

ANTI-SUBSIDY

- a guide

Trade Remedies Investigating Authority
Ministry of Foreign Affairs, Regional Integration and International Trade
(International Trade Division)

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INTRODUCTION

The WTO Agreement on Subsidies and Countervailing Measures (Article VI of GATT 1994 and the Anti-Dumping Agreement) lays down the principles to be followed by the member countries for the imposition of countervailing measures. Pursuant to this Agreement these principles have been prescribed in the Trade (Anti-dumping, Countervailing and Safeguard Measures) Act 2022.

Based on the currently applicable multilateral rules, certain types of subsidies can be attacked either at multilateral level, by bringing a case before the WTO Dispute Settlement (the famous cotton and Airbus/Boeing cases are some of the most notorious examples), or by carrying out a national countervailing (anti-subsidy) investigation. In the latter case, the Investigating Authority will examine whether the requirements are met to consider the measures attacked by the Mauritian applicant as subsidies and if these subsidies are specific. If the answer to both questions is positive, the Investigating Authority will calculate the amount of the subsidy and the subsidy rate. In parallel, the Investigating Authority will analyse if the subsidies are causing injury to a Mauritian industry. This investigation is carried out in accordance with procedural rules described below, in particular with due respect to the rights of the interested parties.

LEGAL FRAMEWORK

The Trade (Anti-dumping, Countervailing and Safeguard Measures) Act 2022, along with the Trade Remedies Regulations 2023, provide the legal framework for anti-dumping and countervailing investigations and for the levy of anti-dumping and countervailing duties. This Act is based on relevant WTO Agreements, including GATT 1994 and the Subsidies and Countervailing Measures Agreements.



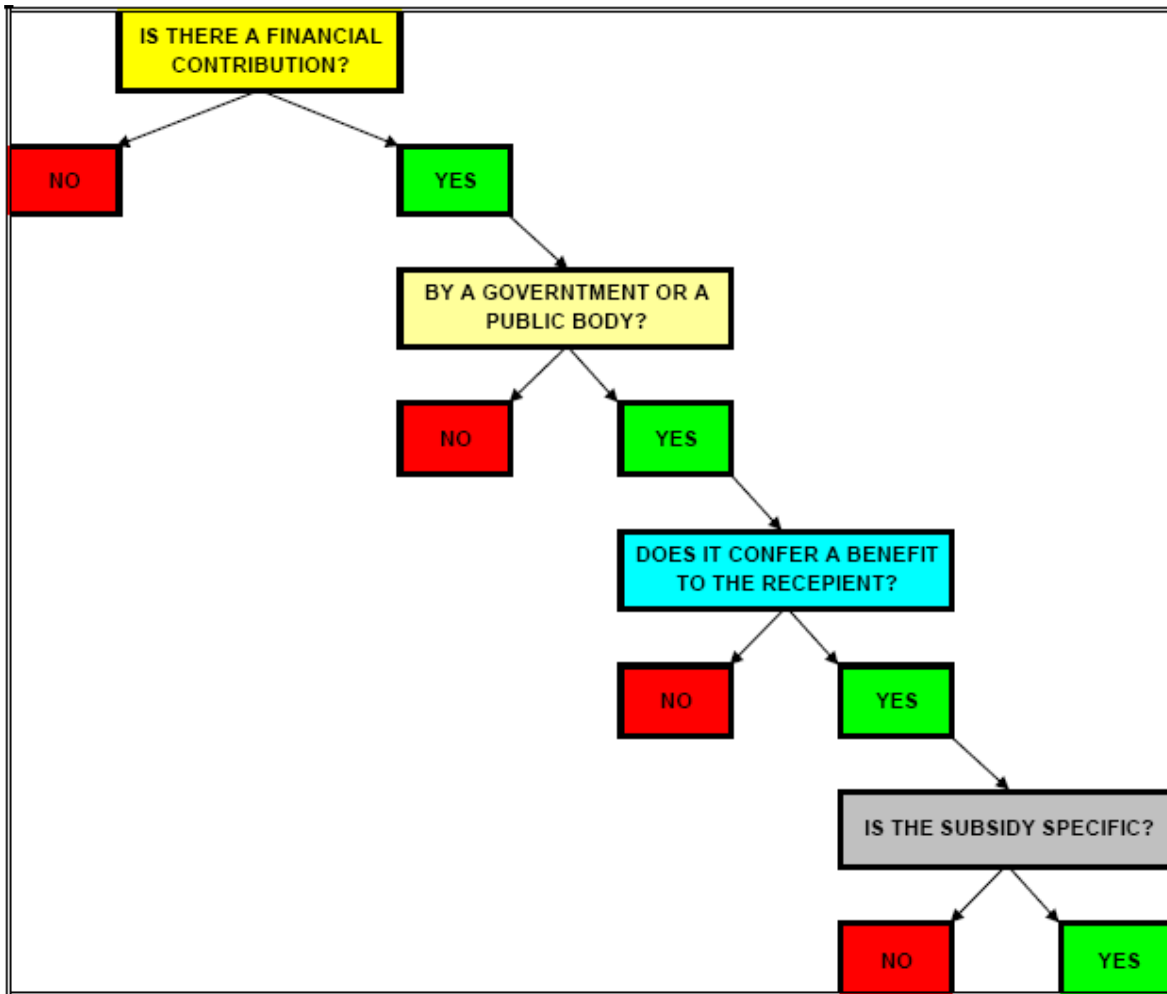
SUBSIDIES DETERMINATION

The first element in any anti-subsidy investigation is the determination of the existence of countervailable subsidies, followed by the calculation of the subsidy amount.

How does the Investigating Authority determine the existence of a subsidy?

This determination requires the analysis of four legal and economic elements:

Graph: Elements in a countervailing investigation



The first element is **financial contribution**. There is a financial contribution when one (or more) of the circumstances listed in Article 1.1(a)(1) or 1.1(a)(2) of the SCM Agreement exists. There a financial contribution where there is

- a direct transfer of funds (e.g. a grant, a loan, etc.);
- a potential direct transfer of funds (e.g. a loan guarantee);
- government revenue otherwise due is foregone or not collected (e.g. an exemption or reduction of corporate income tax, etc.);
- provision of goods or services (e.g. provision of electricity, water, etc.);
- purchase of goods (e.g. computers, etc.);

- payments to a funding mechanism; and
- any form of income or price support in the sense of Article XVI of GATT 1994.

The second element requires to show that the financial contribution is done by a **government or any public body**. Government includes public authorities at central, regional or municipal level. Public bodies include other institutions such as state-owned enterprises, and could also include public companies, such as banks, insurance companies etc.

Cross-subsidisation between private companies **cannot** be subject to purview by the Authority. However, if the Authority finds that a foreign government directs or entrusts a private company to carry out one or more of the types of financial contributions listed above, then action under the Act is possible.

The third element consists in proving that through the financial contribution, a **benefit** is conferred to its recipient. For the most part this determination entails an economic analysis. That for instance a grant confers a benefit is clear as its recipient is in a better position than if he/she had not received it. But other situations are considerably more difficult to assess. For instance, when the financial contribution takes the form of a loan from a public bank, determining whether a benefit is conferred to the lessee requires comparing the terms and conditions – e.g. interest rate, etc. – applied by the public bank with the terms and conditions available from a commercial bank in the market place for a comparable loan to the lessee. If the terms and conditions offered by the public bank are more advantageous than the ones from a commercial bank, then the financial contribution in the form of a loan confers a benefit. The economic analysis required to reply to the question of whether a given financial contribution confers a benefit therefore depends on the type of financial contribution at stake. Guidelines on the assessment of the existence of benefit will be developed by the Authority.

The final element is **specificity**. Subsidies generally available to everyone, or for which objective criteria and conditions governing the eligibility for, and the amount of, are established in the legislation of the exporting country, cannot be countervailed. Subsidies that are **by law** limited to:

- one or more enterprises;
- one or more industries;
- one or more regions of a country; or
- contingent upon export performance or the use of domestic over imported goods

are deemed to be specific in law.

Moreover, subsidies which by law are not specific may be found to be specific if they are **in practice** limited to one or more enterprises, industries, regions or if they are contingent to export performance or use of domestic over imported goods.

Importantly, this examination of the existence of the four elements **must be done programme by programme**. If one or more of the above elements cannot be proven, the Investigating Authority cannot act against that programme.

How does the Authority calculate the subsidy rate?

Once it has been determined that a particular programme meets the four elements, and hence that it can be countervailed, the Authority must compute the amount of the subsidy.

The rules for computing the subsidy rate depend on the type of subsidy at stake. The **first step** is to determine the **amount of the subsidy**. If the subsidy takes the form of a

grant, then the subsidy amount will normally be the amount of the grant. In case of more complicated types of subsidies economic analysis may be required. For instance, in case of a loan, the amount of the subsidy will depend on the difference of the terms and conditions between the loan provided by the public bank and the terms and conditions of a comparable loan that would have been granted by a commercial bank.

The **second step** is to calculate the **subsidy rate on *ad valorem* basis** (where the countervailing measures are applied on a per unit basis of the imported goods, a per unit subsidy rate will also have to be computed). To calculate the *ad valorem* subsidy rate, the Investigating Authority will have to know details regarding the nature of the programme such as whether the subsidy is contingent upon export performance, or whether it is granted for a particular product or region.

When it is an export subsidy, the *ad valorem* subsidy rate will normally be arrived at by dividing the amount of the subsidy by the export turnover of the exporter. However, if the subsidy is limited to a particular product or to exports to particular regions of the world, then the turnover should be the product's export turnover, or the turnover of exports to the particular regions of the world for which the subsidy is granted.

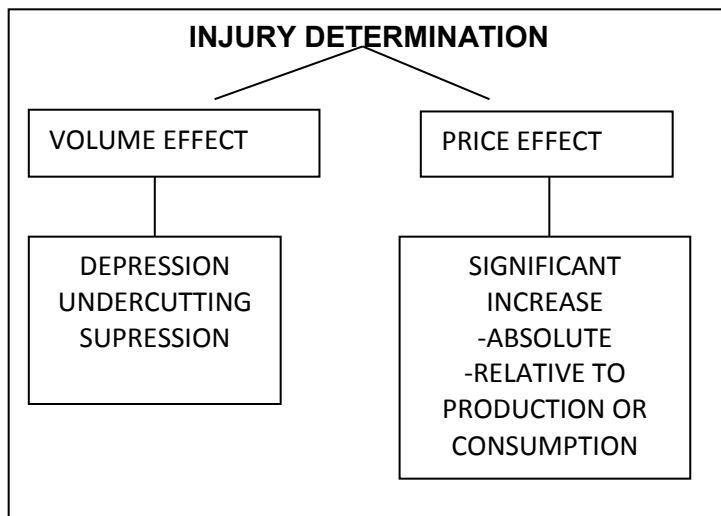
Like Products

Countervailing action can be taken only when there is a Mauritian industry which produces “like articles” when compared to the allegedly subsidised imported goods. The article produced in Mauritius must either be identical to the subsidised goods in all respects or in the absence of such an article, another article that has characteristics closely resembling those goods.

<p style="text-align: center;">LIKE ARTICLE</p> <ul style="list-style-type: none">• Identical – alike in all respects• If not alike in all respects, having closely resembling characteristics
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INJURY TO THE DOMESTIC INDUSTRY

The domestic industry in Mauritius must be able to show that subsidised imports are causing or are threatening to cause material injury to the ‘domestic industry’. Material retardation to the establishment of an industry is also regarded as injury.



The material injury or threat thereof cannot be based on mere allegation, statement or conjecture. Sufficient evidence must be provided to support the contention of material injury. Injury analysis can broadly be divided in three major areas:

The Volume Effect

The Authority examines the volume of subsidised imports, including the extent to which there has been or is likely to be a significant increase in the volume of subsidised

imports, either in absolute terms or in relation to production or consumption in Mauritius, and its affect on the domestic industry.

The Price Effect

The effect of subsidised imports on prices in the Mauritian market for like articles, including the existence of price undercutting, or the extent to which subsidised imports are causing price depression or preventing price increases for the goods which otherwise would have occurred.

The impact on the Mauritian Industry

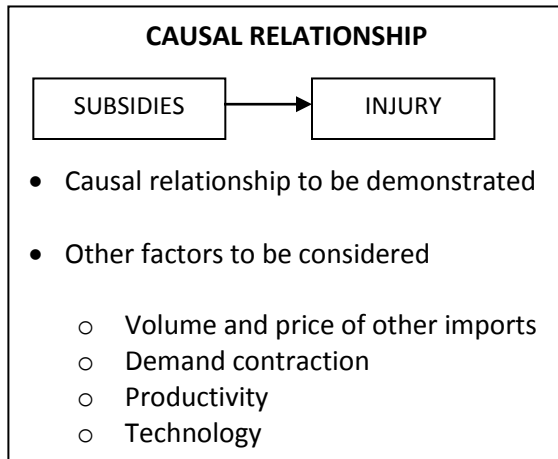
The consequent economic and financial impact of subsidised imports on the concerned Mauritian industry can be demonstrated, inter alia, by :

- decline in output
- loss of sales
- loss of market share
- reduced profits
- decline in productivity
- decline in capacity utilization
- reduced return on investments
- price effects
- adverse effects on cash flow, inventories, employment, wages, growth, investments, ability to raise capital, etc.

INJURY-EVALUATION OF ECONOMIC INDICATORS	
•	ACTUAL/POTENTIAL DECLINE IN
○	Sales
○	Output
○	Profits
○	Market Share
○	Productivity
○	Return on Investment
○	Capacity Utilization etc.
○	Employment
○	Investors/Stocks
○	Ability to raise capital or investment etc.

The injury analysis is a detailed and intricate examination of all the relevant factors. It is not necessary that all the factors considered relevant display a negative performance.

Material injury can be found where for instance important factors such as output, sales volume, sales prices and profitability fell during the period of investigation for injury purposes.



Causal Link

A 'causal link' must exist between the material injury being suffered by the Mauritian industry and subsidised imports. In addition, other injury causes have to be investigated so that they are not attributed to subsidies. Some of these are volume and prices of imports not

sold at subsidised prices, contraction in demand or changes in the pattern of consumption, export performance, productivity of the domestic industry etc.

WHO CAN FILE AN APPLICATION?

An anti-subsidy investigation can normally be initiated only upon receipt of a written application by or on behalf of the "Domestic Industry".

In order to constitute a valid application, the following two conditions have to be satisfied:

- The domestic producers expressly supporting the application must account for not less than 25% of the total production of the like article by the domestic industry in Mauritius; and

STANDING TO FILE AN APPLICATION

- Express support of those who account for
 - More than 25% of total domestic production, and
 - More than 50% production by those supporting and those opposing the application

- The domestic producers expressly supporting the application must account for more than 50% of the total production of the like article by those expressly supporting and those opposing the application.

DOMESTIC INDUSTRY

- Producers of like articles as a whole or those producers whose output is a major proportion of total Mauritian production
- The following may be excluded
 - Importers
 - Those related to importers or exporters

Domestic Industry

Domestic industry means the Mauritian producers of like articles as a whole or those producers whose collective output constitutes a major proportion of total Mauritian production.

Producers who are related to the exporters or importers or are themselves importers of the allegedly subsidised goods may be deemed not to form part of the domestic industry, especially if they oppose the application.

RELIEF TO THE DOMESTIC INDUSTRY

Relief can be provided to the domestic industry in the form of countervailing duties or price undertakings.

1. COUNTERVAILING DUTIES

Duties are imposed on a source specific basis and can be expressed either on *ad valorem* or specific basis. Non-cooperative exporters are required to pay the residual duty, which is generally the highest of the co-operative exporters.

RELIEF TO DOMESTIC INDUSTRY

- Lesser duty Rule
 - Only that amount of duty which is sufficient to remove the injury to the domestic industry

Lesser Duty Rule

Under the WTO provisions, national authorities cannot impose duties higher than the full amount of the subsidy. However, where the injury margin is lower than the full amount of the subsidy and a duty based on the injury margin is considered

sufficient to remove the injury suffered by the Mauritian industry, the Act sets forth that any countervailing duty must be based on the injury margin.

Injury Margin

Besides the calculation of the full amount of the subsidy, the Authority also calculates the injury margin which is the difference between the fair selling price due to the domestic industry and the landed cost of the product under consideration. Landed cost for this purpose is taken as the assessable value under the Customs Act plus the basic customs duties.

INJURY MARGIN

- Difference between the Fair Selling Price and the landed value
- Landed Value is
 - Assessable value under customs Act plus
 - Basic Customs Duty

De Minimis Margins and negligible imports test

DE MINIMIS MARGINS & NEGLIGIBLE IMPORTS TEST

- Amount of countervailable subsidies
 - Exporter Specific
 - Less than 1% (exporters in developed countries)
 - Less than 2% (exporters in developing countries)
 - Less than 3% (exporters in LDCs)
- Volume of Subsidised Imports
 - Country specific
 - Less than 3% from individual country and cumulatively not more than 7%

Any exporter whose amount of countervailable subsidies is less than 1% *ad valorem* shall be excluded from the purview of countervailing duties even if the existence of subsidies, injury as well as the causal link are established. Those thresholds are higher in case of exporters in developing countries (2% *ad valorem*)

and least developed countries (3% ad valorem).

Further, investigations against any developing country are required to be terminated if the volume of the subsidised imports from that particular source are found to be below 4% of the total imports, provided the cumulative imports from all those countries who individually account for less than 4%, are not more than 9% of total imports of the like product in Mauritius.

2. UNDERTAKINGS

The Authority may suspend or terminate an investigation if the exporter concerned furnishes an undertaking to revise his prices to remove the injurious effect of subsidies. The Authority may also suspend or terminate the investigation where the government of the exporting country offers an undertaking on the basis of which it agrees to eliminate or limit the subsidy or take other measures to eliminate the injurious effects they cause to a Mauritian industry. No undertaking can however be accepted before a preliminary determination is made. No countervailing duties are recommended on such exporters from whom price undertaking has been accepted. No undertaking may, however, be accepted in case it is found that acceptance of such undertaking is impracticable or is unacceptable for any reason.

APPLICATION PROCEDURES

Applications can be made by or on behalf of the concerned domestic industry to the Chairperson, Investigating Authority, in the International Trade Division of the Ministry of Foreign Affairs, Regional Integration and International Trade for an investigation of any alleged subsidies. The Investigating Authority may initiate an investigation when there is sufficient evidence that subsidies imports are causing or are threatening to cause material injury to the Mauritian industry producing like articles or are materially retarding the establishment of an industry.

Copies of the prescribed application proforma are available from the Investigating Authority.

Information Required

Applications should be submitted to the Chairperson of the Investigating Authority, in the International Trade Division of the Ministry of Foreign Affairs, Regional Integration and International Trade in the prescribed form.

Period of Investigation

The period of investigation for subsidy purposes should cover one year. For injury purposes, the period of investigation is longer, i.e. three years. It is, however, important that the period taken into consideration for detailed investigation should be representative and as recent as possible.

Confidential Information

Any information provided to the Investigating Authority on a confidential basis by any party shall not be disclosed to any other party without the specific authorization of the party providing the information, if the Investigating Authority is satisfied about its confidentiality. Interested parties supplying information on a confidential basis are required to furnish non-confidential summaries thereof or a statement of reasons as to why such summarization is not possible.

If the Investigating Authority is not satisfied that the confidentiality is warranted or the provider of information is not willing to disclose it in a generalized form, then such information may be disregarded.

INVESTIGATION PROCESS

An application received by the Authority is dealt with as follows:

1. Preliminary Screening:

The application is scrutinized to ensure that it is adequately documented and provides sufficient evidence for initiation. If the evidence is not adequate, then a deficiency letter is issued normally within 7 days of the formal receipt of the application.

2. Initiation:

When the Authority is satisfied that there is sufficient evidence in the application with regard to subsidies, material injury and causal link, a Public Notice is issued initiating an investigation to determine the existence and effect of the alleged subsidies.

The Authority notifies the diplomatic representative of the Government of the exporting country before proceeding to initiate the investigation. In addition, the Authority invites those authorities for consultations with the aim of clarifying the situation with respect to the subsidization allegations made in the application.

The initiation notice must be issued within 60 days of the date of receipt of a properly documented application.

3. Access to Information:

The Investigating Authority provides access to the non-confidential evidence presented to it by various interested parties in the form of a public file, which is available for inspection after receipt of the responses.

4. Preliminary Findings:

The Investigating Authority will proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, make a preliminary finding containing the

detailed information on the main reasons behind the determination. The preliminary finding will normally be made within 150 days of the date of initiation.

5. *Provisional Duty:*

A provisional duty not exceeding the provisionally estimated amount of the subsidy found may be imposed on the basis of the preliminary findings recorded by the Investigating Authority, if approved by the Minister.

The provisional duty can be imposed only after the expiry of 60 days from the date of initiation of investigation. The provisional duty will remain in force only for a period not exceeding 4 months, and it cannot be extended.

6. *Hearings:*

Interested parties who participate in the investigations can request the Investigating Authority for an opportunity to present relevant information orally. However, such oral information shall be taken into consideration only when it is subsequently reproduced in writing.

7. *Final Determination:*

The final determination is normally made within 120 days of the date of preliminary determination.

8. *Disclosure of Information:*

The Investigating Authority will inform all interested parties of the essential facts which form the basis for its decision before the final finding is made. Parties will have 7 days to comment on the essential facts, and these comments are taken into consideration in the final determination.

9. *Time-limit for Investigation Process:*

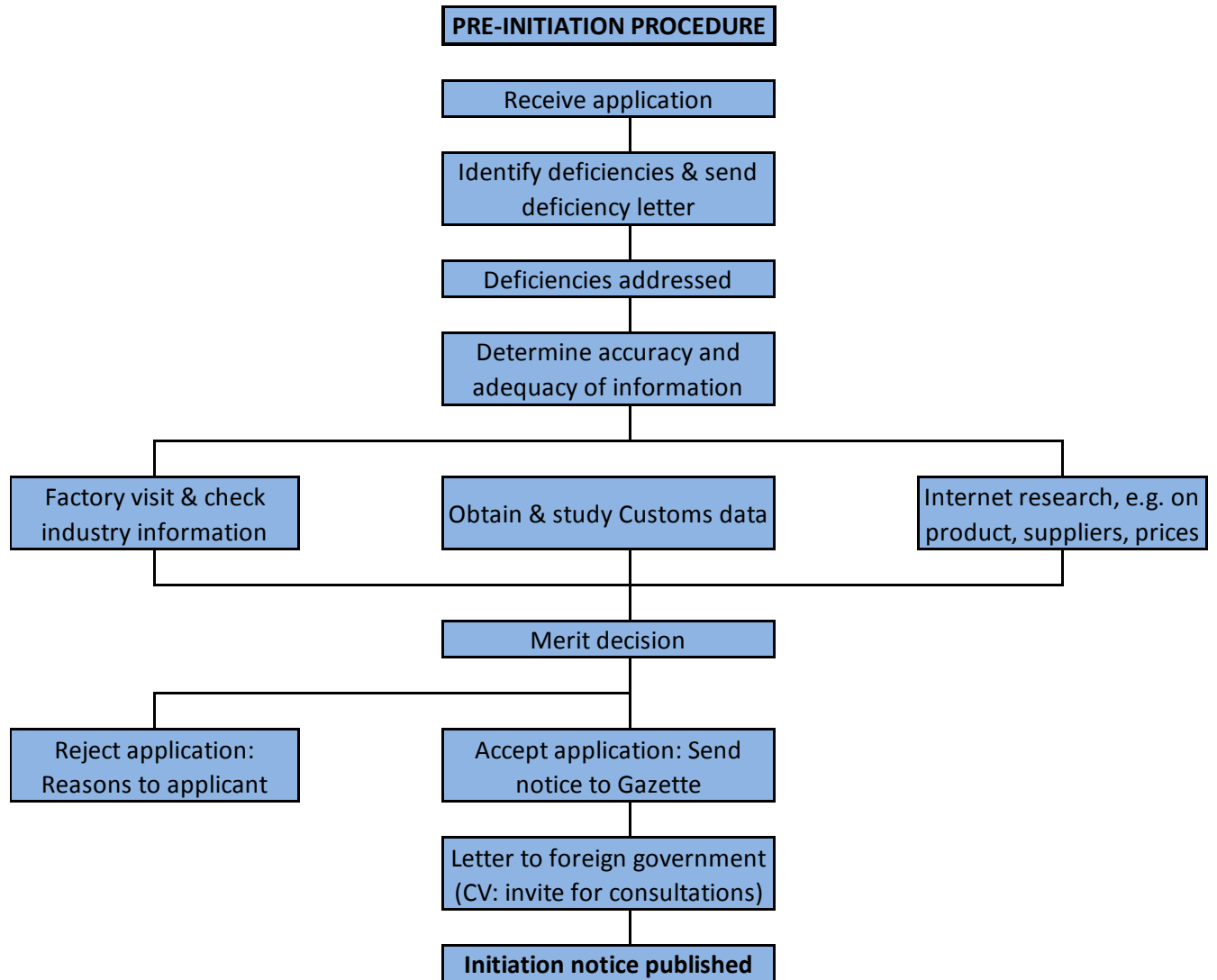
The normal time allowed by the statute for conclusion of investigation and submission of final findings is one year from the date of initiation of the investigation. The above period may be extended by 6 months under special circumstances.

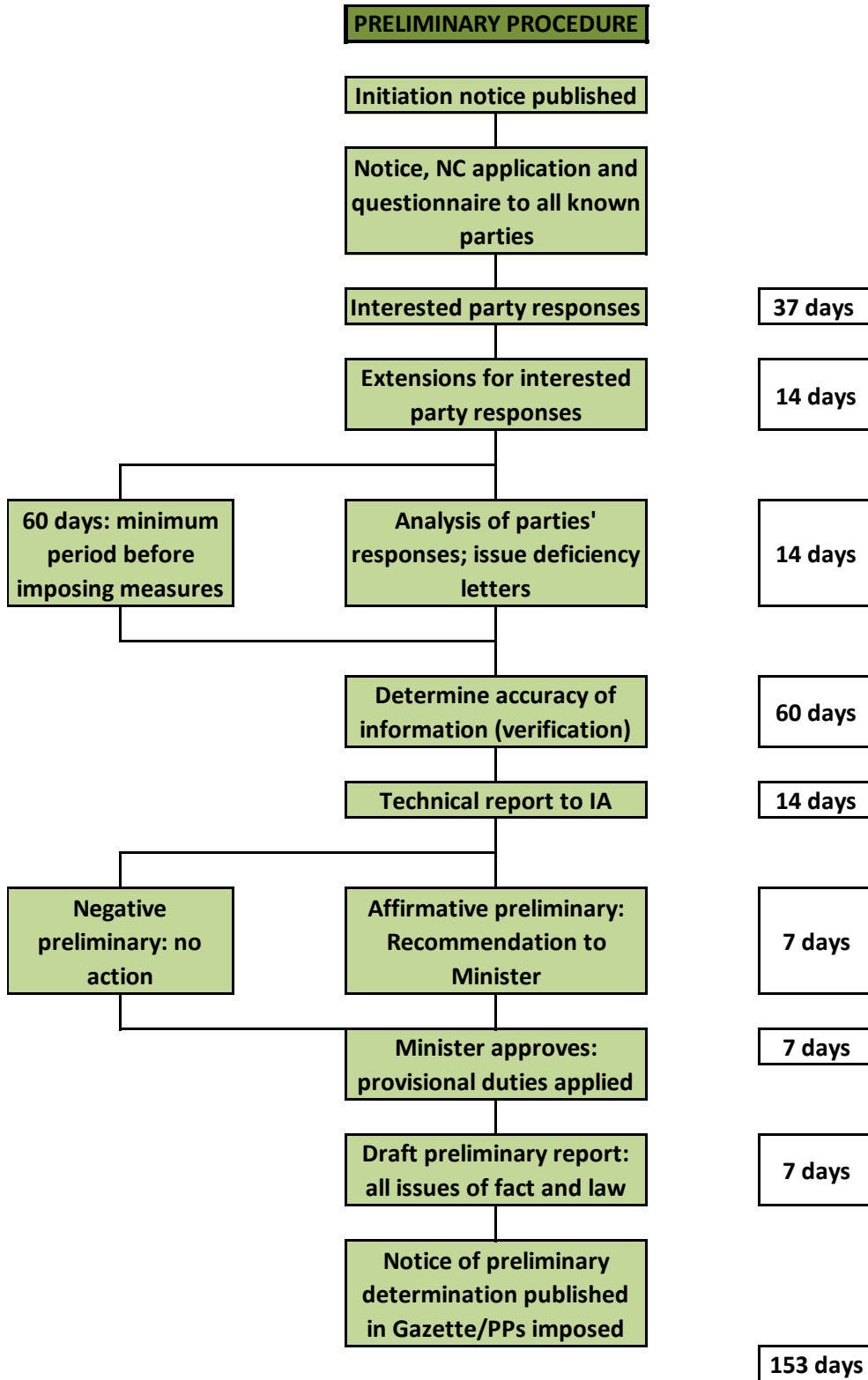
10. Termination:

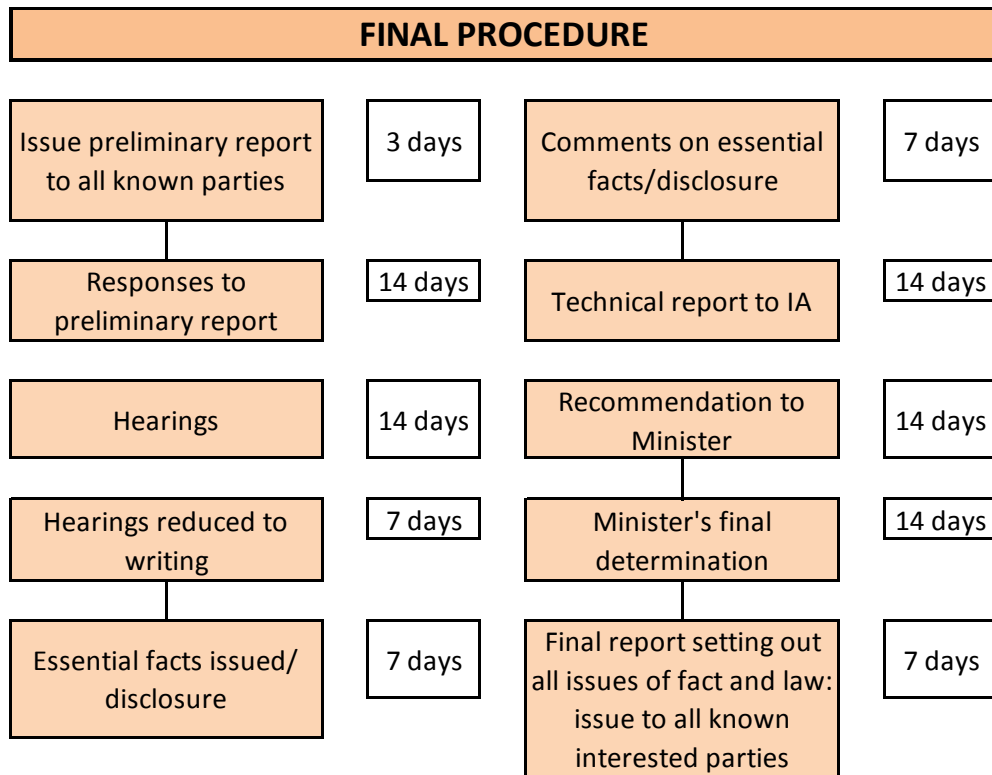
The Authority may suspend or terminate the investigation in the following cases :

- i) if there is a request in writing from the domestic industry at whose instance the investigation was initiated.
- ii) when there is not sufficient evidence of subsidies or injury.
- iii) if the overall level of subsidies does not exceed 1% *ad valorem* (2%, in case the investigation concerns a developing country, and 3% in case of least developed countries).
- iv) the volume of subsidised imports from a country is less than 4% of the total imports of the like article into Mauritius or the volume of subsidised imports collectively from all such countries is less than 9% of the total imports.

12. Flowchart of the procedure:







OTHER PROVISIONS

REVIEW

A countervailing duty imposed under the Act shall have the effect for a maximum period of 5 years from the date of imposition, unless revoked earlier.

The Authority may also review the need for the continued imposition of the countervailing duty, from time to time. Such a review can be done suo motu or on the basis of request received from an interested party in view of the changed

circumstances. A review shall also follow the same procedures prescribed for an investigation to the extent they are applicable.

The Authority is also required to carry out a review for determining individual countervailing duty rates for any new exporter or producer from a country that is subject to countervailing measures, provided that these exporters or producers prove that they were not investigated in the original investigation for reasons other than a refusal to cooperate.

REFUND OF DUTY

If the countervailing duty imposed on the basis of final findings is higher than the provisional duty already imposed and collected, the difference shall not be collected.

If the final countervailing duty is less than the provisional duty already imposed and collected, the difference shall be refunded.

If the provisional duty is withdrawn based on a negative final finding, then any provisional duty already collected shall be refunded and any guarantees shall be released.