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AMIR Program
Access to Microfinance & Improved Implementation of Policy Reform

USAID Contract No. 278-C-00-98-0029-00
Deliverable for Policy Component – Business Association Initiative
Task No. 2.2.3

Anti-Dumping, Countervailing Duty and Safeguard Measures: An Assessment of the Institutional and Legal Framework in the Hashemite Kingdom of Jordan

A Report Prepared for:
The Private Sector in the Hasehemite Kingdom of Jordan

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Submitted to:
United States Agency for International Development

Submitted by:
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October 1999

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ANTI-DUMPING, COUNTERVAILING DUTY AND SAFEGUARD MEASURES: AN ASSESSMENT OF THE INSTITUTIONAL AND LEGAL FRAMEWORK IN THE HASHEMITE KINGDOM OF JORDAN

EXECUTIVE SUMMARY

The AMIR Program is assisting the Kingdom of Jordan in its bid to become a member of the World Trade Organization (AWTO@). As part of this effort, the AMIR Program is advising the private sector in Jordan on the legal and economic implications of WTO membership.

Singled out for special attention by the AMIR Program is the effect WTO membership will have on the ability of Jordan=s private sector to combat the injurious effects of imports which are dumped, subsidized, or significantly increasing. This consultancy has concluded that Jordan currently lacks the legal and institutional framework to apply anti-dumping, countervailing duty, and safeguard measures consistent with the requirements of the relevant WTO agreements. The government, for example, lacks even the beginnings of a trained unit that could conduct an anti-dumping investigation consistent with the WTO Anti-dumping Agreement. In addition, the relevant law in Jordan, the ANational Production Protection Law@ (the ANPPL@), provides no guidance on how such measures will be applied. Article 15 of the NPPL simply states that the Cabinet will issue regulations, consistent with the Kingdom=s international obligations, to address the Aimpact of imports ... which are dumped or subsidized.@

The private sector in Jordan should urge the government to adopt implementing regulations as soon as possible. It should also call upon the government to hire and train personnel to conduct anti-dumping, countervailing duty, and safeguard investigations. Appropriate candidates should have experience in law and cost accounting.

The private sector in Jordan must educate itself on the implications of WTO membership. Seminars, like the one conducted by the Consultant, should be repeated and attendance should include lawyers who can one day help Jordan=s private sector prosecute anti-dumping, countervailing duty, and safeguard actions. The private sector must also become more pro-active. It should hire and train personnel who can track imports and provide advice to potential petitioners on how they can obtain relief. Finally, if a producer believes it is being victimized by imports, it must press its case. It cannot assume that the government will act on its request. The resources and expertise of the government are limited. Successful petitioners will know the rules and pressure the government to take action.

ANTI-DUMPING, COUNTERVAILING DUTY AND SAFEGUARD MEASURES: AN ASSESSMENT OF THE INSTITUTIONAL AND LEGAL FRAMEWORK IN THE HASHEMITE KINGDOM OF JORDAN

I. INTRODUCTION

Between September 29 and October 8, 1999, the Consultant met with numerous business and government officials in Jordan, including the Minister of Trade (Mohammed Asfour) and the Director General of the Amman Chamber of Industry (Mohammed Smadi).[1] On October 6, 1999, the Consultant was the principal speaker at a conference hosted by the Amman Chamber of Industry (AACI@) on anti-dumping, countervailing duty, and safeguard measures.[2] Over 70 business and government leaders attended the conference. In order to prepare for these events, the Consultant reviewed a variety of written materials that describe Jordan=s economy, legal structure (including trade laws), and industrial sector.[3]

In addition, on October 5 and 6, the Consultant undertook an intensive

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[1] A list of the individuals interviewed during the course of the consultancy is attached as Appendix A.

[2] A copy of the training materials prepared by the Consultant and distributed at the conference is attached as Appendix B. Also distributed at the conference, and attached as Appendix C, is a booklet entitled, ACombating Injurious Imports Under the WTO Agreements -- A Domestic Producer=s Guide,@ which the Consultant=s law firm translated into Arabic at its own expense.

[3] A list of documents read during the course of the consultancy is attached as Appendix D.

4 IBLA is helping the Policy Component provide technical assistance to the Government of Jordan on the content of various laws and regulations, including regulations on anti-dumping, countervailing duties, and safeguard measures. According to one official at IBLA (Ms. Nissreen Haram), regulations covering countervailing duties and safeguard measures are less complete than the anti-dumping regulations reviewed by the Consultant.

review of anti-dumping regulations being prepared by the Policy Component of the AMIR Program. On October 7, the Consultant sat down for several hours with officials from International Business Legal Associates (AIBLA@) in Amman to go over his comments and suggestions regarding the draft regulations.[4]

As a result of these activities, it is apparent that Jordan currently lacks the legal and institutional framework to apply anti-dumping, countervailing duty, and safeguard measures consistent with the requirements of the World Trade Organization (AWTO@). The Ministry of Industry & Trade (AMIT@) lacks the expertise and resources to conduct anti-dumping, countervailing duty, and safeguard investigations consistent with the rules of the WTO. In addition, the relevant law in Jordan, the ANational Production Protection Law,@ provides no guidance on how such investigations will be conducted, and under what circumstances such measures will be applied. Article 15 of the NPPL simply states that the Cabinet will issue regulations, consistent with the Kingdom=s international obligations, to address the Aimpact of imports ... which are dumped or subsidized.@

As described more fully below, the WTO strictly regulates the right of Member countries to apply anti-dumping, countervailing duty, and safeguard measures to imports from WTO Member countries. Given the present dearth of resources and expertise in Jordan, it is beyond cavil that WTO membership will have a negative effect, over the near term, on the ability of Jordan=s private sector to combat the injurious effects of imports that are dumped, subsidized, or significantly increasing.

II. THE APPLICATION OF ANTI-DUMPING, COUNTERVAILING DUTY, AND SAFEGUARD MEASURES UNDER THE WTO AGREEMENTS

The General Agreement on Tariffs and Trade 1994 (AGATT 1994@), which is administered by the WTO, permits WTO Member countries to provide affected domestic industries with tariff and other relief against imports under circumstances narrowly defined in the GATT 1994 and related agreements (the AWTO Agreements@). Given Jordan=s efforts to accede to the WTO and the ongoing trade liberalization associated with this

effort, domestic producers in Jordan are more likely than ever before to face significant import competition. It is important, therefore, that producers become familiar with the trade remedies available to them under the WTO Agreements.

The WTO Agreements generally permit three kinds of trade remedies. First, a Member may impose anti-dumping duties against imports which are sold at dumped prices if they cause or threaten to cause material injury to a domestic industry. Second, a Member may impose countervailing duties against imports that are subsidized if the imports cause or threaten material injury to a domestic industry. Third, a country may take a Asafeguard@ action by imposing either an import quota or duties on imports of a product from all countries if increased imports are causing or threatening to cause serious injury to domestic producers.

Because the WTO Agreements specifically prohibit Member countries from establishing quotas or raising duties on imports from other WTO countries except in very limited circumstances, any relief against imports other than through an anti-dumping, countervailing duty, or safeguard action, would likely violate the importing country=s WTO obligations. An investigation to determine whether any of these forms of relief is appropriate must adhere to the strict requirements of the WTO Agreements.

A. Investigating Dumping -- The Application of Anti-dumping Duties by WTO Member Countries

Dumping is essentially price discrimination between purchasers in different national markets. Dumping occurs most often when a company sells a product in an export market at a lower price than it sells the product in its own country. A product need not be sold below cost to be dumped, although below-cost pricing will often result in dumping.[5]

Anti-dumping duties may be assessed when the investigating authorities in the importing country determine that an imported product is dumped and that the dumped imports are causing or threatening to cause material injury to a domestic industry. They are collected by the customs authorities of the importing country. No direct compensation or award of damages is made to domestic producers.

The imposition of anti-dumping duties generally benefits domestic producers by causing the cessation or reduction of imports by causing the prices to increase. The liability for payment of duties is on the importer, which may not be able to pass on the added cost of doing business to its customers. As a result, the importer may shift its sourcing of the affected product to another country or stop importing the product

[5] Anti-dumping duties may be applied to any raw material, agricultural product, or manufactured product sold in international trade.

altogether.

Even if the duties do not result in a cessation of imports, they can greatly affect the export price of the product and the exporter=s profitability. The duties can also discourage other foreign producers from exporting at dumped prices to the country imposing the duties.

1. Anti-dumping Investigations

An investigation to determine whether anti-dumping duties may be applied to imports from a WTO Member country must adhere to the strict requirements of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AAD Agreement@). It is beyond the scope of this paper to provide a detailed description of how anti-dumping duties are calculated under the AD Agreement. It is also beyond the scope of this paper to describe all of the procedural requirements contained in the AD Agreement. For further information on these subjects, the Consultant has attached as Appendix E hereto a paper provided to the MIT that describes, *inter alia*, the anti-dumping law and practice of the United States. The following is only intended as a general guide to the rules that must be followed by WTO Member countries before they may impose anti-dumping duties.

a. Initiation of the Investigation

An anti-dumping investigation is normally initiated based on an application filed by or on behalf of the domestic industry.[6] The application must include relevant evidence (not just simple assertions) of (a) dumping, (b) injury or threat of injury, and (c) a causal link between the dumping and injury.[7] At a minimum, the application must include information reasonably available to the applicant on the items in subparagraphs (i) to (iv) of Article 5.2 of the AD Agreement, including information relating to the product, the industry, the foreign producers, the importers, evidence of dumping, and factors showing injury and causal link.

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[6] AD Agreement, Art. 5.1. Investigations may also be Aself-initiated@ by the government. *Id.*, Art. 5.6.

[7] *Id.*, Art. 5.2.

Upon receipt of an application, an investigating authority may initiate an anti-dumping investigation provided it satisfies the obligations in Article 5 of the AD Agreement. First, the authority must examine the application under Article 5.4 to determine whether it was made Aby or on behalf of the domestic industry.@ Second, the authority should determine whether the application includes information reasonably available to the applicant on the items identified in subparagraphs (i) to (iv) of Article 5.2.

Third, the authority must examine the accuracy and adequacy of the evidence in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.[8] ASufficient evidence@ constitutes more than simple assertions of dumping, injury, and causal link. In determining whether the evidence is Asufficient,@ the investigating authority should consider the definitions and factors relating to the determinations of dumping and injury under Articles 2 and 3 of the AD Agreement.

Fourth, under Article 5.5 of the Agreement, the authority must notify the government of the exporting Member after receipt of a properly documented application and before proceeding to initiate an investigation. After assessing that an application is Aproperly documented,@ the authority must notify before Aproceeding to initiate,@ *i.e.*, just prior to the date of the first formal determination that the application contains sufficient evidence to justify initiation under Article 5.3 (and in all cases prior to the date of publication of the formal notice of initiation under Article 12.1).

Article 12.1 of the AD Agreement provides that after determining that sufficient evidence exists to justify initiating an investigation under Article 5, the investigating authority must notify the exporting Member and other interested parties (including importers, exporters, and foreign producers) of the initiation of investigation. The authority must also publish a public notice of initiation. The public notice must contain the information in subparagraphs (i) to (vi) of Article 12.1.1 of the Agreement. The public notice of initiation should provide a detailed discussion of the authority=s analysis in examining the sufficiency of the evidence, given that WTO panels reviewing a challenge to any anti-dumping measure will rely in large part on this notice for determining whether the authority complied with its obligations under Article 5 of the Agreement in initiating the investigation.

As soon as an anti-dumping investigation has been initiated, the authority

[8] *Id.*, Art. 5.3.

must provide a full text of the written application to known exporters and to the authorities of the exporting Member.[9] The authority must also make the written application available to other interested parties, including importers.[10] At all times, the authority must give due regard to the protection of confidential information.

b. Preliminary Investigation and Determination

[9] *Id.,* Art. 6.1.3.

After initiating the investigation, the investigating authority must notify interested parties of the information that the authority will require and provide ample opportunity to present in writing all evidence that such parties consider relevant to the investigation.[11] The authority should first define the product subject to investigation and the period of investigation for the dumping analysis (normally the preceding 6 to 12 months) and for the injury analysis (for example, the preceding calendar year and corresponding interim periods in the prior year and the current year). To analyze dumping, the authority should issue a questionnaire to the foreign exporters requesting, among other things, transaction specific data on the exporters= sales of the foreign like product in the exporters= home market and to Jordan. To analyze injury and causation, the authority should issue questionnaires to (1) the foreign producers, (2) the domestic producers, and (3) the importers requesting information on the injury and causation factors discussed in Article 3 of the AD Agreement. For example, the questionnaire for foreign producers should request, among other things, information on production, capacity, plans to increase capacity, and exports to Jordan and third countries. The questionnaire for domestic producers should request, among other things, information on production, sales, prices, profits, and the impact of dumped imports on planned investments. The questionnaire for importers should request, among other things, information on the volume, value, and prices of imports and the inventories of the product under investigation.

The investigating authority is obligated to give exporters at least 30 calendar days to reply to questionnaires.[12] The authority must give Adue consideration@ to any request for extension of the period to respond, upon cause shown. Finally, evidence provided in the questionnaires and in other written submissions must be made available promptly to other interested parties participating in the investigation, subject to the requirements to protect confidential information.[13]

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10 AInterested parties@ is defined to include: A(i) an exporter or foreign producer or the importer of a product subject to investigation . . . ; (ii) the government of the exporting Member; and (iii) a producer of the like product in the importing Member . . . . *Id.*, Art. 6.11.

11 *Id.*, Art. 6.1.

12 *Id.*, Art. 6.1.1. Generally, the 30-day period begins on the date of receipt of the questionnaire, deemed to be one week from the date it was sent to the relevant party.

The investigating authority may impose a provisional anti-dumping measure consistent with the obligations under Article 7 of the AD Agreement. Under Article 7.1, the authority may apply a provisional measure if it (1) initiated an investigation in accordance with Article 5 and provided interested parties with adequate opportunities to submit information and make comments, (2) made a preliminary determination of dumping and consequent injury to the domestic industry, and (3) judged that a provisional measure is necessary to prevent injury caused during the investigation. The preliminary determination must be made in accordance with Articles 2 and 3 of the AD Agreement governing the determination of dumping, injury, and causal link. The authority should establish deadlines for the presentation of factual information and comments to ensure that all interested parties have adequate opportunities to participate in the proceeding.

The investigating authority may not apply a provisional measure any sooner than 60 days after the date of initiation, and the application of such measure must be limited to four months.[14] The investigating authority may, however, apply a provisional measure for up to six months under certain narrow circumstances. A provisional measure may take the form of a provisional duty, although a security (cash deposit or bond) is preferred.[15] In addition, the application of a provisional measure must be consistent with Article 9 of the AD Agreement regarding the imposition and collection of anti-dumping duties.[16]

Upon making a preliminary determination, the investigating authority must publish a public notice on the results of the determination.[17] The notice must provide in

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13 *Id.*, Art. 6.1.2.

14 *Id.*, Art. 7.3; Art. 7.4.

15 *Id.*, Art. 7.2.

16 *Id.*, Art. 7.5.

sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. The notice must be forwarded to the government of the exporting Member and to other interested parties. A public notice regarding the imposition of provisional measures must provide sufficiently detailed explanations for the preliminary determinations on dumping and injury, and must refer to the matters of fact and law which have led to arguments being accepted or rejected.[18] The notice should also contain the items in subparagraphs (i) to (v) of Article 12.2.1, with due regard to the protection of confidential information.

c. Final Investigation and Determination

In the final investigation, the authority should verify the information in the injury questionnaire responses submitted by the domestic producers and the importers. The authority should also conduct on-the-spot verifications in the exporting Member=s territory to verify the information in the injury questionnaire responses submitted by the foreign producers and the information in the dumping questionnaire responses submitted by the exporters. On-the-spot verifications in the territory of the exporting Member are governed by Article 6.7 and Annex I of the AD Agreement.

Generally, for verifications in the territory of another WTO Member (assuming such Member does not object), the authority must obtain the agreement of the firms concerned and must notify representatives of the government of the exporting Member.[19] In addition, if the authority determines that exceptional circumstances justify the need for non-governmental experts to assist with the verification, the authority should notify the firms concerned and the exporting Member of the authority=s intention to include such experts on the verification team.[20] Such exceptional circumstances could include, for example, the fact that the authority has never conducted a verification of an exporter=s response to a dumping questionnaire. The non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

Upon agreement of the firms concerned to allow on-the-spot verification, the authority should (1) notify the authorities of the exporting Member of the firms to be visited and the dates agreed,[21] (2) give the firms concerned sufficient advance notice prior to the visit,[22] (3) seek to verify the information provided during the investigation or to obtain additional details, and (4) advise the relevant firms of the nature of the information that the authority will verify.[23]

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17 *Id.*, Art. 12.2.

18 *Id.*, Art. 12.2.1.

19 *Id.*, Art. 6.7.

20 *Id.*, Annex I.2.

21 *Id.*, Annex I.4.

22 *Id.*, Annex I.5.

23 *Id.*, Annex I.7.

Before the final determination is made, the authority must inform all interested parties of the Aessential facts@ under consideration which form the basis for the decision whether to apply a definitive anti-dumping measure.[24] This disclosure must take place in sufficient time for the parties to defend their interests. Arguably, the publication of the preliminary determination satisfies this obligation. The authority could also comply with this obligation, however, by preparing a descriptive report setting out the submissions and other information in the administrative file that the authority will consider or otherwise discuss in the final determination. To facilitate compliance with this and other obligations relating to due process requirements, the authority should also establish a deadline for the submission of factual information from all interested parties, another deadline for the submission of all written arguments by these parties, and should schedule a public hearing.

Upon making a final determination, the investigating authority must issue a public notice on the results of the determination.[25] The notice must provide in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. The notice must be forwarded to the government of the exporting Member and to other interested parties. A public notice regarding the imposition of final anti-dumping measures must provide all relevant information on the matters of fact and law, and reasons which have led to the imposition of final measures, due regard being paid to the protection of confidential information.[26] In particular, the notice must contain the information described in subparagraph 1 of Article 2 and the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers.

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24 *Id.,* Art. 6.9.

25 *Id.,* Art. 12.2.

26 *Id.,* Art. 12.2.2.

B. Investigating Subsidies -- The Application of Countervailing Duties by WTO Member Countries

Countervailing duties are imposed if the production or exportation of foreign merchandise is subsidized, if the subsidy is Aspecific,@ and if the imports are injuring the domestic industry. If the petitioner prevails in a countervailing duty investigation, a duty is imposed on the imported goods to offset the economic benefit conferred on the exporter by the subsidization.

Article 1 of the Agreement on Subsidies and Countervailing Measures (the ASCM Agreement@) defines Asubsidies@ as a financial contribution by a government (or public body) that benefits foreign exporters. The first part of this definition, Afinancial contribution,@ may be found where there is (1) a direct transfer or potential direct transfer of funds (*e.g.*, grants, loans, and equity infusions); (2) forgiveness or noncollection of government revenue that would otherwise be due (*i.e.*, tax credits); (3) the provision of goods or services other than general infrastructure, or the purchase of goods; or (4) evidence of government payments to a funding mechanism or government direction to a private body to carry out transfers of funds or to provide or purchase goods or services in a manner normally done by governments (Aindirect subsidy@).

A subsidy is also characterized by a countervailable benefit. For purposes of determining the countervailable benefit, the basic type of subsidy is a grant. The benefit of a grant is the entire amount of money provided by the government. If the grant is provided on a one-time basis, the benefit will normally be allocated over a period of years. If, on the other hand, the grant is provided periodically, it will be Aexpensed@ in the year of receipt.

The countervailable benefit for other types of subsidies is based on a similar analysis. There is a countervailable benefit from government-provided equity capital, loans, loan guarantees, or goods and services (or the purchase of goods) only if the government gives the recipient terms that are not widely available in the private market. In such cases, the amount of the benefit is the difference between the value of what is provided by the government and what would be available in the market.

This general approach is applied differently to different types of subsidies. One of the most controversial issues in this area relates to the treatment of government purchases of newly-issued private equity shares. If private buyers do not participate in the offering, some investigating authorities (such as the U.S. Department of Commerce) will consider whether the recipient of the infusion was Aequityworthy@ at the time of the infusion -- that is, whether the company was able to generate a reasonable rate of return on new capital within a reasonable period of time. If the authority determines that the recipient was not equityworthy, it will conclude that the private market would not have provided any funds to the company and will treat the entire infusion as a grant. If, on the other hand, the authority determines that the recipient was equityworthy, it will normally find no

countervailable benefit.

As noted above, a countervailable subsidy must be Aspecific.@ In other words, it must be provided to an enterprise or industry (or a group of enterprises or industries), linked to export performance, or premised on the use of domestic over imported goods).[27] The idea here is that a targeted benefit is more distortive of normal market processes than is a benefit that is widely available.

[27] SCM Agreement, Art. 2.

Finally, just as in a dumping investigation, the investigating authority must determine whether the subsidized imports are materially injuring, or are threatening to materially injure, the domestic industry.[28]

1. Countervailing Duty Investigations

Countervailing duty investigations are very similar to anti-dumping investigations in most aspects, including initiation, conduct of the investigation, the right of the parties to provide evidence and argument, and provisional measures. Like anti-dumping investigations, countervailing duty investigations normally last no more than one year. A petitioner may file petitions for anti-dumping and countervailing duty relief on the same imports either together or separately.

One significant difference is that in a countervailing duty action, the governments of the exporting countries involved must be notified prior to initiation of the investigation and given the opportunity to consult with the government of the importing country with regard to resolving the subsidy dispute.[29] This opportunity for consultations must continue throughout the investigation.[30] In anti-dumping cases, the government of the importing country is not obligated to consult with the exporting countries until after initiation of the investigation and, in fact, must avoid any publicizing of the filing of the petition.

C. Investigating Import Surges -- The Application of Safeguard Measures by WTO Member Countries

Under Article 2 of the Agreement on Safeguards (the ASafeguards Agreement@), a WTO Member may apply border measures against imports if they are being imported in such increased quantities (either absolute or relative to domestic production) as to cause or threaten serious injury to a domestic industry. There is no requirement that there be an unfair trade practice, such as dumping. Thus, the degree of injury that must be suffered or threatened in a safeguards case (Aserious@ injury) is higher than the degree that must be shown in a dumping or countervailing duty case (Amaterial@ injury). Moreover, in order to be Aserious,@ the damage must be the result of a sharp and substantial increase of imports, either actual or imminent, of the product from the country or countries at issue. The injury must not be attributable to other factors, such as technological change or changes in consumer preference.

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[28] *Id.,* Art. 15.

[29] *Id.,* Art. 13.1.

[30] *Id.,* Art. 13.2.

Safeguard actions differ from anti-dumping and countervailing duty cases in a number of other respects as well. First, safeguards apply to imports of the subject merchandise from all sources (*i.e.*, countries), whereas anti-dumping and countervailing duties apply only to imports from specific countries.[31] Second, safeguards may entail a variety of border measures, including quotas and higher duties.[32]

Prior to imposing safeguard measures the importing country must seek consultations with the exporting country or countries.[33] If consultations fail to resolve the dispute, the importing country may apply safeguard measures for up four years.[34] Developing countries, such as Jordan, my extend the period of application for up to 6 years, for a total of 10 years.[35]

If safeguards are applied for more than one year, they must be progressively liberalized.[36] Safeguard measures must also be Apaid for.@ In other words, the importing country must grant trade concessions that are Asubstantially equivalent@ to the adverse effects of the safeguard measure.[37] If the importing country fails to honor this requirement, the affected exporting country or countries will be free, after three years, to suspend substantially equivalent trade concessions previously enjoyed by the importing country.[38]

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[31] Safeguards Agreement, Art. 2.2.

[32] *Id.*, Art. 5.

[33] *Id.*, Art. 12.

[34] *Id.*, Art. 7.1.

[35] *Id.*, Art. 9.2.

[36] *Id.*, Art. 7.4.

[37] *Id.*, Art. 8.1.

[38] *Id.*, Art. 8.2.

1. Safeguard Investigations

Article 3 of the Safeguards Agreement sets forth various requirements for investigations that emphasize transparency and due process. For example, Article 3.1 requires the investigation to be conducted pursuant to procedures Apreviously established,@ not procedures developed on the spot for purposes of any particular investigation. There must also be Areasonable public notice to all interested parties,@ and the investigation must include Apublic hearings or other appropriate means in which importers, exporters, and other interested parties could present evidence and their views.@ The investigating authorities are also required to publish a report Asetting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.@

Article 3.2 provides specific rules for the treatment of confidential information by the investigating authority. Basically, authorities may not disclose confidential information without the permission of the party submitting such information. They may, however, request the party to submit a non-confidential summary of the information, or reasons why such a summary cannot be provided.

Article 4.2 requires the investigating authorities to evaluate Aall relevant factors of an objective and quantifiable nature having a bearing on the situation of [the domestic] industry.@ It identifies, in particular, Athe rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.@

Finally, Article 4.2(c) requires the investigating authorities to publish promptly a Adetailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.@ One concern evident in Article 4 is that the factual determination of serious injury or threat must be based on objective evidence. Article 4.2 mandates evaluation of all relevant factors Aof an objective and quantifiable nature,@ and it mandates demonstration of a causal link to increased imports Aon the basis of objective evidence.@ Evaluation of a threat of serious injury necessitates projection of future events, so Article 4.1(b) makes explicit that a threat determination must be Abased on facts and not merely on allegation, conjecture or remote possibility.@

III. RECOMMENDATIONS

Anti-dumping, countervailing duty, and safeguard measures are legitimate tools of trade regulation commonly used by countries around the world and sanctioned by the relevant WTO Agreements. In recent years, many countries, particularly developing countries, have adopted legislation which provides for the application of these measures. A major reason for this trend is the continuing liberalization of trade and the consequent

globalization of competition. As tariffs and non-tariff barriers to trade decline, the demand for remedies against unfair and injurious imports increases.

To date, however, Jordan has not adopted an effective and WTO-consistent anti-dumping, countervailing duty, or safeguard regime. Jordan's efforts to revitalize its private industrial sector and to expand its economy through manufacturing and export growth will be hindered if Jordan does not move forward promptly with an anti-dumping, countervailing duty, and safeguard program. Such a program should include the following elements.

A. Adoption of Implementing Regulations and Legal Structure

A country does not necessarily need to have anti-dumping, countervailing duty, and safeguard laws in place to accede to the WTO. However, a country which lacks such laws must agree not to apply such measures.

In Jordan=s case, it is unclear whether the WTO Agreements on anti-dumping, countervailing duties, and safeguard measures operate in the same fashion as statutes within Jordan. Stated differently, it is unclear whether the WTO Agreements would be enforceable by private parties in the courts of Jordan. If they were, Jordan would be free to apply such agreements (just as it would a statute) to imports from WTO Member countries. Indeed, in some respects, Members that treat the WTO Agreements as Aself-executing@ (*e.g.*, Mexico) have an advantage over Members that adopt implementing legislation (*e.g.*, the United States). In WTO dispute settlement proceedings, the latter often have to explain (or justify) the language in their statutes, while the former avoid such difficulties because the relevant agreement *is* the statute.

In any event, the interests of the private sector in Jordan would be well served by the adoption of regulations on anti-dumping, countervailing duties, and safeguard measures. First of all, the NPPL, as noted above, provides no guidance on how trade investigations will be conducted, and under what circumstances anti-dumping, countervailing duty, and safeguard measures will be applied.[39] Second, the WTO Agreements provide, at best, only limited guidance on many issues. Regulations, if properly drafted, would fill this lacuna.

The basic structure of these regulations can be drawn from the WTO Agreements themselves and from a review of legislation and regulations in other countries. Technical assistance in the formulation of the regulations should be sought from foreign legal consultants experienced in anti-dumping, countervailing duty, and safeguard proceedings. Consultations with WTO officials and representatives of agencies in other countries with responsibility for these actions would also be helpful in familiarizing

[39] As noted above, Article 15 of the NPPL simply states that the Cabinet will issue regulations consistent with the Kingdom=s international obligations, to address the Aimpact of imports ... which are dumped or subsidized.@

government officials with the institutional and procedural options available, and the benefits and drawbacks of each. Because the regulations also need to be tailored specifically to Jordanian legal traditions and institutions and the needs of Jordanian industry, the drafting process should include close consultation among the Jordanian government, private sector interests, and outside consultants.

Finally, there are numerous aspects of a WTO-consistent trade regime that administrative regulations may not be able to address. For example, Article 13 of the AD Agreement requires Members to provide interested parties with the opportunity to challenge final dumping determinations before a judicial, arbitral, or administrative tribunal that is independent of the investigating authority. Another example can be found in Article 9.3.2. of the AD Agreement. This provision requires the Customs authorities in each Member country to grant prompt refunds of anti-dumping duties if they exceed the margin of dumping. Therefore, in addition to pushing for the adoption of WTO-consistent implementing regulations, the private sector in Jordan must be equally mindful and supportive of the need for WTO-consistent customs laws and judicial review statutes. The latter are no less important than the former.

B. Establishment of Investigating Authority

A legal framework is only as good as the people who administer it. At the present time in Jordan, there is no one in the government who has the experience or training to conduct an anti-dumping, countervailing duty, or safeguard investigation consistent with the requirements of the WTO. Therefore, the private sector should call upon the government to hire and train at least two people to conduct these investigations. Appropriate candidates should have a background in law and accounting.

Once the nucleus of an investigative unit is established, it could receive training in the United States or elsewhere at no or little cost to Jordan. However, no amount of training can substitute for the actual hands-on experience gained from conducting an investigation. For this reason, Jordan is strongly advised to retain expert outside assistance on its initial cases. For example, Annex 1.2 of the AD Agreement, as noted above, permits investigating authorities to use non-government experts during the verification of questionnaire responses in foreign countries.

In addition to the necessary personnel and expertise, the government will need to establish, presumably within MIT, a dockets room, a central records unit, and a hearing room. The dockets room will receive filings from interested parties. A central records unit will store the records of all proceedings, including all public documents which must be available for inspection.[40] Finally, pursuant to Article 6.2 of the AD Agreement, Article 12.2 of the SCM Agreement, and Article 3.1 of the Safeguards Agreement, interested

[40] AD Agreement, Art. 6.4. The central records unit will need to be a secure facility that maintains the integrity of confidential information provided by interested parties.

parties have the right to present oral argument at a hearing conducted by the investigating authority. Therefore, the MIT must set aside a room where the parties may present their cases and be subject to examination by the investigators.

C. Dual Responsibilities of the Ministry

MIT should be prepared to discharge two basic responsibilities. The first would be to conduct investigations of dumping, subsidization, and import surges based upon petitions filed by Jordanian producers or upon its own initiative. As is done in other countries, this function could include assistance to potential petitioners on the requirements for filing a case. The second would be to provide expert assistance and advice to Jordanian exporters in defending actions in other countries. This assistance could include a broad range of activities, including providing information on the foreign country's procedures and practices, helping to locate and hire counsel or other representatives in the foreign country, providing translation services, being present during the foreign authorities' verification of information, and reviewing whether the investigation is being conducted in a manner consistent with the relevant WTO Agreements.

D. Assistance to Smaller Companies

Given the difficulties faced by small to medium-sized companies in funding a trade remedies case, consideration should be given to some mechanism for assisting such companies in petitioning for relief from Jordanian authorities. One option is for the government to finance a case, either in whole or in part. As noted above, the relevant WTO Agreements permit Member countries to Aself-initiate@ anti-dumping, countervailing duty and safeguard actions. How such financing would be obtained is a matter of political choice. One possibility is a special tax (or fee) on selected groups or industries most likely to need assistance in anti-dumping, countervailing duty, or safeguard actions. The revenues could go into a fund used solely to finance these proceedings. Alternatively, government funds could be reserved solely for companies meeting certain criteria (for example, the value of annual sales or the number of employees) that are designed to guarantee that only smaller companies that especially need assistance will benefit.

There are also non-governmental financing options available. A number of trade cases in other countries, such as the United States, have been paid for by business associations on behalf of their members. An association can assess its members an amount sufficient to establish a fund for the prosecution of a case.

E. Industry Preparation for Potential Trade Cases

In addition to the investments that must be made in the resources and expertise of the government, the private sector must invest in its own resources. Specifically, the private sector in Jordan must educate itself on the implications of WTO membership. Seminars, like the one conducted by the Consultant, should be repeated and

attendance should include lawyers who can one day help Jordan=s private sector prosecute anti-dumping, countervailing duty, and safeguard actions. The private sector must also become more pro-active. Business associations, like the ACI, should hire and train personnel who can track imports and provide advice to their members on how to prepare a petition. For many industries in Jordan, information on total imports, domestic consumption, and total production is not readily available. A properly train individual, could help collect this type of information from the government (*e.g.*, the Customs authorities) and concerned producers.

Finally, if a producer believes it is being victimized by imports, it must press its case. It cannot assume that the government will act on its request. The resources and expertise of the government are limited. Successful petitioners will know the rules and pressure the government to take action. Because sufficient expertise to provide technical counseling on anti-dumping, countervailing duty, and safeguard issues has not yet been developed in Jordan, it will be necessary on an interim basis for this work to be handled primarily by foreign law firms and economic consultants. The goal, however, is to quickly achieve a high level of local expertise. For this purpose, the foreign experts should work closely with their counterparts in Jordan so that Jordanian lawyers and consultants can eventually assume full responsibility for counseling and representing Jordanian companies in connection with these matters.

IV. CONCLUSION

Following his October 3, 1999 meeting with the Minister of Trade (Mr. Asfour), the Consultant volunteered to write a letter from the ACI to the Minister which summarized the position of Jordan=s private sector on the subject of anti-dumping, countervailing duties, and safeguard measures. A copy of that letter is attached hereto as Appendix F. It is not known whether the ACI ever used any parts of the letter.

Finally, attached hereto as Appendix G is a paper that the ACI could use to advocate its position before the government, the public, and the media on the subject of Ainjurious imports.@ If another business association wanted to embrace the views expressed in the paper, it would be a simple matter to eliminate all references to the ACI. The paper could be (i) distributed to the appropriate policy makers and media outlets as a Astand alone@ document, (ii) attached to a cover letter and delivered to specific officials, or (iii) converted into (or contribute to) a press release. The paper is intentionally short because government officials and representatives of the media generally do not have the time or the inclination to read long discussions of an issue or position. Position papers that are too long or too Aacademic@ exhaust the reader=s attention and are often Afiled@ in the trash.