WORLD TRADE ORGANIZATION

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Negotiating Group on Rules

NEGOTIATING GROUP ON RULES

NOTE BY THE CHAIRMAN

Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules

The Doha Ministerial Declaration establishes that, in the initial phase of negotiations on WTO Rules, "participants will indicate provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase"[1].

This working paper contains a summarized compilation of issues and provisions indicated by participants for clarification and improvement in documents presented to date in the context of the Negotiating Group on Rules. The issues and proposals compiled in this paper refer to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*Anti-Dumping Agreement*") and to the Agreement on Subsidies and Countervailing Measures (the "*SCM Agreement*"), including WTO disciplines on fisheries subsidies. This paper is without prejudice to the identification of additional issues and proposals by participants and will be updated accordingly.

Only a brief summary of the specific issues and proposals raised in the Negotiating Group by participants is provided herein. This compilation is not intended to provide a detailed explanation of these issues and proposals, but rather to give a general overview of their main elements. As such, this paper does not reflect the elements of participants' submissions providing conceptual descriptions, expressions of general policy positions, comments, questions, answers and reactions. These are contained in full in the submissions to the Negotiating Group, as listed in Annex I. The summaries of the issues and proposals included in this paper reflect, as far as possible, the language used in the submissions to the Negotiating Group.

To the extent that they are directly related to existing specific provisions, most of the issues and proposals compiled in this paper follow the structure of the aforementioned Agreements, rather than their original order in documents circulated to the participants of the Negotiating Group on Rules. In such cases, for ease of reference, the relevant specific provisions of the *Anti-Dumping Agreement* and of the *SCM Agreement* have been reproduced in this paper. The placement of issues and proposals reflected in this paper under particular sections, headings and/or provisions of the *Anti-Dumping* and the *SCM Agreements*, and the fact that some issues or proposals presented by different participants may be found under a single heading, are simply meant to facilitate their listing in this paper, and are not meant to change their substance. The format and wording of this paper does not in any way prejudice the position of participants in the negotiations.

This compilation is divided into two parts. Part I contains issues and proposals relating to anti-dumping. Part II is divided into three subparts. The first subpart contains issues and proposals relating to subsidies disciplines. The second reflects issues and proposals relating to fisheries subsidies. The third contains issues and proposals on countervailing measures.

[1] Ministerial Declaration adopted on 14 November 2001, Paragraph 28.

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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.

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[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.

1. Definition of "Sufficient Quantity of Sales of the Like Product in the Domestic Market for the Determination of Normal Value"

- clarify this provision in order to avoid that the test of "representativeness of domestic sales of the like product" be used as a way to artificially reduce the possibility of calculating normal value on the basis of the sales to the domestic market of the exporting country or to artificially increase the use of constructed values; define whether the test should be applied to the product as a whole or to the categories. (TN/RL/W/29)

2. Particular Market Situation

- define "particular market situation" under Article 2.2 to limit the discretion of the investigating authorities to refuse to use the normal price of the product sold domestically when comparing with the export price.[2] (TN/RL/W/66)

[2] See proposal in TN/RL/W/47 listed under Section 4.

3. Determination of Normal Value / Affiliated Parties

- examine the issue of determination of normal value (affiliated parties). (TN/RL/W/86)

- discuss the issue of transactions involving affiliated suppliers, for purposes of determination of normal value (define "affiliation"). (TN/RL/W/10)

- address the issue of whether home-market sales to affiliates may be included in, or excluded from, the calculation of normal value. (TN/RL/W/10)

- establish clear guidance under the *Anti-Dumping Agreement* on the approach to treat transactions between affiliated companies in the context of normal value. (TN/RL/W/66)

- analyze the sales relationship on the domestic market of the producer/exporter and establish criteria for such analysis, since the *Anti-Dumping Agreement* provides for this formula only in respect of the relationship between exporters and importers. (TN/RL/W/81)

- clarify the *Anti-Dumping Agreement* to address situations in where one party is in a position to exercise *de facto* control over another, even when there is no equity ownership or other "legal" control, or where two parties are in such a position that they may be expected to act in concert (Article 4.1 of the *Anti-Dumping Agreement* defines related parties within the domestic industry for purposes of standing and injury, but does not define affiliation for purposes of analysing issues arising from relationships among foreign producers and resellers). (TN/RL/W/130)

Article 2
Determination of Dumping

(…)

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 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.

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[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.

[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.

4. Sales in the Ordinary Course of Trade / Profitability Test

- define "reasonable period of time" for prices which do not provide for recovery of all costs. (TN/RL/W/6)

- clarify and improve the tests for sales in the ordinary course of trade. (TN/RL/W/7)

- identify the manner in which Members have operationalized the criteria of sales "in the ordinary course of trade" and "particular market situation"[3], and arrive at an agreement as to the conditions and circumstances of sales that are to be considered under these specific provisions. (TN/RL/W/47)

[3] See Section 2 *supra*.

- clarify whether investigating authorities should be allowed to disregard sales below cost even when prices provide for recovery of all costs in the period of investigation. (TN/RL/W/6) (TN/RL/W/86)

- explore the possibility of further expanding the conditions under which sales made at a loss would not be excluded for purposes of determining normal values (especially with respect to those industries whose product pricing is extremely sensitive to shifts in supply and demand, and agricultural and other commodity sectors whose producers are typically "price takers" and who usually have fixed costs that cannot be easily reduced over the short term when there is a decline in selling prices).[4] (TN/RL/W/47)

[4] See Section 11 *infra.*

Article 2
Determination of Dumping

(…)

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 provided that such allocations have been historically utilised 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]

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[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.

5. Use of Cost Data

- examine the issue of authorities' discretion on the use of cost data. (TN/RL/W/86)

- define circumstances under which authorities should be required to accept cost data as recorded in the producer's accounting book (e.g. if the accounting records are audited by duly qualified person or agency). (TN/RL/W/10)

6. Cost Allocation

- provide more comprehensive direction concerning the determination and allocation of costs. (TN/RL/W/47)

- provide for the determination of costs giving recognition to the type of manufacturing or production process used in respect of the goods under investigation; for example, certain production processes result in joint-production where multiple products, that may have significantly different sales values, are produced simultaneously using the same inputs and incur the same average production costs on a per unit basis (in such cases, an allocation of costs made on the basis of sales values results in a more meaningful comparison of costs to prices than an allocation of costs based on production volumes, provided that this allocation is made in accordance with generally accepted accounting principles). (TN/RL/W/47)

Article 2
Determination of Dumping

(…)

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

(…)

7. Constructed Value

- elaborate clearer, more comprehensive and representative criteria for calculations of constructed normal value. (TN/RL/W/6)

- elaborate Article 2.2.2 to provide clear guidance for the use of information in the calculation of the constructed normal value. (TN/RL/W/66)

8. Hierarchy of Options in Constructed Value Calculation

- amend the chapeau of Article 2.2.2 specifying that the three options thereunder (items (i) to (iii) set three separate basis for deriving the amount for SGA expenses and profits to be used in a constructed normal value calculation) have a hierarchical significance and a subsequent option may be resorted to only in the absence of relevant data under the preceding option(s). (TN/RL/W/26)

9. Reasonability Test

- impose the limitation enshrined in option 2.2.2(iii), in order to ensure the reasonableness of amount of profit under options 2.2.2(i) and 2.2.2(ii). (TN/RL/W/26)

Article 2
Determination of Dumping

(…)

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.

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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.

10. Constructed Export Price

- examine the issue of constructed export price. (TN/RL/W/86)

- consider a clear definition of what constitutes association or compensatory arrangements. (TN/RL/W/29)

- establish criteria for the determination of association and the resale price. (TN/RL/W/81)

- identify the situations in which an export price could be considered to be unreliable. (TN/RL/W/81)

- consider whether the investigating authority should explain, in the pertinent determination, the reasons for considering the export price unreliable, since the mere establishment of association or compensatory arrangement is not enough. (TN/RL/W/29)

- clarify guidelines applicable to constructed export price so as to rule out asymmetry comparison. (TN/RL/W/10)

- clarify Articles 2.3 and 2.4 to provide clearer guidelines for a symmetric comparison between constructed export price and normal value. (TN/RL/W/66)

- require authorities to deduct home-market profits to observe symmetric deduction of costs and expenses between constructed export price and normal value. (TN/RL/W/10)

11. Cyclical Markets / Perishable, Seasonal, Cyclical Products

- discuss the issue of cyclical markets (e.g., the fact that prices of certain products may fluctuate according to seasonal factors, and the case of rapidly growing manufacturing sector). (TN/RL/W/6)

- clarify and improve the rules pertaining to issues particular to anti-dumping investigations of perishable, seasonal, and cyclical products (producers may be more vulnerable to dumped or subsidized imports that enter the domestic market during the limited portions of the year when their product is sold).[5] (TN/RL/W/72)

[5]See also Section 162 *infra* on the *SCM Agreement and* Sections 4 *supra* and 30 *infra* on the *Anti-Dumping Agreement*.

Article 2
Determination of Dumping

(…)

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], 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.

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[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.

12. Currency Conversion

- agree on certain principles in order to ensure the consistent implementation of Article 2.4.1 (currently there is no general agreement on what constitutes "sustained movements" and how sustained exchange rates fluctuations should be taken into account in converting the export price). (TN/RL/W/105)

- clarify Article 2.4.1 since the 60-day grace period provided for therein may, in certain circumstances, be interpreted as allowing exporters and foreign producers to delay the submission of their questionnaire responses. (TN/RL/W/105)

- clarify and improve Article 2.4.1; for example, the current guidance for addressing currency movements is vague, and is particularly ill-suited for addressing sharp currency fluctuations. (TN/RL/W/130)

- clarify the agreement to require that Members use exchange rates from sources of recognized authority, and require that such sources be disclosed to interested parties. (TN/RL/W/130)

Article 2
Determination of Dumping

(…)

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.

(…)

13. Prohibition of Zeroing

- clarify Article 2.4.2 to explicitly prohibit the practice of zeroing (average dumping margins by definition should be based on the average of all comparisons, including those that generate negative margins). (TN/RL/W/6) (TN/RL/W/26) (TN/RL/W/66)

- amend Article 2.4.2 to explicitly provide that regardless of the basis of the comparison of export prices to normal value (i.e. weighted average-to-weighted average or transaction-to-transaction, or weighted average-to-transaction), all positive margins of dumping and negative margins of dumping found on imports from an exporter or producer of the product subject to investigation or review must be added up. (TN/RL/W/113)

- further amend the first sentence of Article 2.4.2 to clarify that the Article applies to initial investigations and all subsequent reviews under Articles 9 and 11.[6] (TN/RL/W/113)

14. Establishment of Overall Weighted-Average Dumping Margins

- establish clear rules as to the manner in which the overall weighted average margins are to be calculated. (TN/RL/W/72)

15. Single Margin of Dumping for the Entire Period of Investigation or Review

- add a provision to Article 2.4 clarifying that, regardless of the comparison methodology, if margins of dumping are determined separately for imports during multiple portions of the entire period of an investigation or review, the margin of dumping to be determined in the investigation or review must be a single margin of dumping for all imports during the entire period of investigation or review.[7] (TN/RL/W/113)

[6] See Section 58 *infra.*
[7] See Section 58 *infra*.

Article 2
Determination of Dumping

(…)

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.

(…)

16. Like Product

- clarify the definition of "like product" to limit the scope of product types that can be considered as a single "like product".[8] (TN/RL/W/47)

- establish criteria for determining the like product; the following criteria could be suggested as part of a non-exhaustive list: physical characteristics and uses, degree of substitutability, considerations of quality, function, technical specifications, tariff classification, users' perceptions, common distribution channels, overlapping geographical areas of the domestic market and price levels. (TN/RL/W/81)

- consider whether non-hierarchical non-exhaustive criteria, based on the criteria set out in the *Japan Alcoholic Beverages* case, should be incorporated in the definition of what constitutes "like product". (TN/RL/W/91)

- consider whether the word "identical" should be replaced with "goods, which have essentially the same physical characteristics" as part of the process of specifying criteria for the purpose of determination of dumping and determination of injury, as well as for the definition of domestic industry. (TN/RL/W/91)

- consider whether separate criteria should be developed, which make a distinction for the purpose of Article 2 of the *Anti-Dumping Agreement* relating to determination of dumping and Article 3 of the *Anti-Dumping Agreement* relating to the determination of injury. (TN/RL/W/91)

17. Definition of Product Under Investigation

- provide a more rational and disciplined framework to determine the scope of “product under investigation” so that anti-dumping measures would only be applied to those products found to be "dumped" and causing injury. (TN/RL/W/10)

- establish a clear and strict criterion in the *Anti-Dumping Agreement* for the determination of "product under investigation". (TN/RL/W/66)

- discuss appropriate criteria for determining the “product under investigation” to limit arbitrary expansions of product scope. (TN/RL/W/7) (TN/RL/W/10)

[8] See Section 130 *infra* on the *SCM Agreement*.

Article 2
Determination of Dumping

(…)

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

Ad Article VI
Paragraph 1

(…)

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

18. "Non Market Economy" Clause

- revoke the "non market economy" clause. (TN/RL/W/66)

Article 3
Determination of Injury[9]

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 and 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.

(…)

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[9] 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.

19. Definition of "Dumped Imports"

- consider the elaboration of clearer, more detailed definition of "dumped imports", in order to avoid misinterpretations and consequently the misuse of anti-dumping duties. (TN/RL/W/29)

- consider whether the *Anti-Dumping Agreement* should be clarified to specify methods that investigating authorities can readily implement in the injury investigation to calculate the volume of dumped imports for purposes of Articles 3.1 and 3.2 which do not, in accordance with Article 6.10, require examination in the dumping investigation of each individual producer or importer. (TN/RL/W/130)

- include a note to Article 3.1 explaining that dumped imports are those coming from or originating in a country or enterprise for which a positive, more than de minimis margin of dumping has been determined. (TN/RL/W/132)

20. Material Retardation

- clarify the term "material retardation" so as to enable investigating authorities to determine in which circumstances there is material retardation. (TN/RL/W/105)

- consider not restricting the definition of the term "*new industry*" to industries which are being established from zero; take into account the situation of embryonic, restructuring and recently privatized industries. (TN/RL/W/105)

- identify tests similar to those set forth in Article 3 of the *Anti-Dumping Agreement* with respect to material injury and threat thereof in order to assist investigating authorities to determine in which circumstances material retardation occurs. (TN/RL/W/105)

21. Market Segmentation

- consider whether Article 3 of the *Anti-Dumping Agreement* should be clarified to state expressly that investigating authorities have the discretion to engage in sectoral analysis of the impact of dumped imports on the domestic industry in appropriate circumstances, as long as their analysis of impact encompasses the entire domestic industry.[9] (TN/RL/W/130)

[9] See Section 131 *infra* on the *SCM Agreement*.

ARTICLE 3 - DETERMINATION OF INJURY

Article 3
Determination of Injury

(…)

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.

(…)

22. Cumulative Assessment of Injury / Cumulation

- establish which factors should be considered to evaluate if the conditions of competition between imported products from different countries and between them and the like domestic product are the same. (TN/RL/W/6) (TN/RL/W/7) (TN/RL/W/66)

- set an appropriate parameter for the definition of negligible volume of imports. (TN/RL/W/29)

- develop criteria, as those being discussed within the Working Group on Implementation, in defining conditions of competition. (TN/RL/W/86)

- apply a flexible approach when taking into account the factors for assessing conditions of competition (e.g. conditions of competition need to be considered over the whole of the investigation period and not just at a particular point in time). (TN/RL/W/86)

- establish criteria for considering the conditions of competition between the imported products of different origins and the conditions of competition between the imported products and the like domestic product (criteria similar to those set out for determining the like product are suggested).[10] (TN/RL/W/81)

- consider whether the *Anti-Dumping Agreement* and the *SCM Agreement* should be clarified to expressly provide for the cumulation of dumped imports with subsidized imports, in order to assess the effects of the unfair imports on the domestic industry.[11] (TN/RL/W/98)

[10] See Section 16 *supra*.
[11] See Section 132 *infra* on the *SCM Agreement and* Section 68 *infra* on the *Anti-Dumping Agreement.*

Article 3
Determination of Injury

(…)

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 utilisation 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.

(…)

23. Injury Determination

- clarify the rules/disciplines pertaining to injury determinations. (TN/RL/W/1)

- design new rules on injury analysis which give more precise guidance; examine whether one could find straightforward rules for a number of typical "extreme" cases (this could be achieved by providing guidance to the application of the factors listed in Article 3.2 and Article 3.4 of the *Anti-Dumping Agreement*; such guidance could be obtained by introducing more quantitative elements where possible).[12] (TN/RL/W/138)

- establish adequate guidance to evaluate factors to be considered in the determination of injury. (TN/RL/W/10)

- clarify Article 3.4 and its relationship with other provisions of Article 3. (TN/RL/W/10)

- clarify Article 3.4 to limit the discretion of the investigating authorities in the evaluation of injury. (TN/RL/W/66)

- further elaborate some of the mandatory injury parameters for ensuring consistency and predictability among investigating authorities while making an assessment of the consequent impact of dumped imports on the domestic products of the like product. (TN/RL/W/26)

24. Calculation of Injury Margins

- incorporate a provision setting forth disciplines on calculation of injury margins. (TN/RL/W/26)

[12] This proposal was submitted under the general title of "Proposals on Cost Saving in Anti-Dumping Proceedings" (TN/RL/W/138). See also Section 69 *infra*.

- deliberate upon the following questions relevant to possible disciplines on calculation of injury margins:

- How will objectivity and transparency in calculation of injury margins be ensured, given the fact that cost and pricing data of the domestic producers would normally be considered to be confidential and therefore not available to all the interested parties?

- Which domestic producers should be considered for purposes of calculating the domestic producers' price for price under-cutting?

- What should be the time period over which injury margin determination should be made?

- When should price under-cutting/price under-selling appropriately be used?

- What factors should determine a reasonable profit for the domestic industry while calculating target price for under-selling margin?

- What adjustments should be made between the landed price and the domestic sales price?

- To what extent would the various methodologies which are specified in Article 2.4.2 of the *Anti-Dumping Agreement* while determining dumping margins also be applicable for injury margins?

- Should zeroing be prohibited while calculating injury margins? (TN/RL/W/26)

25. Examination of Impact

- consider whether Article 3.4 of the *Anti-Dumping Agreement* should be clarified to provide greater certainty both to investigating authorities and to the parties that appear before them concerning the scope of the authority's obligation to examine "relevant factors and indices" other than the ones explicitly listed in Article 3.4 of the *Anti-Dumping Agreement.*[13] (TN/RL/W/130)

- address whether there should be an express limitation on the authority's obligation with respect to such factors that were never brought to the authority's attention during the course of its investigation.[14] (TN/RL/W/130)

[13] See Section 133 *infra* on the *SCM Agreement*.
[14] See Section 133 *infra* on the *SCM Agreement*.

Article 3
Determination of Injury

(…)

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.

(…)

26. Causation

- develop the procedures and criteria utilised to analyze the causal relationship, with a view to ensure that, even in the presence of other factors, a causal relationship will be found only when there is a clear and substantial link between the dumped imports and the injury. (TN/RL/W/6)

- elaborate Article 3.5 so that appropriate guidance is provided to investigating authorities while separating and distinguishing the injurious effects of other factors from the injurious effects caused by the dumped imports; furthermore, to invoke anti-dumping measures, there is a need to specify an appropriate standard for establishing causality between dumped imports and material injury. (TN/RL/W/26)

- clarify Article 3.5 in order to ensure that a causal link could only be established when the dumped import is the substantial reason for the injury of the domestic industry. (TN/RL/W/66)

- clarify the *Anti-Dumping Agreement* to provide authorities practical guidance in implementing the negative obligation of non-attribution and on how this obligation should relate to the examination of the effect of dumped imports, while ensuring that any affirmative obligations are clearly set forth in the Agreement and are workable for authorities to implement.[15] (TN/RL/W/98)

[15] See Section 134 *infra* on the *SCM Agreement*.

Article 3
Determination of Injury

(…)

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.[10] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

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

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

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

(iv) inventories of the product being investigated.

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

(…)

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[10] 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.

27. Threat of Material Injury

- define factors such as those in Article 3.4 in making a determination of threat of material injury; clarify and improve the description of the factors to be considered so that investigating authorities have more concrete guidance. (TN/RL/W/6)

- clarify and improve Article 3.7 to specify in a more detailed manner the factors to be considered in the determination of the threat of material injury. (TN/RL/W/66)

- clarify subheading (ii) of Article 3.7. (TN/RL/W/110)

- detail the factors that must be considered when determining whether or not protective actions are necessary to prevent material injury from occurring; in particular, identify the potential impact of further dumped imports on the domestic industry concerned in a manner similar to Article 3.4. (TN/RL/W/110)

28. Condition of the Domestic Industry in any Threat of Material Injury Analysis

- consider whether the Agreement should be clarified to address investigating authorities' consideration of the current condition of the domestic industry in an analysis of the threat of material injury.[16] (TN/RL/W/130)

[16] See Section 135 *infra* on the *SCM Agreement*.

Article 3
Determination of Injury

(…)

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.

29. "Special Care" Requirement in Respect of Determination of Threat of Material Injury

- elaborate on the requirement of "special care" in Article 3.8, so that a clear, specific and unambiguous benchmark is specified. (TN/RL/W/26)

ARTICLE 4 - DEFINITION OF DOMESTIC INDUSTRY

Article 4
Definition of Domestic Industry

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related[11] 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;

(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.

(…)

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[11] 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.

30. Definition of Domestic Industry

- examine the issue of definition of domestic industry. (TN/RL/W/86)

- establish clearer criteria for the definition of the term “major proportion”. (TN/RL/W/10) (TN/RL/W/66)

- provide more specific parameters as to what minimum percentage of the domestic production can be considered to be "a major proportion".[17] (TN/RL/W/47)

- establish criteria to determine when the authorities are allowed, in exceptional cases, not to use the "domestic producers as a whole of the like products". (TN/RL/W/10)

- clarify the definition of domestic industry to address the special circumstances raised when domestic and foreign producers have limited selling seasons.[18] (TN/RL/W/72)

- consider whether Article 4.1 of the *Anti-Dumping Agreement* should be clarified to specifically prohibit the practice of limiting the injury analysis solely to those firms which supported the application.[19] (TN/RL/W/98)

- consider whether the *Anti-Dumping Agreement* needs to be clarified to ensure that an investigating authority can satisfy its obligation to obtain reliable and objective data on a domestic industry containing an extremely large number of producers within the confines of an investigation of limited duration (issues that may be addressed in such a clarification include reliance by investigating authorities on information from industry groups or governmental statistical authorities). [20] (TN/RL/W/98)

- consider establishing that the domestic industry shall be taken as a major proportion of the total domestic production only when it is not possible for the authority to obtain information regarding the "domestic producers as a whole of the like products".[21] (TN/RL/W/104)

- consider whether the asymmetry between the *Anti-Dumping* and the *SCM Agreement* with respect to excluding from the domestic industry domestic producers who are themselves importers of a like product from **other countries** should remain (Article 16.1 of the *SCM Agreement* provides for this exclusion, whereas the *Anti-Dumping Agreement* does not contain a similar provision). [22] (TN/RL/W/104)

[17] See Section 136 *infra* on the *SCM Agreement*.
[18] See Section 136 *infra* on the *SCM Agreement* and Section 11 *supra* on the *Anti-Dumping Agreement*.
[19] See Section 136 *infra* on the *SCM Agreement*.
[20] See Section 136 *infra* on the *SCM Agreement*.
[21] See Section 136 *infra* on the *SCM Agreement*.
[22] See Section 136 *infra* on the *SCM Agreement* and Section 68 *infra* on the *Anti-Dumping Agreement.*

ARTICLE 5 - INITIATION AND SUBSEQUENT INVESTIGATION

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) 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 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;

(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.

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

(…)

31. Initiation Standards

- clarify the rules/disciplines pertaining to the initiation of investigations.[23] (TN/RL/W/1) (TN/RL/W/86)

- improve disciplines on initiation of investigations (provide adequate disciplines to protect developing country textiles firms from unnecessary initiations, particularly as these firms are generally small or medium-sized). (TN/RL/W/48)

- clarify and improve requirements to initiate an investigation, in order to allow for a more meaningful "examination" of the basis for beginning the investigation. (TN/RL/W/10)

- clarify the interpretation of the terms "examine", "accuracy", and "adequacy" of evidence. (TN/RL/W/10)

- strengthen the requirements for initiation of an anti-dumping investigation in various areas by, for example defining the concept of information "reasonably available" in Article 5.2. (TN/RL/W/47)

- amend Article 5 to require that, when examining an application for the initiation of an investigation, authorities also consider information on factors other than dumping that may be contributing to the injury being alleged. (TN/RL/W/47)

- consider adding, in addition to the current standards for initiation in Article 5 of the *Anti-dumping Agreement*, a requirement to the effect that clear and sufficient evidence of trade distorting practices that have led to a situation of injurious dumping should be provided to support the relevant anti-dumping petitions before the initiation of investigations. (TN/RL/W/129)

[23] See Section 117 *infra* on the *SCM Agreement*.

Article 5
Initiation and Subsequent 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[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] 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.

(…)

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[13] 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.

[14] 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.

32. Back to Back Anti-Dumping Investigations

- require that an investigating authority shall not initiate an anti-dumping investigation where an investigation on the same product or a broader category of another product which included the product now under consideration from the same Member resulted in negative finding within 365 days prior to the filing of the petition seeking initiation of a new investigation. (TN/RLW/26)

- add a new paragraph to Article 5 of the *Anti-Dumping Agreement*: Investigating authorities shall not initiate an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application. (TN/RL/W/66)

33. Standing Rules

- examine the issue of standing. (TN/RL/W/86)

- establish that applications should be supported by at least more than 50 per cent of the total domestic production. (TN/RL/W/10)

- require that legally sufficient "support" include complete data relevant to assessment of injury, and the causal relationship between that injury and imports. (TN/RL/W/10)

- require investigating authorities to conduct an "objective" assessment of the degree of industry support for an application and to refrain from taking any action that would have a foreseeable effect on the outcome of such a determination. (TN/RL/W/47)

- discuss the standing requirement for the initiation of an investigation to determine whether the concept of "standing" is appropriately defined to ensure that domestic producers representing a relatively small proportion of the domestic production of like products cannot successfully apply for an investigation.[24] (TN/RL/W/47)

- consider requiring that, in cases where an application is made on behalf of a domestic industry by one or more industry associations, that the members of the industry association(s) be identified in the application, with a statement of support for the application.[25] (TN/RL/W/47)

34. Domestic Industry Consisting of Small-Scale or "Unorganised" Sector Producers

- clarify that footnote 13, which refers to the use of sampling techniques in the case of fragmented industries, also applies to the 25 per cent requirement in the last sentence of Article 5.4 (support for application). (TN/RL/W/26)

[24] See Section 119 *infra* on the *SCM Agreement*.
[25] See Section 119 *infra* on the *SCM Agreement*.

Article 5
Initiation and Subsequent Investigation

(…)

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 before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

(…)

35. Initiation and Publicization of the Application

- make clear how the obligation to notify the Government of the exporting Member can be reconciled with the obligation to avoid publicizing the application concerned.[26] (TN/RL/W/132)

[26] See Section 120 *infra* on the *SCM Agreement*.

Article 5
Initiation and Subsequent Investigation

(…)

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.

(…)

36. *Ex Officio* Initiation

- analyze the appropriateness of establishing guidelines for the definition of a "special" situation justifying the *ex officio* initiation of an investigation. (TN/RL/W/81)

Article 5
Initiation and Subsequent Investigation

(…)

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.

(…)

37. Thresholds

- raise existing *de minimis* dumping margin of 2 per cent of export price below which no anti-dumping duty can be imposed to 5 per cent for imports from developing countries. (TN/RL/W/4) (TN/RL/W/66)

- ensure application of the *de minimis* dumping margin of 5% in refund and review cases. (TN/RL/W/4)[27]

- redefine 2 per cent *de minimis* dumping margin level to reflect the high degree of variance and uncertainty resulting from crude methodologies. (TN/RL/W/6)

- discuss whether the current 3 per cent negligible volume threshold is sufficient to justify injury when the volume of total import itself is small. (TN/RL/W/6)

- consider the *de minimis* issue, with a view to making any adjustments to this provision applicable to imports from all Members. (TN/RL/W/47)

- increase the threshold volume of dumped imports which shall be regarded as negligible from 3 to 5 per cent for imports from developing countries. (TN/RL/W/4) (TN/RL/W/66)

- delete the stipulation that anti-dumping action can still be taken even if the volume of imports is below the threshold of 3 per cent, provided countries which individually account for less than the threshold volume, collectively account for more than 7 per cent of the imports. (TN/RL/W/4)

[27] See Section 58 *infra*.

- delete the provision that measures can still be taken if the imports from the countries under the negligible volume collectively account for more than 7 per cent. (TN/RL/W/66)

- revisit the role of *de minimis* in duty collection process. (TN/RL/W/6)

- clarify Article 5.8 to determine whether imports of all origins can be cumulated whether or not they are from WTO Member countries. (TN/RL/W/132)

Article 5
Initiation and Subsequent Investigation

(…)

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

(…)

38. Shorter Periods for Investigations

- discuss whether the periods set out in Article 5.10 of the Agreement on Anti-Dumping could be significantly shortened (this discussion would also have to reflect that shorter deadlines impose greater discipline on investigating authorities and interested parties).[28] (TN/RL/W/138)

[28] This proposal was submitted under the general title of "Proposals on Cost Saving in Anti-Dumping Proceedings" (TN/RL/W/ 138). See also Section 69 *infra*.

ARTICLE 6 - EVIDENCE

Article 6
Evidence

(…)

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.

(…)

39. Hearing and Meetings

- discuss whether further enhancement of Article 6.2 is necessary (currently the Agreement does not provide specific guidelines for implementing this provision or address the role of the administering authority). (TN/RL/W/35)

- discuss whether administering authorities should be required to provide notice and a summary of all meetings that they have with outside parties when the discussions pertain to proceedings under the Agreements. (TN/RL/W/35)

- include a requirement in Article 6 similar to Article 3 of the *Agreement on Safeguards*, which requires a public hearing or other appropriate means by which interested parties can present evidence and views, including the opportunity to respond to the submissions of other parties. (TN/RL/W/47)

Article 6
Evidence

(…)

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

(…)

40. Availability of Relevant Information from National Authorities

- enhance provisions concerning timely information and feedback (currently, there is no definition of what timely is and no specific guidance for national authorities).[29] (TN/RL/W/35)

- give a definition of the term "timely", in order to clarify the period of time involved and establish a fixed interval, so as to guarantee due process for the parties involved and transparency throughout the proceeding, thereby avoiding different interpretations of the same provision by the competent authorities of each Member.[30] (TN/RL/W/132)

- discuss the issue of providing access to non-confidential information; for example, consider ways in which interested parties could be granted access to non-confidential information as soon as it is submitted to national authorities, regardless of whether the national authorities ultimately rely upon the information for purposes of their determination.[31] (TN/RL/W/35)

41. Maintenance of a Public Record

- evaluate how a mechanism for providing access to non-confidential information used by national authorities in an investigation could operate (e.g. maintaining a public record of all non-confidential information submitted by the parties and all memoranda adopted or approved by the pertinent authority that explain the factual or legal bases for its determination or provide pertinent findings and conclusions in support of that determination).[32] (TN/RL/W/35)

[29] See Section 121 *infra* on the *SCM Agreement*.
[30] See Section 121 *infra* on the *SCM Agreement*
[31] See Section 121 *infra* on the *SCM Agreement*.
[32] See Section 122 *infra* on the *SCM Agreement*.

Article 6
Evidence

(…)

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.[17]

(…)

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

42. Treatment of Confidential and Non-Confidential Information

- reflect on ways to improve disclosure and access to non-confidential documents[33]. (TN/RL/W/13)

- examine the issue of treatment of confidential and non-confidential information. (TN/RL/W/86)

- discuss the nature and treatment of confidential information. (TN/RL/W/81)

- discuss the issue of domestic legislation of countries on the different types of information. (TN/RL/W/81)

- discuss criteria for the preparation of non-confidential summaries. (TN/RL/W/81)

- provide clear rules as to how non-confidential summaries should be prepared; give guidance with regard to all areas where non-confidential summaries have to be submitted including for transaction-by-transaction listings and information on cost of production; provide for the possibility of a review of such summary, e.g. by a "Permanent Group of Experts" type of body serviced by the WTO Secretariat; ask Members to establish domestic rules allowing for independent review of non-confidential summaries upon request by an interested party; built upon Article 13 of the *Anti-Dumping Agreement* as a basis for this option.[34] (TN/RL/W/138)

- establish a time-limit for a party to supply a non-confidential summary. (TN/RL/W/44)

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[33] See also Section 69 *infra* (TN/RL/W/138).

[34] This proposal was submitted under the general title of "Proposals on Cost Saving in Anti-Dumping Proceedings" (TN/RL/W/ 138). See also Section 69 *infra.*

- discuss whether each Member should have in place a system to allow access for appropriate persons to confidential information; such a system must incorporate appropriate measures to ensure the proper protection of confidential information.[35] (TN/RL/W/35)

- consider establishing requirements for Members to maintain specific procedures to protect confidential information from unauthorised disclosure.[36] (TN/RL/W/35)

- consider how access to information might be improved to ensure that parties have a proper understanding of the matter (this might include greater recourse to disclosure of information under protective order with appropriate penalties to discourage the misuse of such information). (TN/RL/W/47)

- discuss whether a distinction should be made in Article 6.5 between information which is considered to be by nature confidential and information which is provided on a confidential basis, or whether the claim should be for information which is confidential. (TN/RL/W/44)

- discuss the possibility of including an illustrative list setting out what information can be considered confidential. For example, information could be considered confidential if its disclosure would be likely *inter alia*:

- To be of significant competitive advantage to a competitor;
- To have a significant adverse effect upon the party who submitted the information, or the party from whom the information was acquired by the party who submitted the information;
- To have significant adverse effect upon any party to whom the information relates;
- To prejudice the commercial position of a person who supplied or who is the subject of the information;
- To prejudice the security or defence of a Member, or the international relations of a Member;
- To prejudice the entrusting of information to the authorities of a Member;
- To prejudice the supply of similar information or information from the same source;
- To disclose a trade secret;
- To effect the maintenance of legal privilege. (TN/RL/W/44)

- alternatively, discuss the possibility of identifying matters, a definition, or type of information, which would constitute, or be considered to be, "non-confidential" information. (TN/RL/W/44)

- discuss the introduction of a statement in the *Anti-dumping Agreement* Article 6.5 that information that is in the public domain cannot be considered to be confidential. (TN/RL/W/44)

- define the meaning of the term "upon good cause being shown". (TN/RL/W/44)

- define the meaning of the expression "demonstrated to their satisfaction from appropriate sources that the information is correct" in Article 6.5.2. (TN/RL/W/44)

[35] See Section 123 *infra* on the *SCM Agreement*.
[36] See Section 123 *infra* on the *SCM Agreement*.

- give special consideration in the case of claims of material injury for the use of indices or ranges as being the appropriate/preferred method of providing a non-confidential summary of such information; consider whether this should be an option for all numeric data, for example responses provided in exporter questionnaires. (TN/RL/W/44)

Article 6
Evidence

(…)

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.

(…)

43. Conduct of Verifications

- discuss steps to make verification procedures clearer (e.g. authorities could provide exporting Members and their firms with detailed outlines prior to verification specifying what topics will be covered and what type of supporting documentation will be required; a report on the verification findings should be issued to all interested parties as soon as possible).[37] (TN/RL/W/35)

- explore whether and to what extent standard procedures for on-spot verifications would help (the provisions of Annex I of the *Anti-Dumping Agreement* are a good starting-point for further clarifications in this respect).[38] (TN/RL/W/138)

[37] See Section 124 *infra* on the *SCM Agreement.*

[38] This proposal was submitted under the general title of "Proposals on Cost Saving in Anti-Dumping Proceedings" (TN/RL/W/ 138). See also Section 69 *infra*.

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 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[15] 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.

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[16] 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.

(…)

6.6 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.

(…)

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[15] 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.

6.8 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.

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

(…)

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

(…)

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

(…)

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 do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. 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.

44. Facts Available [39]

- elaborate more stringent rules to provide more clarity to discipline the excessive use of "facts available". (TN/RL/W/6)

- establish objective criteria for determining when the implementing authority considers that the best information available should be used. (TN/RL/W/81)

- examine criteria that could be used to determine whether or not to grant an extension of time for information and before facts available can be used (the Working Group on Implementation's criteria could form a basis of criteria in the *Anti-Dumping Agreement*). (TN/RL/W/86)

- specify the circumstances in which an investigating authority may resort to total facts available. In other situations the investigating authority shall be required to take into consideration all information which meets the criteria of Annex II:3, although some other information may not meet this criteria. (TN/RL/W/26)

- amend the current text of Article 6.8 to explicitly state that “facts available” are to be used only for the purpose of substituting missing or rejected information; examine how the concept of “significant impediment”, which may be a cause of misinterpretation due to its ambiguity, has been applied, and thus whether it is appropriate to maintain this concept in the Agreement, and instead to add the concept of “refusal of verification” to clarify that facts available can be used also in a situation where an interested party refuses verification of necessary information. (TN/RL/W/93)

- amend Annex II.1 to provide that authorities may not resort to “facts available” in an investigation or review unless the authorities have made all reasonable efforts to obtain necessary information from respondents; to fulfill the reasonable effort requirement, the authority must notify the respondent in detail of information which was insufficient in the response to the authorities’ questionnaire; the authority must also permit the respondent to submit the required information within a reasonable

[39] See Section 125 *infra* on the *SCM Agreement*.

period of time; in this connection, "a reasonable period of time" must be determined on a case-by-case basis in the light of the specific circumstances of each investigation. (TN/RL/W/93)

- amend Annex II.3 to make it mandatory for authorities to use any and all submitted information that is verifiable, germane to the investigation and not proven to be inaccurate, as well as complying with the other requirements set out in Annex II. 3. (TN/RL/W/93)

- amend Annex II.7 to provide that authorities shall choose, whenever authorities resort to facts available in accordance with the *Anti-Dumping Agreement*, information from a secondary source that properly represents the prevailing state of the industry or the relevant market with respect to the missing or rejected information; the information shall be chosen, where practicable, based on an objective examination of all information obtained by authorities during the course of an investigation/review in light of the requirements set out in Annex II.7. (TN/RL/W/93)

- (in connection with above) amend Article 6.6 so that the distinction between the authority's obligation with respect to an "Article 6.8 situation" and the other situation is eliminated; for this purpose, delete the exception clause at the beginning of Article 6.6 and the phrase "supplied by interested parties". (TN/RL/W/93)

- improve the last sentence of Annex II.7 by clarifying that a party shall be regarded as being cooperative, *inter alia*, if the party provided a substantial portion of the entire information requested by authorities and substantially all of that information could be verified, or if the party made reasonable efforts to submit the requested information in light of its ability to submit the information and its ability to fulfill the instructions provided by the authorities. (TN/RL/W/93)

- amend Annex II.6 to provide that when the authorities resort to "facts available", they must either in the preliminary determination or in the disclosure pursuant to Article 6.9, provide a sufficient explanation of the reasons why the submitted information has been totally or partially rejected and specifically identify the information that the authorities intend to substitute for the rejected information; due regard must be given to confidential information relating to the disclosure in accordance with Articles 6.4 and 6.5. (TN/RL/W/93)

45. Disclosure / Evidence

- consider whether the Agreement should be clarified as to what constitutes "sufficient time for parties to defend their interests" as well as to what constitutes adequate disclosure of the "essential facts" in the context of Article 6.9 of the Agreement.[40] (TN/RL/W/98)

- address the lack of indication of the period of time necessary for the parties to make their comments in defence of their interests and the lack of an indicative list of the elements which the communication should contain, with a view to standardizing the criteria and avoiding significant differences between one investigation and another, depending on the Member concerned.[41] (TN/RL/W/132)

- clarify rules on disclosure (Art. 6.9 of the *Anti-Dumping Agreement*); any rules on disclosure should aim at defining the minimum information to be given.[42] (TN/RL/W/138)

[40] See Section 126 *infra* on the *SCM Agreement*.
[41] See Section 126 *infra* on the *SCM Agreement*.
[42] This proposal was submitted under the general title of "Proposals on Cost Saving in Anti-Dumping Proceedings" (TN/RL/W/ 138). See also Section 69 *infra*.

- consider whether a requirement might be warranted for a disclosure meeting for the authorities to review with the interested parties, upon request, how the dumping margins and countervailing duty rates were calculated. (TN/RL/W/130)[43]

- consider improving the existing provisions on evidence (i.e. Article 6) by providing exporters or producers subject to investigation with an additional opportunity for defence through presenting evidence that:

(a) they are not earning above-market profit margins in their home market; or

(b) there does not exist any home-market sanctuaries that enable them to enjoy artificial advantages (e.g. evidence of open markets, like, free entry to domestic markets, low tariffs, etc.). (TN/RL/W/129)

[43] See Section 126 *infra* on the *SCM Agreement*.

Article 6
Evidence

(…)

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.

(…)

46. Treatment in Case of a Large Number of Exporters, Producers, Importers or Types of Products

- elaborate clear and precise criteria for the application of Article 6.10, particularly to clarify terms like "reasonable number" or "largest percentage of the volume … which can reasonably be investigated". (TN/RL/W/29)

- ensure that relevant criteria of representativeness are established. (TN/RL/W/29)

- qualify the situations where samples may be used. (TN/RL/W/29)

47. Favoured Exporter Treatment

- consider whether changes to the Agreement should be made to specifically prohibit the practice of excluding by name, *ab initio*, certain favoured exporters from any investigation and from coverage of any eventual anti-dumping measure, even though they produce merchandise like that which is under investigation.[44] (TN/RL/W/98)

48. Procedural Issues / Sampling

- clarify the precise manner by which a statistically valid sample can be developed (e.g. what are the relevant characteristics of the underlying population, and what is the relationship between the available sampling units and the parameter value to be estimated?).[45] (TN/RL/W/78)

[44] See Section 145 *infra* on the *SCM Agreement*.
[45] See Section 164 *infra* on the *SCM Agreement* and Section 69 *infra* on the *Anti-Dumping Agreement*.

Article 6
Evidence

(…)

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.

(…)

49. Interested Parties

- consider taking industrial users and consumer organizations into account in the definition of "interested parties" in the *Anti-Dumping Agreement*, with a view to securing them the opportunity, if they so wish, to fully participate in anti-dumping investigations since their initiation. [46] (TN/RL/W/104)

[46] See Section 127 *infra* on the *SCM Agreement* and Section 72 *infra* on the *Anti-Dumping Agreement*.

ARTICLE 7 – PROVISIONAL MEASURES

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, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

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

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.

50. Provisional Measures

- consider harmonizing the provisions of the *Anti-Dumping* and *SCM Agreement* regarding the application of provisional measures, especially the prohibition of collecting provisional duties.[47](TN/RL/W/104)

[47] See Section 137 *infra* on the *SCM Agreement* and Section 68 *infra* on the *Anti-Dumping Agreement*.

ARTICLE 8 - PRICE UNDERTAKINGS

Article 8
Price Undertakings

8.1 Proceedings may[19] 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.

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, 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.

(…)

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[19] 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.

51. Price Undertakings

- define what should constitute “satisfactory voluntary undertakings”. (TN/RL/W/10)

- elaborate Articles 8.1 and 8.3 to limit the discretion of investigating authorities in rejecting proposals for price undertakings, such as the expressions of "satisfactory voluntary undertakings" and "reasons of general policy". (TN/RL/W/66)

- agree on more specific provisions relating to price undertakings, seeking answers to some questions including the following:

- How to determine the undertaking 'price' to be given in a price undertaking? [Article 8.1]

- What shall be treated as 'satisfactory' and what shall be 'unsatisfactory' price undertaking? [Article 8.1]

- Relevant conditions for non-acceptance of price undertakings shall be more specifically clarified [Article 8.3]. (TN/RL/W/26)

- define "reasons of general policy" in the context of refusal by authorities of proposals for price undertakings in Article 8.3. (TN/RL/W/10)

- confirm that price undertakings need only eliminate injurious effects of dumping. (TN/RL/W/10)

- take into account the needs of developing countries. (TN/RL/W/10)

- consider ways to provide appropriate methodologies for the calculation of a duty that is less than the full margin of dumping but which is adequate to remove the injury to the domestic industry.[48] (TN/RL/W/47)

- provide that developed countries shall accept price undertaking proposals from developing country exporters as long as the undertaking offsets the dumping margin determined; even in cases where the actual or potential exporters are great, the investigating authorities shall accept such proposals from those cooperating exporters whose share individually in the total exports from the targeted country where the exporters are located to the importing developed country Member is more than 10%. (TN/RL/W/66)

- establish inappropriateness of a level of price undertaking that implies a price increase higher than necessary to remove injury. (TN/RL/W/29)

- give an outline of the procedure to be followed in cases where only some exporters submit price undertakings, and of the treatment applicable to the others. (TN/RL/W/81)

- clarify that the authorities in the importing country cannot require all exporters, the majority of exporters or a specific proportion of the exporters to offer price undertakings as a condition for the acceptance of price undertaking offers from one or a limited number of exporters. (TN/RL/W/118)

- require authorities to provide, in a public notice, the criteria and reasons for non-acceptance of a price undertaking offer, and to permit, before a final decision is taken and within the time-limits of the investigation, comments from the exporter offering the price undertaking. (TN/RL/W/118)

- minimize the wide level of discretion and ambiguity contained in Article 8.3; this include, *inter alia*, to clarify that the existence of a large number of exporters in itself is not a valid reason for rejection, except in clearly defined exceptional circumstances, including when compliance cannot be monitored. (TN/RL/W/118)

- clarify that price undertaking offers shall be accepted if they offset injury caused by dumping and comply with the procedures and other conditions necessary for the implementation of the price undertaking. (TN/RL/W/118)

- clarify that authorities, prior to the preliminary determination of injury and dumping, shall inform exporters of their right to offer price undertakings as well as make known to them the applicable rules and procedures to be followed in requesting consideration of price undertakings, including any procedural deadlines. (TN/RL/W/118)

[48] See Section 52 *infra*.

- clarify that exporters have the right to request an adjustment of the price undertaking if there are changes in circumstances, including situation where domestic market price falls below the level stipulated in the price undertaking. (TN/RL/W/118)

- clarify that price undertakings should be implemented in good faith and in a predictable manner, and that they should not be terminated merely because of minor non-compliance of procedural requirements, provided the substantive commitments are respected. (TN/RL/W/118)

ARTICLE 9 - IMPOSITION AND COLLECTION OF ANTI-DUMPING DUTIES

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.

(…)

52. Lesser duty

- make the lesser duty rule mandatory while imposing an anti-dumping duty against imports from a developing-country Member by any developed-country Member. (TN/RL/W/4) (TN/RL/W/66)

- make the lesser duty rule mandatory when investigating dumping of imports from a developing country. (TN/RL/W7)

- consider the mandatory application of the lesser duty rule by developed Members in anti-dumping proceedings concerning developing Members. (TN/RL/W/110)

- discuss a mandatory lesser duty rule. (TN/RL/W/13)

- consider ways to provide appropriate methodologies for the calculation of a duty that is less than the full margin of dumping but which is adequate to remove the injury to the domestic industry.[49] (TN/RL/W/47)

- discuss the appropriateness of applying anti-dumping duties that are higher than necessary to counteract injury. (TN/RL/W/6)

- discuss the appropriateness of imposing and collecting duties when a *de minimis* margin is determined for the collection of duty. (TN/RL/W/7)

- discuss whether there should be a distinction between mandatory consideration and mandatory application of the lesser duty rule. (TN/RL/W/86)

- discuss whether there should be some distinction in the application or consideration of the lesser duty rule depending on the country of export. (TN/RL/W/86)

- discuss whether there are situations when the lesser duty rule would be inappropriate, e.g., where systematic and persistent dumping in a particular product has disrupted world markets. (TN/RL/W/86)

- amend Articles 9.1, 9.3 and 9.4[50] to provide for the mandatory application of the lesser duty rule. (TN/RL/W/119)

[49] See Section 51 *supra*.

- add a new sub-article after the current Article 9.1 to explain that: (i) the calculation of the lesser duty level must be based on a methodology which will be provided in Annex III; and (ii) the lesser duty level shall only apply if it is lower than the margin of dumping. (TN/RL/W/119)

- add a new Annex III which provides that the lesser duty level shall be calculated in accordance with the following methods and that the calculation of the lesser duty level shall take full account of the obligation set out in Article 3.5 to separate the injurious effects of other factors from the dumped imports, so as not to attribute these effects to the lesser duty level:

- price undercutting method: the lesser duty level is calculated as the difference between the price, normally at the ex-factory level, of the domestic like product and the CIF landed price of the dumped imports; with appropriate adjustment based on differences affecting price comparability between the domestic like product and the imported product including market characteristics affecting customers' purchase decision between them in the market of the importing Member;

- representative cost plus profit method: the lesser duty level is calculated as the difference between the representative per unit cost of production, selling, general and administrative costs ("SG&A"), and profit of the domestic like product; and the CIF landed price of the dumped imports; with appropriate adjustment based on differences affecting the price comparability between the domestic like product and the imported product including market characteristics affecting customers' purchase decision between them in the market of the importing Member;

- non-dumped import price method: the lesser duty level is calculated as the difference between the CIF landed price of the non-dumped imports of the like products and the CIF landed price of the dumped imports. (TN/RL/W/119)

- ensure in Annex III that Article 2.4, including the prohibition of zeroing, applies *mutatis mutandis* to the calculation of the lesser duty level. (TN/RL/W/119)

[50] See text of Articles 9.3 and 9.4 in the following pages.

Article 9
Imposition and Collection of Anti-Dumping Duties

(…)

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.

(…)

53. Exclusion of Companies

- consider whether the Agreement needs to be clarified specifically to ensure that any examined exporter or producer found not to be dumping during an investigation may not be covered by any measure which results from that investigation.[51] (TN/RL/W/98)

[51] See Section 143 *infra* on the *SCM Agreement.*

Article 9
Imposition and Collection of Anti-Dumping Duties

(…)

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

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

(…)

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[20] 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.

54. Imposition and Collection of Duties

- clarify and improve the rules on imposition and collection of duties when a *de minimis* margin is determined for the collection of the duty. (TN/RL/W/7)

- discuss the different assessment methodologies (retrospective and prospective) with a view to creating more predictable duty enforcement systems so that exporters and importers can operate in a more certain environment, while providing the requisite protection from material injury to the domestic industry. (TN/RL/W/47)

55. Accrual of Interest

- consider whether changes to the Agreement may be necessary to address the lack of a provision requiring payment of interest on any excess monies collected and held by the importing Member.[52] (TN/RL/W/98)

56. Refund or Reimbursement of the Duty Paid in Excess

- improve the provisions regarding reimbursement of duties paid in excess. (TN/RL/W/104)

- consider whether the *Anti-Dumping* and *SCM Agreements* should be equally precise in the provisions regarding reimbursement of duties paid in excess.[53] (TN/RL/W/104)

- insert a provision guaranteeing the payment of interest on refunded anti-dumping duties in Article 9.3. (TN/RL/W/110)

[52] See Section 140 *infra* on the *SCM Agreement*.
[53] See Section 144 *infra* on the *SCM Agreement* and Section 68 *infra* on the *Anti-Dumping Agreement*.

Article 9
Imposition and Collection of Anti-Dumping Duties

(…)

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.

(…)

57. "All-Others" Rate

- discuss whether it is logical to require authorities to ignore zero/*de minimis* margins in the calculation of all-others rate, regardless of the fact that zero and *de minimis* margins also represent actual performance of exporters/producers from the exporting country. (TN/RL/W/10)

- improve Article 9.4 so that *de minimis* margins are considered for the determination of "all others" rate for exporters/producers which are not sampled. (TN/RL/W/66)

- consider whether Article 9.4 should be clarified to permit appropriate use of dumping margins which may include limited amounts of facts available information in calculating the all-others rate.[54] (TN/RL/W/72)

- remove the present uncertainty arising from the present lacuna (Article 9.4 prohibits the use of certain margins in the calculations of the ceiling for the all-others rate but does not address the issue of how that ceiling should be calculated in the event that all margins are excluded), by adopting a

[54] See Section 141 *infra* on the *SCM Agreement*.

provision like that in Article 2.2.2(iii), i.e. determining dumping margins by "any other reasonable method". (TN/RL/W/90)

- improve Article 9.4 in order to ensure that the "all-other" rate can be calculated using an appropriate and reasonable method in circumstances where exporters and producers investigated have been found to cooperate insufficiently (in certain circumstances it would be appropriate to take into account dumping margins that are based on constructed normal values for the determination of the "all-others" rate; experience has shown that this may reveal necessary in situations where a limited amount of facts available was used during the investigation in the anti-dumping margin determination). (TN/RL/W/110)

ARTICLES 9 AND 11 - REVIEWS

Article 9
Imposition and Collection of Anti-Dumping Duties

(…)

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 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. 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. 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.

Article 11
Duration and Review of Anti-Dumping Duties and Price Undertakings

(…)

11.2 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 anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[21] 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. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

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 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.[22] The duty may remain in force pending the outcome of such a review.

(…)

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[21] 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.

[22] 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.

58. Reviews[55]

(Article 9.3 - anti-dumping duty assessment)

(Article 9.5 - new shipper reviews)

(Article 11.2 - revocation reviews)

(Article 11.3 - sunset reviews)

- clarify the rules/disciplines pertaining to the review of existing anti-dumping measures. (TN/RL/W/1) (TN/RL/W/86)

- provide a clear methodological framework for reviews.[56] (TN/RL/W/138)

- address the absence of clear criteria and procedures for the initiation of final reviews and reviews upon request, and for the determinations resulting therefrom. (TN/RL/W/7)

- clearly articulate the concepts, procedures and methodologies applicable to reviews under Article 9.3 (anti-dumping duty assessment), Article 9.5 (new shipper reviews), Article 11.2 (revocation reviews) and Article 11.3 (sunset reviews). (TN/RL/W/10)

- clarify that the provisions of Articles 2 (Determination of Dumping), 3 (Determination of Injury), 4 (Definition of Domestic Injury), 5 (Initiation and Subsequent Investigation), and 6 (Evidence) shall apply to the reviews, whenever applicable, under Articles 9.3, 9.5 and 11.2, with the exception of the specific rules concerning these reviews (In particular, the *de minimis* rule and/or its threshold in Article 5.8 should be applied to these reviews to the extent that it is appropriate. In any case, the *de minimis* threshold should be applied to duty assessment conducted under Article 9.3. In addition, the same methodology that was applied to the original investigation for comparison between the normal price and the export price as stipulated in Article 2.4.2 should be applied to these reviews unless a different methodology is requested by the exporters). (TN/RL/W/83)

- examine minimum standards of information for the initiation of reviews and elements of analysis in relation to the recurrence of dumping and injury. (TN/RL/W/81)

- apply same rules as those used in the initial investigation to reviews. (TN/RL/W/10)

- formulate clear provision in the *Anti-Dumping Agreement* to require that the procedures and methodologies used in the initial investigation shall be applied in the reviews under Articles 9.3, 9.5, 11.2 and 11.3. (TN/RL/W/66)

- clarify the Agreement to stipulate which, if any, provisions that were originally intended to apply to initial investigations also apply to the various review provisions under the Agreement; in cases where, because of the fundamental differences between initial investigations and reviews, certain provisions of the Agreement cannot be reasonably applied to reviews, consideration should be given to providing rules that apply specifically to reviews.[57] (TN/RL/W/47)

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[55] See Sections 13 and 15 *supra*.

[56] This proposal was submitted under the general title of "Proposals on Cost Saving in Anti-Dumping Proceedings" (TN/RL/W/ 138). See also Section 69 *infra*.

[57] See Section 146 *infra* on the *SCM Agreement*.

- ensure application of the *de minimis* dumping margin of 5 per cent in refund and review cases. (TN/RL/W/4)[58]

- limit to a maximum of 12 months the duration of reviews stipulated in Article 11.4. (TN/RL/W/10) (TN/RL/W/66)

- examine whether or not there should be mandatory deadlines for review investigations and whether these deadlines could be significantly shorter than the ones which are currently applicable for new investigations.[59] (TN/RL/W/138)

- add a new provision to Article 11 whereby a review can be undertaken on the basis of positive evidence submitted by any interested party based on the findings of a judicial review establishing that the underlying investigation was flawed. (TN/RL/W/26)

- discuss the appropriateness of an expansive use of sunset reviews to continue anti-dumping orders. (TN/RL/W/6)

- provide that all anti-dumping measures shall remain in force only for as long as and to the extent necessary to counteract dumping which is causing injury and shall without exception be terminated at the latest 5 years from the imposition of the order. (TN/RL/W/76)

- provide that a Member shall not initiate a new anti-dumping investigation, either on its own initiative or based on a petition, until a date no sooner than one year following the termination of the anti-dumping measure, unless there are exceptional circumstances that justify the initiation in a shorter period, which shall not be less than six months; the authority shall give a full description of the exceptional circumstances and present the reasons justifying the initiation of the investigation within such a shorter period in the public notice of initiation. (TN/RL/W/76)

- adopt "automatic sunset" of anti-dumping measures, and allow a one year grace period until re-investigation. (TN/RL/W/111)

- establish that anti-dumping measures taken by developed country Members against exports from developing country Members shall automatically cease after five years, and that no application to initiate new investigations against the same products from the same developing country shall be accepted before 365 days after the previous measures have ceased. (TN/RL/W/66)

- clarify the circumstances that might lead to the continuation of a measure, and provide an indicative list of factors that authorities should consider in determining whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[60] (TN/RL/W/47)

- improve the rule so that the reviews are not unfairly extended to the prejudice of responding parties (to this end, clarify (1) that reviews under Articles 9.3 and 11.2 must be completed within 12 months, (2) that authorities are encouraged to pay interest at a reasonable rate if duties are not refunded within 90 days following the completion of the review and (3) that reviews under Article 9.5 must be completed within 9 months after the date on which a request for a review has been made, unless an extension of the procedure is requested by the new shipper). (TN/RL/W/83)

- apply the 12-month time-limit set forth in Article 11.4 to sunset reviews. (TN/RL/W/110)

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[58] See Section 37 *supra*.

[59] This proposal was submitted under the general title of "Proposals on Cost Saving in Anti-Dumping Proceedings" (TN/RL/W/ 138). See also Section 69 *infra*.

[60] See Section 146 *infra* on the *SCM Agreement*.

- authorize members to amend the level of the measures imposed following sunset reviews which concluded that injurious dumping was likely to continue or recur, in order to guarantee under Article 11.3 the "adequate" character of anti-dumping measures stated in Article 9.1. (TN/RL/W/110)

- include guidelines for expeditious reviews for new exporters. (TN/RL/W/7)

- determine whether Article 9.5 needs to be clarified in order to prevent misuse of the special provisions for new shippers.[61] (TN/RL/W/72)

- establish detailed procedural guidelines on how to conduct new exporter reviews, with a particular emphasis on situations where export prices are not known because the company concerned has not yet effected exports but intends to sell to the country which imposed an anti-dumping measure. (TN/RL/W/81)

- improve Article 9.5 in order to prevent its use by exporters and producers subject to anti-dumping measures as a circumventing instrument; such improvement could be achieved by examining, among other elements, the circumstances in which the initiation of newcomer reviews can be requested, the newcomer review procedure and duration and the measures applicable to new exporters or producers while newcomer reviews are carried out. (TN/RL/W/110)

- clarify that the request for Article 9.3 reviews can only be made by exporters or importers. (TN/RL/W/83)

- clarify that the margin of dumping in an Article 9.3 review shall be based on all imports from a specific exporter that were entered into the importing Member for not less than one year, and not on an individual import basis. (TN/RL/W/83)

- clarify, through the development of *harmonized indicative lists* relating to the assessment of dumping and the "likelihood of injury" under Article 11.2, that the burden of proof is on those parties advocating the continuation of the anti-dumping order (as for the assessment of dumping, the following points shall be included in the *harmonized indicative list*, (1) dumping margins to be considered are those based on current market conditions and pricing, not the pricing during the period of the original investigation; and (2) in case the measure is subject to reviews after the original measure, the authorities shall rely on the margin found in the most recent review; (3) if no dumping margin has been found, the "likelihood of injury" test shall not apply and the measure shall be terminated. The following points should be included in the *harmonized indicative list* with respect to the assessment of the "likelihood of injury", (1) the likelihood of injury caused by the imports shall be based on the current competitive circumstances of the domestic industry and the relevant exporters, and not on information from the original investigation; (2) the authorities shall conduct their examination in accordance with Article 3 of the *Anti-Dumping Agreement*, based on facts, and not merely on allegation, conjecture or speculation; (3) the determination made by the authorities whether the continuation of the anti-dumping duty is warranted or not, shall be based on the current volume of the dumped imports). (TN/RL/W/83)

- explore the differences between reviews under Articles 11.2 and 11.3, going beyond the issue of the point in time at which such reviews may be conducted and the parties that may request them. (TN/RL/W/81)

- consider whether there should be a greater symmetry between the provisions of Article 19.3 of the *SCM Agreement* and Article 9.5 of the *Anti-Dumping Agreement* with regard to the basis on which such reviews must be carried out. (TN/RL/W/104)[62]

[61] See Section 146 *infra* on the *SCM Agreement*.

ARTICLE 10 - RETROACTIVITY

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.

59. Retroactivity

- consider whether the end result of the discussions on the issue of retroactivity should reflect a symmetry between the *Anti-Dumping* and the *SCM Agreement.*[63] (TN/RL/W/104)

60. Critical Circumstances

- consider clarifying what provisional steps are appropriate to preserve the right to impose duties retroactively (where there is a finding of critical circumstances); clarify and improve Article 10.6 in order to make it more effective (provide a sufficient remedy).[64] (TN/RL/W/72)

[63] See Section 147 *infra* on the *SCM Agreement* and Section 68 *infra* on the *Anti-Dumping Agreement*.
[64] See Section 148 *infra* on the *SCM Agreement*.

ARTICLE 12 - PUBLIC NOTICE AND EXPLANATION OF DETERMINATIONS

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[23], adequate information on the following:

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

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

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

(v) 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 for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

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

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

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

(iv) considerations relevant to the injury determination as set out in Article 3;

(v) the main reasons leading to the determination.

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, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters 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 the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

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[23] 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.

61. Public Notice and Explanation of Determinations / Transparency

- improve standards and procedures for public notices and explanations of determinations; such procedures should provide the public and any interested party with all facts, methods and assessments, including a detailed description on how the exact results relating to dumping and injury determination have been derived at, in order to allow independent scrutiny. (TN/RL/W/29)

- revisit Article 12.1 in order to seek greater clarification and detail and to guarantee transparency in the investigation since its initiation (Article 12.1 establishes that adequate information on different aspects of the investigation should be introduced either in the public notice or in a separate report, however, it does not mention fundamental information such as the period under investigation for dumping and injury, as well as the conclusions reached by the investigating authorities upon the evidence presented in the public notice). (TN/RL/W/29)

- further detail Articles 12.2.1 and 12.2.2 in order to guarantee that the relevant and necessary explanations will be made available; for example:

- consider whether it would be worth mentioning that where the investigating authority should adopt the normal price of exportation for a third country, it should explain the criteria used for selecting the third country;

- consider whether, in case of using samples as provided in Article 6.10, the criteria for the selection should be explained;

- consider whether in case of using the constructed price, the investigating authority should explain the reasons for choosing certain criteria for establishing the amounts of administrative costs, of sales and general costs, as well as the amount of profit;

- consider whether the investigating authorities should be required to present the analysis on the impact of other factors on the domestic industry. (TN/RL/W/29)

- examine the issue of transparency in investigatory procedures. (TN/RL/W/86)

- consider ways to promote greater disclosure of decisions and calculations performed; for example, investigating authorities could be required to give detailed descriptions of decisions made, the facts on which those decisions were based and the calculation methodology applied to determine the dumping margin.[65] (TN/RL/W/35)

- provide definition of "sufficient detail" in Article 12. (TN/RL/W/35)

- consider bolstering the information requirements in Article 12 of the *Anti-Dumping Agreement* in order to ensure greater transparency and procedural fairness. (TN/RL/W/47)

- lay down guidelines with respect to the level of detail required in determinations [66]. (TN/RL/W/132)

[65] See Section 149 *infra* on the *SCM Agreement*.
[66] See Section 149 *infra* on the *SCM Agreement*.

- develop a detailed and practical guide to best practice options for implementing transparency provisions in the AD Agreement; have a draft document developed on which to base further discussions; options on how this work could be progressed include:

- having the matter taken up in the Working Group on Implementation;
- establishing a “transparency working group” under the auspices of the Rules Group;
- asking the Secretariat to develop a draft document; or
- commission some work from outside sources. (TN/RL/W/137)

ARTICLE 13 - JUDICIAL REVIEW

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.

62. Judicial Review

- discuss whether Members should provide additional information on procedures within their respective countries for pursuing legal recourse in an anti-dumping case (e.g. identify the court or other judicial system put in place and explain how that legal system operates). [67] (TN/RL/W/35)

[67] See Section 150 *infra* on the *SCM Agreement*.

ARTICLE 15 - DEVELOPING COUNTRY MEMBERS

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.

63. Special and Differential Treatment for Developing Country Members[68]

- establish a special and clearly defined developing country package once clear, effective and updated rules for all WTO Members have been discussed. (TN/RL/W/13)

- take account in the course of the negotiations of the situation of small economies more vulnerable to the harm caused by unfair trade practices, as well as the situation of developing country Members, bearing in mind that the scope of special and differential treatment should be confined to operations between developed countries and developing countries. (TN/RL/W/36)

- develop the terms of Article 15 to make the provision fully operational; for instance, elaborate on the idea of "special regard" and "constructive remedies" (provisions could be developed both as for the exemplification of ways to give "special regard" and constructive remedies that should be explored by the authorities of the developed country and as regards the procedures to be followed in each situation). (TN/RL/W/46)

- consider including specific provisions to give developing country members meaningful and effective S&D treatment. (TN/RL/W/46)

- "special regard", "special situation", and "essential interests of developing country Members", read together, shall be understood to require that developed country Members shall specifically take into account the development needs of developing and least-developed country Members particularly for sustainably maintaining or increasing market access for products of export interest to them; in this regard:

- the causal link between the fact of dumping and of injury on the one hand, to imports from developing and least-developed country Members on the other, shall be determined on a case by case basis taking into account the WTO goals of improving living standards in developing and least-developed country Members through growth in the trade of these countries, in a manner that

[68] The proposals listed under this Section are those that have been specifically referred to by participants as relating to the Special and Differential Treatment for Developing Country Members provision contained in Article 15 of the *Anti-Dumping Agreement*. Other proposals regarding developing country Members may be found under other Sections of this paper such as Sections 31, 37, 51, 52, 58.

demonstrates that the achievement of these goals in developing and least-developed country Members has duly been taken into account; and

- coherence shall be ensured between the *Anti-Dumping* and the *SCM Agreements* on the basis of the importance of sustainably maintaining or increasing market access for products of export interest to developing and least-developed country Members; and of maintaining their export competitiveness.[69] (Proposal refered to the NGR by the Chairman of the General Council, letter of 20 May 2003 to the Chairman of the NGR)

- "constructive remedies provided for by this Agreement" shall within the context of Article 15 be understood to include:

- consultations for mutually agreed solutions within the meaning of the paragraph above other than anti-dumping duties, price undertakings, or any action prohibited by the Agreement on Safeguards;

- internal reforms in developed country Members regarding market conditions, and employment and investment conditions to improve competitiveness on the basis of fair competition rather than taking anti-dumping measures against imports; and

- exploring solutions against anti-competitive practices if determined to have taken place, on the basis of taking into account and protecting the interests of domestic consumers, rather than taking any anti-dumping measures. (Proposal refered to the NGR by the Chairman of the General Council, letter of 20 May 2003 to the Chairman of the NGR)

[69] See Section 68 *infra*.

ARTICLE 17 - CONSULTATION AND DISPUTE SETTLEMENT

Article 17
Consultation and Dispute Settlement

(…)

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.

(…)

64. Standard of Review

- consider whether Article 17.6 should be addressed to ensure that panels and the Appellate Body properly apply it.[70] (TN/RL/W/130)

[70] See Section 168 *infra* on the *SCM Agreement*.

ARTICLE 18 - FINAL PROVISIONS

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.[49]

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.

18.4 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.

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

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

65. Detailed National Legislation/Regulation

- provide the Negotiating Group on Rules with a comprehensive overview of how Members have applied the procedural fairness provisions of the Agreement in their national laws, regulations and practices, as a starting point in the discussion on principles and procedures that could be adopted into the Agreement.[71] (TN/RL/W/35)

- encourage Members to provide binding regulations or other administrative guidelines that give the necessary details about the procedures their authorities use to conduct investigations.[72] (TN/RL/W/35)

[71] See Section 151 *infra* on the *SCM Agreement*.
[72] See Section 151 *infra* on the *SCM Agreement*.

OTHER ISSUES

66. Circumvention

- discuss appropriate ways to preserve the effectiveness of the anti-dumping instrument (prevent circumvention of anti-dumping measures). (TN/RL/W/13)

- negotiate uniform procedures to address the circumvention of anti-dumping measures.[73] (TN/RL/W/50)

- address the issue of circumvention; adopt principles in order to set a common framework for the adoption of anti-circumvention measures. (TN/RL/W/110)

67. Duty Refund

- consider having special dispute settlement provisions for the *Anti-Dumping Agreement* in cases where the imposition of duties under this agreement has been found to be inconsistent with the provisions of the agreement; these new provisions would require the return of anti-dumping duties or duty deposits in cases where a Member's compliance action with a DSB decision results in the measure being withdrawn, or a partial return of duties or duty deposits where the amount of duties/deposits that would have been collected under a WTO-compliant measure is less than the amounts actually collected.[74] (TN/RL/W/47)

68. Harmonization of the *Anti-Dumping Agreement* and the *SCM Agreement* [75]

- address divergences between similar provisions of the *Anti-Dumping* and the *SCM Agreements*, so that, where appropriate, differences in similar provisions of the two agreements are eliminated. (TN/RL/W/47)

69. Reducing the Cost of Investigations

- explore whether an improvement could be achieved by screening all procedural aspects with a view to identifying those areas where changes can bring about a reduction in the cost of co-operation while at the same time maintaining the quality of the investigation. (TN/RL/W/13)

- discuss the simplification and standardization of information collection, particularly at the initial stages of investigations. (TN/RL/W/13)

- identify areas where increased procedural fairness can reduce costs of investigations.[76] (TN/RL/W/35)

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[73] See Section 155 *infra* on the *SCM Agreement*.
[74] See Section 156 *infra* on the *SCM Agreement*.
[75] See Section 157 *infra* on the *SCM Agreement* and Sections 22, 30, 50, 56, 58, 59, 63 and 81 on the *Anti-Dumping Agreement*.
[76] See Section 158 *infra* on the *SCM Agreement*.

- explore standardizing verification outlines and the structure of verification reports.[77] (TN/RL/W/35)

- explore the possibility of model/standard questionnaires which are to be applied by Members carrying out AD investigations; examine whether or not it would be appropriate to have simplified questionnaires for SMEs. (TN/RL/W/138)

- explore whether and to what extent standard procedures for on-spot verifications would help (the provisions of Annex I of the *Anti-Dumping Agreement* are a good starting-point for further clarifications in this respect).[78] (TN/RL/W/138)

- discuss whether the periods set out in Article 5.10 of the *Anti-Dumping Agreement* could be significantly shortened (this discussion would also have to reflect that shorter deadlines impose greater discipline on investigating authorities and interested parties).[79] (TN/RL/W/138)

- examine whether or not there should be mandatory deadlines for review investigations and whether these deadlines could be significantly shorter than the ones which are currently applicable for new investigations.[80] (TN/RL/W/138)

- discuss whether the current ADA should be clarified by explicitly forbidding the mandatory representation by lawyers of a co-operating party. (TN/RL/W/138)

- provide clear rules as to how non-confidential summaries should be prepared; give guidance with regard to all areas where non-confidential summaries have to be submitted including for transaction-by-transaction listings and information on cost of production; provide for the possibility of a review of such summary, e.g. by a "Permanent Group of Experts" type of body serviced by the WTO Secretariat; ask Members to establish domestic rules allowing for independent review of non-confidential summaries upon request by an interested party; built upon Article 13 of the *Anti-Dumping Agreement* as a basis for this option[81]. (TN/RL/W/138)

- clarify rules on disclosure (Art. 6.9 of the *Anti-Dumping Agreement*); any rules on disclosure should aim at defining the minimum information to be given[82]. (TN/RL/W/138)

- provide a clear methodological framework for reviews.[83] (TN/RL/W/138)

- design new rules on injury analysis which give more precise guidance; examine whether one could find straightforward rules for a number of typical "extreme" cases (this could be achieved by providing guidance to the application of the factors listed in Article 3.2 and Article 3.4 of the *Anti-Dumping Agreement*; such guidance could be obtained by introducing more quantitative elements where possible).[84] (TN/RL/W/138)

70. Swift Control Mechanism for Initiations

- reflect on whether and under which conditions initiations of investigations could be made subject to a swift control mechanism. (TN/RL/W/13)

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[77] See Section 158 *infra* on the *SCM Agreement*.
[78] See Section 43 *supra*.
[79] See Section 38 *supra*.
[80] See Section 58 *supra*.
[81] See Sections 42 *supra*.
[82] See Section 45 *supra*.
[83] See Section 58 *supra*.
[84] See Section 23 *supra*.

- consider whether, and what circumstances, initiations of investigations could be made subject to a swift dispute settlement procedure under the Understanding on the Settlement of Disputes. (TN/RL/W/47)

- consider establishing "fast track initiation panels", which, ideally, would issue their recommendations before the actual imposition of measures. Procedures for fast track panels could contain e.g. the following elements:

- The grounds on which initiations can be challenged could be limited to a few key elements of the initiation. For instance the following three aspects could be subject to review: standing of complainants (Article 5.4), formal requirements for the application (Article 5.2(i) to (iv)), and accuracy and adequacy of evidence concerning dumping, injury and causal link (Article 5.3)

- Shortened period for consultation before the establishment of the fast-track panel

- Only one written submission and one hearing

- Shorter deadlines for submissions

- No interim review stage

- Shortened standard period for issuance of the report to the Parties and for its circulation to the other Members

- Obligation on the panel to issue suggestions on how to implement recommendations (alternatively one could think of a recommendation to terminate as the only possible recommendation if initiation panels find a violation)

- Short and standard "reasonable period of time" for implementation.[85] (TN/RL/W/67)

- consider providing for "binding arbitration", which could cover e.g. absence of evidence (i.e. any of the items listed in Article 5.2) or manifestly unsuitable evidence in the complaint, missing notification (Article 5.5). Arbitration should be requested quickly (perhaps within 10 days of initiation), be concluded in a short time (e.g. 30 days) and without appeal. Arbitration could be conducted on the basis of a "check-list" of the basic elements required for the initiation of an investigation and which fall within the scope of the arbitration.[86] (TN/RL/W/67)

- consider the creation of a "standing advisory body" (this body could be modelled upon the "Permanent Group of Experts" provided for in Article 24.3 of the *SCM Agreement*) to give a non-binding advisory opinion on the WTO legality of the initiation of an anti-dumping investigation; this body would report to the WTO Committee on Anti-Dumping Practices where Members could express their views on the report.[87] (TN/RL/W/67)

[85] See Section 159 *infra* on the *SCM Agreement*.
[86] See Section 159 *infra* on the *SCM Agreement*.
[87] See Section 159 *infra* on the *SCM Agreement*.

71. Technical Assistance / Capacity Building

- develop standardized training programs; organize meetings of administrators to learn and discuss technical issues [88] (TN/RL/W/35)

72. Public Interest

- clarify the rules/disciplines pertaining to the consideration of the broader public interest. (TN/RL/W/1)

- strengthen rules in order to ensure that relevant information pertaining to public interest is taken into account in a more substantive manner.[89] (TN/RL/W/6)

- discuss whether authorities should take into account the interests of the other economic sectors affected by the anti-dumping measure. (TN/RL/W/6)

- discuss the establishment of a public interest test (in terms of an examination of the impact on economic operators) as an additional condition before measures can be imposed. (TN/RL/W/13)

- examine the unintended effects of anti-dumping action and efforts to strengthen existing provisions of the Agreement so as to fully consider the consequences of anti-dumping duties for broader economic, trade and competition policy concerns. (TN/RL/W/47)

73. Concurrent Application of Anti-Dumping and Safeguard Measures

- suspend the imposition of anti-dumping measures or adjust the level of duty as long as the safeguard measure is enforced, in situations which result in concurrent imposition of anti-dumping and safeguard measures on the same product. (TN/RL/W/26)

74. Persistent Dumping

- address the issue of persistent dumping which may take two forms: (i) persistent dumping of the same product imported from different countries, (ii) persistent dumping of the same product, by the same producer/country, being exported to numerous countries around the world.[90] (TN/RL/W/72)

- in the case of persistent dumping of the same product imported from different countries, consider introducing rules providing for expedited procedures to determine whether the newly surging imports are being dumped and causing material injury. (TN/RL/W/72)

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[88] See Section 160 *infra* on the *SCM Agreement*.
[89] See Section 49 *supra*.
[90] See Section 163 *infra* on the *SCM Agreement*.

75. Repeated Dumping

- examine the issue of exporters of products that are found to be injuriously dumping a product in three or more Member jurisdictions; repeated dumping findings against the products of the same exporter and country may indicate an underlying practice or policy in the exporting country that should be addressed. (TN/RL/W/47)

76. Codification of Recommendations and Decisions

- consider the codification of some case law in anti-dumping matters. (TN/RL/W/86)

- codify in the Agreement the recommendations of the Anti-Dumping Committee's Working Group on Implementation concerning mutually agreeable practices with respect to the application of the *Anti-Dumping Agreement*, as well as any further recommendations made during the course of these negotiations. (TN/RL/W/47)

- consider whether some or all of the Dispute Settlement Body's interpretations of the *Anti-Dumping Agreement* should be incorporated into the Agreement.[91] (TN/RL/W/47)

77. Periods of Data Collection for Anti-Dumping Investigations

- provide guidelines for determining what period or periods of data collection may be appropriate for the examination of dumping and of injury. (TN/RL/W/29)

- ensure, with respect to original investigations to determine the existence of dumping and consequent injury, that the period of data collection for dumping investigations coincides with the period of data collection for investigating sales below cost. (TN/RL/W/29)

- ensure, with respect to original investigations to determine the existence of dumping and consequent injury, that the period of data collection for injury investigations includes the entirety of the period of data collection for the dumping investigation. (TN/RL/W/29)

78. Duty Absorption

- discuss and clarify the issue of duty absorption (when there appears to have been no or insufficient increase in the export price in response to the imposition of measures). (TN/RL/W/86)

79. Consultation Prior to Initiation

- consider supplementing a consultation provision to provide that prior to initiation of any investigation under Article VI, concerned Members shall consult with a view to (a) considering the evidence of dumping and injury; (b) identifying any trade distorting practices that may have led to a situation of injurious dumping; and (c) resolving any situation of injurious dumping and trade

[91] See Section 161 *infra* on the *SCM Agreement*.

distorting practices through appropriate settlement or undertaking; such consultations may also occur prior to the imposition of any anti-dumping duties. (TN/RL/W/129)

80. High Inflation Economies

- clarify relevant provisions to give better guidance with respect to special methodologies which may be necessary when an exporting country is experiencing very high levels of inflation. (TN/RL/W/130)

81. Consistent Use of Terminology

- review the use of terms within the *Anti-Dumping* and *Subsidies Agreements* as well as across the two agreements (such a review would reveal the inconsistent use of certain terms, which may have unintended consequences for the interpretation of the Agreements , for example, Article 6.7 of the *Anti-Dumping Agreement* provides for notifying "the representatives of the government of the Member" with respect to an in-country verification, by contrast, in elaborating on the same requirement, Annex I, paragraph 1 refers to notifying "the authorities of the exporting Member"; similarly, in what are otherwise equivalent provisions, Article 19.3 of the *SCM Agreement* uses the term "levied" where Article 9.2 of the *Anti-Dumping Agreement* uses the term "collected").[92] (TN/RL/W/130)

82. Preliminary Determination

- consider whether the Agreement could be improved by requiring that Members issue a preliminary determination at a point in time prior to a final determination that would give parties sufficient time to defend their interests.[93] (TN/RL/W/130)

83. Nature and Composition of Investigating Authorities

- consider whether the *Anti-Dumping Agreement* should be clarified to expressly incorporate the concept that individual members should continue to have the flexibility to organize their authorities as they deem appropriate, particularly for Members that use authorities with multiple decision makers; matters that may be addressed in such a clarification could include, for example, a Member's ability: (a) to determine what constitutes the determination of the appropriate authority; and (b) to permit separate authorities to maintain distinct records.[94] (TN/RL/W/130)

[92] See Section 166 *infra* on the *SCM Agreement* and Section 68 *supra* on the *Anti-Dumping Agreement.*
[93] See Section 167 *infra* on the *SCM Agreement.*
[94] See Section 169 *infra* on the *SCM Agreement.*

84. Small Economies: Regional Authority

- explore proposal for a regional trade authority (proposed in the context of the Work Programme on Small Economies), which would conduct trade remedy cases on behalf of individual Members.[95] (TN/RL/W/35)

- consider how a regional authority (designated by small economies that do not have the resources to maintain a "competent authority") might function, and any changes in the *Anti-Dumping Agreement* which may be necessary.[96] (TN/RL/W/72)

[95] See Section 170 *infra* on the *SCM Agreement*.
[96] See Section 170 *infra* on the *SCM Agreement*.

PART II

I. SUBSIDIES DISCIPLINES

ARTICLE 1 - DEFINITION OF SUBSIDY

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.

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.

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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.

85. Definition of Subsidy

- make subsidies rules for industrial products more operational in order to bring "disguised" subsidies for industrial products more clearly within the disciplines of the *SCM Agreement.* (TN/RL/W/30)

- clarify Article 1, so that entities which are effectively controlled by the state and acting on non-commercial terms are covered by this provision (an alternative would be to clarify the rules so as to cover situations where the public direction is less apparent but nevertheless leads to non-commercial behaviour in terms of the financial operation in question). (TN/RL/W/30)

- further develop the standard for determination of government control. (TN/RL/W/78)

- clarify the definition of "public body". (TN/RL/W/78)

- examine the "entrusts or directs" provision of Article 1.1(a)(1)(iv) to clarify the rules in cases where government action, though very much influencing the course of events, may not be clear or explicitly documented. (TN/RL/W/78)

- establish more explicit rules as to royalty-based financing schemes (these schemes need to be judged against a market or commercial standard)[97]. (TN/RL/W/78)

- consider establishing appropriate guidelines to assist investigating authorities in conducting pass-through analyses (where the recipient of the original "financial contribution" and the recipient of the resulting "benefit" are alleged to be different entities, the investigating authorities cannot assume but, rather, must definitively establish, a subsidy pass-through from the former to the latter). (TN/RL/W/112)

[97] See Section 128 *infra* on the *SCM Agreement*.

ARTICLE 2 - SPECIFICITY

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[2] 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.[3] 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 Article 3 shall be deemed to be specific.

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

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[2] 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.

[3] 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.

86. Specificity

- clarify certain aspects of the current provisions on "specificity" (e.g., the meaning of the phrase "enterprise or industry or group of enterprises or industries"). (TN/RL/W/112)

ARTICLE 3 - PROHIBITION

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[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5];

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

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

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[4] 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.

[5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

87. Prohibited Subsidies

- clarify prohibited subsidies disciplines to ensure the equitable application of *SCM Agreement* rules/disciplines among WTO Members (issue of assessment of contingency on export performance, in the case of small domestic markets). (TN/RL/W/1)

- expand the existing category of prohibited subsidies to include those instances of government intervention that have a similarly distortive impact on competitiveness or trade as do export and import substitution subsidies (e.g., include in this expanded category some of the practices listed in the "dark amber" provisions of Article 6.1 such as large domestic subsidies, subsidies to cover operating losses by a company and direct forgiveness of debt). (TN/RL/W/78)

- consider whether more equitable and predictable rules in relation to prohibited export subsidies can be achieved; in this regard, discuss whether the concept of levels of export competitiveness in a product, used in the *SCM Agreement* in relation to special and differential treatment, can help to address any confusion between a product which has been subsidized contingent on export performance, and a product which may be subsidized but, due to fluctuating domestic market conditions, is no longer solely for the domestic market. (TN/RL/W/85)

- establish clearer rules on the conditions or facts which give grounds for a conclusion that a subsidy is contingent ‘in fact’ upon actual or anticipated export performance. (TN/RL/W/139)

- make clear, in considering a range of factors (for the determination that a subsidy is contingent in fact upon export performance), that export propensity should not be a factor taken in isolation; list a range of factors that should be taken into account for export contingency; establish that investigating authorities should ensure that consideration of the facts relating to contingency on export performance is clearly established in a countervail investigation. (TN/RL/W/139)

88. "Local Content" Subsidies

- clarify and make rules operational so that any subsidy linked to the use or purchase of domestic industrial products, and thus, in breach of Article III.4 of the GATT 1994, is covered by the prohibition (the fact that subsidies are available only to domestic producers would not, by itself, put them in the prohibited category - Article III:8 b of GATT 1994). (TN/RL/W/30)

- recognize that subsidies contingent upon use of domestic over imported goods are crucial to the process of industrialization and development of developing countries, and any prohibition on such use of these subsidies would further disadvantage these countries. (TN/RL/W/4)

ARTICLE 3 / ANNEX I - ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

ANNEX I
ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(…)

(j) The provision by governments (or special institutions controlled by 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.

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.

(…)

89. Export Credits (Items (j) and (k) of Annex I)

- review items (j) and (k) of the Illustrative List of Export Subsidies in Annex I, in order to ensure a "level playing field" among WTO Members in the area of export credits, i.e., with respect to the "break even" test in item (j) and to the "material advantage" issue in item (k). (TN/RL/W/5)

- address the issue of "evolutionary interpretation" of the reference to the OECD Arrangement in item (k) of the Illustrative List of Export Subsidies in Annex I. (TN/RL/W/5)

- establish clear and consistent rules for all types of export financing. (TN/RL/W/30)

- address legitimate concerns of developing countries as far as the OECD regime on official support for export credits is concerned. (TN/RL/W/30)

- recognize that export credits can be provided for either in the currency of the exporting country or in foreign currency in accordance with the circumstances of each case. (TN/RL/W/120)

- discuss and clarify the issue arising from certain investigating authorities disallowing the cost-to-government approach in determining the existence and extent of subsidy, when such an approach is implicit in item (k) of the Illustrative List. (TN/RL/W/120)

ARTICLE 4 - REMEDIES

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.

4.4 If no mutually agreed solution has been reached within 30 days[6] 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[7] (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.

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

[7] As established in Article 24.

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.[8]

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[9] 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.[10]

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.

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

[9] 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.

[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.

90. Remedies for Prohibited Subsidies / Enforcement

- explore strengthening the remedies for prohibited subsidies (currently injury to a Member's domestic industry from these subsidies must still be shown in the context of a national countervailing duty proceeding). (TN/RL/W/78)

- clarify the remedy set down in Article 4, namely "withdrawal of the subsidy" where it has been established that a prohibited subsidy has been provided (questions to be considered include: should there be consistency in the application of a remedy and what is meant by “withdraw the subsidy”? If the subsidy agreement is based on the so-called traffic light test according to the effect a subsidy has on trade, would the replacement of a prohibited subsidy with an actionable subsidy “withdraw the subsidy”? Further, should a remedy involve retrospectivity? If the purpose of the remedy is to bring measures into conformity and balance rights and obligations, how is retrospectivity consistent with this? Where does enforcement go beyond any adverse trade effect?). (TN/RL/W/85)

- examine following issues to clarify provisions in Part III (Article 4.7) and Part V (Article 7.8) :

- Whether the context of Part III and V alters the meaning of “withdraw the subsidy”, as has been suggested by some panels;
- Whether replacement of a prohibited subsidy with an actionable subsidy constitutes an effective or suitable remedy;
- Whether “withdrawal of the subsidy” means removal of adverse trade effects;
- Whether retrospectivity or repayment should normally only be countenanced to the extent that there are portions of a subsidy which are deemed allocated over future periods of time;
- Given that there is a presumption of serious trade effects where it is established that there is a prohibited subsidy, whether there is nonetheless a need to quantify or establish the level of serious trade effects in ‘withdrawal of the subsidy’;
- Whether ‘withdrawal of the subsidy’ should not go beyond the adverse trade effects;
- Whether SCM Articles 4.10 and 7.9 in relation to “appropriate countermeasures” provide context to the meaning of “withdraw the subsidy”;
- Whether there should be a distinction between recurring and non-recurring subsidies;
- Whether termination of a prohibited subsidy constitutes “withdrawal”;
- Whether “withdrawal” must encompass a punitive remedy and have an “impact” and enforcement effect on the subsidizing Member. (TN/RL/W/139)

91. Accelerated Timeframes

- consider how the special timeframes for prohibited subsidies can be reconciled with the generally applicable timeframes in the DSU in situations where other claims of violation, in addition to those in respect of prohibited subsidies, are also at issue, having regard to parallel negotiations currently taking place in the Doha Round, to improve the efficiency and effectiveness of the DSU. (TN/RL/W/112)

92. Permanent Group of Experts

- examine the functioning of the Permanent Group of Experts to determine how its advisory and dispute settlement roles might be improved. (TN/RL/W/112)

ARTICLE 6 - SERIOUS PREJUDICE

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[14] of a product exceeding 5 per cent[15];

(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;

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.[16]

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[17] 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.

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

[15] 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.

[16] 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.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports 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 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[18] 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.

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[18] 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.

93. Serious Prejudice Remedy / Actionable Subsidies

- consider a more viable serious prejudice remedy, especially in view of the importance of access to third country markets for Members with relatively small domestic markets and for certain specialized industries. (TN/RL/W/1)

- strengthen and make the serious prejudice remedy more effective. (TN/RL/W/78)

- review the causation provisions. (TN/RL/W/78)

- consider reinstating and enhancing the deemed serious prejudice provision of Article 6.1. (TN/RL/W/112)

- explore how current disciplines (paragraph 4 of Annex IV) in respect of start-up subsidy incentives, which can have obvious trade distorting effects, might be improved. (TN/RL/W/112)

- consider building the recommendations on the calculation of the cost to government and *ad valorem* subsidization for different types of subsidies as well as on related issues contained in the *Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures* on Annex IV to the *SCM Agreement* into the Agreement, if and as appropriate, with a view to improving the clarity and effectiveness of Annex IV and, by extension, Article 6.1(a) of the *SCM Agreement.* (TN/RL/W/112)

- explore how the current serious prejudice provisions might be usefully clarified and improved in order to render the multilateral discipline more effective; for example, consideration should be given to clarifying the subsidy "effects" requirement (including the identification of other factors that may be contributing to export or import displacement). (TN/RL/W/112).

- clarify the circumstances listed under SCM Article 6.7, in particular sub-paragraph (f); consider what standards or other regulatory requirements would be captured by this sub-paragraph. (TN/RL/W/139)

ARTICLE 7 - REMEDIES

Article 7
Remedies

(…)

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.

(…)

94. Remedies

- clarify the remedy "to remove the adverse effects", or eliminate it entirely and establish the withdrawal of the subsidy as the exclusive remedy. (TN/RL/W/78)

ARTICLE 8 - IDENTIFICATION OF NON-ACTIONABLE SUBSIDIES

Article 8
Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable[23]:

(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:[24, 25, 26]

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[23] 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.

[24] 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.

[25] 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.

[26] 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.

the assistance covers[27] not more than 75 per cent of the costs of industrial research[28] or 50 per cent of the costs of pre-competitive development activity[29, 30];

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 t he 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[31] and non-specific (within the meaning of Article 2) within eligible regions provided that:

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[27] 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.

[28] 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.

[29] 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.

[30] 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.

[31] 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.

(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[32], 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.

(c) assistance to promote adaptation of existing facilities[33] 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.

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[32] "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.

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.[34]

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.

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

95. Non-Actionable Subsidies

- consider whether a non-actionable subsidy category should be pursued. (TN/RL/W/1)

- address the issue of non-actionable subsidies and explore the possibility of re-introducing the concept into the *SCM Agreement* in such a way as to allow its application, as measures aimed at achieving legitimate development goals such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production; consider launching an exploratory process for which a relevant basis might be the categories specified in paragraph 8 of the *SCM Agreement.* (TN/RL/W/41)
- consider the following suggestions that would permit the application of non-actionable measures in the existing categories in Article 8 of the *SCM Agreement*:

  - to remove or lower the ceilings or benchmarks specified for each category of non-actionable subsidies in Article 8 of the *SCM Agreement*;

  - to amend the wording of some of the provisions of Article 8; for instance, the "assistance" provided in each of the three categories set out in the Article (direct allocation of funds) could be supplemented by other forms of financial contribution or support by a government body. (TN/RL/W/131)

- explore several avenues with a view to incorporating diversification of production, for example, in the existing categories in the *SCM Agreement* for the benefit of developing and least-developed country Members; a new category of non-actionable subsidies, considered as furthering legitimate development goals, might for instance be incorporated in the *SCM Agreement* together with an indicative list of non-actionable measures, in the form of a new Annex to the Agreement. (TN/RL/W/131)

ARTICLE 25 - NOTIFICATIONS

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 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[54], 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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[54] 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.

96. Notifications

- explore the possibility of penalizing partial or non-notifications; devise a mechanism through which the quality and scope of notifications could be scrutinized and if failings were found or suspected a review procedure could be generated through an expedited WTO dispute settlement procedure similar to the one envisaged for spurious initiations or by referring the matter to an empowered Permanent Group of Experts. (TN/RL/W/30)

- consider reflecting in the *SCM Agreement* the approach developed by the Subsidies Committee to implementing Members' notification obligations. (TN/RL/W/78)

- consider the SCM Committee's consensus on treatment of notifications at the May 2001 meeting; the work initiated within the Committee in relation to compliance and streamlining subsidy notifications could also be examined and considered in the context of clarification and improvement of the *SCM Agreement.* (TN/RL/W/85)

- consider eliminating or consolidating some of the information required under the current notification provisions (the requirement that the "trade effects" of the notified subsidy be described, for example, is difficult if not impossible to answer accurately and, thus, is normally left unanswered by most Members). (TN/RL/W/78)

- consider ways to lessen the burden on lesser developed countries, especially those in Annex VII of the *SCM Agreement*, with respect to notification obligations.[98] (TN/RL/W/78)

[98] See Section 97 *infra*.

ARTICLE 27 - SPECIAL AND DIFFERENTIAL TREATMENT OF 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[55], 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.

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[55] 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.

27.6 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.

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.

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.

97. Special and Differential Treatment for Developing Country Members[99]

- give positive consideration to a package of S&D treatment provisions for developing countries on the understanding that this would be for a strictly temporary period and would be drawn up only following an agreement on rules for non-exempted countries; S&D treatment could be considered in clearly defined circumstances for remedies, including countervailing duties, against certain prohibited and actionable subsidies given by developing countries. (TN/RL/W/30)

- to take account in the course of the negotiations of the situation of small economies more vulnerable to the harm caused by unfair trade practices, as well as the situation of developing country Members, bearing in mind that the scope of special and differential treatment should be confined to operations between developed countries and developing countries. (TN/RL/W/36)

- review the existing Article 27 provisions in the light of any changes in the *SCM Agreement*, to make sure that effective remedies remain against injurious subsidies. (TN/RL/W/30)

- consider relieving least developed country Members (and perhaps other low income and small economies) of their notification obligation for specific subsidies under Article 25 (review could be conducted in the context of the Trade Policy Review Mechanism; in this process, the relevant parts of

[99] The proposals listed under this Section are those that have been specifically referred to by participants as relating to the Special and Differential Treatment of Developing Country Members provision contained in Article 27 of the *SCM Agreement*. Other proposals regarding developing country Members may be found under other Sections of this paper, such as Sections 88 and 89 *supra*.

the review could be conducted in the Committee on Subsidies and Countervailing Measures). (TN/RL/W/30)

- consider ways to lessen the burden on lesser developed countries, especially those in Annex VII of the *SCM Agreement*, with respect to notification obligations.[100] (TN/RL/W/78)

- add a new provision in Article 27.10 to provide for countervailing duties on imports from developing countries being restricted only to that amount by which the subsidy exceeds the *de minimis* level. (TN/RL/W/4)

- amend Article 27.10 (b) to provide for countervailing duty not being imposed in the case of imports from developing countries where the total volume of imports is negligible, i.e. 7 per cent of total imports. (TN/RL/W/4)

- amend Article 27.2 so that the prohibition in Article 3.1 (a) does not apply to export subsidies granted by developing countries where they account for less than 5 per cent of the f.o.b. value of the product. (TN/RL/W/4)

- amend Article 27.11 to provide for the *de minimis* level of subsidization below which countervailing duty shall not be imposed in case of imports from developing countries being raised above 3 per cent. (TN/RL/W/4)

- amend Article 27.3 so that the prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members; delete the reference to expiry of this flexibility after five/eight years from the date of entry into force of the WTO Agreement; clarify that the provisions of the amended Article 27.3 shall be applicable notwithstanding the provisions of any other agreement in the WTO *acquis.* (TN/RL/W/4)

- introduce a provision to address the eventuality that after reaching export competitiveness in a particular product, subsequently the export competitiveness is lost; the discussions held on this Implementation issue in the SCM Committee provide a useful basis for addressing this issue during the Rules Negotiations. (TN/RL/W/120)

- remove the seeming contradiction between time-bound derogation in paragraph 27.3 from the obligation in paragraph 1(b) of Article 3 of the *SCM Agreement (*prohibition of subsidies contingent upon the use of domestic over imported goods) and paragraph 1 of Article 2 of the Agreement on TRIMs which prohibits measures inconsistent with paragraph 4 of Article III of GATT 1994 (National Treatment); one way of removing this contradiction and thus providing the intended rights to LDCs in the unrestricted recourse to the use of local content is to provide in both Agreements for the right as long as a country remains in the LDC status. (Proposal refered to the NGR by the Chairman of the General Council, letter of 20 May 2003 to the Chairman of the NGR)

- delete the word "may" from the text of Article 27.1; the provision, if amended, would read as follows: "Members recognize that subsidies play an important role in economic development programmes of developing country Members". (Proposal refered to the NGR by the Chairman of the General Council, letter of 20 May 2003 to the Chairman of the NGR)

- "inconsistent with its development needs" in Article 27.4 refers to where otherwise prohibited or actionable subsidies would clearly not benefit any domestic industry. (Proposal refered to the NGR by the Chairman of the General Council, letter of 20 May 2003 to the Chairman of the NGR)

[100] See Section 96 *supra*.

- it is understood that developing country Members shall not be prevented from seeking extensions on grounds of not strictly following the time frames in Article 27.4 and the Decision on Procedures for Extensions Under Article 27.4 for Certain Developing Country Members (G/SCM/39). (Proposal refered to the NGR by the Chairman of the General Council, letter of 20 May 2003 to the Chairman of the NGR)

- it is understood that in consultations and in any proceedings, there shall be no presumption of serious prejudice whatsoever including on the basis of any percentage or amount of subsidisation where developing country Members grant subsidies; and that any serious prejudice shall be demonstrated exclusively by positive evidence. (Proposal refered to the NGR by the Chairman of the General Council, letter of 20 May 2003 to the Chairman of the NGR)

- it is understood that nullification and impairment in cases of actionable subsidies that developing country Members grant or maintain, shall be construed to mean only the displacement or impediment of imports of a like product into the market of the developing country Member or injury to a domestic industry in the market of the importing Member. (Proposal refered to the NGR by the Chairman of the General Council, letter of 20 May 2003 to the Chairman of the NGR)

- it is understood that Article 27.13 covers any privatisation programmes undertaken within the period from 1 January 1995 and that developing country Members may grant or maintain the subsidy programmes under Article 27.13 to ensure good adjustment of their economies; it is further understood that "limited period" refers to a period of not less than 8 years. (Proposal refered to the NGR by the Chairman of the General Council, letter of 20 May 2003 to the Chairman of the NGR)

- "interested developing country Member" in Article 27.15 shall be construed to refer to any developing country Member regardless of any subsidy programmes maintained, on the basis that developing country Members have an abiding interest in the use and operation of subsidies due to their importance in the rapid economic development of developing country Members. (Proposal refered to the NGR by the Chairman of the General Council, letter of 20 May 2003 to the Chairman of the NGR)

OTHER ISSUES

98. Natural Resources and Energy Pricing

- further clarify and improve the rules and remedies in the area of natural resources and energy. (TN/RL/W/78)

99. Taxation

- work toward greater equalization in the treatment of various tax systems (direct and indirect taxation systems) that, at least with regard to their subsidy-like effects, have only superficial differences. (TN/RL/W/78)

100. Codification of Analytical and Quantification Methodologies

- clarify a host of measurement-related concepts, such as when and how to allocate subsidy benefits over time, the determination of market-based interest rate benchmarks, and the attribution of subsidy benefits to specific categories of a company's sales and among related companies; use the work of the Informal Group of Experts on some of these topics as a useful starting-point for further discussions. (TN/RL/W/78)

101. Traffic Light Framework

- consider whether the traffic light framework remains viable. (TN/RL/W/1)

102. Provision of Equity Capital

- strengthen disciplines with respect to the actions of any government which go against a determination by the equity market that a company will not generate a market return. (TN/RL/W/78)

- require governments to provide prior notification to the Subsidies Committee of any intended provision of equity capital (this notification might require that a Member explain how the government investment was consistent with the usual investment practice of private investors). (TN/RL/W/78)

- give consideration to certain lesser developed countries with respect to these requirements, except perhaps, in those sectors which have been shown to be export competitive. (TN/RL/W/78)

103. Subsidies and the Environment

- address the environmental dimension of subsidies and consider further how to approach subsidies aimed at the protection of the environment, following the expiry of the "green box". (TN/RL/W/30)

104. Trade- and Market-Distorting Practices

- discuss and consider ideas and recommendations for addressing trade- and market-distorting practices in the steel sector, building upon discussions among the major steel-producing nations at the OECD.[101] (TN/RL/W/24)

105. Privatization

- examine whether the *SCM Agreement* should be clarified with respect to the impact of privatization on the benefit from prior subsidies in those circumstances in which Article 27.13 does not apply. (TN/RL/W/130)

[101] See also documents TN/RL/W/27, TN/RL/W/49 and TN/RL/W/95.

II. FISHERIES SUBSIDIES

106. Need for Improved WTO Disciplines

- improve WTO disciplines in the fisheries sector[102]. (TN/RL/W/3) (TN/RL/W/12)

107. Scope of Fisheries Subsidies

- determine the scope of subsidies to be negotiated in order to give subsidies of different natures and effects on trade, environment and sustainable development, differential consideration. (TN/RL/W/9)

108. Categorization of Fisheries Subsidies

- look specifically at different categories of subsidy, their nature and impacts as well as their situation under existing WTO disciplines (some form of categorization will be needed for that purpose; categorization schemes by some international organizations may serve as a starting point). (TN/RL/W/58).

109. Framework for Addressing the Issue of Fisheries Subsidies

- conduct the discussion on the fisheries subsidies issue in a cross-sectoral manner, focusing on the trade distortion aspect, as part of the clarification and improvement of the *SCM Agreement* in accordance with paragraph 28 of the Doha Ministerial Declaration. (TN/RL/W/52)

- deal with the issue of over-exploitation and IUU (illegal, unreported and unregulated) fishing at the regular session of the CTE, based upon the findings by international organizations with expertise in fisheries such as the FAO. (TN/RL/W/52)

- establish, as a matter of priority, WTO rules on fisheries subsidies in line with recognized subsidy disciplines under the *SCM Agreement.* (TN/RL/W/82)

110. Non-Actionable Fisheries Subsidies[103]

- define as "non-actionable" certain subsidies such as those on infrastructure construction, prevention and control of disease, scientific research and training, fisherman's switching to other businesses, have no adverse effect on trade, environment and sustainable development. (TN/RL/W/9)

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[102] See comments on the general issue of Fisheries Subsidies in TN/RL/W/11, TN/RL/W/17, TN/RL/W/21, TN/RL/W/52.

[103] See also Section 116 *infra*.

- consider the following categories of subsidies permitted and therefore non-actionable:

- subsidies to support the retraining of fishermen, early retirement schemes and diversification;

- limited subsidies for modernization of fishing vessels to improve safety, product quality or working conditions or to promote more environmentally friendly fishing methods (such modernization must not increase the ability of the vessel to catch fish);

- subsidies to fishermen and vessel owners who have to temporarily stop their fishing activity, when stoppages are due to unforeseeable circumstances such as natural disasters, or in the framework of tie-up schemes linked to permanent capacity reduction measures in the context of recovery plans for overexploited fish stocks;

- subsidies for the scrapping of vessels and the withdrawal of capacity. (TN/RL/W/82)

111. Expanded Category of Prohibited ("Red Light") Fisheries Subsidies / Prohibition of Capacity Enhancing Subsidies

- consider the possibility of expanding the category of prohibited ("red light") subsidies (see *SCM Agreement*, Article 3) expressly to cover those fisheries subsidies that directly promote overcapacity and overfishing, or have other direct trade-distorting effects; such subsidies could be categorized either by the type of programme (e.g. programmes that are deemed to result in overcapacity or overfishing), and/or by the fishery that they benefit (e.g. subsidies that contribute to overcapacity and overfishing in fisheries that are already overfished). (TN/RL/W/77)

- prohibit the following types of capacity enhancing subsidies after a short transitional period:

- subsidies for marine fishing fleet renewal (e.g. construction of vessels, increase in fishing capacity); and

- subsidies for the permanent transfer of fishing vessels to third countries, including through the creation of joint enterprises with third country partners. (TN/RL/W/82)

- expressly prohibit all fisheries subsidies of a commercial nature, directly geared towards lowering costs, increasing revenues, raising production (by enhancing capacity), or directly promoting overcapacity and overfishing; such subsidies would comprise *inter alia*:

- subsidies designed to transfer a country's ships for operation on the high seas or in the local waters of a third country;

- subsidies that contribute to the purchase of ships, whether new or used;

- subsidies to help modernize an existing fleet;

- subsidies that contribute to reducing the costs of production factors;

- subsidies that generate positive discrimination in the tax treatment of the economic activity of operators involved in the capture, processing and/or marketing of fisheries resources;

- subsidies that result in positive discrimination in access to credit. (TN/RL/W/115)

112. Revision of Fisheries Subsidies

- provide for the review of the lists of "prohibited" and "permitted" subsidies, both in terms of their operation and to consider whether they should be modified to further advance the ultimate aim, which is to match capacity to the available fish and so contribute to the sustainable exploitation of fishery resources (in this respect, the work of relevant international organizations, such as the FAO and/or international fisheries management bodies, could be taken into account). (TN/RL/W/82)

113. Serious Prejudice and a Presumptively Harmful ("Dark Amber") Category

- consider a "dark amber" category of subsidies (these subsidies would be presumed to be harmful unless the subsidizing government could affirmatively demonstrate that no overcapacity/overfishing or other adverse trade effects have resulted from the subsidy; a "dark amber" category could be modelled on the now expired Article 6.1 of the *SCM Agreement*). (TN/RL/W/77)

- explore ways of making the existing provisions of the *SCM Agreement* that pertain to serious prejudice fully operational and effective in disciplining fisheries subsidies. (TN/RL/W/77)

- not prohibit the remaining subsidies, which have not been incorporated into the red light box,[104] to the extent that they are sufficiently accredited and notified in the WTO; where the subsidizing Member has not fully met its notification obligations or has failed to notify the programme, it shall be determined that that Member has the responsibility of demonstrating that the subsidy at issue does not cause trade injury to the complaining Member. (TN/RL/W/115)

- establish that it shall be for the complaining Member to provide evidence of the injury with respect to the following subsidies:

- subsidies of a social nature, the final purpose of which is to resolve problems affecting small-scale fisheries, for the benefit of coastal communities and with a view to improving quality of life;

- subsidies relating to fisheries management, including research and administrative and other measures, the sole purpose of which is to ensure the sustainability of hydro-biological resources and their environment. (TN/RL/W/115)

114. Utilisation of Expertise of International Bodies

- utilise the results of the work of the OECD and FAO on fisheries subsidies in conducting discussions at the WTO. (TN/RL/W/11)

[104] See Section 111 *supra*.

- explore ways to draw upon information about the state of fisheries stocks and similar expertise in other organizations, including development of relationships with the UN Food and Agriculture Organization and regional fisheries management organizations; the group could also find ways to obtain the views of non-governmental groups and individuals with expertise, including the fisheries industry and environmental conservation groups. (TN/RL/W/77)

115. Improved Notification of Subsidies Programmes / Transparency

- consider ways to improve the quality of fisheries subsidies notifications under the *SCM Agreement*; this could include provision for more detailed fishery-specific information, including information about relevant management regimes, so as to make notifications of fisheries subsidies under the *SCM Agreement* more complementary of existing fishery-related notifications in other fora (e.g. on capacity). (TN/RL/W/77)

- discuss ways to make the fisheries subsidy notification requirement more effective. (TN/RL/W/77)

- improve the present notification rules:

- a subsidy programme meeting the terms of the "Permitted" subsidies would have to be notified to the WTO Committee on Subsidies and Countervailing Measures to fully qualify for this category;

- the Secretariat could keep a "scoreboard" of notifications per Member and per type of programmes; this "scoreboard" could be made publicly available. (TN/RL/W/82)

- discuss the establishment of a proper system for the notification of fisheries subsidies, bearing in mind the following questions *inter alia*:

- notifications of fisheries subsidies should be complementary to the existing notifications in other forums, in particular the FAO;

- notifications relating to fisheries subsidies should be mandatory, in particular for subsidies in the amber category;

- the WTO Secretariat should keep a "scoreboard" of notifications received per Member and per type of subsidy, which would be made available publicly. (TN/RL/W/115)

116. Special and Differential Treatment for Developing Country Members

- accord developing countries special and differential treatment while participants aim to clarify and improve the disciplines on fisheries subsidies. (TN/RL/W/9)

- give due consideration to subsidies for fisheries development of developing countries as long as these subsidies do not harm sustainable use of fisheries resources (for instance, consideration should be given from the viewpoint of subsistence and food security in local communities to fisheries subsidies provided to coastal small-scale fisheries); however, as such special and differential treatment of developing countries is not confined within the fisheries sector, it should be discussed as a generic matter of the *SCM Agreement.* (TN/RL/W/11)

- draw up rules in the context of Article 27 of the *SCM Agreement* which take special account of the distinct needs of developing countries in fisheries. (TN/RL/W/82)

- clarify Article 1 of the ASCM to explicitly exclude the following from definition of subsidy, for small vulnerable coastal states:

(1) Access Fees and Development Assistance - any development assistance granted to small vulnerable coastal states by developed or more advanced developing countries to facilitate sustainable management.

(2) Fiscal Incentives to Domestication and Fisheries Development - incentives applied by small vulnerable coastal states for the development and domestication of their fisheries.

(3) Artisanal Fisheries - those measures undertaken by governments of small vulnerable coastal states to assist their artisanal fisheries sector. (TN/RL/W/136)

III. COUNTERVAILING MEASURES

ARTICLE 11 - INITIATION AND SUBSEQUENT INVESTIGATION

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[38] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[39] 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.

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[38] 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.

[39] 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.

> 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.

117. Initiation Standards

- clarify the rules/disciplines pertaining to the initiation of investigations.[105] (TN/RL/W/1)

- focus on the problem of initiation standards where, e.g., successive cases are opened in respect of subsidies which have been found to have already expired or that are no longer used. (TN/RL/W/30)

118. Definition of Product Under Investigation

- provide a more rational and disciplined framework to determine the scope of "product under investigation," so that countervailing measures are applied only to those products found to be subsidized and causing injury. (TN/RL/W/19)

- define appropriate criteria for determining the "product under investigation" to limit arbitrary expansions of product scope. (TN/RL/W/19)

119. Standing Rules

- establish that applications should be supported by at least more than 50 per cent of the total domestic production. (TN/RL/W/19)

[105] See Section 31 *supra* on the *Anti-Dumping Agreement*.

- discuss the standing requirement for the initiation of an investigation to determine whether the concept of "standing" is appropriately defined to ensure that domestic producers representing a relatively small proportion of the domestic production of like products cannot successfully apply for an investigation.[106] (TN/RL/W/47)

- consider requiring that, in cases where an application is made on behalf of a domestic industry by one or more industry associations, that the members of the industry association(s) be identified in the application, with a statement of support for the application.[107] (TN/RL/W/47)

120. Initiation and Publicization of the Application

- make clear how the obligation to notify the Government of the exporting Member (in Article 11.5) can be reconciled with the obligation to avoid publicizing the application concerned. [108] (TN/RL/W/132)

[106] See Section 33 *supra* on the *Anti-Dumping Agreement*.
[107] See Section 33 *supra* on the *Anti-Dumping Agreement.*
[108] See Section 35 *supra* on the *Anti-Dumping Agreement*.

ARTICLE 12 - EVIDENCE

Article 12
Evidence

(…)

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.

(…)

121. Availability of Relevant Information from National Authorities

- enhance provisions concerning timely information and feedback (currently, there is no definition of what timely is and no specific guidance for national authorities).[109] (TN/RL/W/35)

- give a definition of the term "timely", in order to clarify the period of time involved and establish a fixed interval, so as to guarantee due process for the parties involved and transparency throughout the proceeding, thereby avoiding different interpretations of the same provision by the competent authorities of each Member.[110] (TN/RL/W/132)

- discuss the issue of providing access to non-confidential information; for example, consider ways in which interested parties could be granted access to all non-confidential information as soon as it is submitted to national authorities, regardless of whether the national authorities ultimately rely upon the information for purposes of their determination.[111] (TN/RL/W/35)

122. Maintenance of a Public Record

- evaluate how a mechanism for providing access to non-confidential information used by national authorities in an investigation could operate (e.g. maintaining a public record of all non-confidential information submitted by the parties and all memoranda adopted or approved by the pertinent authority that explain the factual or legal bases for its determination or provide pertinent findings and conclusions in support of that determination).[112] (TN/RL/W/35)

[109] See Section 40 *supra* on the *Anti-Dumping Agreement*.
[110] See Section 40 *supra* on the *Anti-Dumping Agreement.*
[111] See Section 40 *supra* on the *Anti-Dumping Agreement*.
[112] See Section 41 *supra* on the *Anti-Dumping Agreement*.

Article 12
Evidence

(…)

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.[42]

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 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.[43]

(…)

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

[43] 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.

123. Protection and Disclosure of Confidential Information

- discuss whether each Member should have in place a system to allow access for appropriate persons to confidential information; such a system must incorporate appropriate measures to ensure the proper protection of confidential information. [113] (TN/RL/W/35)

[113] See Section 42 *supra* on the *Anti-Dumping Agreement*.

- consider establishing requirements for Members to maintain specific procedures to protect confidential information from unauthorised disclosure.[114] (TN/RL/W/35)

Article 12
Evidence

(…)

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.

(…)

124. Conduct of Verifications

- discuss steps to make verification procedures clearer (e.g. authorities could provide exporting Members and their firms with detailed outlines prior to verification specifying what topics will be covered and what type of supporting documentation will be required; a report on the verification findings should be issued to all interested parties as soon as possible).[115] (TN/RL/W/35)

[114] See Section 42 *supra* on the *Anti-Dumping Agreement*.
[115] See Section 43 *supra* on the *Anti-Dumping Agreement*.

Article 12
Evidence

(…)

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.

(…)

125. Facts Available

- establish symmetry between the provisions of the *Anti-Dumping Agreement* on facts available (Annex II of the *Anti-Dumping Agreement*) and the *SCM Agreement*, which does not elaborate on the matter.[116] (TN/RL/W/19)

- agree that there should be analogous provisions within the *SCM Agreement* relating to countervailing duty measures to reflect corresponding provisions in the *Anti-Dumping Agreement*, for example, clarification of facts available under *SCM Agreement* Article 12.7.[117] (TN/RL/W/85)

- apply the *Anti-Dumping Agreement* Annex II procedures to countervailing duty investigations with a few modifications in order to adapt it to the language and concepts of the *SCM Agreement* (For instance, where Annex II of the *Anti-Dumping Agreement* reads "interested parties", it should be read "interested Members and/or interested parties"; where Annex II reads "normal value", it should be read "amount of subsidy"; and, of course, where Annex II reads "Paragraph 8 of Article 6", it should read "Paragraph 12 of Article 7"; as "independent sources" are concerned, mention, for instance, Members' notifications to WTO and public reports of the agencies responsible for programs).[118] (TN/RL/W/19)

[116] See Section 157 *infra* on the *SCM Agreement* and Section 44 *supra* on the *Anti-Dumping Agreement.*
[117] See Section 157 *infra*.
[118] See Section 157 *infra*.

Article 12
Evidence

(…)

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.

(…)

126. Disclosure / Evidence

- consider whether the *SCM Agreement* should be clarified as to what constitutes "sufficient time for parties to defend their interests" as well as to what constitutes adequate disclosure of the "essential facts" in the context of Article 12.8 of the Agreement.[119] (TN/RL/W/98)

- address the lack of indication of the period of time necessary for the parties to make their comments in defence of their interests and the lack of an indicative list of the elements which the communication should contain, with a view to standardizing the criteria and avoiding significant differences between one investigation and another, depending on the Member concerned.[120] (TN/RL/W/132)

- consider whether a requirement might be warranted for a disclosure meeting for the authorities to review with the interested parties, upon request, how the dumping margins and countervailing duty rates were calculated.[121] (TN/RL/W/130)

[119] See Section 45 *supra* on the *Anti-Dumping Agreement*.
[120] See Section 45 *supra* on the *Anti-Dumping Agreement*.
[121] See Section 45 *supra* on the *Anti-Dumping Agreement*.

Article 12
Evidence

(…)

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.

(…)

127. Interested Parties

- consider taking industrial users and consumer organizations into account in the definition of "interested parties" in the *SCM Agreement*, with a view to securing them the opportunity, if they so wish, to fully participate in countervailing duty investigations since their initiation.[122] (TN/RL/W/104)

[122] See Section 49 *supra* on the *Anti-Dumping Agreement*.

ARTICLE 14 - CALCULATION OF THE AMOUNT OF SUBSIDY IN TERMS OF THE BENEFIT TO THE RECIPIENT

Article 14
Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

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:

(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;

(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).

128. Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

- clarify the rules/disciplines pertaining to the calculation of amounts of subsidy. (TN/RL/W/1)

- establish further and more detailed guidelines concerning the quantification of amounts of subsidy (e.g., in respect of royalty-based financing)[123]. (TN/RL/W/112)

- amend the "chapeau" of Article 14, so that it mirrors the language of its title; provide that, for the purpose of Part V of the *SCM Agreement*, investigating authorities shall calculate the amount of the subsidy in terms of the benefit conferred to the recipient (producer/exporter) and do so on a product unit basis. (TN/RL/W/19)

- establish that the obligation of transparency foreseen in the "chapeau"[124] applies both to the method of calculation of the benefit and to the method of calculation of the amount of the subsidy. (TN/RL/W/19)

- use the work undertaken by the Informal Group of Experts on calculation of *ad valorem* subsidization as a basis for the examination and setting of further priorities for potential consensus and acceptable practice/guidelines, for the purposes of Part V of the *SCM Agreement.* (TN/RL/W/85)

129. Additional Guidelines to Article 14

- include additional guidelines to Article 14 on:

(i) deduction of expenses and export taxes

(ii) appropriate denominator for the calculation of subsidy amount

(iii) subsidy tied to the acquisition of capital goods (amount of subsidy spread over the useful life of the assets).[125] (TN/RL/W/19)

- establish specific criteria, such as those mentioned in Article 6.10 of the *Anti-Dumping Agreement*, for the use of samples in the calculation of the amount of the subsidy.[126] (TN/RL/W/19)

- clarify, improve and further develop the specific terms of Article 14(b) regarding the provision of government loans with a view to facilitating determination of whether there has been inappropriate government intervention in such situations as those involving direct government intervention in bankruptcy or near bankruptcy proceedings, and industry restructuring (clarification and improvement in this regard could include certain notification/transparency requirements in those instances in which a government, government-owned or –controlled entity, or "public body", becomes involved in assisting a financially troubled company). (TN/RL/W/78)

- clarify and improve the specific provisions of Article 14(a) regarding the provision of equity capital; specifically, address practical issues that can arise in analyzing equity infusions – such as the role of independent studies, the specific factors that should be considered when examining the financial health and prospects of a company, and the use of initial and secondary stock prices. (TN/RL/W/78)

[123] See Section 85 *supra*.

[124] Specific language is proposed in document TN/RL/W/19, page 4, to amend the "chapeau" of Article 14.

[125] Specific language is proposed in document TN/RL/W/19, page 5, to add new items to Article 14.

[126] See Sections 157 and 164 *infra*.

ARTICLE 15 - DETERMINATION OF INJURY

Article 15
Determination of Injury

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[46] and *(b)* the consequent impact of these imports on the domestic producers of such products.

(…)

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[46] 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.

130. Like Product

- clarify the definition of like product to limit the scope of product types that can be considered as a single "like product".[127] (TN/RL/W/47)

131. Market Segmentation

- consider whether Article 15 of the *SCM Agreement* should be clarified to state expressly that investigating authorities have the discretion to engage in sectoral analysis of the impact of subsidized imports on the domestic industry in appropriate circumstances, as long as their analysis of impact encompasses the entire domestic industry.[128] (TN/RL/W/130)

[127] See Section 16 *supra* on the *Anti-Dumping Agreement*.
[128] See Section 21 *supra* on the *Anti-Dumping Agreement.*

Article 15
Determination of Injury[45]

(…)

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.

(…)

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[45] 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.

132. Cumulative Assessment of Injury / Cumulation

- establish which factors should be considered in the evaluation of "conditions of competition" between imported products from different origins and between them and the like domestic product. (TN/RL/W/19)

- consider whether the *Anti-Dumping Agreement* and the *SCM Agreement* should be clarified to expressly provide for the cumulation of dumped imports with subsidized imports, in order to assess the effects of the unfair imports on the domestic industry.[129] (TN/RL/W/98)

[129] See Section 22 *supra* on the *Anti-Dumping Agreement and Section* 157 *infra* on the *SCM Agreement*.

Article 15
Determination of Injury

(…)

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

(…)

133. Examination of Impact

- consider whether Article 15.4 of the *SCM Agreement* should be clarified to provide greater certainty both to investigating authorities and to the parties that appear before them concerning the scope of the authority's obligation to examine "relevant factors and indices" other than the ones explicitly listed in Article 15.4 of the *SCM Agreement.*[130] (TN/RL/W/130)

- address whether there should be an express limitation on the authority's obligation with respect to such factors that were never brought to the authority's attention during the course of its investigation.[131] (TN/RL/W/130)

[130] See Section 25 *supra* on the *Anti-Dumping Agreement*.
[131] See Section 25 *supra* on the *Anti-Dumping Agreement.*

Article 15
Determination of Injury

(…)

15.5 It must be demonstrated that the subsidized imports are, through the effects[47] 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.

(…)

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

134. Causation

- consider clarifying Article 15.5 with respect to the issue of causation.[132] (TN/RL/W/98)

[132] See Section 26 *supra* on the *Anti-Dumping Agreement*.

Article 15
Determination of Injury

(…)

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.

(…)

135. Condition of the Domestic Industry in any Threat of Material Injury Analysis

- consider whether the Agreement should be clarified to address investigating authorities' consideration of the current condition of the domestic industry in an analysis of the threat of material injury.[133] (TN/RL/W/130)

[133] See Section 28 *supra* on the *Anti-Dumping Agreement*.

ARTICLE 16 - DEFINITION OF DOMESTIC INDUSTRY

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[48] 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.

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[48] 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.

136. Definition of Domestic Industry

- provide more specific parameters as to what minimum percentage of the domestic production can be considered to be "a major proportion".[134] (TN/RL/W/47)

- clarify Article 16 concerning the definition of the domestic industry to address the special circumstances raised when domestic and foreign producers have limited selling seasons.[135] (TN/RL/W/72)[136]

- consider whether Article 16.1 of the *SCM Agreement* should be clarified to specifically prohibit the practice of limiting the injury analysis solely to those firms which supported the application.[137] (TN/RL/W/98)

- consider whether the *SCM Agreement* needs to be clarified to ensure that an investigating authority can satisfy its obligation to obtain reliable and objective data on a domestic industry containing an extremely large number of producers within the confines of an investigation of limited duration (issues that may be addressed in such a clarification include reliance by investigating authorities on information from industry groups or governmental statistical authorities).[138] (TN/RL/W/98)

- consider establishing clearer criteria for the definition of the term "major proportion".[139] (TN/RL/W/104)

- consider establishing that the domestic industry shall be taken as a major proportion of the total domestic production only when it is not possible for the authority to obtain information regarding the "domestic producers as a whole of the like products".[140] (TN/RL/W/104)

- consider whether the asymmetry between the *Anti-Dumping* and the *SCM Agreement* with respect to excluding from the domestic industry domestic producers who are themselves importers of a like product from **other countries** should remain (Article 16.1 of the *SCM Agreement* allows for the exclusion of domestic producers who are themselves importers of a like product from **other countries**).[141] (TN/RL/W/104)

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[134] See Section 30 *supra* on the *Anti-Dumping Agreement*.
[135] See Section 30 *supra* on the *Anti-Dumping Agreement* and Section 162 *infra* on the *SCM Agreement*.
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[136] See Section 30 *supra* on the *Anti-Dumping Agreement* and Section 162 *infra* on the *SCM Agreement*.
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[137] See Section 30 *supra* on the *Anti-Dumping Agreement*.
[138] See Section 30 *supra* on the *Anti-Dumping Agreement* and Section 164 *infra* on the *SCM Agreement*.
[139] See Section 30 *supra* on the *Anti-Dumping Agreement*.
[140] See Section 30 *supra* on the *Anti-Dumping Agreement*.
[141] See Section 30 *supra* on the *Anti-Dumping Agreement* and Section 157 *infra* on the *SCM Agreement*.

ARTICLE 17 - PROVISIONAL MEASURES

Article 17
Provisional Measures

17.1 Provisional measures may be applied only if:

(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.

137. Provisional Measures

- consider harmonizing the provisions of the *Anti-Dumping* and *SCM Agreement* regarding the application of provisional measures, especially the prohibition of collecting provisional duties; consider whether the exporter should be allowed to request a two-month extension of the period of application in a countervailing duty investigation.[142] (TN/RL/W/104)

[142] See Section 50 *supra* on the *Anti-Dumping Agreement* and Section 157 *infra* on the *SCM Agreement*.

ARTICLE 18 - UNDERTAKINGS

Article 18
Undertakings

18.1 Proceedings may[49] 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 acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

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[49] 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.

138. Price Undertakings[143]

- define what should constitute “satisfactory voluntary undertakings”. (TN/RL/W/19)

- define “reasons of general policy” in Article 18.3. (TN/RL/W/19)

[143] See Section 51 *supra* on the *Anti-Dumping Agreement*.

ARTICLE 19 - IMPOSITION AND COLLECTION OF COUNTERVAILING DUTIES

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[50] 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 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[51] 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.

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

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

139. *De minimis* Rule in Article 11.9 and Its Relation With Article 19

- remedy the omission of a *de minimis* rule in Article 19. (TN/RL/W/19)

- establish that no countervailing duties shall be collected when the amount of the subsidy is found to be *de minimis*, both on a prospective and on a retrospective basis. (TN/RL/W/19)

140. Accrual of Interest

- consider whether changes to the Agreement may be necessary to address the lack of a provision requiring payment of interest on any excess monies collected and held by the importing Member.[144] (TN/RL/W/98)

141. "All-Others" Rate

- consider what clarification could be appropriately made in the *SCM Agreement* in regard of all-others rate.[145] (TN/RL/W/72)

142. Lesser Duty[146]

- make the use of the "lesser duty" rule mandatory. (TN/RL/W/19)

143. Exclusion of Companies

- consider whether the Agreement need to be clarified specifically to ensure that any examined exporter or producer found not to have received a countervailable subsidy during an investigation may not be covered by any measure which results from that investigation.[147] (TN/RL/W/98)

144. Refund or Reimbursement of the Duty Paid in Excess

- consider whether the *Anti-Dumping* and *SCM Agreement* should be equally precise in the provisions regarding reimbursement of duties paid in excess. [148] (TN/RL/W/104)

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[144] See Section 55 *supra* on the *Anti-Dumping Agreement*.
[145] See Section 57 *supra* on the *Anti-Dumping Agreement* .
[146] See Section 52 *supra* on the *Anti-Dumping Agreement*.
[147] See Section 53 *supra* on the *Anti-Dumping Agreement*.

145. Favoured Exporter Treatment

- consider whether changes to the Agreement should be made to specifically prohibit the practice of excluding by name, *ab initio*, certain favoured exporters from any investigation and from coverage of any eventual countervailing measure, even though they produce merchandise like that which is under investigation.[149] (TN/RL/W/98)

[148] See Section 56 *supra* on the *Anti-Dumping Agreement* and Section 157 *infra* on the *SCM Agreement*.
[149] See Section 47 *supra* on the *Anti-Dumping Agreement*.

ARTICLE 19 AND 21 – REVIEWS

Article 19
Imposition and Collection of Countervailing Duties

(…)

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 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.

(…)

Article 21
Duration and Review of Countervailing Duties and Undertakings

(…)

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.[52] The duty may remain in force pending the outcome of such a review.

(…)

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[52] 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.

146. Reviews

(Article 19.3 – countervailing duty assessment)

(Article 21.2 - revocation reviews)

(Article 21.3 – sunset reviews)

- clarify the rules/disciplines pertaining to the review of existing countervailing measures. (TN/RL/W/1)

- spell out more clearly the requirements for extending the life of a measure for a further 5 years. (TN/RL/W/30)

- establish that the duration of reviews shall be limited to a maximum of 12 months. (TN/RL/W/19)

- apply, in the case of reviews, the same rules as those used in the initial investigations. (TN/RL/W/19)

- clarify the Agreement to stipulate which, if any, provisions that were originally intended to apply to initial investigations also apply to the various review provisions under the Agreement; in cases where, because of the fundamental differences between initial investigations and reviews, certain provisions of the Agreement cannot be reasonably applied to reviews, consideration should be given to providing rules that apply specifically to reviews.[150] (TN/RL/W/47)

- clarify the circumstances that might lead to the continuation of a measure, and provide an indicative list of factors that authorities should consider in determining whether the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.[151] (TN/RL/W/47)

- apply the procedures of notification and consultation as established by Article 13.1 to reviews. (TN/RL/W/19)

- clarify that the expression "by or on behalf of the domestic industry" in Article 21.3 should be understood as in Article 11.4. (TN/RL/W/19)

- determine whether the *SCM Agreement* needs to be clarified in order to prevent misuse of the special provisions for new shippers.[152] (TN/RL/W/72)

- consider whether there should be a greater symmetry between the provisions of Article 19.3 of the *SCM Agreement* and Article 9.5 of the *Anti-Dumping Agreement* with regard to the basis on which such reviews must be carried out.[153] (TN/RL/W/104)

[150] See Section 58 *supra* on the *Anti-Dumping Agreement*.
[151] See Section 58 *supra* on the *Anti-Dumping Agreement*.
[152] See Section 58 *supra* on the *Anti-Dumping Agreement*.
[153] See Section 58 *supra* on the *Anti-Dumping Agreement* and Section 157 *infra* on the *SCM Agreement*.

ARTICLE 20 - RETROACTIVITY

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.

147. Retroactivity

- consider further developing the provisions of the *SCM Agreement* as far as retroactivity is concerned. (TN/RL/W/104)

- consider whether the *SCM Agreement* should mirror Article 10.8 of the *Anti-Dumping Agreement* in order to establish an important time-limit for the retroactive application of definitive duties.[154] (TN/RL/W/104)

- consider whether the end result of the discussions on the issue of retroactivity should reflect a symmetry between the *Anti-Dumping* and the *SCM Agreement.*[155] (TN/RL/W/104)

148. Critical Circumstances

- consider clarifying what provisional steps are appropriate to preserve the right to impose duties retroactively (where there is a finding of critical circumstances); clarify and improve Article 20.6 in order to make it more effective (provide a sufficient remedy).[156] (TN/RL/W/72)

[154] See Section 59 *supra* on the *Anti-Dumping Agreement* and Section 157 *infra* on the *SCM Agreement*.
[155] See Section 59 *supra* on the *Anti-Dumping Agreement* and Section 157 *infra* on the *SCM Agreement*.
[156] See Section 59 *supra* on the *Anti-Dumping Agreement* .

ARTICLE 22 - PUBLIC NOTICE AND EXPLANATIONS OF DETERMINATIONS

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[53], adequate information on the following:

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

(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.

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[53] 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.

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.

149. Public Notice and Explanation of Determinations / Transparency

- consider ways to promote greater disclosure of decisions and calculations performed; for example, investigating authorities could be required to give detailed descriptions of decisions made, the facts on which those decisions were based and the calculation methodology applied to determine the countervailing duty rate.[157] (TN/RL/W/35)

- lay down guidelines with respect to the level of detail required in determinations.[158] (TN/RL/W/132)

[157] See Section 61 *supra* on the *Anti-Dumping Agreement* .
[158] See Section 61 *supra* on the *Anti-Dumping Agreement*.

ARTICLE 23 - JUDICIAL REVIEW

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.

150. Judicial Review

- discuss whether Members should provide additional information on procedures within their respective countries for pursuing legal recourse in a countervailing duty case (e.g. identify the court or other judicial system put in place and explain how that legal system operates).[159] (TN/RL/W/35)

[159] See Section 62 *supra* on the *Anti-Dumping Agreement* .

ARTICLE 32 - OTHER FINAL PROVISIONS

Article 32
Other Final Provisions

(…)

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.

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.

(…)

151. Detailed National Legislation/Regulation

- provide the Negotiating Group on Rules with a comprehensive overview of how Members have applied the procedural fairness provisions of the Agreement in their national laws, regulations and practices, as a starting point in the discussion on principles and procedures that could be adapted into the Agreement.[160] (TN/RL/W/35)

- encourage Members to provide binding regulations or other administrative guidelines that give the necessary details about the procedures their authorities use to conduct investigations. [161] (TN/RL/W/35)

[160] See Section 65 *supra* on the *Anti-Dumping Agreement*.
[161] See Section 65 *supra* on the *Anti-Dumping Agreement*.

ANNEXES II AND III

ANNEX II
GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS[61]

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.

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[61] 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.

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 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.

152. Verification System for Drawback and Substitution Drawback Schemes

- establish a presumption that a reasonable and effective verification system is in existence wherever standard input-output norms or similar averaging procedures are developed fairly and systematically for determining the average amount of various inputs required for the manufacture of one unit of the

final product and are used to determine the amount payable to the exporter on account of remission of indirect taxes or import duties. (TN/RL/W/120)

153. Capital Goods and Consumables to be Included in the Definition of Inputs Consumed

- amend footnote 61 of the *SCM Agreement* to include capital goods and consumables in the list of goods that are consumed in the process of production. (TN/RL/W/120)

154. No Obligation for the Exporter Concerned to Import the Inputs

- clarify Annex III to the *SCM Agreement* to the extent that sale of the entitlement to obtain the duty free imported inputs in substitution drawback schemes would not be considered a subsidy, provided such inputs are imported within two years and sale of such entitlement is not made at a premium. (TN/RL/W/120)

OTHER ISSUES

155. Circumvention

- negotiate uniform procedures to address the circumvention of countervailing duty measures.[162] (TN/RL/W/50)

156. Duty Refund

- consider having special dispute settlement provisions for the *SCM Agreement* in cases where the imposition of duties under this agreement has been found to be inconsistent with the provisions of the agreement; these new provisions would require the return of countervailing duties or duty deposits in cases where a Member's compliance action with a DSB decision results in the measure being withdrawn, or a partial return of duties or duty deposits where the amount of duties/deposits that would have been collected under a WTO-compliant measure is less than the amounts actually collected.[163] (TN/RL/W/47)

157. Harmonization of the *Anti-Dumping Agreement* and the *SCM Agreement* [164]

- address divergences between similar provisions of the *Anti-Dumping* and the *SCM Agreements*, so that, where appropriate, differences in similar provisions of the two agreements are eliminated. (TN/RL/W/47)

- agree that there should be analogous provisions within the *SCM Agreement* relating to countervailing duty measures to reflect corresponding provisions in the *Anti-Dumping Agreement*, for example, clarification of facts available under *SCM Agreement* Article 12.7.[165] (TN/RL/W/85)

- harmonize, where possible and appropriate, the provisions of the *SCM Agreement* and *Anti-Dumping Agreement* (e.g., whereas the *SCM Agreement* provides expedited reviews for any exporter that was not actually investigated, the *Anti-Dumping Agreement* restricts expedited reviews to new shippers). (TN/RL/W/112)

158. Reducing the Cost of Investigations

- identify areas where increased procedural fairness can reduce costs of investigations.[166] (TN/RL/W/35)

- explore standardizing verification outlines and the structure of verification reports.[167] (TN/RL/W/35)

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[162] See Section 66 *supra* on the *Anti-Dumping Agreement*.
[163] See Section 67 *supra* on the *Anti-Dumping Agreement*.
[164] See Section 68 *supra* on the *Anti-Dumping Agreement* and Sections 125, 129, 136, 137, 144 and 146 on the *SCM Agreement*.
[165] See Section 125 *supra*.
[166] See Section 69 *supra* on the *Anti-Dumping Agreement*.
[167] See Section 69 *supra* on the *Anti-Dumping Agreement* and Section 164 *infra* on the *SCM Agreement*.

- explore the possibility of model/standard questionnaires which are to be applied by Members carrying out AD investigations; examine whether or not it would be appropriate to have simplified questionnaires for SMEs.[168] (TN/RL/W/138)

- explore whether and to what extent standard procedures for on-spot verifications would help (the provisions of Annex I of the *Anti-Dumping Agreement* are a good starting-point for further clarifications in this respect). (TN/RL/W/138)

- discuss whether the periods set out in Article 5.10 of the *Anti-Dumping Agreement* could be significantly shortened (this discussion would also have to reflect that shorter deadlines impose greater discipline on investigating authorities and interested parties). (TN/RL/W/138)

- examine whether or not there should be mandatory deadlines for review investigations and whether these deadlines could be significantly shorter than the ones which are currently applicable for new investigations. (TN/RL/W/138)

- discuss whether the current ADA should be clarified by explicitly forbidding the mandatory representation by lawyers of a co-operating party. (TN/RL/W/138)

- provide clear rules as to how non-confidential summaries should be prepared; give guidance with regard to all areas where non-confidential summaries have to be submitted including for transaction-by-transaction listings and information on cost of production; provide for the possibility of a review of such summary, e.g. by a "Permanent Group of Experts" type of body serviced by the WTO Secretariat; ask Members to establish domestic rules allowing for independent review of non-confidential summaries upon request by an interested party; built upon Article 13 of the *Anti-Dumping Agreement* as a basis for this option. (TN/RL/W/138)

- clarify rules on disclosure (Art. 6.9 of the *Anti-Dumping Agreement*); any rules on disclosure should aim at defining the minimum information to be given. (TN/RL/W/138)

- provide a clear methodological framework for reviews. (TN/RL/W/138)

- design new rules on injury analysis which give more precise guidance; examine whether one could find straightforward rules for a number of typical "extreme" cases (this could be achieved by providing guidance to the application of the factors listed in Article 3.2 and Article 3.4 of the *Anti-Dumping Agreement*; such guidance could be obtained by introducing more quantitative elements where possible). (TN/RL/W/138)

159. Swift Control Mechanism for Initiations

- consider establishing "fast track initiation panels", which, ideally, would issue their recommendations before the actual imposition of measures. Procedures for fast track panels could contain e.g. the following elements:

- The grounds on which initiations can be challenged could be limited to a few key elements of the initiation. For instance the following three aspects could be subject to review: standing of complainants (Article 11.4), formal requirements for the application (Article 11.2 (i) to (iv)), and

[168] Proposals submitted in document TN/RL/W/138 and listed under this heading refer to the *Anti-Dumping Agreement* but apply, *mutatis mutandis*, to countervailing duty investigations and measures (see document TN/RL/W/138, page 1).

accuracy and adequacy of evidence concerning subsidisation, injury and causal link (Article 11.3)

- Shortened period for consultation before the establishment of the fast-track panel
- Only one written submission and one hearing
- Shorter deadlines for submissions
- No interim review stage
- Shortened standard period for issuance of the report to the Parties and for its circulation to the other Members
- Obligation on the panel to issue suggestions on how to implement recommendations (alternatively, if a violation is found, a panel shall recommend the termination of the measure)
- Short and standard "reasonable period of time" for implementation.[169] (TN/RL/W/67)

- consider providing for "binding arbitration", which could cover e.g. absence of evidence (i.e. any of the items listed in Article 11.2) or missing invitation for consultations of the exporting country concerned (Article 13.1). Arbitration should be requested quickly (perhaps within 10 days of initiation), be concluded in a short time (e.g. 30 days) and without appeal. Arbitration could be conducted on the basis of a "check-list" of the basic elements required for the initiation of an investigation and which fall within the scope of the arbitration.[170] (TN/RL/W/67)

- consider the creation of a "standing advisory body" (this body could be modelled upon the "Permanent Group of Experts" provided for in Article 24.3 of the *SCM Agreement*) to give a non-binding advisory opinion on the WTO legality of the initiation of a countervailing duty investigation, this body would report to the WTO Committee on Subsidies and Countervailing Measures where Members could express their views on the report.[171] (TN/RL/W/67)

160. Technical Assistance / Capacity Building

- develop standardized training programs; organize meetings of administrators to learn and discuss technical issues.[172] (TN/RL/W/35)

161. Codification of Decisions

- consider whether some or all of the Dispute Settlement Body's interpretations of the *SCM Agreement* should be incorporated into the Agreement.[173] (TN/RL/W/47)

[169] See Section 70 *supra* on the *Anti-Dumping Agreement*.
[170] See Section 70 *supra* on the *Anti-Dumping Agreement*.
[171] See Section 70 *supra* on the *Anti-Dumping Agreement*.
[172] See Section 71 *supra* on the *Anti-Dumping Agreement*.
[173] See Section 76 *supra* on the *Anti-Dumping Agreement*.

162. Perishable, Seasonal, Cyclical Products

- clarify and improve the rules pertaining to issues particular to countervailing duty investigations of perishable, seasonal, and cyclical products (producers may be more vulnerable to dumped or subsidized imports that enter the domestic market during the limited portions of the year when their product is sold).[174] (TN/RL/W/72)

163. Persistent Subsidization

- address the issue of persistent subsidization, i.e. persistent subsidization of the same product, by the same producer/country, being exported to numerous countries around the world.[175] (TN/RL/W/72)

164. Procedural Issues / Sampling

- clarify the precise manner by which a statistically valid sample can be developed (e.g. what are the relevant characteristics of the underlying population, and what is the relationship between the available sampling units and the parameter value to be estimated?).[176] (TN/RL/W/78)

- develop a model questionnaire and verification outlines to be used in countervailing duty investigations. (TN/RL/W/78)

165. Subsidized Domestic Like Product

- explore practical modalities to ensure that the countervail process takes account of the amount of subsidization specifically benefiting the domestic like product. (TN/RL/W/112)

166. Consistent Use of Terminology

- review the use of terms within the *Anti-Dumping* and *Subsidies Agreements* as well as across the two agreements (such a review would reveal the inconsistent use of certain terms, which may have unintended consequences for the interpretation of the Agreements , for example, Article 6.7 of the *Anti-Dumping Agreement* provides for notifying "the representatives of the government of the Member" with respect to an in-country verification, by contrast, in elaborating on the same requirement, Annex I, paragraph 1 refers to notifying "the authorities of the exporting Member"; similarly, in what are otherwise equivalent provisions, Article 19.3 of the *SCM Agreement* uses the term "levied" where Article 9.2 of the *Anti-Dumping Agreement* uses the term "collected").[177] (TN/RL/W/130)

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[174] See Sections 4 and 11 *supra* on the *Anti-Dumping Agreement* and Section 136 *supra* on the *SCM Agreement*.

[175] See Section 74 *supra* on the *Anti-Dumping Agreement* .

[176] See Section 48 *supra* on the *Anti-Dumping Agreement* and Section 158 *supra* on the *SCM Agreement.*

[177] See Section 81 *supra* on the *Anti-Dumping Agreement* and Section 157 *supra* on the *SCM Agreement*.

167. Preliminary Determination

- consider whether the Agreement could be improved by requiring that Members issue a preliminary determination at a point in time prior to a final determination that would give parties sufficient time to defend their interests.[178] (TN/RL/W/130)

168. Standard of Review

- consider whether a provision similar to Article 17.6 of the *Anti-Dumping Agreement* should be included in the *SCM Agreement.*[179] (TN/RL/W/130)

169. Nature and Composition of Investigating Authorities

- consider whether the *SCM Agreement* should be clarified to expressly incorporate the concept that individual members should continue to have the flexibility to organize their authorities as they deem appropriate, particularly for Members that use authorities with multiple decision makers; matters that may be addressed in such a clarification could include, for example, a Member's ability: (a) to determine what constitutes the determination of the appropriate authority; and (b) to permit separate authorities to maintain distinct records.[180] (TN/RL/W/130)

170. Small Economies: Regional Authority

- explore proposal for a regional trade authority (proposed in the context of the Work Programme on Small Economies), which would conduct trade remedy cases on behalf of individual Members.[181] (TN/RL/W/35)

- consider how a regional authority (designated by small economies that do not have the resources to maintain a "competent authority") might function, and any changes in the *SCM Agreement* which may be necessary. [182] (TN/RL/W/72)

[178] See Section 82 *supra* on the *Anti-Dumping Agreement.*
[179] See Section 64 *supra* on the *Anti-Dumping Agreement.*
[180] See Section 83 *supra* on the *Anti-Dumping Agreement.*
[181] See Section 84 *supra* on the *Anti-Dumping Agreement.*
[182] See Section 84 *supra* on the *Anti-Dumping Agreement* .

ANNEX I[183]

TN/RL/W/1 – Improved Disciplines Under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement. Communication from Canada.

TN/RL/W/3 – The Doha Mandate to Address Fisheries Subsidies: Issues. Submission from Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and the United States.

TN/RL/W/4 – Proposals on Implementation Related Issues and Concerns – Agreement on Subsidies and Countervailing Measures/ Anti-Dumping Agreement. Submission by India.

TN/RL/W/5 – Export Credits in the WTO. Paper by Brazil.

TN/RL/W/6 – Anti-dumping: Illustrative Major Issues. Paper by Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand and Turkey.

TN/RL/W/7 – Implementation-Related Issues. Paper by Brazil.

TN/RL/W/9 – Proposal from the People's Republic of China on Fisheries Subsidies. Communication from China.

TN/RL/W/10 – Second Contribution to Discussion of the Negotiating Group on Rules on Anti-dumping Measures. Paper by Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland and Thailand.

TN/RL/W/11 – Japan's Basic Position on the Fisheries Subsidies Issue. Communication from Japan.

TN/RL/W/12 – Fisheries Subsidies: Limitations of Existing Subsidy Disciplines. Submission from New Zealand.

TN/RL/W/13 – Submission from the European Communities Concerning the Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping Agreement). Communication from the European Communities.

TN/RL/W/17 – Korea's Views on the Doha Development Agenda Discussions on Fisheries Subsidies.

TN/RL/W/18 – Replies to the Questions/Comments from Australia on TN/RL/W/10. Paper by Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; and Thailand.

TN/RL/W/19 – Countervailing Measures: Illustrative Major Issues. Paper by Brazil.

[183] This Annex contains the list of documents relating to Anti-Dumping, Subsidies and Countervailing Measures and Fisheries Subsidies circulated under document series TN/RL/W/ . Documents in this series which relate to Regional Trade Agreements are included in this Annex.

TN/RL/W/20 – Questions from the European Communities on Documents TN/RL/W/6 and TN/RL/W/10. Communication from the European Communities.

TN/RL/W/21 – Adverse Trade and Conservation Effects of Fisheries Subsidies. Communication from the United States.

TN/RL/W/22 – Comments on Document TN/RL/W/6 on Anti-Dumping Measures. Paper from Australia.

TN/RL/W/23 – Comments on Document TN/RL/W/10 on Anti-Dumping Measures. Paper from Australia.

TN/RL/W/24 – Submission by the United States. Communication from the United States

TN/RL/W/25 – Questions from the United States on Papers Submitted to the Rules Negotiating Group. Communication from the United States.

TN/RL/W/26 – Second Submission of India (Anti-dumping Agreement). Communication from India.

TN/RL/W/27 – Basic Concepts and Principles of the Trade Remedy Rules. Communication from the United States.

TN/RL/W/28, TN/RL/W/28/Rev.1(adding Mexico) – General Contribution to the Discussion of the Negotiating Group on Rules on Anti-Dumping Measures. Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand; and Turkey.

TN/RL/W/29 – Third Contribution to Discussion of the Negotiating Group on Rules on Anti-dumping Measures. Paper by Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand and Turkey.

TN/RL/W/30 – WTO Negotiations Concerning the WTO Agreement on Subsidies and Countervailing Measures. Proposal by the European Communities.

TN/RL/W/31 – Replies to Additional Questions to Our Second Contribution (TN/RL/W/10). Paper by Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; and Thailand.

TN/RL/W/33 – Special and Differential Treatment and the Subsidies Agreement. Communication from the United States.

TN/RL/W/34 – Second Set of Questions from the United States on Papers Submitted to the Rules Negotiating Group. Communication from the United States.

TN/RL/W/35 – Investigatory Procedures under the Anti-Dumping and Subsidies Agreements. Submission by the United States.

TN/RL/W/36 – Morocco's Views on the Negotiations on the Rules and Disciplines of the Agreement on Implementation of Article VI of the GATT 1994 and the Agreements on Subsidies and Countervailing Measures. Communication from Morocco.

TN/RL/W/37 – Comments from Australia on Brazil's Paper on Countervailing Measures: Illustrative Major Issues (Document TN/RL/W/19). Submission by Australia.

TN/RL/W/38 – Comments from Australia on the United States' Paper on Basic Concepts and Principles of the Trade Remedy Rules (Document TN/RL/W/27). Submission by Australia.

TN/RL/W/39 – Comments from Australia on the European Communities' Subsidies Paper (TN/RL/W/30). Submission by Australia.

TN/RL/W/40 – Intervention by India on the Proposal by the EC Captioned WTO Negotiations Concerning the WTO Agreement on Subsidies and Countervailing Measures (TN/RL/W/30). Communication from India.

TN/RL/W/41 – Improved Rules Under the Agreement on Subsidies and Countervailing Measures - Non-Actionable Subsidies. Proposal by Venezuela and Cuba.

TN/RL/W/42 – Questions to the United States on TN/RL/W/24. Communication from India.

TN/RL/W/43 – Comments from Australia on the United States' Paper on Investigatory Procedures Under the Anti-Dumping And Subsidies Agreements (TN/RL/W/35). Submission by Australia.

TN/RL/W/44 – Treatment of Confidential and Non-Confidential Information Under Article 6.5 of the WTO Anti-Dumping Agreement. Submission by Australia.

TN/RL/W/45 – Replies to Questions to our First Contribution (TN/RL/W/6). Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Singapore; Switzerland and Thailand.

TN/RL/W/46 – Fourth Contribution to the Discussion of the Negotiating Group on Rules on Anti-Dumping Measures. Paper by Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Korea; Japan; Mexico; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand and Turkey.

TN/RL/W/47 – Submission from Canada Respecting the Agreement on Implementation of Article VI of the GATT 1994 (the Anti-Dumping Agreement). Communication from Canada.

TN/RL/W/48 – Anti-Dumping Actions in the Area of Textiles and Clothing: Developing Members' Experience and Concerns. Communication from Bangladesh, People's Republic of China; Colombia; Costa Rica; Egypt; Guatemala; Hong Kong, China; India; Indonesia; Korea; Macao, China; Maldives; Pakistan; Paraguay; Peru; Thailand and Vietnam.

TN/RL/W/49 – Communication From the United States Attaching a Communiqué from the Organization for Economic Cooperation and Development (OECD). Communication from the United States.

TN/RL/W/50 – Circumvention. Communication from the United States.

TN/RL/W/51 – Questions Pertaining to the United States' Paper on Basic Concepts and Principles of the Trade Remedy Rules. Communication from Japan.

TN/RL/W/52 – Japan's Contribution to Discussion on Fisheries Subsidies Issue. Communication from Japan.

TN/RL/W/53 – Replies to Questions Presented to the United States on Submission TN/RL/W/27. Communication from the United States.

TN/RL/W/54 – Third Set of Questions from the United States on Papers Submitted to the Rules Negotiating Group. Communication from the United States.

TN/RL/W/55 – Position Paper to be Presented by the Arab Republic of Egypt on the Doha Declaration Concerning the Negotiations of the Anti-Dumping Agreement. Communication from Egypt.

TN/RL/W/56 – Egyptian Paper Containing Comments on the Contributions Submitted in the Framework of the Doha Negotiations on the Anti-Dumping Agreement. Communication from Egypt.

TN/RL/W/57 – Egyptian Paper Containing Questions and Comments on the Contributions Submitted in the Framework of the Doha Negotiations on the Subsidies and Countervailing Measures Agreement. Communication from Egypt.

TN/RL/W/58 – Subsidies in the Fisheries Sector: Possible Categorizations. Submission from Argentina, Chile, Iceland, New Zealand, Norway, and Peru.

TN/RL/W/59 – Comments from Australia on the Third Contribution from a Number of Countries (Document TN/RL/W/29). Communication from Australia.

TN/RL/W/60 – Comments from Australia on Morocco's Paper on Anti-Dumping and Subsidies and Countervailing Measures Agreements (TN/RL/W/36). Communication from Australia.

TN/RL/W/61 – Comments from Australia on Venezuela's Submission on Non-Actionable Subsidies Under the Agreement on Subsidies and Countervailing Measures (Document TN/RL/W/41). Communication from Australia.

TN/RL/W/62 – Comments from Australia on Canada's Submission on the Anti-Dumping Agreement (Document TN/RL/W/47). Communication from Australia.

TN/RL/W/63 – Senior Officials' Statement on Anti-Dumping Negotiations. Communication from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand and Turkey.

TN/RL/W/64 – Replies to the Questions Made by the Australian Delegation in Document TN/RL/W/37. Submission by Brazil.

TN/RL/W/65 – Korea's Comments on Canada's Submission on the *Anti-Dumping Agreement* (TN/RL/W/47). Communication from Korea.

TN/RL/W/66 – Proposal of the People's Republic of China on the Negotiation on Anti-Dumping. Communication from China.

TN/RL/W/67 – Negotiations on Anti-Dumping and Subsidies – Reflection Paper of the European Communities on a Swift Control Mechanism for Initiations. Communication from the European Communities.

TN/RL/W/68 – Intervention by India on the Submission by the United States on Special and Differential Treatment and the Subsidies Agreement. Communication by India.

TN/RL/W/69 – Korea's Views on the Suggested Categorization of Fishery Subsidies. Communication from Korea.

TN/RL/W/70 – Preliminary Replies to the Questions by Australia Contained in Document TN/RL/W/61. Document Submitted by Venezuela and Cuba.

TN/RL/W/71 – Responses by the United States to Questions from Australia on Investigatory Procedures Under the Anti-Dumping and Subsidies Agreements. Submission by the United States.

TN/RL/W/72 – Identification of Certain Major Issues Under the Anti-Dumping and Subsidies Agreements. Submission by the United States.

TN/RL/W/73 – Comments from Australia on the Arab Republic of Egypt's Position Paper Concerning the Negotiations on the Anti-Dumping Agreement (TN/RL/W/55). Submission from Australia.

TN/RL/W/74 – Comments from Australia on the People's Republic of China's Paper on Anti-Dumping (Document TN/RL/W/66). Submission from Australia.

TN/RL/W/75 – Comments from Australia on the European Communities' Paper: Reflection Paper on a Swift Control Mechanism for Initiations (Document TN/RL/W/67). Submission from Australia.

TN/RL/W/76 – Proposal on Sunset. Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Switzerland; Thailand and Turkey.

TN/RL/W/77 – Possible Approaches to Improved Disciplines on Fisheries Subsidies. Communication from the United States.

TN/RL/W/78 – Subsidies Disciplines Requiring Clarification and Improvement. Communication from the United States.

TN/RL/W/79 and TN/RL/W/79/Corr.1 – Preliminary Comments and Questions by the Arab Republic of Egypt on the Contributions Submitted in the Framework of the Doha Negotiations on the Anti-Dumping Agreement and on the Agreement on Subsidies and Countervailing Measures. Submission from Egypt.

TN/RL/W/80 – Clarifications Sought by India on the Submissions by the United States (TN/RL/W/35) and Canada (TN/RL/W/47). Communication from India.

TN/RL/W/81 – Communication from Argentina.

TN/RL/W/82 – Submission of the European Communities to the Negotiating Group on Rules – Fisheries Subsidies.

TN/RL/W/83 – Proposal on Reviews. Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

TN/RL/W/84 – Questions from Japan Concerning Papers on the Fisheries Subsidies Issue.

TN/RL/W/85 – General Contribution to the Discussion of the Negotiating Group on Rules on the Agreement on Subsidies and Countervailing Duty Measures. Submission from Australia.

TN/RL/W/86 - General Contribution to the Discussion of the Negotiating Group on Rules on the Anti-Dumping Agreement. Submission from Australia.

TN/RL/W/87 – Replies to the Questions Posed by Australia Concerning the Document Submitted by Morocco. Communication from Morocco.

TN/RL/W/88 – Comments from the People's Republic of China on the United States Proposal on Fisheries Subsidies (TN/RL/W/77). Communication from China.

TN/RL/W/89 – Comments by Australia on the United States' Paper on Subsidies Disciplines Requiring Clarification and Improvement (Document TN/RL/W/78). Communication from Australia.

TN/RL/W/90 – Article 9.4 of the WTO Anti-Dumping Agreement: Dumping Margins for Each Sampled Exporter Based on Facts Available. Submission by Australia.

TN/RL/W/91 – "Like Product" Within the Meaning of the WTO Anti-Dumping Agreement. Submission by Australia.

TN/RL/W/92 – Responses from Canada to Certain Questions Posed by Korea in TN/RL/W/65, Australia in TN/RL/W/62, Egypt in TN/RL/W/79 and India in TN/RL/W/80. Communication from Canada.

TN/RL/W/93 – Proposal on Facts Available. Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

TN/RL/W/94 – Replies to the Questions and Comments of WTO Members Concerning the Proposal of China (TN/RL/W/66). Submission from the People's Republic of China.

TN/RL/W/95 – Elements of a Steel Subsidies Agreement. Comments from the United States.

TN/RL/W/96 – Questions from Korea on the United States' Paper on Subsidies Disciplines. Submission from Korea.

TN/RL/W/97 – Korea's Comments on the Submission from the United States (TN/RL/W/77). Submission from Korea.

TN/RL/W/98 – Identification of Additional Issues Under the Anti-Dumping and Subsidies Agreements. Paper Submitted by the United States.

TN/RL/W/99 – India's Replies to Questions From the United States on Its Submissions (TN/RL/W/4 and TN/RL/W/26). Communication from India.

TN/RL/W/100 – Egypt's Preliminary Comments on the Contributions Submitted in the Framework of the Doha Negotiations on the Agreements on Anti-Dumping and Subsidies and Countervailing Measures (TN/RL/W/72). Communication from Egypt.

TN/RL/W/101 – Egyptian Paper Containing Replies to Questions Posed by Australia in Document Number TN/RL/W/73. Communication from Egypt.

TN/RL/W/102 and TN/RL/W/102/Corr.1 – Egypt's Preliminary Comments on the Contributions Submitted in the Framework of the Doha Negotiations on the Agreements on Anti-Dumping and Subsidies and Countervailing Measures (TN/RL/W/78). Communication from Egypt.

TN/RL/W/103 – Fourth Set of Questions From the United States on Papers Submitted to the Rules Negotiating Group. Communication from the United States.

TN/RL/W/104 – Agreements on Anti-Dumping Practices and Subsidies and Countervailing Measures Illustrative Common Issues. Paper by Brazil; Chile; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Switzerland; Thailand and Turkey.

TN/RL/W/105 – Submission of the Arab Republic of Egypt on the Clarification of Certain Provisions of the Anti-Dumping Agreement. Communication from Egypt.

TN/RL/W/106 – Questions From India on Australia's Paper on 'General Contribution to the Discussion of the Negotiating Group on Rules on the Anti-Dumping Agreement'. Communication from India.

TN/RL/W/107 – Observations and Comments by Venezuela on Document TN/RL/W/78 Submitted by the United States Concerning Prohibited Subsidies and Other Subjects Under the WTO Agreement on Subsidies and Countervailing Measures. Communication from Venezuela.

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