WORLD TRADE ORGANIZATION

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Negotiating Group on Rules

NEW DRAFT CONSOLIDATED CHAIR TEXTS OF THE AD AND SCM AGREEMENTS

As foreshadowed in past Reports to the Trade Negotiations Committee, I am today circulating to all participants new draft texts on anti-dumping and on horizontal subsidies, as well as a specific roadmap on fisheries subsidies.

As reflected in my Report of July 2008, and again confirmed in my bilateral consultations last month, the clear message I received from delegations is that my new texts should reflect a new, bottom-up approach. This coincides with my own assessment that at the present time I lack an adequate basis to propose a new balance, and that we must look to Members, rather than to the Chair, to move our work forward. As I stated very clearly in July, and the situation has not changed since that time, it should not be expected that my new texts will offer any magic solutions in the many areas where Members' positions differ dramatically and where the alternatives remain as delegations originally tabled them, i.e., very far apart.

Thus, it will come as no surprise to delegations that these new texts reflect such a bottom-up approach and provide draft legal language only in those areas where *some* degree of convergence appears to exist. In respect of a number of important issues I do not, consistent with such an approach, have a basis to propose compromise solutions, much less specific drafting language. In these instances, I have identified the issue in brackets and have attempted to summarize in general terms the range of views expressed regarding it. Obviously, these summaries are not comprehensive: for a more detailed statement of Members' positions, I would refer delegations to the Working Document dated 28 May 2008 (TN/RL/W/232) and to underlying submissions by delegations. As will be clear from the summaries, we will of course need to discuss these bracketed issues intensively if we are to find solutions.

It should be obvious from these texts that a great deal of work remains to be done in order to ensure that we have Rules texts reflecting the greatest convergence possible. Not only are there large gaps where on issues of great importance to delegations no solutions are proposed; but few, if any, of the textual proposals that can be found in these new texts can be considered to attract consensus support.

On fisheries subsidies, as envisaged in my Report of July 2008, instead of a new draft text I am tabling a roadmap for our further discussions, as in this area the situation is of a different nature. The Group is mandated to strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing, while formulating appropriate and effective special and differential treatment that addresses the interests and concerns of developing Members. Yet, we have no pre-existing agreement to which to revert, and the differences among delegations go to the very concepts and structure of the rules. I believe that further discussion is necessary to provide the essential input for a new draft text that could meet these two important objectives. To this end, the roadmap identifies the key questions that we need to address in order to reconcile the approaches and advance our work in this area.

I am circulating these documents in order to provide a platform for further discussions, and it is my intention to provide ample opportunity for such discussions through an intensive programme of meetings beginning early next year. Whether we can now move forward and make progress on the basis of these documents depends primarily on the collective commitment and flexibility of delegations.

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AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby *agree* as follows:

PART I

Article 1

Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[1] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

Article 2

Determination of Dumping

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

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[3] determine that such sales are made within an extended period of time[4] in substantial

[1] The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

[2] Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

[3] When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

[4] The extended period of time should normally be one year but shall in no case be less than six months.

quantities[5] and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation, giving due regard to any cost ~~provided that such~~ allocations ~~have been~~ historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products

[5] Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

[6] The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8] <u>taken from a source of recognized authority[9]</u>, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

<u>2.4.1.1 The source of recognized authority normally used, and the specific method normally followed by the authorities in applying subparagraph 4.1, shall be set forth in the laws, regulations or publicly available administrative procedures of the Member concerned, and their application to each particular case shall be transparent and adequately explained.</u>

<u>2.4.1.2 If, in a particular case, a Member does not use the source of recognized authority or specific method set forth in its laws, regulations or publicly available administrative procedures, it shall explain in the relevant public notices or separate report under Article 12 why it did not use such source or method.</u>

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[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[8] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

[9] <u>Sources of recognized authority may include central banks, multilateral financial institutions, widely distributed financial journals, or other sources not created primarily for the purpose of conducting anti-dumping, countervailing or safeguard proceedings.</u>

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

[ZEROING: Delegations remain profoundly divided on this issue. Positions range from insistence on a total prohibition of zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts.]

2.4.3 When there are differences within the product under consideration, such as different models, types, grades or technical specifications, the authorities shall provide exporters and foreign producers with timely opportunities to express their views regarding possible categorization and matching for purposes of comparison. This shall not prevent the authorities from proceeding expeditiously with the investigation.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

Article 3

Determination of Injury[10]

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports[11] and

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

the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

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

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

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

> **[CAUSATION OF INJURY: Delegations maintain a wide range of views on such questions as whether it should be mandatory to separate and distinguish the effects of dumped imports and other factors, the extent to which authorities should be required to conduct a quantitative (as opposed to qualitative) analysis of non-attribution, and the extent to which authorities should be required to weigh the injurious effects of dumped imports against the effects of other factors.]**

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification

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[11] For purposes of a determination of injury under this Article, imports attributable to any exporter or producer for which the authorities determine a margin of dumping of zero or *de minimis* shall not be considered to be "dumped imports".

of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[12] In making a determination regarding the existence of a threat of material injury, the authorities shall consider the state of the domestic industry during the period of investigation, including an examination of the impact of dumped imports upon it in accordance with paragraph 4, in order to establish a background for the evaluation of threat of material injury. In addition, the authorities should consider, *inter alia*, such factors as:

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

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

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

(iv) inventories of the product being investigated.

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

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

[MATERIAL RETARDATION: Although there is a broadly expressed view that the provisions of the Agreement regarding material retardation would benefit from amplification and clarification, there are widely varying views about how to achieve this. Most notably, while some delegations consider that an industry might still be in establishment even if there was some domestic production, other delegations consider that once there is *any* domestic production an industry is no longer "in establishment", and in such cases the proper analysis is one of current injury or threat.]

Article 4

Definition of Domestic Industry

4.1 For the purposes of this Agreement, and except to the extent otherwise provided in Article 5.4, the term "domestic industry" shall be interpreted as referring to the domestic producers as

[12] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related[13] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers[14];

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

[EXCLUSION OF PRODUCERS WHO ARE RELATED TO EXPORTERS OR IMPORTERS OR WHO ARE THEMSELVES IMPORTERS: There are widely varying views about the need for criteria governing this exclusion, and about the nature of any possible criteria. In particular, some delegations consider that the rules should be precise, reflecting numerical criteria, and directive in nature. Other delegations believe that any criteria should not be too prescriptive, as the assessment must be case by case.]

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied[15] only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

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[13] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

[14] The reasons underlying any decision by the authorities to exclude from the domestic industry producers that are related to the exporters or importers or are themselves importers of the allegedly dumped product shall be explained in the relevant public notices or separate reports required by Article 12.

[15] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

Article 5

Initiation and Subsequent Investigation

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) (a) the identity of the applicant and the domestic industry by or on behalf of which the application is made and, where the applicant is itself a producer, a description of the volume and value of the domestic production of the like product by the applicant; ~~. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product)~~ (b) the identity of those producers (or, to the extent this is not practicable in the case of fragmented industries, associations of domestic producers of the like product) supporting the application, and ~~, to the extent possible, a description of~~ the volume and value of domestic production of the like product accounted for by those ~~such~~ producers or associations of producers; and (c) the identity of all known domestic producers of the like product (or, to the extent this is not practicable in the case of a fragmented industry, associations of domestic producers of the like product) and the total volume and value of domestic production of the like product;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member[16];

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

[16] Including the sources of the information provided and, where relevant, the method used to derive prices from that information.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application[17] to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[18] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[19] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry. For the purpose of this paragraph, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like product, subject to the application of Article 4.1(i) and 4.1(ii).

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and no later than 15 days before initiating ~~before proceeding to initiate~~ an investigation, the authorities shall notify the government of the exporting Member concerned and shall provide it with the full text of the written application, paying due regard to the requirement for the protection of confidential information as provided for in paragraph 5 of Article 6.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

> **[PRODUCT UNDER CONSIDERATION: While many delegations consider that a provision on this issue would be useful, concerns have been expressed that such a provision might be unnecessary, could create more problems than it purports to solve, and could have "vertical" as well as "horizontal" implications (e.g., with respect to the inclusion of parts), as well as implications in respect of subsequent proceedings. There are also differences of view regarding, inter alia, how broadly the product under consideration should be defined, the role of physical and market characteristics in determining the product under consideration, and when and how product under consideration should be determined.]**

5.7 The evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

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[17] The authorities shall, in particular, consult sources readily available to them, such as trade associations, publications and public records, with a view to identifying any domestic producers of the like product not identified in the application.

[18] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

[19] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

5.10*bis* Except where circumstances have changed, the authorities shall not initiate an investigation where a previous investigation of the same product from the same Member initiated pursuant to this Article resulted in a negative final determination within one year prior to the filing of the application. If an investigation is initiated in such a case, the authorities shall explain the change in circumstances which warrants initiation in the notice of initiation or separate report provided for in Article 12.1.

Article 6

Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1*new* The authorities shall consult sources readily available to them, such as trade associations, publications and public records, with a view to identifying any exporters or foreign producers of the allegedly dumped product not identified in the application.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[20,21] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

[20] It is desirable that the authorities not require certification of translations by official translators. Where such certification is required, exporters or foreign producers shall be given an additional seven days for reply.

[21] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

6.1.1*bis* Within a reasonable period of time after the receipt of the response to a questionnaire, the authorities shall make a preliminary analysis of that response. Any requests for clarification or additional information shall be directed to the interested party concerned in writing and in sufficient time for the authorities to consider timely responses thereto.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[22] ~~and to the authorities of the exporting Member~~ and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

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

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall ~~whenever practicable~~ provide ~~timely~~ opportunities for all interested parties to see promptly all ~~information that is relevant to the presentation of their cases, that is~~ non-~~t~~confidential information ~~as defined in paragraph 5, and~~ that is ~~used by~~ submitted to or obtained by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.4*bis* The authorities shall maintain a file containing all non-confidential documents submitted to or obtained by the authorities in an anti-dumping proceeding, including non-confidential summaries of confidential documents and any explanations provided pursuant to Article 6.5.1 as to why summarization is not possible, and shall allow interested parties to review and copy the documents in that file upon request. Access to this file shall be provided promptly, and, where the proceeding is ongoing or is subject to judicial, arbitral or administrative review, within two working days of a request. The non-confidential file shall be kept in an organized manner, and a complete index of all documents in the possession of the authorities, including confidential documents, shall be included therein. Each file shall include all public notices related to that proceeding issued pursuant to Article 12, as well as separate reports issued pursuant to footnote 37 to that Article. Each file shall be maintained so long as the measure to which it relates remains in force. The authorities shall provide for the copying of documents in the non-confidential file at the reasonable expense of the person so

[22] It being understood that, where the number of exporters involved is particularly high, the full text of the written application ~~should~~ may instead be provided only ~~to the authorities of the exporting Member or~~ to the relevant trade association, if any. In such cases, the authorities shall so inform the government of the exporting Member.

requesting, or shall allow, subject to reasonable safeguards, that person to remove the documents for copying elsewhere.[23]

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[24]

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential versions of the document containing the confidential information within three working days of submitting the original document.~~summaries thereof~~. The non-confidential version shall be identical to the version containing the confidential information, except that the confidential information shall be removed and replaced by a summary of that information ~~These summaries shall be~~ in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, ~~such~~ parties providing confidential information may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[25]

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. ~~Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.~~

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

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[23] The requirements of this paragraph may be met by making such non-confidential documents and indices available via the internet.

[24] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

[25] Members agree that requests for confidentiality should not be arbitrarily rejected.

[INFORMATION REQUESTS TO AFFILIATED PARTIES: Some delegations support the inclusion in the text of language to ensure that interested parties are not treated as non-cooperative if they fail to provide information from affiliates that they did not control. Other delegations are concerned that such language could encourage non-cooperation, and cautioned about an inappropriately narrow concept of control in this context.]

6.9 The authorities shall, before a final determination is made, ~~inform~~ provide all interested parties with a written report of the essential facts under consideration which they intend will form the basis for the decision whether to apply definitive measures. Interested parties shall have 20 days to respond to this report and the authorities shall address such responses in their final determination.[26] ~~Such disclosure should take place in sufficient time for the parties to defend their interests.~~

6.9*bis* The authorities shall, normally within seven days after giving public notice of a final determination under Article 12.2, disclose to each exporter or producer for whom an individual rate of duty has been determined the calculations used to determine the margin of dumping for that exporter or producer.[27] The authorities shall provide to the exporter or producer the calculations, either in electronic format (such as a computer programme or spreadsheet) or in another appropriate medium, a detailed explanation of the information used, the sources of that information and any adjustments made to the information prior to its use in the calculations. The disclosure and explanation shall be in sufficient detail to permit the interested party to reproduce the calculations without undue difficulty.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall ~~preferably~~ be chosen in consultation with, and preferably with the consent of, the exporters, producers or importers concerned.

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

6.10.3 Where the authorities limit their examination pursuant to this paragraph, they shall explain, in their public notices or separate reports pursuant to Article 12, the basis for their conclusion that it was impracticable to determine an

[26] This disclosure shall be made within sufficient time to allow an exporter to offer an undertaking in response.

[27] This requirement is satisfied where the authorities make such a disclosure pursuant to Article 6.9 before the final determination is made.

individual margin of dumping for each known exporter or producer, the reasons for the specific selection made and the reasons why an individual margin was not determined for any exporter or producer not initially selected who submitted the necessary information in time for that information to be considered during the course of the investigation.

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable, including by responding in a timely manner to requests for clarification of questionnaires.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 7

Provisional Measures

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5 and, a public notice has been given to that effect; and

(ii) interested parties have been given adequate opportunities to submit information, including responses to questionnaires sent in accordance with Article 6.1.1, and make comments;

(iii) a detailed preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry taking into account any responses to questionnaires and any other relevant information submitted by interested parties; and

(~~iiii~~v) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

Article 8

Price Undertakings

8.1 Proceedings may[28] be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping or, if no affirmative preliminary determination is made, until the authorities have made disclosure pursuant to paragraph 9 of Article 6. The authorities shall inform exporters of their right to offer undertakings and shall allow them an adequate opportunity to do so.

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. ~~Should the case arise and where practicable, t~~The authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall~~, to the extent possible,~~ give the exporter an opportunity to make comments thereon.

[28] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of material violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available.[29] In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 9

Imposition and Collection of Anti-Dumping Duties

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

> **[PUBLIC INTEREST/LESSER DUTY: Participants are sharply divided on the desirability of a procedure to take account of the representations of domestic interested parties when deciding whether to impose a duty. Some consider that such a procedure would impinge on Members' sovereignty and would be costly and time-consuming, while others support inclusion of such a procedure. Issues related to any such procedure include the extent to which any such procedures should apply in the context of Article 11 reviews, whether the ADA's requirement for a judicial review mechanism should apply to decisions pursuant to any such procedure, and the extent to which WTO dispute settlement should apply. On lesser duty, many delegations strongly support inclusion of a mandatory lesser duty rule. Other delegations oppose the inclusion of such a rule, with one delegation noting that it was not practically possible to calculate an injury margin. Among those supporting a mandatory lesser duty rule, there are varying views**

[29] Without prejudice to the right to take expeditious actions, the authorities shall inform the exporter if they consider that there has been a material violation of the undertaking, and shall provide the exporter an opportunity to comment.

about the appropriate degree of specificity for any new rules and the extent to which those rules should prescribe or prioritize particular approaches to determining the appropriate level of duty.]

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. In this regard, each Member shall establish procedures[30] to ensure a prompt refund, upon request, where the amount collected exceeds the actual margin of dumping.[31] In this respect, the following subparagraphs shall apply.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.[32] Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty, or by an exporter on behalf of, and in association with, one or more importers. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and

[30] These procedures shall be set forth in the Member's laws, regulations or published administrative procedures and shall be notified to the Committee pursuant to Article 18.5.

[31] The actual dumping margin determined by the authorities shall be based on the relevant updated normal value and export price.

[32] It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.3.4 In the event that monies paid or deposited are refunded pursuant to this paragraph, the authorities shall pay a reasonable amount of interest on the monies refunded.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that (a) they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product, and (b) they have engaged in one or more *bona fide* sales in commercial quantities into the importing Member (as evidenced by shipments of the product or by a contract for sale pursuant to which such shipments will occur within six months of the date upon which the contract was concluded).

9.5.1 A decision whether or not to initiate a review under this paragraph shall be taken within three months of the lodging of a written request, during which period the authorities may take such steps as they deem appropriate to verify the accuracy and adequacy of the information contained in the request. The applicant and the domestic industry shall be advised of the initiation of any review and a public notice of the initiation shall also be made. If the authorities decide not to initiate a review, they shall provide the applicant with a written statement of the reasons underlying that decision.

9.5.2 The ~~Such a~~ review shall be ~~initiated and~~ carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member, and shall in any event be concluded within nine months of its initiation.

9.5.3 No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such

producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review. Upon collection of any such duties due, the authority shall promptly release any guarantee or bond.

[ANTI-CIRCUMVENTION: Delegations disagree as to whether there should be specific rules on anti-circumvention. Some delegations consider that the only appropriate reaction to perceived circumvention is to seek initiation of a new investigation, while other delegations consider that anti-circumvention is a reality, and that rules on anti-circumvention are necessary to achieve some degree of harmonisation among the procedures used by different Members. To the extent that rules are included, delegations disagree, inter alia, whether numerical thresholds are desirable, whether findings of dumping, injury and causation should be required and whether anti-circumvention measures should be company-specific or country-wide.]

Article 10

Retroactivity

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

10.8*bis* In the event that monies paid or deposited are refunded pursuant to paragraphs 3 or 5 of this Article, the authorities shall pay a reasonable amount of interest on the monies refunded.

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, or for a modification of the level of the duty[33], where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[34] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Interested parties may also request a modification in the level of the duty. If, as a result of the review under this paragraph, the authorities determine that there has been a change in circumstances of a lasting nature[35] since the original investigation or the last review under Article 11.2 or 11.3, such that the anti-dumping duty is no longer warranted or the level of the duty applicable to one or more exporters is no longer appropriate, the duty~~, it~~ shall be terminated immediately or its level modified.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own

[33] Where the anti-dumping duty imposed takes the form of a prospective normal value, this requirement relates to the modification of the prospective normal value.

[34] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article. However, a determination made pursuant to that paragraph is relevant evidence which may be considered when deciding whether the initiation of a review to examine the possible modification of the level of a duty under this Article is warranted.

[35] In determining whether there has been a change of circumstances of a lasting nature, the authorities may take into account, *inter alia*, the impact of the existing duty and the possible consequences if that duty were terminated or modified.

initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[36] The duty may remain in force pending the outcome of such a review.

[SUNSET REVIEWS: Delegations have widely differing views regarding various aspects of the sunset issue. There is sharp disagreement as to whether there should be any automatic termination of measures after a given period of time and, if so, after how long. On the two extremes of this issue are those delegations that favour automatic termination after five years without any possibility of extension and those that reject the principle of automatic termination altogether. Other issues dividing delegations include whether there is a need for additional standards and criteria governing sunset determinations and, if so, what standards and criteria would be most appropriate; what rules should apply to the initiation of sunset reviews, including whether there should be limitations on *ex officio* initiation, and proposed standing and evidentiary thresholds for initiation; and the timeframes for completion of investigations.]

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

Article 12

Public Notice and Explanation of Determinations

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[37], adequate information on the following:

(i) a description of the product under consideration, including its tariff classification for customs purposes, the name of the exporting country or countries, and, to the extent already known to the authorities, the names of the exporters and foreign producers of the product~~product involved~~;

(ii) the domestic like product and the domestic industry, including whether any domestic producers were excluded from the domestic industry, and the names of the applicant

[36] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[37] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

and of the domestic producers of the like product (or, if relevant, associations of producers) supporting the application and of other domestic producers of the like product insofar as they are known to the investigating authorities;

(iii) the procedural background of the investigation, including the date on which the application was received and the date of initiation of the investigation;

(iv~~ii~~) the basis on which dumping is alleged in the application;

(~~i~~v) a summary of the factors on which the allegation of injury is based;

(vi) whether the authorities may consider limiting their examination in accordance with paragraph 10 of Article 6 and any procedures in that respect; and

(vii) next steps in the process, including the time limits allowed to interested parties for making their views known, other indicative time frames, periods of data collection and a contact to whom ~~the address to which~~ representations by interested parties should be directed;

~~(vi) the time limits allowed to interested parties for making their views known~~.

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations of the analysis underlying ~~for~~ the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

~~(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;~~

(~~i~~i) a description of the product under consideration, including its tariff classification ~~which is sufficient~~ for customs purposes, the name of the exporting country or countries, and the names of the known exporters and foreign producers of the product under consideration;

(ii) information concerning the domestic like product and the domestic industry, including the names of all known domestic producers of the like product;

(iii) the periods of data collection for both the preliminary dumping and preliminary injury analysis;

(iv~~ii~~) the margins of dumping established and information concerning the calculation of the margins of dumping, including an~~a full~~ explanation of the basis upon which normal values were established (sales in the home market, sales to a third market or constructed normal value), the basis upon which export prices were established (including, if appropriate, the adjustments related to the construction of export price), and ~~reasons for~~ the methodology used in the ~~establishment and~~ comparison of normal values and ~~the~~ export prices (including any adjustments made to reflect differences affecting price comparability)~~and the normal value under Article 2~~;

(~~i~~v) ~~considerations~~ information relevant to the injury determination as set out in Article 3, including information concerning the domestic market for the subject imports and the like product, the volume and the price effects of the subject imports, the consequent impact of the subject imports on the domestic industry and, if relevant, the factors leading to a conclusion of threat of material injury or material retardation of the establishment of a domestic industry;

(vi) information concerning any use of full or partial facts available, including, where applicable, the reasons why information submitted by a party was rejected;

(vii) information concerning the on-the-spot verification of information used by the authorities, if undertaken;

(viii) information on any provisional measures being imposed, including the form, level, and duration of such measures; and

(ix) information concerning next steps in the process, and related time frames, and information concerning a contact to whom representations by interested parties should be directed~~(v) the main reasons leading to the determination~~.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1,

to the extent applicable, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters, foreign producers and importers~~, and the basis for any decision made under subparagraph 10.2 of Article 6.~~

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply *mutatis mutandis* to proceedings conducted pursuant to Articles 9.3 and 9.5, to decisions under Article 10 to apply duties retroactively and to the initiation and completion of reviews pursuant to Article 11 ~~and to decisions under Article 10 to apply duties retroactively~~.

Article 13

Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Article 14

Anti-Dumping Action on Behalf of a Third Country

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

[THIRD COUNTRY DUMPING: Some delegations support new rules on third country dumping, as in their view the current rules are unworkable, although it was emphasized that many other issues would have to be addressed if this provision were to be

operationalised. Other delegations question whether it is desirable to operationalise this provision at all, with one delegation preferring that the provision be deleted entirely.]

Article 15

Developing Country Members

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

[SPECIAL AND DIFFERENTIAL TREATMENT/TECHNICAL ASSISTANCE: After the Chairman's text was released, two groups of developing Members submitted a proposal relating to special and differential treatment and technical assistance in trade remedies (TN/RL/GEN/154). Further consideration of this proposal is required.]

PART II

Article 16

Committee on Anti-Dumping Practices

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as the "Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months, and a list of definitive measures in force as of the end of that period. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 17

Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

(i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a

non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

PART III

Article 18

Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[38]

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

18.3*bis* The results of the DDA shall apply to investigations, and reviews of existing measures pursuant to Articles 9.3, 9.5, and 11, initiated pursuant to applications which have been made on or after the date of entry into force of those results or, where an investigation or review is initiated by the authorities without those authorities having received an application, the investigation or review was initiated on or after the date of entry into force of those results.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews. In addition, the Committee shall review the anti-dumping policy and practices of individual Members according to the schedule and procedures set forth in Annex III.

18.7 The Annexes to this Agreement constitute an integral part thereof.

[38] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

ANNEX I

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 7 OF ARTICLE 6

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned ~~should~~ shall be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member shall~~should~~ be so informed. Such non-governmental experts shall~~should~~ be subject to effective sanctions for breach of confidentiality requirements.

3. It shall ~~should~~ be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities shall~~should~~ notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice shall~~should~~ be given to the firms in question before the visit is made. To afford the firms adequate opportunity to prepare for on-the-spot investigations, the investigating authorities shall provide each firm at least 14 days advance notice of the dates on which the authorities expect to conduct any on-the-spot investigation of the information provided by that firm.[39]

6. Visits to explain the questionnaire ~~should~~may only be made at the request of an exporting firm. Such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it shall ~~should~~ be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it.

7*bis* No less than 10 days prior to each on-the-spot investigation, the investigating authorities shall provide to the firm a document that sets forth the topics the firm should be prepared to address during the on-the-spot investigation, and describes the types of supporting documentation that shall be made available for review. ~~; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though t~~This shall~~should~~ not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation shall~~should~~, whenever possible, be answered before the visit is made.

[39] This does not prevent the authorities from adjusting the date, where necessary in light of developments in the investigation, and after consultation with the firm concerned.

9. The investigating authorities shall disclose in the form of a written report their factual findings resulting from the on-the-spot investigation. In addition to the factual findings, the report shall describe the methods and procedures followed in carrying out the on-the-spot investigation. The report shall be made available to all interested parties in sufficient time for the parties to defend their interests, subject to the requirement to protect confidential information.

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

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

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities shall~~should~~ consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and shall ~~should~~ not request the party to use for its response a computer system other than that used by the party. The authorit~~y~~ies ~~should~~ shall not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities ~~should~~ shall not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties[40], which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, ~~should~~ shall be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language ~~should~~ shall not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information ~~should~~ shall be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this ~~should~~ shall not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party ~~should~~ shall be informed forthwith of the reasons therefor, and ~~should~~ shall have an opportunity to submit further evidence or information, or to provide further explanations, within a reasonable period, due account being taken of the time-limits of the investigation[41]. If the further evidence or information submitted, or the explanations provided, are considered by the authorities as not being satisfactory, the authorities shall

[40] Submitted information cannot be used without undue difficulties if, *inter alia*, an assessment of the accuracy or relevance of that information is dependent upon other information that has not been supplied or cannot be verified.

[41] Provided that the authorities need not consider any further evidence or information that is not submitted in time such that it can be verified during any on-site investigation conducted pursuant to Article 6.7.

inform the interested party concerned of the reasons for the rejection of ~~such~~ the evidence or information and ~~should~~ shall set forth such reasons ~~be given~~ in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they ~~should~~ shall do so with special circumspection. In such cases, the authorities ~~should~~ shall, where practicable, check the information from other independent sources at their disposal or reasonably available to them, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation[42]. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

[42] The sources consulted shall be identified in the disclosure conducted pursuant to Article 6.9.

ANNEX III

PROCEDURES FOR THE REVIEW OF MEMBERS'
ANTI-DUMPING POLICY AND PRACTICES PURSUANT TO ARTICLE 18.5

1. The anti-dumping policy and practices of Members shall be subject to periodic review by the Committee.

A. Objectives

2. The purpose of the review is to contribute to the transparency and understanding of Members' policies and practices in respect of anti-dumping. The review is not intended to serve as the basis for enforcement of specific obligations under this Agreement or for dispute settlement procedures, or to impose new policy commitments on Members.

B. Procedures for Review

3. The review shall be conducted on the basis of the following documentation:

(a) a factual report, to be drawn up by the Secretariat on its own responsibility; and

(b) if the Member under review so wishes, a report supplied by that Member.

4. The factual report by the Secretariat shall be based on the information available to it and that provided by the Member under review. The Secretariat should seek clarification from such Member regarding its anti-dumping policies and practices making use of the indicative checklist identified in paragraph 8 of this Annex. The Member under review shall provide the information requested for the preparation of the report, and shall be provided with an opportunity to comment on the draft report prior to its circulation.

5. The first cycle of reviews shall begin three years after the date of entry into force of the results of the Doha Development Agenda. During the ensuing five years, the Committee shall review the anti-dumping policies and practices of the 20 Members with the most anti-dumping measures in force as of the date of entry into force.[43]

6. The list of the Members to be reviewed during each subsequent five-year review period shall be established on the basis of the number of original investigations initiated during the most recent five-year period for which information is available. The list shall include the 20 Members that initiated the most investigations pursuant to Article 5 during that period, as well as any additional Members that have initiated five or more original investigations during that period; provided, that the Committee may adjust the list of Members to be reviewed and/or the cycle for review in light of subsequent developments and experience.

7. The Committee shall agree on the order of, and schedule for, the conduct of these reviews, taking into account the resource constraints of the Secretariat and of developing country Members.[44]

[43] Least-developed country Members shall be subject to review pursuant to this Annex on a voluntary basis only.

[44] In the event that the Committee fails to agree, the Director-General shall decide on the order of, and schedule for, the reviews.

8. The factual report of the Secretariat shall describe in detail the anti-dumping policy and practices of the Member under review including, where relevant and applicable, with respect to the following matters:

- institutional organization of the investigating authorities
- statistics on proceedings carried-out
- pre-initiation procedures and practices
- determination of export price and normal value (and adjustments thereto)
- details of comparison methods
- calculation of dumping margin
- details and methodology of analysis and determination of injury and causal link
- application of a lesser duty
- application of public interest considerations
- level of co-operation obtained
- use of facts available
- procedural requirements
- treatment of confidential information
- practice with regard to on-the-spot verifications
- duty collection and assessment system
- acceptance of undertakings
- review investigations (under Articles 9 and 11)
- anti-circumvention procedures
- judicial/administrative review

9. The report by the Secretariat and any report by the Member subject to review shall be circulated to the Members on an unrestricted basis, and shall be considered at a special meeting of the Committee convened for that purpose.

10. Members recognize the need to minimize the burden for governments that might arise from unnecessary duplication of work pursuant to this procedure and the Trade Policy Review Mechanism.

C. Developing Country Members

11. The Secretariat shall make technical assistance available, on request of a developing country Member, to facilitate that Member's effective participation in the review. The Secretariat shall also consult with the developing country Member subject to review and shall, where appropriate, include in its report to the Committee an assessment of that Member's broader technical assistance and resource needs with respect to anti-dumping.

D. Appraisal of the Mechanism

12. The Committee shall undertake an appraisal of the operation of these procedures upon completion of the first cycle of reviews. The Committee should seek to identify any changes which would enhance the operation of these procedures, and may, if appropriate, recommend that the Council for Trade in Goods submit to the Ministerial Conference any proposals for the amendment of these procedures necessary to effectuate such changes.

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AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Members hereby *agree* as follows:

PART I: GENERAL PROVISIONS

Article 1

Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) [1];

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.[2]

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[1] In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

[2] A benefit is conferred when the terms of the financial contribution are more favourable than those otherwise commercially available to the recipient in the market. Where relevant, for the determination of the existence of a benefit Article 14.1 shall provide guidance for determining whether such more favourable terms exist.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

Article 2

Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[3] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[4] In the case of subsidies conferred through the provision of goods or services at regulated prices, factors that may be considered include the exclusion of firms within the country in question from access to the goods or services at the regulated prices. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of paragraphs 1(a) or 1(b) of Article 3 shall be deemed to be specific.

[3] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

[4] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

PART II: PROHIBITED SUBSIDIES

Article 3

Prohibition

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact[5], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[6];

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods~~.~~;

(c) subsidies referred to in Article I of Annex VIII.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

Article 4

Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

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[5] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

[6] The ~~M~~measures referred to in Annex I as export subsidies shall be deemed to fall within paragraph (a). The legal status of any measure not referred to in Annex I as an export subsidy shall be determined on the basis of paragraph (a), and Annex I shall not be used to establish by negative implication that a measure does not constitute an export subsidy within the meaning of that paragraph; provided, however, that measures explicitly referred to in Annex I as not constituting prohibited export subsidies shall not be prohibited under this or any other provision of this Agreement. This footnote is without prejudice to the operation of footnote 1.

4.4 If no mutually agreed solution has been reached within 30 days[7] of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts[8] (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[9]

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[10] countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.[11]

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[7] Any time-periods mentioned in this Article may be extended by mutual agreement.

[8] As established in Article 24.

[9] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

[10] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

[11] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

PART III: ACTIONABLE SUBSIDIES

Article 5

Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member[12];

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994[13];

(c) serious prejudice to the interests of another Member.[14]

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 6

Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

(a) the total ad valorem subsidization[15] of a product exceeding 5 per cent[16];

(b) subsidies to cover operating losses sustained by an industry;

(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

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[12] The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.

[13] The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

[14] The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

[15] The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

[16] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.[17]

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[18] as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

6.4 For the purpose of paragraphs 3(a) and 3(b), the displacement or impeding of imports or exports, respectively, shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: *(a)* there is an increase in the market share of the subsidized product; *(b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; *(c)* the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information

[17] Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

[18] Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist[19] during the relevant period:

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

(d) existence of arrangements limiting exports from the complaining Member;

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 7

Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to *(a)* the existence and nature of the subsidy in question, and *(b)* the injury caused to the

[19] The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

domestic industry, or the nullification or impairment, or serious prejudice[20] caused to the interests of the Member requesting consultations.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days[21], any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB[22] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[23]

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

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[20] In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.

[21] Any time-periods mentioned in this Article may be extended by mutual agreement.

[22] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

[23] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable[24]:

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:[25] ,[26] ,[27]

the assistance covers[28] not more than 75 per cent of the costs of industrial research[29] or 50 per cent of the costs of pre-competitive development activity[30], [31];

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[24] It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.

[25] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

[26] Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.

[27] The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

[28] The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

[29] The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

[30] The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

[31] In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

and provided that such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;

(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development[32] and non-specific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria[33], indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

- one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;

- unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

[32] A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

[33] "Neutral and objective criteria" means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

(c) assistance to promote adaptation of existing facilities[34] to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.[35]

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

[34] The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

[35] It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

Article 9

Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

PART V: COUNTERVAILING MEASURES

Article 10

Application of Article VI of GATT 1994[36]

Members shall take all necessary steps to ensure that the imposition of a countervailing duty[37] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement.

[36] The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

[37] The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

Countervailing duties may only be imposed pursuant to investigations initiated[38] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

Article 11

Initiation and Subsequent Investigation

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of *(a)* a subsidy and, if possible, its amount, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and *(c)* a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) evidence with regard to the existence, amount and nature of the subsidy in question;

(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[39] by domestic producers of the like product, that the application has been made

[38] The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

[39] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

by or on behalf of the domestic industry.[40] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation.

11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11.7 The evidence of both subsidy and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis* , or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.

11.10 An investigation shall not hinder the procedures of customs clearance.

11.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

Article 12

Evidence

12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

[40] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.[41] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters[42] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

12.2. Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[43]

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional

[41] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

[42] It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

[43] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

circumstances, a statement of the reasons why summarization is not possible must be provided.

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[44]

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if *(a)* the firm so agrees and *(b)* the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

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

12.9 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and

(ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly

[44] Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

12.11 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 13

Consultations

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.[45]

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

Article 14

Calculation of the Amount of a Subsidy ~~in Terms of the Benefit to the Recipient~~

14.1 For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

[45] It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

[CERTAIN FINANCING BY LOSS-MAKING INSTITUTIONS: There are significant differences of view as to whether a new provision should be introduced that would establish a benchmark for determining the existence of a benefit in the case of government loans or guarantees provided by institutions incurring long-term operating losses, and/or financing to state-owned enterprises that are not creditworthy or equityworthy. Proponents consider that such a provision would clarify the Agreement's treatment of an important form of trade-distortive financing, some delegations are concerned over how the key concepts could be defined, and others are categorically opposed, including because they see such a provision as discriminating against state-owned enterprises.]

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale). Where the price level of goods or services provided by a government is regulated, the adequacy of remuneration shall be determined in relation to prevailing market conditions for the goods or services in the country of provision when sold at unregulated prices, adjusting for quality, availability, marketability, transportation and other conditions of sale; provided that, when there is no unregulated price, or such unregulated price is distorted because of the predominant role of the government in the market as a provider of the same or similar goods or services, the adequacy of remuneration may be determined by reference to the export price for these goods or services, or to a market-determined price outside the country of provision, adjusting for quality, availability, marketability, transportation, and other conditions of sale.

14.2 For the purpose of Part V, where a subsidy is granted in respect of an input used to produce the product under consideration, and the producer of the product under consideration is unrelated to the producer of the input, no benefit from the subsidy in respect of the input shall be attributed to the product under consideration unless a determination has been made that the producer of the product

under consideration obtained the input on terms more favourable than otherwise would have been commercially available to that producer in the market.[46]

14.3 For the purpose of Part V, the methods used by the investigating authority to attribute subsidy benefits to particular time periods shall be consistent with the following guidelines:[47]

(a) With the exception of benefits from loan subsidies and similar subsidized debt instruments, subsidy benefits shall either be expensed in full in the year of receipt ("expensed") or allocated over a period of years ("allocated"). Expensed subsidies shall be deemed to benefit the recipient by the full amount of the benefit in the year in which they are expensed, whereas allocated subsidies shall be deemed to benefit the recipient throughout the allocation period. Loan subsidies, and similar subsidized debt instruments, shall be deemed to benefit the recipient throughout the period in which the loan or debt instrument remains outstanding.

(b) Benefits from subsidies arising from the following types of measures normally shall be expensed: direct tax exemptions and deductions; exemptions from and excessive rebates of indirect taxes or import duties; provision of goods and services for less than adequate remuneration; price support payments; discounts on electricity, water, and other utilities; freight subsidies; export promotion assistance; early retirement payments; worker assistance; worker training; and wage subsidies.

(c) Benefits from subsidies arising from the following types of measures normally shall be allocated: equity infusions; grants; plant closure assistance; debt forgiveness; coverage for an operating loss; debt-to-equity conversions; provision of non-general infrastructure; and provision of plant and equipment.

(d) In determining whether a subsidy listed in paragraph 3(b) is more appropriately allocated, or whether a subsidy listed in paragraph 3(c) is more appropriately expensed, and in determining whether a subsidy of a type not listed in either paragraph 2(b) or 2(c) should be allocated or expensed, the following non-exhaustive list of factors shall be considered:

(i) whether the subsidy is non-recurring (e.g., one-time, exceptional, requiring express government approval) or recurring[48]

(ii) the purpose of the subsidy[49]; and

(iii) the size of the subsidy.[50]

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[46] Where, however, it has been established that the effect of the subsidy is so substantial that other relevant prices available to the producer of the product under consideration are distorted and do not reasonably reflect commercial prices that would prevail in the absence of the subsidization, other sources, such as world market prices, can be used as the basis for the determination in question.

[47] The reference in this paragraph to particular measures does not mean that those measures will necessarily constitute specific subsidies; rather, a determination regarding the existence of a specific subsidy shall be made pursuant to Part I of the Agreement in the light of the facts of a particular case.

[48] The fact that a subsidy is non-recurring normally will be indicative of allocation. The fact that a subsidy is recurring normally will be indicative of expensing.

[49] For example, the fact that a subsidy is tied to the capital assets or structure of the recipient normally will be indicative of allocation. The fact that a subsidy is tied to a firm's regular, ongoing production and sales activities (e.g., wages) normally will be indicative of expensing.

[50] The fact that a subsidy is large normally will be indicative of allocation. The fact that a subsidy is small normally will be indicative of expensing.

(e) The allocation period for allocated subsidies normally should correspond to the average useful life of the depreciable, physical assets of the relevant industry or firm.

(f) Any method for measuring the amount of allocated subsidy benefits at a particular point in the allocation period may reflect a reasonable measure of the time value of money.

(g) Any public notice issued pursuant to paragraph 3 of Article 22 shall include a full description and adequate explanation of the allocation and expensing methodologies used.

Article 15

Determination of Injury[51]

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products[52] and *(b)* the consequent impact of these imports on the domestic producers of such products.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on

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

[52] Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects[53] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

15.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

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

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

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

(v) inventories of the product being investigated.

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

15.8 With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care.

[53] As set forth in paragraphs 2 and 4.

Article 16

Definition of Domestic Industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related[54] to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

16.2. In exceptional circumstances, the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 2, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of countervailing duties on such a basis, the importing Member may levy the countervailing duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18, and adequate assurances in this regard have not been promptly given, and *(b*) such duties cannot be levied only on products of specific producers which supply the area in question.

16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

Article 17

Provisional Measures

17.1 Provisional measures may be applied only if:

[54] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

Article 18

Undertakings

18.1 Proceedings may[55] be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider

[55] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.

acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 19

Imposition and Collection of Countervailing Duties

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties[56] whose interests might be adversely affected by the imposition of a countervailing duty.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of

[56] For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

19.4 No countervailing duty shall be levied[57] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

Article 20

Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

[57] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

Article 21

Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.[58] The duty may remain in force pending the outcome of such a review.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply *mutatis mutandis* to undertakings accepted under Article 18.

Article 22

Public Notice and Explanation of Determinations

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[59], adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

[58] When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[59] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested Members and interested parties should be directed; and

(vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination as set out in Article 15;

(v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

Article 23

Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

PART VI: INSTITUTIONS

Article 24

Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

PART VII: NOTIFICATION AND SURVEILLANCE

Article 25

Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each second year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies[60], Members shall ensure that their notifications contain the following information:

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);

(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);

(iii) policy objective and/or purpose of a subsidy;

(iv) duration of a subsidy and/or any other time-limits attached to it;

(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

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[60] The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

25.12 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 26

Surveillance

26.1 The Committee shall examine the new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every ~~third~~second year. ~~Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.~~

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies[61], and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either *(a)* on the basis of notification by the developing country Member having reached export competitiveness, or *(b)* on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

> **[EXPORT COMPETITIVENESS: Many delegations support in principle clarifying the provisions on the determination of export competitiveness in a product, but views differ considerably as to the best way to do this, including changing the period and/or methodology for calculating share of world trade in a product, or clarifying the definition of a "product" for this purpose. Views also differ widely as to whether reintroduction of export subsidies should be allowed if export competitiveness is lost after having been reached, and if so on what basis and for how long.]**

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

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[61] For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

PART IX: TRANSITIONAL ARRANGEMENTS

Article 28

Existing Programmes

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and

(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

Article 29

Transformation into a Market Economy

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

(a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;

(b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

PART X: DISPUTE SETTLEMENT

Article 30

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

PART XI: FINAL PROVISIONS

Article 31

Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

Article 32

Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[62]

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

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[62] This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes to this Agreement constitute an integral part thereof.

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available[63] on world markets[63] to their exporters.

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes[64] or social welfare charges paid or payable by industrial or commercial enterprises.[65]

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

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[63] The term "commercially available on world markets" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

[64] For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

[65] The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes[5864] in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes[5864] on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).[66] This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges[5864] in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by and/or acting under the authority of governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

[EXPORT CREDITS – MARKET BENCHMARKS: Delegations disagree regarding whether the texts of item (j) and the first paragraph of item (k) should be amended to replace the cost-to-government benchmark with one based on benefit-to-recipient. Those favoring such changes consider that the current provisions work to the disadvantage of developing Members and are inconsistent with the Agreement's general definition of "subsidy". Other delegations, however, consider that such changes would increase costs for developing country borrowers, and would reduce predictability for export credit agencies.]

[66] Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

[EXPORT CREDITS – SUCCESSOR UNDERTAKINGS: Views differ widely as to whether the second paragraph of item (k) should be amended such that any changes to the OECD Export Credit Arrangement would not automatically take effect for purposes of the SCM Agreement. At one end of the spectrum, some delegations consider that only amendments not objected to by any Member within a certain period should have legal effect under the second paragraph of item (k), while at the other end of the spectrum some delegations consider that Members should not have any basis on which effectively to veto decisions taken by Participants to the Arrangement.]

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

ANNEX II

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS[67]

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating

[67] Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 2.

4. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

ANNEX IV

CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION
(PARAGRAPH 1(A) OF ARTICLE 6)[68]

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's[69] sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.[70]

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.[71]

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

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[68] An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

[69] The recipient firm is a firm in the territory of the subsidizing Member.

[70] In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned.

[71] Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.

ANNEX V

PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.[72] This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.[73]

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in

[72] In cases where the existence of serious prejudice has to be demonstrated.

[73] The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

ANNEX VI

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the government of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX VII

DEVELOPING COUNTRY MEMBERS REFERRED TO
IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum[74]: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, Honduras, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

[74] ~~The inclusion~~In constant 1990 dollars for three consecutive years as calculated by the Secretariat on the basis of ~~developing country Members in the list in paragraph (b) is based on~~ the most recent data from the World Bank on GNP per capita, pursuant to paragraph 10.1 of the Ministerial Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17). A Member shall not leave Annex VII(b) so long as its GNP per capita in current dollars has not reached US$1,000 based upon the most recent data from the World Bank, and shall be reincluded in the list in Annex VII(b) when its GNP per capita falls back below US$1,000.

ANNEX VIII

FISHERIES SUBSIDIES

Note: The text on fisheries subsidies will be revised following discussion of the issues identified in the annexed fisheries subsidies roadmap.

FISHERIES SUBSIDIES – ROADMAP FOR DISCUSSIONS

THE NEGOTIATING MANDATE

1. The Ministerial mandate from Hong Kong directs this Negotiating Group to "strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing" and, as an integral part of the negotiations, to establish "appropriate and effective special and differential treatment for developing and least-developed Members".

GENERAL CONSIDERATIONS

2. The issue of fisheries subsidies continues to be the subject of a vigorous debate. My sense is that all participants recognize the global crisis of overcapacity and overfishing, with its consequent negative economic and environmental effects, and are committed to ensuring that the disciplines ultimately developed, whatever their form, must be *effective* in fulfilling the negotiating mandate from Ministers. That said, since I tabled my first draft text in document TN/RL/W/213, participants' views have continued to differ widely.

3. In my view, the existing differences are mainly due to varied perceptions among participants as to the exact scope and meaning of the mandate. Ministers in Hong Kong identified as the central focus of these negotiations the strengthening of disciplines, in particular through a prohibition, on subsidies that contribute to overcapacity or overfishing. Thus it is clear that crafting such new disciplines is at the core of the negotiations. During the negotiations, much of the debate in practice has been about other considerations that should modulate the impact of any new disciplines. In this regard, while the Group had many useful discussions on the basis of my first draft text, of both possible disciplines and other considerations, that text did not move us closer to a common understanding as to subsidies that should be prohibited and exempted from disciplines. I thus fully recognize that I will need to revise that text in view of the continued differences of view. The discussions to date have not, however, generated the necessary elements that would provide me with the basis for a revision that could lead to greater convergence.

4. As we resume our work, therefore, I believe that in the first instance in our discussions we should take a step back and reflect on the fundamental issues raised by the mandate. In particular, in my view the Group should work to identify those subsidies that contribute to overcapacity or overfishing, with a view to determining which of these should and should not be prohibited, while considering at the same time how to effectively address the needs and particularities of developing Members.

5. In this context, wherever certain participants may consider that certain subsidies should not be prohibited, the Group would need to consider the reasons advanced: for example, because such subsidies contribute only minimally to overcapacity or overfishing; because the effects of such subsidies could be adequately controlled by fisheries management or other means; because the small scale of certain subsidized operations would limit or eliminate the potential contribution to overcapacity or overfishing of the subsidies; or because of their importance to development priorities. In respect of any such proposed exemptions, the Group would need to consider how the integrity of the mandate would be ensured, such that any such subsidies would not in practice contribute to overcapacity or overfishing.

6. A basic issue that would need to be taken up is how the existence of overcapacity or overfishing can be established as objectively and precisely as possible. Given that many questions of judgement would be involved in such determinations, one important question is the appropriateness of

leaving it to each Member to judge its own situation, or if not the Member, who else could or should make such judgements.

7. A further fundamental issue is how to ensure adequate implementation, monitoring and surveillance. As is the case for all WTO rules, fisheries subsidies disciplines would need to include provisions for such mechanisms. Given the potential, as recognized in the mandate, for fisheries subsidies to contribute to overcapacity and overfishing, coupled with the mobile and undomesticated nature of the resources, a principal question would be how adequate surveillance of the effectiveness of the operation of the rules could be ensured, and whether the rules therefore should include enhanced surveillance mechanisms.

8. I believe that the best approach for the Negotiating Group to take in seeking a common understanding in respect of these basic conceptual issues is to discuss these issues on the basis of a number of more detailed questions. In this regard, to facilitate this process, in the next sections of this paper I raise a series of such questions, all of which are aimed at clarifying participants' positions on different aspects of the mandate.

9. I call upon all participants to re-engage in, and deepen, the debate of the basic concepts that must be addressed, and especially to come to grips with how the various elements of a new discipline will work together in a coherent way to effectively fulfil the mandate that we have received from the Ministers.

PROHIBITION

10. On the basis of this mandate, a core task for the Negotiating Group is to seek a common understanding as to the subsidies that "contribute to overcapacity and overfishing". As participants are aware, my first draft text took a "bottom-up" approach, listing particular specific subsidies that would be prohibited.[1] This list was drawn up based on submissions by and discussions among participants identifying those subsidies that the submitters considered contribute to overcapacity and/or overfishing. It is clear from the discussions that participants' views still differ widely regarding which subsidies should be prohibited.

11. I therefore would seek first a detailed discussion by the Group on which particular subsidies they believe should be prohibited (including but not limited to those referred to in my first draft text) in the light of the Ministerial mandate, addressing *inter alia* the following points:

(a) For each subsidy that in your view should be prohibited, how does it contribute to overcapacity or overfishing?

(b) If you believe that a given subsidy should not be prohibited, why? If this is because you do not consider that it contributes to overcapacity or overfishing, what are the specific reasons for this view?

(c) Where you consider that a given subsidy that has been proposed for prohibition should not be included in a list of prohibited subsidies, because in your view it does not contribute to overcapacity or overfishing, how would you address the question of interchangeability of subsidies? Specifically, how could non-prohibited subsidies that

[1] On a fundamental point related to this list of measures, I wish to be clear that my first draft text would apply only to subsidies that are specific on any of the bases provided for in Article 2 of the Agreement (i.e., the list does not include subsidies that would not meet the definition of specificity in Article 2, but is not limited to subsidies that are specific on a sectoral basis to fisheries).

reduce costs to the fisheries sector be prevented from contributing to overcapacity or overfishing?

(d) What should the scope of any prohibitions be, i.e., how far upstream or downstream should they reach, and should the focus be marine wild capture fisheries?

(e) Should any or all proposed prohibitions be conditional on anything? If so, on what?

(f) What role should there be for a provision such as the prohibition of non-listed subsidies in respect of "unequivocally overfished" fisheries?

(g) If such a provision is viewed as unnecessary,

(i) How otherwise could it be ensured that a bottom-up list of prohibited subsidies would be effective in fulfilling the mandate?

(ii) What would be the justification for permitting subsidies in respect of overexploited fisheries?

GENERAL EXCEPTIONS

12. In my first draft text, the list of subsidies that would be prohibited is modulated by general exceptions, mainly for subsidies identified by participants as helping to reduce overcapacity and overfishing, and to improve environmental conditions in marine wild capture fisheries. In the light of the mandate from Ministers, i.e., to prevent them from undermining the effectiveness of the prohibition, these proposed exceptions as envisaged would be conditioned on the establishment and operation of fisheries management systems and measures.

13. Participants are asked to consider the following:

(a) What measures are appropriate for inclusion in a list of general exceptions?

(i) For each such measure, is the rationale that it would be unlikely to contribute to, or would counteract, overcapacity or overfishing? If so, why?

(ii) For any measure proposed for a general exception in spite of possibly contributing to overcapacity or overfishing, what would be the rationale for excepting it from prohibition?

(b) Where you consider that a given measure that has been proposed for a general exception should instead be prohibited, what are the reasons? Do you consider that the measure would contribute to overcapacity or overfishing, and if so, how specifically?

(c) Should general exceptions be conditional in principle on having a fisheries management system in place (leaving for the section below the details concerning fisheries management):

(i) Should each general exception be conditional on fisheries management?

- Are there additional or alternative conditions that should apply?

- Are there general exceptions that in your view should be unconditional? Which ones?

- How could it be ensured that any unconditional exceptions would not contribute to overcapacity or overfishing?

(d) If most WTO Members are committed to and already have implemented or are in the process of implementing fisheries management systems, what would be the difficulties, in practical terms, of agreeing to having fisheries management in place as a condition for making use of general exceptions?

SPECIAL AND DIFFERENTIAL TREATMENT

14. In the light of the mandate from Ministers, my first draft text contains special and differential treatment provisions whereby developing Members could provide certain capacity- and effort-enhancing subsidies that otherwise would be subject to prohibition. During the negotiations, developing Members have consistently acknowledged that subsidies by any country can contribute to the global problems of overcapacity and overfishing, and thus have indicated that they are not seeking a "blank check" allowing unlimited and unconditional subsidization. The difficulty in the negotiations on S&D provisions thus far is how to find a balance between flexibility for developing Members to provide subsidies to develop their fisheries sector on the one hand, and ensuring that such subsidies do not contribute to overcapacity and overfishing, on the other hand.

15. Participants are asked to reflect in detail on the following questions:

(a) Do participants support an essentially full carve-out from the disciplines for LDCs?

(b) For developing Members other than LDCs, is it appropriate and consistent with the mandate that S&D exceptions be broadest and subject to the fewest conditions for subsidies to the smallest-scale, closest to shore, and least commercial fishing operations, with exceptions becoming progressively narrower and subject to more conditions as the subsidized operations become larger-scale, further from shore, and more commercial?

(i) If so, how could such different types, scales and/or geographic areas of operations be defined and differentiated?

(ii) How would the resulting categories relate to the mandate to discipline subsidies that contribute to overcapacity or overfishing?

(iii) What types of conditionalities would apply, to which categories?

(c) Are there other bases on which fisheries operations of developing Members could be categorized for the purpose of S&D exceptions, which would provide the necessary flexibility to developing Members without contributing to overcapacity or overfishing?

(d) If no other dividing lines among types, scales and/or geographic areas of operations can be identified, would all non-LDC developing Members receive the same S&D treatment in respect of their fisheries subsidies to all types, scales and geographic areas of fisheries operations?

(i) In such a situation, what should the exceptions be, and to what conditions should they be subject?

(ii) If all non-LDC developing Members were fully exempted from eventual prohibitions on, for example, subsidies for vessel construction/modification, and operating costs, how could it be ensured that such subsidies would not contribute to overcapacity or overfishing?

(iii) On what other basis could S&D treatment be structured?

(e) Should some or all exemptions for developing Members be conditional on fisheries management?

(i) If so, which exemptions should be subject to such conditionality?

(ii) What sort of fisheries management conditionalities should these be and how could their effectiveness at preventing overcapacity and overfishing be ensured? Would self-certification that management was effective be sufficient?

(f) If S&D exceptions were not conditioned on fisheries management, what other conditions should there be, if any, and how would those operate to prevent the subsidies from contributing to overcapacity or overfishing?

(g) What is the appropriate role for technical assistance for developing Members to implement new disciplines?

(i) How can effective technical assistance for the implementation of management conditionalities be ensured while not indirectly making more resources available to subsidize?

(ii) How can developing Members' needs and donor Member's capabilities be reconciled in a way that contributes most efficiently to fulfilling the mandate?

GENERAL DISCIPLINE/ACTIONABILITY

16. Under the existing provisions of the SCM Agreement, specific subsidies benefiting the fisheries sector are actionable, and thus can be the subject of multilateral adverse effects challenges (e.g. serious prejudice) and countervailing measures if the applicable conditions are present. These provisions are not, however, designed to clearly identify any contribution that such subsidies may make to overcapacity or overfishing. With a view to creating predictability and certainty concerning how to identify and address such effects, my first draft text contains certain guidelines on the basis of which a Member could challenge another Member's subsidies if those subsidies caused depletion of or harm to, or creation of overcapacity in respect of, stocks whose range extended into the challenging Member's EEZ, or particular stocks in which that Member had identifiable fishing interests.

(a) Should new fisheries subsidies rules define any fisheries-specific negative effects from subsidies that could be challenged by other Members?

(b) If so, how should such effects be defined?

(i) To what extent, if at all, should implementation by the subsidizing Member of sound fisheries management be considered to relevant evidence for a determination of whether its subsidies have caused such effects? Why?

(ii) What additional or alternative evidence would be relevant? Why?

(c) If no parameters are established in respect of relevant evidence, what would be alternative approaches to ensure predictability and certainty in the application of general subsidy disciplines?

FISHERIES MANAGEMENT CONDITIONALITIES

17. The discussions in the Negotiating Group indicate that participants generally believe that exceptions – both general and S&D – should not be unconditional, given their potential to undercut the effectiveness of the disciplines on subsidies that contribute to overcapacity and overfishing.

18. The discussions also have indicated a widely-shared view that the principal conditionalities should pertain to fisheries management, a central component of which would be stock assessments, in part because of the difficulties of directly measuring the effect of particular subsidies on particular wild capture fisheries due to the mobile and undomesticated nature of the resource.

19. There are, however, differing views as to how much detail WTO fisheries subsidies rules should contain on fisheries management, in respect of both the substantive basis of such conditionalities and the appropriate fora and mechanisms for monitoring and enforcing their implementation. There has been considerable debate on the approach taken to these issues in my first draft text.

20. I would ask participants to reflect on the following questions:

(a) Are there other conditionalities that should be applicable to exceptions (general and S&D), either in addition to or instead of fisheries management conditionalities?

(b) How important is it for the effective operation of the disciplines that all Members' fisheries management systems and measures adhere to a common standard, and how prescriptive should that standard be?

(c) If a common standard is not necessary or not acceptable, how could the effectiveness of different Members' systems in controlling overcapacity and overfishing be monitored and enforced?

- What would prevent one Member with ineffective management from overfishing stocks that were safeguarded/replenished by another Member's effective management measures?

(d) Given that an international consensus already exists in respect of a substantial number of international fisheries management instruments, and those instruments themselves take account of the capacity constraints of developing countries, does it make sense to draw inspiration from those instruments for the substantive content of management conditionalities for using exceptions from the prohibition?

(i) If not, why not?

(ii) If so, how could the typically non-binding nature and relatively general and flexible wording of those instruments be reconciled with a binding prohibition of subsidies that contribute to overcapacity or overfishing, and binding conditionalities concerning fisheries management where exceptions are used?

(e) What role should stock assessments play in any management conditionalities?

(i) If stock assessments are considered unnecessary, why, and how could overfishing and overcapacity be monitored in the absence of stock assessments?

(ii) If stock assessments are considered to be a necessary element, how could the rules take into account Members' different capabilities while ensuring that the assessments are as reliable and robust as possible?

(iii) To what extent if at all should the results of stock assessments form part of any conditionalities?

(f) Is it logical to require a stock assessment before a capacity-enhancing subsidy is provided?

(i) If not, why not?

(ii) If so, what practical problems would need to be resolved?

(iii) What timing and review mechanism for such stock assessments could best reconcile a Member's need to implement a given subsidy on the one hand, and other Members' need for multilateral surveillance/transparency in respect of the fisheries resources that would be affected by it on the other hand?

(g) Given the existing role of the FAO in discussing FAO members' substantive implementation of various international fisheries instruments, what specific problems/concerns would there be if that role were enhanced in respect of stock assessments and/or fisheries management systems?

- Would the problems be the same if the review at the FAO were similar to reviews of notifications by WTO bodies (i.e., multilateral review among members, for transparency, rather than a mechanism for approval, whether by a panel of experts or a multilateral body)?

(h) Why, if at all, would the WTO be better-positioned to perform such reviews of fisheries-related information?

- How could the necessary expertise be built into any WTO-based review of fisheries management, without the WTO becoming a fisheries management organization?

TRANSPARENCY

21. Most participants appear to believe that enhanced transparency in respect of fisheries subsidies should be an important outcome of the negotiations, as a necessary element in ensuring that the disciplines operate effectively. In this regard, my first draft text includes specific transparency

provisions that would apply where exceptions are used; in particular, information related to subsidies for which exceptions were invoked would be notified to, and reviewed by, the WTO, and there would be consequences for non-notification. Concerning transparency in respect of fisheries management, given the technical questions that would arise in review of Members' fisheries management systems, as outlined in the previous section, my first draft text envisages a multilateral mechanism that would make use of outside fisheries expertise and institutions.

22. I would ask participants to reflect on the following issues:

(a) Assuming that notifications would be required in respect of subsidies for which exceptions from the prohibition were invoked, is it logical for such notifications to include information addressing the conformity of the subsidies with the specific criteria and characteristics of the invoked exceptions?

(b) Would a requirement to notify such subsidies after rather than before they were implemented be effective in ensuring that the pertinent criteria were respected? Are there effective alternatives?

(c) What mechanisms could be built into the rules to create incentives to notify?

(d) If a presumption that non-notified subsidies are prohibited is either not workable or not acceptable, what other approaches would be effective in encouraging the submission of complete and timely notifications, so as to provide meaningful information to Members?

DISPUTE SETTLEMENT

23. On dispute settlement, depending on the specific disciplines agreed, disputes clearly could arise which would focus on technical questions related to the fisheries sector rather than on purely legal issues. My first draft text suggests a mechanism that could be used to bring fisheries expertise into the dispute settlement process as needed.

(a) Is it necessary for WTO fisheries subsidies rules to provide for a specific mechanism by which panels can obtain scientific and other technical expertise related to fisheries issues that may arise in disputes?

(i) If so, why would the provisions in Article 13 of the DSU not be sufficient?

(ii) Should resort to any such mechanism be mandatory for all panels dealing with disputes under the fisheries subsidies rules, or should such resort be at the discretion of each panel?

(b) If such a specific mechanism is considered unnecessary, how could necessary expertise be assured in disputes involving technical fisheries issues?

(c) How could it be ensured that panels would make use of available mechanisms, in particular the provisions in Article 13 of the DSU, when necessary?

IMPLEMENTATION

24. Given that any mechanisms ultimately agreed as part of new disciplines on fisheries subsidies will imply a certain degree of institutional infrastructure, expertise and resources, it is clear that implementation of the disciplines would pose certain difficulties, especially for developing Members. My first draft text envisages certain flexibilities in this respect, such as the possibility for regional bodies to fulfil the roles otherwise envisaged for national mechanisms, at least for developing Members, as well as provisions on technical assistance.

25. Participants are asked to consider the following issues in respect of the implementation of new disciplines:

(a) What concrete mechanisms could be included in fisheries subsidies disciplines to facilitate their implementation to the maximum possible extent?

(b) Would such mechanisms be limited to implementation of fisheries management, or would they address other aspects of the disciplines as well?

(c) To the extent that disciplines foresee implementation of management or other obligations on a regional basis, how could it be ensured that the obligations were fulfilled in respect of and by each Member individually?

TRANSITION RULES

26. It is clear that whatever the new disciplines, Members would need a certain amount of time to bring their existing measures – subsidies and potentially fisheries management systems – into conformity. My first draft text parallels the approach in the SCM Agreement, envisaging a longer transition period for developing than developed Members.

27. I would ask Members to reflect on the following points:

(a) What would be the specific purpose of a transition period in the context of new disciplines on fisheries subsidies?

(b) Should a transition period for bringing otherwise prohibited subsidies into conformity with new rules be available only in respect of such subsidies that have been notified?

(c) To what extent should the length of a transition period be linked to the strength of the disciplines (i.e., the degree of the new obligations imposed on Members)?

(d) How should a transition rule for developing Members take into account the nature and extent of special and differential treatment?

(e) Should a transition period be linked to implementation of fisheries management systems on which exceptions would be conditioned, or should it only relate to bringing otherwise prohibited subsidies into conformity with the new disciplines?

(f) Should transition periods vary based on the particular type of subsidy involved? What would be the implications of such differentiation on overcapacity and overfishing?

(g) Should a transition rule require Members to report during the transition period on their progress in implementing new obligations?