of view persist.[45]

The negotiations finally concluded on June 30, 1967 as the Contracting Parties agreed to the Agreement on Implementation of Article VI of the GATT ('Kennedy Round Anti-dumping Code').

C. Tokyo Round Negotiations (1973-1979)

Since adopting the Kennedy Round Anti-dumping Code, the Committee on Anti-Dumping Practices met regularly to review the introduction and application of the Code domestically by the Contracting Parties.

Some countries, like the United States, analysed and compared the Kennedy Round Code with their own anti-dumping code 1921.[46] With respect to initiation, the report stated that the "requirements in paragraphs (a) that investigations shall normally be initiated upon the request of an industry are consistent with past experience under the Act"[47] as "great majority of investigations has been started because of complaints

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[45] GATT Secretariat, Group on Anti-Dumping Policies, *Note by the Secretariat on Meetings on* 10-11 May 1966, GATT Doc. TN.64/NTB/W/11, at 4 (June 06, 1966).
[46] S. COMM. ON FIN., 90TH CONG., TEXT OF ANTIDUMPING ACT, 1921, INTERNATIONAL ANTIDUMPING CODE AND RELATED MATERIALS, https://www.finance.senate.gov/imo/media/doc/PrtAnti2.pdf.
[47] *Id.*, at 70.

by domestic industries"[48] and "only a relatively small number have been initiated by the Government."[49] Importantly, the report emphasised the need for request-based initiation by referring to evidence regarding injury, which is usually available to the complainant. The report stated that:

> the purpose of the provision was to ensure that an expensive and time-consuming investigation would not be initiated where there is no possibility of injury or where the complaint is frivolous, and that this was consistent with the rule of statutory construction that a law will not be interpreted to require the performance of a futile act.[50]

The Committee also met regularly to prepare and discuss an inventory of problems and issues arising under the existing Anti-dumping Code. For example, in February 1977, the Committee released the Analytical Inventory of Problems and Issues Arising Under the Anti-Dumping Code.[51] One of the problems related to *ex officio* initiations was the definition of 'special circumstances' that permit the initiation of an investigation without request.[52] The problem was based on two positions taken by Contracting Parties previously, namely (a) *ex officio* procedures started without the criteria of Article 5(a) being fully met and (b) procedure applied only in special cases and where there is evidence both of dumping and injury.[53]

The experience of signatories to the Code suggested that the *ex officio* process was seldom utilised, and there was general acceptance and reaffirmation of the need to have sufficient evidence on dumping and injury before the initiation.[54] In the next version, Article 5 required providing sufficient evidence of a causal link between dumped imports and the alleged injury.[55] The Tokyo Round Anti-dumping Code reflected these proposals.

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48 *Id.*
49 *Id.*
50 *Id.*
51 GATT Secretariat, Committee on Anti- Dumping Practices, *Analytical Inventory of Problems and Issues arising under the Anti-Dumping Code*, GATT Doc. COM.AD/W/68 (Mar. 08, 1977).
52 *Id.*, at 27.
53 *Id.*
54 GATT Secretariat, Committee on Anti- Dumping Practices, *Priority Issues in the Anti-Dumping Field: Submission by Japan*, GATT, COM.AD/W/83, at 9 (Nov. 17, 1978).
55 *Id.*, at 7.

Regarding the proposed Code for subsidies, the Secretariat prepared an initial note based on written submissions and comments from the Contracting Parties.[56] On the point of initiation, some parties, such as the European Communities, commented that the procedure should be opened based on a formal complaint by the industry affected, supported by sufficient evidence regarding the existence of a subsidy and material injury.[57] Subsequently, Canada prepared a draft code containing the first draft subsidy provisions.[58] The said draft did not contain any specific initiation procedures. In the subsequent draft, the twin initiation procedures, similar to the Anti-Dumping Code, were inserted.[59] The phrases were refined in the subsequent drafts, but the provision remained the same.[60] Eventually, the subsidy code was agreed upon in 1979.

Under the Codes, self-initiations were permitted in 'special circumstances' 'only if' there was sufficient evidence of dumping/subsidy, injury, and a causal link between the dumped/subsidised imports and the alleged injury. Just like an initiation based on an application, there was a requirement of sufficient evidence of dumping/subsidy, injury, and a causal link between the dumped/subsidised imports and the alleged injury. On the evidence requirement, initiations based on applications required the applicant to furnish sufficient evidence; in the case of self-initiations, the IA was required to have sufficient evidence. The Codes do not guide where such evidence must originate, i.e., whether the IA must gather evidence independently or whether the domestic industry can assist them.

Another key distinction between the two initiation procedures is the use of the term 'normally' for the first procedure, where the industry makes a written request, and the term 'special circumstances' for the second self-initiated procedure.

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[56] GATT Secretariat, Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Subsidies and Countervailing Duties", *Checklist of Positions on the Various Issues in the Area of Subsidies and Countervailing Duties Note by the Secretariat*, GATT Doc. MTN/NTM/W/52 (July 17, 1976).
[57] *Id.,* at 22.
[58] GATT Secretariat, Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Subsidies and Countervailing Duties", *Checklist of Positions on the Various Issues in the Area of Subsidies and Countervailing Duties - Note by the Secretariat*, GATT Doc. MTN/NTM/W/80 (Jan. 19, 1977).
[59] GATT Secretariat, Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Subsidies and Countervailing Duties", *Subsidies/Countervailing Measures - Outline of an Arrangement*, GATT Doc. MTN/NTM/W/168, at 3–4 (July 10, 1978).
[60] GATT Secretariat, Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Subsidies and Countervailing Duties", *Subsidies/Countervailing Measures - Outline of an Arrangement*, GATT Doc. MTN/NTM/W/210, at 3 (Dec. 19, 1978).

'Normal' is defined as "constituting or conforming to a type or standard; regular, usual, typical; ordinary, conventional."[61] 'Normally' has been defined as 'under normal or ordinary conditions; as a rule, ordinarily.' The term's ordinary meaning thus conveys that the phrase 'normally be initiated' refers to an ordinary, regular, or conventional way of initiating an investigation.

'Special' on the other hand, is defined as "having an individual, particular, or limited application, object or intention; affecting a single person, thing, group, etc."[62] or "exceptional in quality or degree; unusual; out of the ordinary; esp. excelling in some (usually positive) quality; exceptionally good."[63] Thus, 'in special circumstances' conveys that the self-initiation procedure must be in unusual situations and/or limited in application.

Whether an IA must ascertain if the 'normal' procedure can be applied before self-initiation remains untested so far under GATT and WTO jurisprudence. However, using the term 'normally' in the first part and followed by 'special' in the subsequent part of the same provisions gives a sense of hierarchy in the two procedures.

Concerning the existence of 'special circumstances,' the GATT Panel had an opportunity to expound on the meaning of the term in the US — Softwood Lumber II.[64] In this dispute, the US self-initiated a countervailing duty investigation against Canada on imports of Softwood Lumber in the backdrop of Canada's termination of the Memorandum of Understanding (MOU) on trade in softwood lumber between the United States and Canada. The said MOU resulted from a previous countervailing duty investigation on importing the same product from Canada, leading to an affirmative preliminary determination.[65] However, before making a final determination, Canada instituted a dispute with the United States and approached the Committee on Subsidies and Countervailing Measures to establish a panel.[66]

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[61] *Normal*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/search/dictionary/?scope=Entries&q=normal.
[62] *Special*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/special_adj?tab=meaning_and_use&tl=true#21643884.
[63] *Id.*
[64] Report of the Panel, *United States — Measures Affecting Imports of Softwood Lumber from Canada*, GATT Doc. SCM/162 (adopted Oct. 27, 1993) [hereinafter US — Lumber].
[65] *Id.*, at 4.
[66] *Id.*

During the pendency of the dispute, both countries concluded an MOU to resolve their differences concerning the Softwood Lumber trade.[67] Among other things, the MOU allowed Canada to collect an export charge on the export of softwood lumber and possible reduction/elimination by introducing 'replacement measures.' Further, a few provisions were explicitly linked to the previous countervailing duty investigation, such as the implementation of the MOU upon termination of the ongoing investigation and the US release of bonds and refund deposits.[68] Canada also understood that the MOU related not only to the settlement of the current investigation but also to avoiding the enactment of legislative restrictions or further investigations under US trade law. Canada retained its right to terminate the MOU in such eventualities. Soon after signing the MOU, the US terminated the ongoing investigation. At the same time, the petitioner retained its right to file another petition based on the same Canadian acts and practices.[69] Subsequently, the US imposed a temporary charge as Canada could not collect export duty on exported Softwood Lumber. The charge was suspended when Canada started collecting the duty, subject to the condition that if there was a shortfall in the collection of such duty, the US may increase the tariff. The situation initially resulted in Canada's modification and termination of the MOU.[70]

Following the termination, the US self-initiated a countervailing duty investigation against Canada on imports of Softwood Lumber because:

> Canada's unilateral termination of the MOU, which was the basis for the withdrawal of the CVD petition and the termination of the CVD investigation in 1986, constitutes special circumstances within the meaning of Article 2.1 of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code).[71]

Canada challenged the self-initiation, among other aspects of the US action, before the Committee on Subsidies and Countervailing Measures.[72] Canada argued that (i) the reason given as 'special circumstances' to justify the self-initiation of the

[67] *Id.*
[68] *Id.*, at 5.
[69] *Id.*
[70] *Id.*, at 8.
[71] *Id.*, at 9.
[72] *Id.*, at 11.

investigation did not constitute 'special,' and (ii) the US initiated the investigation absent sufficient evidence of the existence of a subsidy, injury, and causal link.[73]

On the issue of the existence of 'special circumstances,' the Panel first examined Canada's reference to US comments on the parallel provision under the draft anti-dumping code in 1967, which, according to Canada, explained the meaning of 'special circumstances.'[74] The US had stated that:

> . . . initiation of anti-dumping actions "should normally come from domestic producers." We believe, however, that governments should retain authority to initiate anti-dumping investigations on their own motion. In some cases, the domestic producers affected by dumping may lack sufficient knowledge, or sufficient resources and organisation to acquire the knowledge that dumping is the cause of their market difficulties. To forbid governmental initiation of anti-dumping actions discriminates in favour of the well-organised, economically sophisticated, and usually larger or more highly concentrated domestic industries. Rigid requirements regarding the quantum of evidence necessary to initiate government investigation also discriminate in favour of the larger firms, who are able to gather price information regarding international competitors.[75]

Thus, Canada argued that the Government's self-initiation should be restricted to cases where the domestic industry consisted of many small, not-well-organised producers—as the US commented during earlier negotiations.

The Panel noted that the term 'special circumstances' is not defined and that the situation referred to by Canada is not mentioned in Article 2.1. The Panel interpreted that:

> the term "special" had to be interpreted in the light of the main purpose of the initiation provisions in Article 2:1, which was to ensure that investigations were normally initiated through a petition procedure. A self-Initiation in circumstances occurring so rarely that this main purpose was not undermined could therefore,

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[73] *Id.*, at 30.
[74] *Id.*, at 131.
[75] GATT Secretariat, Sub-Committee on Non-Tariff Barriers Group on Anti-Dumping Policies, *Anti-Dumping Checklist, Comments by the United States*, GATT Doc. TN.64/NTB/W/10/Add.3, at 7 (Apr. 28, 1966).

> in the view of the Panel, be considered to be covered by Article 2:1.[76]

Based on the above, the Panel presented an important illustration of 'special circumstances' and held that the US correctly identified the circumstance, i.e., Canada's termination of an agreement that had been the basis of the United States industry's decision to withdraw its petition, were sufficiently exceptional to warrant the conclusion that they were 'special circumstances' within the meaning of Article 2:1.[77] The situation or circumstances were considered 'so rare' that it necessitated an *ex-officio* investigation, especially when the authority possesses necessary evidence gathered from prior investigation, and saved crucial time for taking action against alleged subsidised imports. Further, as the Panel noted, self-initiations need not be just restricted to a situation where the domestic industry consists of many small, not-well-organised producers, as the US proposed during the negotiations.[78]

With respect to the sufficiency of evidence, the Panel opined that it must be judged with respect to the particular action under Article 2.1 of the Agreement, i.e., the justification for initiating an investigation.[79] The Panel further opined that the standard of review concerning initiation should be sensitive to the intended anti-harassment function of the initiation procedure.[80] In particular, the Panel laid down that the quantum and quality of evidence required before initiation would necessarily have to be less than that at the time of making a final determination—but at the same time, 'sufficient evidence' clearly meant something more than a mere allegation or conjecture and could not mean just 'any evidence' and must be relevant to establish the three required elements.[81]

Finally, as regards the contention whether self-initiation required a higher standard of sufficient evidence than petition-based initiation, the Panel noted that there was nothing in the text of the Agreement to suggest a different level of evidence for self-initiation is required than petition-based initiation, and that no purpose would have been served with different standards of evidence for initiation.[82] Finally, the Panel noted that the words 'only if' in Article 2.1 did not refer to a higher evidentiary standard for self-initiation; rather, the words related to the existence of the elements

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[76] US — Lumber, *supra* note 64, at 132.
[77] *Id.*
[78] *Id.*
[79] *Id.*, at 133–134.
[80] *Id.*
[81] *Id.*
[82] *Id.*, at 135.

mentioned in Article 2.1, that is, the existence of subsidisation, injury/threat of injury, and causal link.[83]

In conclusion, most early users of the regulations had a mechanism that allowed governments to initiate and investigate on their own. Post Kennedy Round, countries seemed to agree on 'normally' initiating an investigation through a written request by or on behalf of the producers and, in 'rare' circumstances, on their own initiative. By 1992, most Contracting Parties had aligned with the Codes and provided for both initiation procedures. The GATT US — Softwood Lumber II clarified the requirements for initiation, including *ex-officio* initiations, and laid the groundwork for the WTO agreements on anti-dumping and subsidies, helping to shape their development.

III. THE WTO JURISPRUDENCE

During the Uruguay Round of negotiations (1986 to 1994), the Contracting Parties discussed and negotiated further improvement of the existing codes. In the context of Anti-Dumping initiation procedures, Japan submitted that the evidence must not only be sufficiently objective but also require the authorities to provide, upon request, the reasons for their decision on whether sufficient evidence exists to initiate the investigation.[84] This proposal laid the groundwork for current provisions in the (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994) ADA requiring 'relevancy' and 'adequacy' of the evidence presented. Hong Kong emphasised that, normally, there should be no self-initiations, and that exceptional circumstances shall not be deemed to exist when the authorities accept a standing complaint and monitor imports to self-initiate an investigation.[85]

On 'sufficient evidence', the European Communities proposed ensuring minimum standards regarding the information which a request for initiation should contain and such information reasonably be expected to be available to the complainants, in

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[83] *Id.*

[84] Negotiating Group on MTN Agreements and Arrangements, *Submission of Japan on the Amendments to the Anti-Dumping Code*, GATT Doc. MTN.GNG/NG8/W/48, at 5 (Aug. 03, 1989).

[85] Negotiating Group on MTN Agreements and Arrangements, *Amendments to the Anti-Dumping Code: Communication from the Delegation of Honk Kong*, GATT Doc. MTN.GNG/NG8/W/51, at 3 (Sept. 12, 1989).

particular with respect to injury suffered.[86] Canada also supported more specific guidelines on minimum documentation and information requirements. It proposed that "simple assertion or the provision of selected facts unrepresentative of the true situation cannot be considered sufficient to meet the minimum technical requirements",[87] which eventually found its way in Article 5.2 of the ADA. Nordic Countries supported compensation provisions for unfounded anti-dumping investigations, in addition to proposing that the authority verify the information and evidence presented before the initiation of the investigation.[88]

The initiation provision was restructured in the first consolidated draft text. In particular, the sufficiency of the evidence was elaborated upon by listing out the contents of the information (also for self-initiation—except complainant identification requirement), a requirement to review the adequacy of the evidence provided, the need for satisfactory evidence before initiation, and not publicising the request for initiation, before a decision to initiate has been made.[89] These proposals and comments were further refined to reflect in the adopted text of the current ADA.

With respect to the Subsidies Code, the focus was on the definition of the term' domestic industry' for determining the standing of petitioners, verification of the standing of parties to file petitions, clarification of the expression 'sufficient evidence', and consideration of ways to secure the interests of exporters in cases of unfounded investigations.[90] Subsequent iterations and checklists reflected general agreement on creating more precise rules for initiating investigations to avoid unjustified investigations against exporters, including provisions to verify the

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[86] Negotiating Group on MTN Agreements and Arrangements, *Communication from the European Communities to GATT Uruguay Round-Anti-Dumping Code*, GATT Doc. MTN.GNG/NG8/W/63, at 2–3 (Dec. 20, 1989) (the list of information proposed included information on standing of complainants, normal value and export price, injury, and causality.)

[87] Negotiating Group on MTN Agreements and Arrangements, *Amendments to the Anti-Dumping Code: Submission by Canada*, GATT Doc.MTN.GNG/NG8/W/65, at 1–2 (Dec. 22, 1989).

[88] Negotiating Group on MTN Agreements and Arrangements, *Amendments to the Anti-Dumping Code: Submission by the Nordic Countries*, GATT Doc. MTN.GNG/NG8/W/64, at 8–9 (Dec. 22, 1989).

[89] Negotiating Group on MTN Agreements and Arrangements, *Report of the acting Chairman of the Informal Group on Anti-Dumping*, GATT Doc. MTN.GNG/NG8/W/83/Add.5, at 16–17 (July 23, 1990).

[90] Negotiating Group on MTN Agreements and Arrangements, *Communication from the Republic of Korea*, GATT Doc. MTN.GNG/NG10/W/10, at 6 (Oct. 22, 1987).

complainant's standing, material injury, compensation for unjustified investigations, and simultaneous anti-dumping and countervailing duty investigations.[91]

Some countries, like Brazil, proposed stricter initiation processes, noting that only 20% of all investigations between 1980 and 1986 resulted in positive outcomes, with many investigations initiated on insufficient grounds.[92] The Nordic countries reiterated the importance of the consultation process before initiation and advocated a moratorium period before initiating a countervailing duty investigation.[93] They were also inclined to consider the provision of compensation against "manifestly unfounded harassment investigations", in addition to supporting growing calls to strengthen the 'sufficient evidence' criterion and the requirement to establish a prima facie case of a subsidy, material injury, and causality.[94]

The proposal and comments culminated in restructuring the existing Subsidies Code, with provisions for 'normal' initiation based on the domestic industry's written request and for self-initiation by the authority. The provision further required the IAs to review the adequacy of the evidence in the request for initiation, taking into account any relevant and readily available information.[95]

As a result of ongoing negotiations, the draft texts were adopted as the ADA and Agreement on Subsidies and Countervailing Measures (ASCM). Both agreements set out the procedures that Members must follow when initiating and conducting trade remedy investigations.

The WTO provisions on initiation are an extension of the GATT Kennedy Round and Tokyo Round Codes, *inter alia*, providing similar provisions and conditions for

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[91] Negotiating Group on MTN Agreements and Arrangements, GATT Doc. MTN.GNG/NG10/W/9/Rev.3, at 30–31 (May 26, 1988).

[92] Negotiating Group on MTN Agreements and Arrangements, *Communication from Brazil*, GATT Doc. MTN.GNG/NG10/W/24, at 2–3 (Nov. 10, 1988).

[93] Negotiating Group on MTN Agreements and Arrangements, *Elements of the framework for negotiations: Submission by the Nordic Countries (Finland, Iceland, Norway, Sweden)*, GATT Doc. MTN.GNG/NG10/W/30, at 8 (Nov. 27, 1989).

[94] *Id.*, at 9.

[95] Negotiating Group on MTN Agreements and Arrangements, *Draft text by the Chairman*, at 12-13, GATT Doc. MTN.GNG/NG10/W/38/Rev.1 (Sept. 04, 1990); *see also* Negotiating Group on MTN Agreements and Arrangements, *Draft text by the Chairman*, GATT Doc. MTN.GNG/NG10/W/38/Rev.2, at 17–18 (Nov. 02, 1990); *see also* Negotiating Group on MTN Agreements and Arrangements, *Draft text by the Chairman*, GATT Doc. MTN.GNG/NG10/W/38/Rev.3, at 17–18 (Nov. 06, 1990); *see also* Negotiating Group on MTN Agreements and Arrangements, *Negotiating framework: Proposal by Canada*, GATT Doc. MTN.GNG/NG10/23, at 17–18 (Nov. 07, 1990).

self-initiating an investigation without receiving a formal written application by or on behalf of the domestic industry.

The terms '*ex-officio*' or 'self-initiation' are not defined under the WTO agreements. *Sua sponte*, which is synonymous with '*ex-officio,*' is a Latin legal term that means 'of one's own accord; voluntarily'[96] or 'without prompting or suggestion.' The term is used in the legal context to describe a situation in which an authority acts on its own, without being prompted or requested to act by another party. Thus, *ex-officio* actions involve the concerned authority taking actions without any prompt or request by another party.

A careful reading of the self-initiation provisions suggests that an IA may initiate an investigation *ex-officio* where it does not receive a written application by or on behalf of a domestic industry. The available literature offers limited scenarios in which countries could self-initiate investigations. One possible interpretation is a situation in which the IA receives information from the domestic industry, not in the form of a written application but as an informal representation.

An example of such a case might be where the domestic industry is so fragmented that, although suffering a material injury, domestic producers can't coordinate their efforts to meet the standing requirements to bring an application due to a lack of cooperation amongst the producers.[97] As previously noted, the United States also proposed such a scenario during anti-dumping code negotiations as a 'special circumstance' under which authorities may self-initiate investigations.

Another possibility, as in the GATT *US — Softwood Lumber II* dispute, is the occurrence of an event so rare, such as the termination of an MOU leading to the withdrawal of a previously filed petition by the domestic industry and the subsequent closure of the investigation. In such cases, the IA need not again follow the normal procedure of receiving a fresh application; instead, it can rely on a previously filed application that contains sufficient information and evidence to justify an investigation.

Similar to GATT Codes, Article 5.6 of ADA and Article 11.6 of ASCM allow *ex-officio* initiations if there exist, *inter alia*, (a) special circumstances, and (b) sufficient evidence of the existence of dumping/subsidy, injury, and causal link.

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[96] BRYAN A. GARNER & HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 1560, (9th ed. 2009).

[97] JUDITH CZAKO ET AL., A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS 22–23 (2003).

The existence of 'special circumstances' requires two essential considerations: (i) what constitutes 'special circumstances'? (ii) Is the existence of 'special circumstances' a *sine qua non* for *suo-moto* initiations?

Article 17.6 (ii) of the ADA requires interpreting the relevant provisions in accordance with customary rules of interpretation of international law. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides that '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 the light of its object and purpose.' Among other things, Article 31 of the VCLT requires that treaty provisions be given their ordinary meaning in their proper context.

The word 'special' means 'not ordinary or usual'. It may also mean 'something having a particular purpose.'[98] 'Circumstance' is defined as a 'fact or event that makes a situation the way it is.'[99]

Comnenus, in his paper, gave a textual and contextual meaning of the term 'special circumstances.' He first referred to the term's ordinary meaning with the meaning of 'normal' given by the Appellate Body in the *US — Offset Act* (Byrd Amendment) as a proscription to initiate an investigation without a written application from the domestic industry. Based on this definition, he gave a textual meaning to the phrase 'special circumstances' as 'an event or fact that is not ordinary or has some particular purpose or conditions and facts connected with a situation that is different from what is normal.'[100] In other words, the phrase indicates that self-initiations must not be in the ordinary course. Further, he gave a contextual definition of 'special circumstances' to mean 'conditions and facts connected with a situation wherein authorities may self-initiate an investigation without a written application by or on behalf of the domestic industry.'[101]

In the *US — Offset Act* (Byrd Amendment) dispute, the Complainants defined the object and purpose of the self-initiation prohibition. They submitted that "if the potential beneficiaries of an anti-dumping measure or a countervailing measure do

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[98] *Special*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/special.

[99] *Circumstance*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/circumstance.

[100] George Arie Comnenus, *The General Theory of the Natural Course of World Trade: Special Circumstances to Initiate Trade Remedy Investigations,* 55 J. WORLD TRADE 805, 807 (2021) [hereinafter Comnenus].

[101] *Id.*

not consider them to be in their interest, there is no good reason, in the absence of 'special circumstances,' for the authorities of the importing Member to impose a measure which restricts trade."[102] Comnenus reads this interpretation and comes up with an alternate definition of the object and purpose of Article 5.6 of the ADA, which means "[t]o enable self-initiation when, in the absence of a petition from the domestic industry, 'conditions and facts' signal that potential beneficiaries of trade remedies would consider them to be in their interest."[103]

Indeed, the GATT Panel in US — Softwood Lumber II analysed the meaning of 'special circumstances' and opined that the term must be interpreted in light of Article 2.1, which requires investigations to be initiated normally through a written request, and circumstances for self-initiation should occur so rarely that the main purpose of Article 2.1 is not undermined.

It must also be noted that the WTO agreements omit the word 'normally,' which was present in the GATT Codes. The GATT Codes provided that "an investigation . . . shall normally be initiated upon a written request." The interpretation of 'normally' under the GATT Codes has been discussed previously.

In the WTO agreements, the word 'normally' is used in different provisions of the ADA and ASCM and may guide their meaning. For example, Article 2.2.1.1 provides that costs shall normally be calculated based on records kept by the exporter. In *China — Broiler Products*, the Panel stated that "the use of the term 'normally' in Article 2.2.1.1 means that an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records."[104] The Panel also referred to the Appellate Body's observation in *US — Clove Cigarettes* that:

> the ordinary meaning of the term 'normally' is defined as "under normal or ordinary conditions; as a rule." According to the Appellate Body, "the qualification of an obligation with the adverb 'normally' does not, necessarily, alter the characterization of that obligation as constituting a 'rule' . . . [r]ather, the use of the term 'normally' . . . indicates that the rule . . . admits of derogation under certain circumstances." As using the respondents' books and

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[102] Panel Report, *United States — Continued Dumping and Subsidy Offset Act of 2000,* ¶ 4.150, WTO Doc. WT/DS217/R, WT/DS234/R, (adopted Jan. 27, 2003).
[103] Comnenus, *supra* note 100, at 808.
[104] Panel Report, *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, ¶ 7, WTO Doc. WT/DS427/R, 161 (adopted Sept. 25, 2013).

> records is the rule and declining to do so is a derogation from that rule, it is for the investigating authority to decide to do so and to justify its decision on the record of the investigation and/or in the published determinations.[105]

The use of the term 'normally' thus was considered to allow for derogation under certain circumstances, but with a justification for derogating from the norm. In the context of self-initiation provisions, the term 'normally' under the GATT Codes would have required a justification for derogating from the norm. Logically, omitting the term 'normally' in the WTO agreements would still allow for derogation from the rule to initiate an investigation based on an application from the domestic industry. However, the omission can be read to remove the need to justify the derogation from the norm. Further, the omission also removes the possible hierarchy that the GATT Codes created by making initiations based on applications be undertaken 'normally' and *ex-officio* initiations only under rare or 'special circumstances.'

While the conditions and facts connected with the special situation remain unspecified, Comnenus proposes three possible 'conditions and facts' connected to the special situation or circumstances, that is, (i) the existence of an unnatural excess in country-specific imports, (ii) the existence of significant price undercutting, and (iii) significant transnational price discrimination.[106]

Thus, it may be reasonable to conclude that *ex officio* initiations can take place as a derogation to the usual method, provided there are special circumstances and sufficient evidence to warrant initiation. Indeed, using the plural term "circumstances" in the WTO provisions indicates that certain conditions and facts may exist that necessitate *ex-officio* initiations, which the affected domestic industry would consider to be in its interest, even without filing a formal petition.

On the sufficiency of the evidence, the standard of review applied by Panels to a claim under Article 5.3 has been to verify 'whether or not an objective and unbiased investigating authority, looking at the facts before it, could properly have determined that there was sufficient evidence of dumping, injury, and a causal link to justify the initiation of an anti-dumping investigation.'[107]

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[105] *Id.*
[106] Comnenus, *supra* note 100, at 814–820.
[107] Panel Report, *Morocco — Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, ¶¶ 7.356–7.358 , WTO Doc. WT/DS578/R, (not yet adopted).

The provisions do not require the investigating authorities to explain how the examination was conducted or its nature. Having said that, the sufficiency of evidence must be assessed based on the accuracy and adequacy of the information. It must, however, be kept in mind that "the quantum and quality of the evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after the investigation."[108]

In respect of *suo-moto* initiations, the last part of Article 5.6 of ADA and Article 11.6 of ADA make it clear the applications must meet the criteria mentioned in paragraph 2 of respective articles, that is, they must include sufficient evidence of (a) dumping/subsidy, (b) injury and (c) a causal link between dumped/subsidized imports and injury. It must also be ensured that simple assertions unsubstantiated by relevant evidence are insufficient to meet the evidentiary requirements. Thus, the standard of examining evidence and further investigation processes beyond the initiation stage for *suo-moto* initiations remains the same as for normal initiations (based on applications filed by the domestic industry).

The Panel in the *US — Carbon Steel* from Germany, in the context of evidentiary standards under ASCM, stated in unequivocal terms that Article 11.6 of ASCM requires that a CVD investigation cannot be self-initiated by an IA unless the requirement of sufficient evidence of subsidisation, injury, and causation is met.[109] The Panel elaborated further by stating that "the terms of the provision are unequivocal. Such mandatory and conditional ('in special circumstances'; 'only if'; 'to justify') language suggests that the drafters had an important consideration in mind when drafting this provision, as reflected in the precise choice of words. In particular, the provision's mandatory nature and conditional language convey, in our view, that the drafters sought a particular outcome, to protect exporters and prevent trade harassment through the initiation of groundless investigations."[110] Although the dispute did not pertain to self-initiated investigations, the sufficiency-of-evidence requirement remains the same regardless of the manner of investigation initiation. This has been explicitly stated by the GATT Panel in GATT *US — Softwood Lumber II*, wherein the Panel noted that there was nothing in the text of the Agreement to suggest that a different level of evidence for self-initiation is required than for

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[108] Panel Report, *Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico*, ¶ 7.57, WTO Doc. WT/DS60/R, (adopted Nov. 25, 1988) (the Report was reversed in total by Appellate Body on procedural grounds as dispute not properly before the Panel. Panel Report adopted as reversed, WT/DSB/M/51, § 9(a)).
[109] Panel Report, *United States — Countervailing duties on certain corrosion-resistant carbon steel flat products from Germany*, ¶ 8.34, WTO Doc. WT/DS213/R, (adopted Dec. 19, 2002).
[110] *Id.*

petition-based initiation, and that no purpose would have been served by different standards of evidence for initiation.

IV. MEMBERS' PRACTICE

In the following paragraphs, the paper looks at the law and practice of a few major users of AD or CVD investigations.

Sections 9A, 9B, and 9C of the Customs Tariff Act, 1975 (for anti-dumping and countervailing duty measures) govern Indian trade remedy investigations. Respective rules complement the said provisions.[111]

Domestic anti-dumping and countervailing self-initiation procedures are based on ADA and ASCM. However, there is one key difference. Unlike the ADA and ASCM, which require the existence of 'special circumstances' for the *ex-officio* initiation, the Indian provisions do not have such a requirement. Regarding anti-dumping measures, India has two initiation provisions—one for initiating an anti-dumping investigation and another for initiating an anti-circumvention investigation. Both contain identical provisions that are also similar to those of countervailing duty investigations. The pertinent rule states:

> Notwithstanding anything contained in sub-rule (1), the designated authority may initiate an investigation suo-moto if it is satisfied from the information received from the [Principal Commissioner of Customs or Commissioner of Customs] appointed under the Customs Act, 1962 (52 of 1962) or from any other source that sufficient evidence exists as to the existence of the circumstances referred to in clause (b) of sub-rule (3).[112]

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[111] Customs Tariff (Identification, Assessment and Collection Of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (India) [hereinafter Anti-Dumping duty Rules]; *see also* Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidies Articles and for Determination Injury) Rules, 1995 (India) (as of Dec. 31, 2024).

[112] Anti-Dumping duty Rules, *supra* note 111; *see also* Ministry of Finance, Notification No. 10/2021-Customs (N.T.) (Notified on Feb. 01, 2021) (substituting "Collector of Customs" with "Principal Commissioner of Customs or Commissioner of Customs" in r. 5(4). Also, in sub-rule (4) to Rule 5, the term "Collector of customs" substituted to "Principal Commissioner of Customs" or "Commissioner of Customs" vide Notification No. 10/2021-Customs (N.T.) dated 01-Feb-2021.)

The rule is an extension of India's initial anti-dumping and additional duty on bounty-fed articles rules of 1985, which prescribed similar provisions on self-initiation. However, the said rules importantly provided that the IA shall 'normally' initiate an investigation only upon receipt of a written request, perhaps reflecting the GATT Codes.[113]

India's self-initiation provisions require two main considerations: First, is the rule an exception to the general rule, or does it grant additional power? Second, what should be the source of information and the test for sufficiency of evidence?

Concerning the first issue, the term 'notwithstanding' means 'despite the fact or thing mentioned' or 'not considering or being influenced by; despite.[114] In the context of the self-initiation provision, "notwithstanding anything contained in sub-rule (1)" would mean allowing the IA to self-initiate despite the availability of a normal application process. It can also mean the power of an IA to initiate an investigation on its own without being influenced by the other procedures. Thus, the way the Indian provision has been enacted appears to indicate that the IA has an additional power to self-initiate, with or without any formal application by the domestic industry. The 'notwithstanding' provision marks a significant departure from the WTO provisions, which begin with 'If, in special circumstances'—indicating an exception to the general rule. As discussed previously, special circumstances cover situations that depart from normal circumstances or usual methods—indicating the use of the provisions in rare events that do not render the normal procedure redundant.

Interestingly, the Indian provisions require the existence of the 'circumstances' referred to in an earlier sub-rule on the requirement of evidence relating to dumping/subsidy/increased imports, injury, and causal link. However, linking the term 'circumstances' with an earlier sub-rule does not clarify the term's meaning, as the previous sub-rule only relates to the sufficiency of evidence. Thus, the use of the term 'circumstances' has limited relevance. On a plain reading of the provisions, it appears there is no requirement to demonstrate the *ex*istence of 'special circumstances' as required under the ADA or ASCM, which deviates from WTO

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[113] Customs Tariff (Identification, Assessment and Collection of Duty or Additional Duty on Dumped Articles and for Determination of Injury) Rules of, 1985, ADP/1/Add/25, Rule 7, at 13; Customs Tariff (Identification, Assessment and Collection of Duty or Additional Duty on Bounty-fed Articles and for Determination of Injury) Rules, 1985, SCM/1/Add/25, Rule 6, at 28.

[114] *Notwithstanding*, CAMBRIDGE ONLINE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/notwithstanding.

provisions. Nonetheless, the provision has not yet been challenged, and, as such, no determination has been made regarding its inconsistency.

As regards the second issue, the self-initiation rule requires that information be received from a designated customs officer or another source. One possible interpretation is based on the legal maxim *Noscitur a Sociis*, meaning 'known by its associates' or where the generic words take meaning by considering the context of surrounding words.[115] It can also be based on the legal maxim of *Ejusdem Generis*, wherein the general word that follows specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words.[116] The provision requires gathering information specifically from a designated customs officer. During the evolution of GATT, countries often initiated and investigated dumping based on information gathered by customs authorities or by customs officials themselves. This was so they had the official, more accurate information about unfairly priced imports. Thus, by inserting a specific source, the provision appears to indicate that the information must come from a reliable, authentic source under government control. Given this interpretation, the phrase 'or from any other source' can be taken to mean any other reliable source within the government's control from which the IA can seek information. Indeed, granting unfettered discretion to obtain information from any source would render the designated customs officer's information source redundant.

The other interpretation is that the phrase 'or from any other source' is independent and allows the IA to obtain information from anywhere. This enables an IA to consider the domestic industry's situation to provide information in the necessary format and to gather information from any reasonably available source. This interpretation can be considered in line with the WTO jurisprudence that the quality and quantity of evidence required at the time of initiation vary from the quality and quantity of evidence collected during the investigation, and balance the interests of domestic producers to safeguard their industry and foreign producers.

As noted earlier*, ex-officio* initiations do not provide any additional flexibility beyond the initiation stage. In India, post-initiation procedures and standards, including the standard of scrutiny and evidentiary value concerning the accuracy and adequacy of

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115 *Noscitur a Sociis*, LEXIS NEXIS LEGAL GLOSSARY, https://www.lexisnexis.co.uk/legal/glossary/noscitur-a-sociis.

116 P. ST. J. LANGAN, MAXWELL ON THE INTERPRETATION OF STATUTES 297 (12th ed., 1969).

information, remain the same as in the case of initiations based on domestic industry applications, except in the case of fragmented industries.[117]

Self-initiated investigations remain untested before the Indian courts; hence, India has no authoritative ruling. Thus, it may be worth examining the investigations conducted by India so far to evaluate the above interpretations.

In recent years, India has initiated four anti-dumping investigations on its own.[118] In the Unframed Glass Mirror AD investigation, the IA received representation from an association of producers alleging injury due to dumped imports. The representation prompted the IA to seek information from the customs authorities. The IA examined import data from customs authorities and representations to determine whether dumping, injury, and causal links existed to initiate the investigation.[119] In addition, the IA noted that the producers forming part of the association belonged to the Micro, Small, and Medium Enterprises (MSME) category, with only 2 being large companies, and that, overall, they formed part of unorganised and fragmented industries.[120] The initiation was partly based on a representation of domestic producers and partly on information collected from customs, forming 'information received from any other source.' There was also no mention of the existence of 'special circumstances.'

In the past, the IA initiated investigations in which the industry was fragmented. In some cases, the fragmented industries applied to the prescribed format,[121] while in others it filed representations or requested that the IA seek information from the producers.[122] Thus, the practice seems to suggest that the IA exercises its discretion

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117 Simplification of procedure for filing of application for Anti-dumping (AD)/ Countervailing duty (CVD) investigation by fragmented industries, Trade Notice No. 09/2021 (Directorate Gen. of Trade Remedies July 29, 2021) (India).
118 Anti-Dumping cases, *supra* note 5.
119 Unframed Glass Mirror AD from China, *supra* note 5, at ¶¶ 1–3.
120 *Id.*, at ¶ 28.
121 Anti-Circumvention investigation concerning alleged circumvention via Malaysia of the anti-dumping duty imposed on imports of Fishing Net from China, AD (AC)-01/2023, ¶19 (Directorate Gen. of Trade Remedies June 7, 2023) (Final Findings) (India); Anti-dumping investigation concerning imports of "Printed Circuit Boards (PCB)" originating in or exported from China PR and Hong Kong, AD(OI)-16/2022, ¶ 80 (Directorate Gen. of Trade Remedies Dec. 29, 2023) (Final Findings) (India).
122 Sunset Review of anti-dumping duty imposed on imports of "Glazed/Unglazed Porcelain/Vitrified tiles in polished or unpolished finish with less than 3% water absorption" originating in or exported from China PR, AD-SSR-20/2020, ¶¶ 12–14 (Directorate Gen. of Trade Remedies Jan. 22, 2021) (Initiation Notice) (India).

in deciding whether to invoke *ex-officio* procedures, depending on the facts of the case.

Similar reasoning was followed in the Telescopic Channel Drawer AD investigation from China and the Roller Chains AD investigation from China.[123] However, in this investigation, the IA explicitly notes a specific format in which fragmented industries are required to share information.[124] Further, compared to the Unframed Glass Mirror AD investigation, where the IA gathered information from the designated customs authorities, the Telescopic Channel Drawer AD investigation did not specifically state that it complied with this requirement.[125] Regarding the standing of the domestic industry before the initiation of the investigation, the IA addressed the issue only briefly, stating that, in a *suo-moto* initiation, the information typically required through a formal application is not necessary before the investigation begins, and such information can be gathered during the investigation.[126] Finally, there was no mention of special circumstances in this investigation.

In the Fasteners from China AD investigation, the IA considered the representation filed by one producer with the support of 29 domestic producers and an association of producers representing 150 producers as 'information' and initiated the investigation ex-officio upon satisfaction as to the adequacy and accuracy of the information and prima facie evidence submitted therein.[127] There was no mention of the existence of 'special circumstances.'

Apart from these anti-dumping investigations initiated by India, India has previously self-initiated three anti-dumping investigations,[128] wherein the source of information was not disclosed and was instead termed as 'reliable sources.'

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[123] Telescopic Channel Drawer AD from China, *supra* note 5; Roller Chains AD from China, *supra* note 5, at ¶ 17.
[124] Simplification of procedure for filing of application for Anti-dumping (AD)/ Countervailing duty (CVD) investigation by fragmented industries, Trade Notice 09/2021, ¶6 (Directorate Gen. of Trade Remedies July 29, 2021) (India).
[125] Roller Chains AD from China, *supra* note 5 (herein, information was gathered from DGCI&S import data, a government agency, but not forming part of designated customs authorities).
[126] Telescopic Channel Drawer AD*, supra* note 5, at ¶ 52.
[127] Suo-Moto investigation of Fasteners from China*, supra* note 5 (the investigation is yet to be concluded.)
[128] Anti-Dumping investigation concerning imports of Sports Shoes (both branded and un-branded) originating in or exported from China PR, AD-OI (15/2023) (Directorate Gen. of Anti-Dumping & Allied Duties. Nov. 20, 2000) (Initiation Notice) (India); *see also* Anti-

In addition, India also conducted a self-initiated countervailing duty investigation[129] wherein the IA noted that the representation received contains information on India's steep decline in production due to a significant increase in imports driven by subsidies available in the subject countries. No party made any submission, and the IA did not make a specific determination on the issue of self-initiation. Overall, the Indian practice offers limited guidance on self-initiation provisions.

The European Communities (now the European Union, or the EU) is also among the biggest users of trade remedy investigations, with the third-highest number of anti-dumping initiations and the second-highest number of countervailing duty initiations.[130]

Article 5(6) of the Council Regulation 384/96[131] and Article 10(10) of the Council Regulation (EC) 2026/97 provide that:

> [i]f in special circumstances, it is decided to initiate an investigation without having received a written complaint by or on behalf of the Community industry for the initiation of such investigation, this shall be done based on sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify such initiation (emphasis added).

Dumping investigation concerning imports of AA Dry Cell Batteries originating in or exported from China PR and Vietnam, 14/31/2014-DGAD (Directorate Gen. of Anti-Dumping & Allied Duties Oct. 20, 2015) (Initiation Notice) (India); *see also* Anti-Dumping investigation concerning imports of toys originating in or exported from China PR, 54/1/2000-DGAD (Directorate Gen. of Anti-Dumping & Allied Duties, Nov. 20, 2000) (Initiation Notice) (India).

[129] Countervailing Duty investigation concerning imports of Copper Tubes and Pipes from Malaysia, Thailand and Vietnam, CVD-08/2020 (Directorate Gen. of Trade Remedies Sept. 25, 2020) (Initiation Notice) (India).

[130] WORLD TRADE ORGANISATION, ANTI-DUMPING INITIATION: BY REPORTING MEMBER, https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf; *see also* WORLD TRADE ORGANISATION, COUNTERVAILING INITIATIONS: BY REPORTING MEMBER, https://www.wto.org/english/tratop_e/scm_e/CV_InitiationsByRepMem.pdf.

[131] *See* Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, 2016 O.J. (L 176) 21; Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, 2016 O.J. (L 176) 55 (the most up-to-date as of December 31, 2024 provisions contain the same provisions on ex-officio initiations).

The provisions are identical to Article 5.6 of the ADA and Article 11.6 of the ASCM.

Similar to the WTO provisions on self-initiations, the EU provisions on self-initiations also require (i) the existence of special circumstances and (ii) sufficient evidence on dumping/subsidy, injury, and causal link that justifies initiation.

The EC has, in a few instances, self-initiated anti-dumping investigations since this can only be done based on information on dumping, injury, and causality, meeting the 'sufficient evidence' test applicable to complaints.[132] In Synthetic Fibre Ropes from India, the Commission self-initiated an anti-dumping investigation based on information from a recently terminated investigation on the same product imported from the same country. The Commission noted in its initiation notice that:

> information made available to the Commission at a late stage of that investigation indicated that, at the end of the previous investigation and during the period following it, there was prima facie evidence that the situation of the Community industry may have further deteriorated as a result of continued dumped imports from India. In these special circumstances and given that the new information could not be taken into consideration within the context of the above-mentioned proceeding,[133]

the Commission decided to self-initiate a new anti-dumping proceeding.

Consistent with the requirements, the Commission was informed of sufficient prima facie evidence that the Community industry's situation had further deteriorated due to continued dumped imports from India. The deterioration of the problem since the end of the previous investigation and the subsequent period, given the new information, could not be taken into account in the previous investigation; these together were considered 'special circumstances' sufficient to initiate the

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[132] IVO VAN BAEL & JEAN-FRANCOIS BELLIS, ANTI-DUMPING AND OTHER TRADE PROTECTION LAWS OF THE EC 355 (6th ed. 2019) [hereinafter BAEL & BELLIS].

[133] Notice of initiation of an anti-dumping proceeding concerning imports of synthetic fibre ropes originating in India, 1997 O.J. (C 201/8, 97/C 201/07), ¶ 2; *see also* Commission Regulation (EC) No 18/98 of Jan. 7, 1998 imposing a provisional anti-dumping duty on imports of synthetic fibre ropes from India, Jan. 7, 1998, O.J. (L4) 28, ¶ 1 [hereinafter Synthetic Fibre Ropes from India].

investigation.[134] It is important to note that the Commission justified the existence of special circumstances and sufficient prima facie evidence.

Similarly, in Certain Parts of Television Camera Systems (Japan), the Commission self-initiated an investigation based on information made available to it in a previous circumvention investigation on the same products. The information collected from the previous investigation, along with that from one community producer representing a major share of the production, was considered sufficient to establish injury and causation.[135] Interestingly, the termination of the previous investigation without the imposition of a measure on the grounds of withdrawal of the complaint and information made available during the dumping investigation was considered 'special circumstances.'[136] Unlike the Synthetic Fibre Ropes case, in which the Commission explained why the situation was abnormal (i.e., deterioration of the situation subsequent to the investigation period), there was no further explanation of how the situation was extraordinary or abnormal.

In the recently initiated CVD investigation on Battery Electric Vehicles (BEVs) from China, the European Commission (EC) stated the following:

> After an in-depth analysis of recent market developments and considering the sensitivity of the electric vehicle sector and its strategic importance to the EU economy in terms of innovation, value added and employment, the Commission has collected market information from various independent sources. This information tends to show the existence of subsidisation by the People's Republic of China which negatively affects the situation of the Union industry.
>
> [. . .]
>
> The available evidence, as summarised in Section 4 of this Notice, shows the likelihood of substantially increased subsidised low-priced imports that would pose an imminent threat of injury to an already vulnerable EU industry. Such a surge of low- priced imports, gaining significant markets share in a rapidly growing

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[134] Synthetic Fibre Ropes from India, *supra* note 133; *see also* BAEL & BELLIS, *supra* note 132, at 355.
[135] Notice on Intimation of an anti-dumping proceeding concerning imports of certain parts of television camera system originating in Japan 1999 O.J. (C 38) 2.
[136] *Id.*

> market in which a significant and sustained rate of investments is needed as the Union market transitions to full electrification, would lead the Union industry to incur heavy losses which could prove rapidly unsustainable.[137]

The EU conducted an extensive analysis of market developments concerning the electric vehicle sector, considered its strategic importance to the EU economy as a whole, and took into account the allegedly imminent threat of injury to an already vulnerable EU industry due to increased subsidized low-priced imports, to reach a conclusion that there exists a "special circumstance" that necessitated it to take ex-officio action.[138] The Commission further clarified in its final determination that it considered the rapid market penetration by the Chinese low-priced and subsidised imports of BEVs, which threatens to irreparably damage the Union industry, to be of a special nature justifying the initiation of an ex-officio investigation.

Recently, China challenged the EU's final decision and the notice of CVD initiation on imports of BEVs before the WTO.[139] Among other aspects, China has challenged the notice of initiation because the EU failed to demonstrate the existence of special circumstances and sufficient evidence regarding the alleged subsidisation, injury, and causal link to justify the ex-officio initiation of the investigation.[140] The dispute is currently pending for adjudication.

In another investigation, though there was no *ex-officio* initiation, an *ex-officio* conduct of an investigation led to a final determination even though the applicant, Union Industry Association, withdrew its application.[141] In the Fatty Acid AD from Indonesia investigation, the Commission initiated an investigation at the request of the association on behalf of the Union industry. During the investigation, the association withdrew its application. This led to the foreign exporters' request to

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[137] Notice of initiation of an anti-subsidy proceeding concerning imports of new battery electric vehicles designed for the transport of persons originating in People's Republic of China, 2003 O.J. (C/2023/160), at 1; *see also* Commission Implementing Regulation (EU) 2024/2754 of 29 October 2024 imposing a definitive countervailing duty on imports of new battery electric vehicles designed for the transport of persons originating in the People's Republic of China, 2024 O.J. (L 2025/2754), at 1 [hereinafter Countervailing duty on Import of New Battery].
[138] *Id.*, at 2.
[139] Request for Consultation on New Battery Electric Vehicles, *supra* note 1.
[140] *Id.*, at 5.
[141] Commission Implementing Regulation (EU) 2023/111 of 18 January 2023 imposing a definitive anti-dumping duty on imports of fatty acid originating in Indonesia, 2023 O.J. (L 18) 1.

terminate the investigation, as there was no legal standing with Union producers not meeting the standing threshold.[142] The Commission continued with its 'ex-officio' investigation, stating that EC's anti-dumping regulation provides discretion to the Commission to continue with the investigation even after withdrawal of the complaint if the continuation of the investigation and imposition of the measure is in the Union's interest.[143] The Commission further stated that:

> Article 5.4 of WTO ADA does not place any obligation on the proceeding authorities of a Member to terminate an anti-dumping investigation in progress when the level of support for the complaint falls below a minimal threshold of 25 % of domestic production,… and thus even if the Union industry withdraws the complaint, the Commission is not placed under an obligation to terminate the proceeding, but merely has the option to do so. Thus, this claim was rejected.[144]

Indonesia has challenged the determination before the WTO, *inter alia*, because the EU de facto carried out an ex-officio investigation without sufficient evidence of dumping, injury, and a causal link following the withdrawal of the complaint.[145]

Overall, the European law on ex-officio initiations mirrors the WTO provisions. In practice, the ex-officio initiations are not purely based on information collected by the Commission itself but rather on information passively provided by the Union industry. This was the case in the Synthetic Fibre Ropes and Television Camera Systems investigation, in which the Commission relied on information from the previous investigation.

While maintaining that it examined information from publicly available sources, the EC does not disclose the sources, which creates aspersions on the accuracy or genuineness of the information. Without a source of information, it remains unlikely that the investigation was initiated without an active or passive push from (some of) the domestic producers.

Concerning the existence of special circumstances, the past determinations show the existence of reasons justifying the existence of situations necessitating an *ex-officio*

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142 *Id.*, ¶ 64.
143 *Id.*, ¶ 68.
144 *Id.*, ¶ 64.
145 Request for Consultations by Indonesia, *European Union — Anti Dumping Measure on Imports of Fatty Acid*, ¶23, WTO Doc. WT/DS622/1 (Feb. 7, 2024) [hereinafter E.U. — Fatty Acid].

initiation. Except for the recent BEV dispute, the EU's invocation of the self-initiation process remains unchallenged. If adjudicated, the BEV dispute will provide the much-awaited authoritative ruling on the issue of *ex-officio* initiations.

Turkey's Regulation on the Prevention of Unfair Competition in Imports[146] allows the IA to *ex-officio* initiate a dumping or subsidy investigation if sufficient evidence of dumped or subsidised imports and the existence of injury to the domestic industry by such imports is present. Like some of the other Members, the regulation does not provide for the existence of 'special circumstances' for invoking ex-officio initiation. Turkey's Trade Policy Review suggests that "the Turkish authorities may decide to initiate an investigation ex-officio if the affected industry is fragmented with an exceptionally large number of producers, provided sufficient evidence exists to indicate dumping, injury, and a causal link."[147]

As of 2015,[148] Turkey has initiated an *ex-officio* anti-dumping investigation concerning the United States on cotton.[149] In this investigation, Turkey's *ex-officio* initiated an investigation considering the fragmented and scattered structure of the fiber cotton trade market, which comprised very small companies. According to Turkey, this structure met the special situation conditions stipulated by the WTO ADA. Turkey further stated that, despite limited participation by the companies, determinations were made to the extent that an investigation regarding dumping, damage, and causal links could be opened. In addition, Turkey reiterated that dumping investigations are 'normally' opened following an evaluation by the complaining domestic producers following a proper application.[150] Despite not mentioning the existence of 'special circumstances,' Turkey initiates *ex-officio* investigations only in special cases and maintains that dumping investigations should 'normally' be based on petitions by the domestic industry.

The United States' anti-dumping and countervailing duty provisions are contained in the Tariff Act of 1930 (as amended).[151] Section 732(a) provides the procedure for

[146] Regulation on the Prevention of Unfair Competition in Imports, art. 20, R.G. 23861 (Oct. 30, 1999) (Turk.).
[147] Trade Pol'y. Rev. Body, *Trade Policy Review: Turkey*, *Report by the Secretariat*, WTO Doc. WT/TPR/S/331, at 39 (Feb. 09, 2016).
[148]Trade Pol'y. Rev. Body, *Trade Policy Review: Turkey*, *Report by the Secretariat,* WTO Doc. WT/TPR/S/439 (Feb. 01, 2023) (the latest Trade Policy Review Report prepared by the Secretariat does not indicate any new ex-officio initiations by Turkey).
[149] *Id.*, at ¶ 3.58.
[150] İthalatta Haksız Rekabetin Önlenmesine İlişkin Tebliğ [Communiqué on the Prevention of Unfair Competition in Imports] No. 2016/7, art. 4(3), R.G. 29687 (Apr. 17, 2016) (Turk.).
[151] Tariff Act of 1930, ch. 497, 46 Stat. 590.

self-initiating an anti-dumping duty investigation by stating that an "antidumping duty investigation shall be initiated whenever the administering authority determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 731 exist."[152] In addition, in the event of persistent dumping, the provision also allows the establishment of a monitoring program for imports of a class or kind of merchandise from any additional supplier country for a period not exceeding one year, subject to specified conditions.[153]

Similar to Indian provisions, the US provisions do not refer to 'special circumstances' for self-initiating an investigation and go a step further than India in empowering the administering authority to initiate an investigation 'whenever' it determines 'from information available to it'. The use of the word 'whenever' entrusts the authority with a broad power to self-initiate investigations and use information from any source—unlike Indian provisions, which require gathering information, *inter alia*, from designated customs officers.

Yet, there have been very few cases in which the US has invoked the provisions in a fresh investigation.[154] The Department of Commerce (DOC) acknowledged this fact while initiating a simultaneous anti-dumping and countervailing duty investigation on Common Alloy Aluminium Sheet from China.[155] In the initiation notice, the DOC stated:

> [a]lthough the Department has rarely invoked this statutory authority, the Department intends to make use of all the tools available under U.S. unfair trade laws, where such action is warranted under the law, to ensure potential unfair trade practices are addressed. To that end, self-initiation of certain AD and CVD cases can address situations in which industries face potentially dumped and/or subsidised imports and in which the Department receives comprehensive, detailed information. Although the

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[152] *Id.* § 701(a) (contains verbatim provision for self-initiating a countervailing duty investigation).
[153] *Id.* § 731(a)(2).
[154] Trade Pol'y. Rev. Body, *Trade Policy Review: United States, Report by the Secretariat*, WTO Doc. WT/TPR/S/350, ¶ 3.70 (Nov. 14, 2016).
[155] Common Alloy Aluminium Sheet from the People's Republic of China: Initiation of Less-Than-Fair-Value and Countervailing Duty Investigations, 82 Fed. Reg. 57,214 (Dec. 04, 2017); Trade Pol'y. Rev. Body, *Trade Policy Review: United States*, *Report of the Secretariat*, WTO Doc. WT/TPR/S/434 (Nov. 09, 2022); *supra* note 112 (apart from this case, there had been three self-initiations by USDOC since 1980).

> Department expects that future investigations will normally proceed based on petitions filed by or on behalf of the industry, the Department will take action under Sections 702(a) and 732(a), where warranted, to facilitate the application of the appropriate trade remedy for U.S. industries.[156]

In this investigation, the DOC stated that it had information on dumping from China, on Chinese goods benefiting from countervailable subsidies, and that such imports may be materially injuring or threatening to injure the domestic industry in the United States. In addition, the DOC also considered the "systemic and significant overcapacity in the Chinese aluminium industry as documented in a recent International Trade Commission's investigation", a significant increase in imports from China, and the potential for further increases in exports from China to base its decision to self-initiate the investigation.[157]

Despite being one of the largest and most active users of trade remedy investigations, the US practice presents a unique case study on the limited use of ex-officio initiations, despite the tendency to engage in trade wars with China and find ways to curtail their imports.

Canada's Section 31(1) of the Special Import Measures Act sets out the initiation procedures. The provision incorporates both methods of initiation—self-initiation and initiation upon receipt of an application. The provision, inter-alia, provides that:

> the President shall cause an investigation to be initiated respecting the dumping or subsidizing of any goods and whether there is a reasonable indication that such dumping or subsidizing has caused injury or retardation or is threatening to cause injury, forthwith on the President's own initiative or, subject to subsection (2), where the President receives a written complaint . . . , if the President believes that there is the evidence: (a) that the goods have been dumped or subsidized; and (b) that discloses a reasonable indication that the dumping or subsidizing has caused injury or retardation or is threatening to cause injury.[158]

Interestingly, unlike the WTO provisions and those of other countries, Canada's initiation provision begins with the option of self-initiation and then moves to

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[156] *Id.*
[157] *Id.*
[158] Special Import Measures Act, R.S.C. 1985, c. S-15, § 31(1) (Can.).

initiation through application. This indicates that Canada does not view self-initiation as an 'exception' or as a method to be used in rare circumstances. The omission of 'exceptional' or 'special' circumstances in the initiation provision fortifies the above interpretation. Nonetheless, the WTO's Trade Policy Report by the Secretariat suggests that although the Canadian authority "can self-initiate anti-dumping and countervailing investigations, it generally initiates those following complaints from the domestic industry,"[159] and self-initiation is "seldom the case."[160] The research does not indicate any self-initiated investigations, making it difficult to gauge how Canada applies the said provision.

Brazil's initial Decree No. 1602 regulated the norms governing the administrative procedures regarding the imposition of anti-dumping measures.[161] Article 24 of the said Decree provided for self-initiation of an anti-dumping investigation, whereby the Federal Government may, in 'exceptional circumstances,' initiate an investigation "as long as there is sufficient evidence of dumping, injury, and a causal link between them which justifies the initiation of an investigation."[162]

Article 44 of the most up-to-date notified regulation,[163] also contains a modified self-initiation procedure, stating that "[i]n exceptional and duly justified circumstances, SECEX may initiate an investigation of its own initiative, provided it has sufficient evidence of the existence of dumping, injury, and a causal link between the dumped imports and the alleged injury."[164]

Brazil's regulation appears to be a WTO-plus provision as it not only provides for exceptional circumstances but also requires a due justification before the investigating authority can initiate an investigation. Compared to the WTO provision, the Brazilian regulation on self-initiation appears to be stringent, although

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159 Trade Pol'y. Rev. Body , *Trade Policy Review: Canada*, *Report by the Secretariat*, WTO Doc. WT/TPR/S/314, ¶ 3.46 (Apr. 27, 2015).

160 Trade Pol'y. Rev. Body, *Trade Policy Review: Canada*, *Report by the Secretariat*, WTO Doc. WT/TPR/S/389, ¶ 3.66 (Apr. 17, 2019).

161 Comm. On Anti-Dumping Prac., *Notification of Laws and Regulations Under Article 18.5 of the Agreement on Implementation of Article VI of GATT 1994 Brazil*, WTO Doc.G/ADP/N/1/BRA/2 (Aug. 26, 1997).

162 *Id.*, at 14 (Article 33 of Decree No. 1751 regulating the norms for administrative procedures regarding the application of countervailing measures (G/SCM/N/1/BRA/2 dated September 08, 1997) contains an identical provision).

163 Comm. On Anti-Dumping Prac., *Notification of Laws and Regulations Under Article 18.5 of the Agreement Brazil*, WTO Doc. G/ADP/N/1/BRA/3 (Sept. 20, 2013).

164 *Id.*, at 17.

in the absence of available information on Members' practice, it is difficult to understand how the provisions are applied.

In conclusion, domestic legislation and Members' practice vary inter se and differ from the WTO provisions on self-initiation. Notably, some Members, like the EU and Brazil, provide special or exceptional circumstances for the authority to self-initiate an investigation. Brazil even requires a justification for invoking the provision. Other Members do not refer to 'special' or 'exceptional' circumstances for invoking self-initiations. These Members, therefore, do not consider self-initiations to be invoked in certain rare situations and rather preserve their rights to invoke them in light of the facts and circumstances. However, in practice, Members rarely initiate investigations *ex-officio*. Interestingly, the US does not state the existence of 'special circumstances' in its regulation, but it affirms that it endeavours to initiate investigations on its own in exceptional situations.

Practices among India, the EU, and the US indicate that self-initiation provisions have rarely been invoked, even though these Members are among the most significant users of anti-dumping and countervailing duty investigations. Even with a limited number of self-initiated investigations carried out by them, the practice varies significantly, with India not justifying the existence of 'special circumstances' while the EU, Turkey, and the US adhere to the requirement. All three Members state that there is sufficient evidence to initiate an investigation on their own, although not all of them share the source of the information they received. Of all the Members, only the EU's practice was challenged before the DSB and is presently awaiting adjudication.

V. CONCLUSION

The provision for self-initiation of trade remedy investigations has been discussed by countries for a very long time. Since the early twentieth century, as trade remedy investigations have moved from legal investigations to more administrative investigations, the evidentiary requirements for initiating an investigation were gradually reduced, apart from balancing the interests of domestic and foreign producers.

The Kennedy Round negotiations led to the first consolidated multilateral text on the anti-dumping provisions, including the twin initiation procedures. Both the Kennedy Round and the Tokyo Round Code provided for self-initiations in 'special circumstances' 'only if' there was sufficient evidence of dumping/subsidy, injury, and a causal link between the dumped/subsidised imports and the alleged injury. The GATT Panel in *US — Softwood Lumber II* clarified that the term 'special' had to be interpreted in the light of the main purpose of the initiation provisions in Article 2:1, which was to ensure that investigations were normally initiated through a petition procedure, and this main purpose should not be undermined, unless there are rare circumstances.

On the sufficiency of the evidence, the GATT Panel in *US — Softwood Lumber II* stated that the initiation requirement must balance the rights, obligations, and interests of (i) the interest of the import-competing domestic industry in securing an initiation of an investigation and (ii) the interests of exporters in avoiding burdensome consequences of an investigation initiated on an unmeritorious basis. In particular, the standard of review concerning initiation should be sensitive to the intended anti-harassment function of the initiation procedure. It further stated that the quantum and quality of evidence required before initiation would necessarily have to be less than that at the time of making a final determination—but at the same time, 'sufficient evidence' clearly meant something more than a mere allegation or conjecture and could not mean just 'any evidence' and must be relevant to establish the three required elements. It also importantly held that nothing in the text of the Agreement suggests a different level of evidence for self-initiation is required than petition-based initiation, and that no purpose would have been served with different standards of evidence for initiation.

WTO provisions on self-initiation were an extension of the GATT Codes. Nonetheless, the biggest difference was the omission of the term 'normally' in the case of initiations based on petitions. The ordinary and textual meaning of the term 'special circumstance' would mean that self-initiations must not be in the ordinary course. Alternatively, it could also mean "conditions and facts connected with a situation wherein authorities may self-initiate an investigation without a written application by or on behalf of the domestic industry."[165]. By omitting the term 'normally' in the WTO agreements would still allow for derogation from the rule to initiate an investigation based on an application from the domestic industry. However, the omission can be read to remove the need to justify the derogation from the norm. Further, the omission also removes the hierarchy that the GATT Codes created, with applications-based initiations being undertaken 'normally' and *ex-officio* initiations only under rare or 'special circumstances.'

The practice among Members indicates that domestic legislation and Members' practice vary slightly or substantially from the WTO provisions on self-initiation. While some Members have an explicit requirement for special circumstances, with one Member even requiring a justification, others do not mention exceptional circumstances in their domestic regulations.

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[165] Comnenus, *supra* note 100, at 805–807.

There is one *ex officio* initiation and another *ex officio* investigation (not initiation) currently challenged before the DSB, and these disputes, if adjudicated by the DSB, will greatly advance the jurisprudence on this issue.

Ex-officio initiations remain a critical legal hook to address unfair trade practices and protect domestic industries. Across countries, self-initiations have remained rare despite being an attractive alternative for seeking protection, due to evidentiary requirements and a preference for industry-led applications. Indeed, there remains a possibility that the domestic industry may not benefit from such initiatives if the subsequent investigation shows negligible injury or dumping/subsidisation. Negotiating history under the GATT and the WTO indicates a careful balance between the interests of domestic and foreign producers, eventually leading to the establishment of standardised initiation procedures.

At the same time, the rising trend of self-initiations and challenges before the DSB reflects a notable shift in practice amongst countries to adopt underutilised provisions and to interpret the existing provisions innovatively. Understanding the provisions' evolution, object, and purpose and engaging in a deeper exchange will help develop the existing limited jurisprudence, which will be necessary with more active *ex-officio* initiations in the future.

A. A note on research limitations and open areas

The paper explores the jurisprudence and practice on a topic that has attracted limited research. Due to limited research on self-initiations in trade remedy investigations and authorship, the paper attempts to build the jurisprudence from scratch by examining the early history of trade remedy regulations and the evolution of self-initiation provisions. The said evolution has been traced primarily from the publicly available GATT records. A deeper understanding could be developed through interviews and discussions with Member representatives and experts, who are better informed about the process.

Secondly, the paper examines the laws and practices of key Members who are prominent users of trade remedy investigations. While significant research on self-initiated investigations was conducted, the author had limited success tracing them. This is especially the case since none of the countries allows filtering their domestically maintained list of investigations by initiation method. Hence, scanning every initiation notice and tracing *ex-officio* initiations without a specific publication or report is impractical, and a more thorough, research-intensive methodology needs to be developed.

Thirdly, apart from the initial investigation, trade remedy procedures also entail interim or sunset reviews, which may also be initiated pursuant to an application or *ex-officio*. The present paper limits the research to an initial investigation only, as comparing the said provision would entail considerable research. Nonetheless, it will be useful to compare the initiation process under various types of investigations and reviews to better understand the scope of *ex-officio* initiations.

Finally, the paper does not examine the effects of *ex-officio* initiations, including whether such a process could mean soft-protectionism or an instrument in the policy toolkit to safeguard domestic industry interests against import competition.