WORLD TRADE ORGANIZATION

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Negotiating Group on Rules

COMMUNICATION FROM THE CHAIRMAN

On 8 April 2011, the Chairman of the Trade Negotiations Committee informed TNC participants that Negotiating Chairs would be circulating to all participants documents which represent the product of the work in their Negotiating Groups.

As the TNC Chair has indicated, and in line with the stated expectations of delegations, these documents are to be bottom-up in nature, and to reflect convergence achieved but also lack of convergence where necessary. Their objective is to "capture" the current situation in the negotiations. I have taken these considerations very much to heart, as I prepared the attached documents, which reflect the state of play in the Rules negotiations on the topics of anti-dumping, subsidies and countervailing measures and fisheries subsidies (regional trade agreements are addressed in a separate document.)

The first document relates to anti-dumping. In this area, I have chosen to prepare a revised legal text. This should not be understood to mean that I perceive significant signs of convergence on the major "political" issues. To the contrary, it is noticeable that the new text contains the same twelve bracketed issues as the 2008 Chair text. The 2008 Chair text on anti-dumping does however contain extensive un-bracketed language on a wide range of technical but nevertheless important issues, and our work over the past two plus years has pointed to a few areas where useful changes to that language might be warranted. In short, therefore, arguably a new text on anti-dumping can usefully reflect some limited progress, and in any event it can serve to give a clear idea of where things stand.

The second document relates to subsidies and countervailing measures. In this area, I have chosen to prepare a report rather than a text for the following reasons. First, as with anti-dumping, there have been no significant signs of convergence on bracketed issues as reflected in the 2008 Chair text on subsidies and countervailing measures. Furthermore, unlike in the area of anti-dumping the amount of un-bracketed text in the area of subsidies and countervailing measures is limited, and some of that language (such as that relating to regulated pricing and to the role and interpretation of the Illustrative List of Export Subsidies) is controversial. And while on certain more technical issues un-bracketed language has gained some traction, there are very few useful changes to be proposed at this point. In the area of transposition of possible changes in anti-dumping provisions to their counterpart CVD provisions, insufficient discussion has occurred to date to allow the identification of legal language reflecting convergence. Finally, a significant number of substantive new proposals have been submitted during the past few months. Due to time pressure, the Negotiating Group has not yet fully explored the degree to which any elements of convergence can be found in respect of these proposals. Thus, I see no advantage to preparing a new SCM text at this juncture.

The third document relates to fisheries subsidies. In this area also, I chose to prepare a report rather than a text. As I explain in more detail in the attached report, at present there is too little convergence on even the technical issues, and indeed virtually none on the core substantive issues, for there to be anything to put into a bottom-up, convergence legal text. And the alternative, a text showing all of the proposals as possible "options", would probably be impossible to produce as one

text that laid out in a comprehensible manner the full range of separate options; and it would be nothing more than a compilation of proposals. In my view, a detailed and analytical report on the challenges faced in this difficult negotiation will be far more useful as a tool to "capture" the negotiations and frame its future work.

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

Members hereby *agree* as follows:

PART I

Article 1

Principles

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

Article 2

Determination of Dumping

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

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

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

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

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

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

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.

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 do not differ from any allocations that have been ~~provided that such allocations have been~~ historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]

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

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

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

[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.

[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.

(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.

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

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

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

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

<u>2.4.1.2 If, in a particular case, a Member does not use the source of recognized authority or specific method set forth in its laws, regulations or publicly available administrative procedures, it shall</u>

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

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

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

explain, in the relevant public notices or separate report under Article 12, why it did not use such source or method.

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

[ZEROING: This issue remains among the most divisive in the anti-dumping negotiations, and there have been few signs of convergence. Positions range from insistence on a total prohibition on zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts. Some delegations however hold more nuanced positions, and there is openness among some delegations to undertake a technical examination of this issue in particular contexts, such as for example the third ("targeted dumping") methodology provided for in Article 2.4.2.]

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

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

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

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

Article 3

Determination of Injury[10]

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports[11] and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

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

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

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

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

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

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

[CAUSATION OF INJURY: Delegations continue to hold widely diverging views on issues relating to causation of injury. Recent discussions have focused on two issues: whether it should be mandatory to separate and distinguish the effects of dumped imports and other factors, and the extent to which authorities should be required to conduct a quantitative (as opposed to qualitative) analysis of non-attribution. Although there seems to be a shared view that authorities should carefully consider the effects of factors other than dumped imports, and ensure they are not attributed to dumped imports, there are substantial gaps regarding the degree of precision that can or should be required.]

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

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

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

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

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

(iv) inventories of the product being investigated.

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

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

[MATERIAL RETARDATION: There is a broadly expressed view that the provisions of the Agreement regarding material retardation would benefit from amplification and clarification, and many elements of the 2007 Chair text attract broad support. There are however widely divergent views on the core issue of when an industry is "in

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

establishment". Most notably, while some delegations consider that an industry might still be in establishment even if there was some domestic production, other delegations consider that once there is *any* domestic production an industry is no longer "in establishment", and in such cases the proper analysis is one of current injury or threat.]

Article 4

Definition of Domestic Industry

4.1 For the purposes of this Agreement, and except to the extent otherwise provided in Article 5.4, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

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

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

[EXCLUSION OF PRODUCERS WHO ARE RELATED TO EXPORTERS OR IMPORTERS OR WHO ARE THEMSELVES IMPORTERS: There are widely varying views about the need for criteria governing this exclusion, and about the nature of any possible criteria. In particular, some delegations consider that the rules should be precise, reflecting numerical criteria, and directive in nature. Other delegations believe that any criteria should not be too prescriptive, as the assessment must be case by case. Yet other delegations do not exclude such producers and believe that no changes to these provisions are necessary.]

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied[15] only on the

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

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

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

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

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

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

Article 5

Initiation and Subsequent Investigation

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

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

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

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

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export

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

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

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

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

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

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

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

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

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

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

[PRODUCT UNDER CONSIDERATION: While many delegations consider that a provision on this issue would be useful, concerns have been expressed that such a provision could have "vertical" as well as "horizontal" implications (e.g. with respect to the inclusion of parts), as well as implications in respect of subsequent proceedings. These concerns have caused some delegations to link this issue to the outcome of discussions on anti-circumvention, while other delegations reject any such linkage. There are also differences of view regarding, inter alia, how broadly the product under consideration should be defined, the role of physical and market characteristics in determining the product under consideration, and when and how product under consideration should be determined.]

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

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

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

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

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

Article 6

Evidence

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

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

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

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

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

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

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

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

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

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

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

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

6.4*bis* The authorities shall maintain a file containing all non-confidential documents submitted to or obtained by the authorities in an anti-dumping proceeding, including non-confidential summaries of confidential documents and any explanations provided pursuant to Article 6.5.1 as to why summarization is not possible, and shall allow interested parties to review and copy the documents in that file upon request. Where the proceeding is ongoing or is subject to judicial, arbitral or administrative review, access to this file shall be provided within five working days of a request. The non-confidential file shall be kept in an organized manner, and a complete index of all documents in the possession of the authorities, including confidential documents, shall be included therein. Each file shall include all public notices related to that proceeding issued pursuant to Article 12, as well as separate reports issued pursuant to footnote 37 to that Article. Each file shall be maintained so long as the measure to which it relates remains in force. The authorities shall provide for the copying of documents in the non-confidential file at the reasonable expense of the person so requesting, or shall allow, subject to reasonable safeguards, that person to remove the documents for copying elsewhere.[23]

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

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

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

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

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and

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

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

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

unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. ~~Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.~~

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

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

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

6.9*bis* The authorities shall, normally within seven days after giving public notice of a final determination under Article 12.2, disclose to each exporter or producer for whom an individual rate of duty has been determined the calculations used to determine the margin of dumping for that exporter or producer.[27] The authorities shall provide to the exporter or producer the calculations, either in electronic format (such as a computer programme or spreadsheet) or in another appropriate medium, a detailed explanation of the information used, the sources of that information and any adjustments made to the information prior to its use in the calculations. The disclosure and explanation shall be in such a form as to permit the reproduction of the calculations.

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

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall ~~preferably~~ be chosen in consultation with, and preferably with the consent of, the exporters, producers or importers concerned. Where there are large numbers of exporters, producers or importers, the authorities may consult with relevant trade associations.

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[26] Where no preliminary determination has been made, this disclosure shall be made within sufficient time to allow an exporter to offer an undertaking in response.

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

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

6.10.3 Where the authorities limit their examination pursuant to this paragraph, they shall explain, in their public notices or separate reports pursuant to Article 12, the basis for their conclusion that it was impracticable to determine an individual margin of dumping for each known exporter or producer, the reasons for the specific selection made and the reasons why an individual margin was not determined for any exporter or producer not initially selected who submitted the necessary information in time for that information to be considered during the course of the investigation.

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

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

(ii) the government of the exporting Member; and

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

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

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

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

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

Article 7

Provisional Measures

7.1 Provisional measures may be applied only if:

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

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

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

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

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

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

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

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

Article 8

Price Undertakings

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

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused

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

by such dumping or, if no affirmative preliminary determination is made, until the authorities have made disclosure pursuant to paragraph 9 of Article 6. The authorities shall inform exporters of their right to offer undertakings and shall allow them an adequate opportunity to do so.

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

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

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

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

Article 9

Imposition and Collection of Anti-Dumping Duties

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

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

[PUBLIC INTEREST: Participants are sharply divided on the desirability of a procedure to take account of the representations of domestic interested parties when deciding whether to impose a duty. Some consider that such a procedure would impinge on Members' sovereignty and would be costly and time-consuming, while others support inclusion of such a procedure. Issues related to any such procedure include the elements that can or should be taken into account in any public interest proceeding, the extent to which any such procedures should apply in the context of Article 11 reviews, whether the ADA's requirement for a judicial review mechanism should apply to decisions pursuant to any such procedure, and the extent to which WTO dispute settlement should apply.]

[LESSER DUTY: Many delegations strongly support inclusion of a mandatory lesser duty rule. Other delegations oppose with equal conviction the inclusion of such a rule, with one delegation noting that it was not practically possible to calculate an injury margin. Among those supporting a mandatory lesser duty rule, there are varying views about the appropriate degree of specificity for any new rules and the extent to which those rules should prescribe or prioritize particular approaches to determining the appropriate level of duty. Some delegations have indicated that at a minimum language in the current Agreement regarding the desirability of applying a lesser duty should be maintained.]

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

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

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

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

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

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

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

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

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

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

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

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

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

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

or by a contract for sale pursuant to which such shipments will occur within six months of the date upon which the contract was concluded).[33]

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

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

9.5.3 No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review. Upon collection of any such duties due, the authority shall promptly release any guarantee or bond.

[ANTI-CIRCUMVENTION: Delegations disagree as to whether there should be specific rules on anti-circumvention. Some delegations consider that the only appropriate reaction to perceived circumvention is to seek initiation of a new investigation, while other delegations consider that anti-circumvention is a reality, and that rules on anti-circumvention are necessary to achieve some degree of harmonization among the procedures used by different Members. To the extent that rules are included, delegations disagree, inter alia, what types of circumvention should be addressed (with particular concern expressed regarding the use of anti-circumvention measures in respect of exports originating in a third country), whether numerical thresholds are desirable, whether findings of dumping, injury and causation should be required and whether anti-circumvention measures should be company-specific or country-wide.]

Article 10

Retroactivity

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

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of

[33] Provided, that if such shipments have not occurred within six months of the date upon which the contract was concluded, the authorities may terminate the review without determining individual margins for the exporters or producers concerned.

injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

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

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

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

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

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

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

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

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

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

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

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

11.2 The authorities shall review the need for the continued imposition of the duty, or for a modification of the level of the duty[34], 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.[35] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Interested parties may also request a modification in the level of the duty. If, as a result of the review under this paragraph, the authorities determine that there has been a change in circumstances of a lasting nature[36] since the original investigation or the last review under Article 11.2 or 11.3, such that the anti-dumping duty is no longer warranted or the level of the duty applicable to one or more exporters is no longer appropriate, the duty~~, it~~ shall be terminated immediately or its level modified.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own 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.[37] The duty may remain in force pending the outcome of such a review.

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

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

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

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

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

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

[37] 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.

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[38], due regard being paid to the requirement for the protection of confidential information, adequate information on the following:

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

(ii) the domestic like product and the domestic industry, including whether any domestic producers were excluded from the domestic industry, and the names of the applicant and of the domestic producers of the like product (or, if relevant, associations of producers) supporting the application and of other domestic producers of the like product insofar as they are known to the investigating authorities;

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

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

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

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

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

[38] 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.

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

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

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

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

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

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

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

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

(~~i~~v) ~~considerations~~ information relevant to the injury determination as set out in Article 3, including information concerning the domestic market for the subject imports and the like product, the volume and the price effects of the

subject imports, the consequent impact of the subject imports on the domestic industry and, if relevant, the factors leading to a conclusion of threat of material injury or material retardation of the establishment of a domestic industry;

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

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

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

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

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, to the extent applicable, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters, foreign producers and importers~~, and the basis for any decision made under subparagraph 10.2 of Article 6.~~

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

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

Article 13

Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations

within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Article 14

Anti-Dumping Action on Behalf of a Third Country

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

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

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

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

[THIRD COUNTRY DUMPING: Some delegations support new rules that would eliminate the requirement for Council for Trade in Goods approval to take anti-dumping action on behalf of a third country, as in their view the current rules are unworkable. Other delegations do not rule out such new rules, but consider that many other issues about how such actions would be taken would need to be resolved before they could reach a judgment on the desirability of operationalizing anti-dumping action on behalf of a third country. Yet other delegations question whether it is desirable to operationalize this provision at all, with certain delegations preferring that the provision be deleted entirely.]

Article 15

Developing Country Members

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

[SPECIAL AND DIFFERENTIAL TREATMENT/TECHNICAL ASSISTANCE: The Group has continued to examine issues relating to special and differential treatment for developing Members, both as exporters and as users of anti-dumping. While some delegations advocate flexibilities for the investigating authorities of developing Members, for example in respect of initiation of investigations, other delegations are cautious about such flexibilities, particularly in light of the fact that many developing

Members are now active users of anti-dumping. Regarding technical assistance, some delegations propose creation of a trade remedies facility that would assist smaller and resource restricted developing Members to develop the capacity to use such remedies. While some delegations oppose any facility that would assist Members to use trade remedies, others consider that all Members have an equal right to use trade remedies in a WTO-consistent manner.]

PART II

Article 16

Committee on Anti-Dumping Practices

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

16.2 The Committee may set up subsidiary bodies as appropriate.

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

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

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

Article 17

Consultation and Dispute Settlement

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

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

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

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

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

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

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

17.6 In examining the matter referred to in paragraph 5:

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

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

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

PART III

Article 18

Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[39]

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

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

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

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

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

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

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

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

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

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

ANNEX I

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

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

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

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

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

5. Sufficient advance notice shall ~~should~~ be given to the firms in question before the visit is made. To afford the firms adequate opportunity to prepare for on-the-spot investigations, the investigating authorities shall provide each firm at least 14 days advance notice of the time period within which the authorities expect to conduct any on-the-spot investigation of the information provided by that firm.[40]

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

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

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

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

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

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

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

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

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

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties[41], which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, ~~should~~ shall be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language ~~should~~ shall not be considered to significantly impede the investigation.

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

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

6. If evidence or information is not accepted, the supplying party ~~should~~ shall be informed forthwith of the reasons therefor, and ~~should~~ shall have an opportunity to submit further evidence or information, or to provide further explanations, within a reasonable period, due account being taken of the time-limits of the investigation[42]. If the further evidence or information submitted, or the explanations provided, are considered by the authorities as not being satisfactory, the authorities shall

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

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

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

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they ~~should~~ shall do so with special circumspection. In such cases, the authorities ~~should~~ shall, where practicable, check the information from other independent sources at their disposal or reasonably available to them, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation[43]. 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.

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

ANNEX III

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

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

A. Objectives

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

B. Procedures for Review

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

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

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

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

5. The first cycle of reviews shall begin three years after the date of entry into force of the results of the Doha Development Agenda. During the ensuing five years, the Committee shall review the anti-dumping policies and practices of the 20 Members with the most anti-dumping measures in force as of the date of entry into force.[44]

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

7. The Committee shall agree on the order of, and schedule for, the conduct of these reviews, taking into account the resource constraints of the Secretariat and of developing country Members.[45]

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

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

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

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

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

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

C. Developing Country Members

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

D. Appraisal of the Mechanism

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

NEGOTIATIONS ON SUBSIDIES AND COUNTERVAILING MEASURES

REPORT BY THE CHAIRMAN

I. INTRODUCTION

1. As foreseen in the fax of 8 April 2011 from the Chairman of the Trade Negotiations Committee, I am circulating this report on the negotiations on horizontal subsidies disciplines and countervailing measures. I have prepared this report on my own responsibility as Chairman of the Negotiating Group, as representative of the current status of the Group's work on this issue.

2. After careful consideration of the current state of play – described below – I have concluded that there is an insufficient basis at this time for me to present a revised legal text of the Agreement on Subsidies and Countervailing Measures. There are a number of reasons for this. First, in spite of an extremely intensive programme of work in a variety of formats since the beginning of the year, there have been no significant signs of convergence on the bracketed issues as contained in the 2008 Chair text. Second, on unbracketed issues, there are only a relatively small number of such issues compared with anti-dumping, and a number of these have proven to be controversial. While there is considerable convergence on a handful of unbracketed changes, not only are these very few but they are confined to essentially technical issues. Third, in the area of transposition of possible changes in anti-dumping provisions into their counterpart CVD provisions, to date there has been insufficient discussion to allow the identification of legal language reflecting convergence. Fourth, also unlike the situation for anti-dumping, the negotiations on horizontal subsidies and CVDs have seen the submission of a number of substantive new proposals in recent months. Due to time pressure, the Negotiating Group has not yet fully explored the degree to which any elements of convergence can be found in respect of these proposals.

3. In short, particularly in view of the clear message from delegations that they wish to remain in a bottom-up mode, and would not welcome compromise proposals from Chairs where there is no or little convergence among Members, I see no advantage to preparing a new SCM text at this juncture. To the contrary, given all of the above considerations, in my view a narrative report outlining the issues and explaining in detail the areas of convergence and divergence is the best and most objective vehicle to capture in a bottom-up way the current situation in these negotiations, and thus to frame the issues for further work.

4. This report is organized in four sections, corresponding to how the negotiations have been structured over the past year: (1) bracketed issues; (2) unbracketed issues; (3) new proposals; and (4) transposition. Each section describes the issues on the table and the range of positions on each.

II. BRACKETED ISSUES

A. CERTAIN FINANCING BY LOSS-MAKING INSTITUTIONS

5. This issue originated in a proposal by the European Union to create a new category of prohibited subsidies covering the provision by virtue of government action of financing to a wide range of industries on terms and conditions inadequate to cover the long-term operating costs and losses of such financing, where this benefited exported goods. The proposal in its original form, for a prohibition, did not attract a consensus, including because some opposed singling out any form of government-provided financing for tightened disciplines, and because some queried why there should be a prohibition of certain measures that in their view were not necessarily specific subsidies, and thus

not necessarily even covered by the SCM Agreement. Discussions moved to exploration of possible benchmarks for calculating benefits from such financing as an alternative, and the 2007 Chair text reflects this approach, proposing a deeming provision for the existence of a benefit, based on whether the provider institution incurred long-term losses on the provision of loans and loan guarantees as a whole. This text proved controversial, including because some delegations continued to reject the introduction of strengthened disciplines on any government-provided financing, and others queried the appropriateness of deeming the existence of a benefit to the recipient based on a cost-to-government standard.

6. The 2008 Chair text thus moved this issue into a bracket summarizing the range of positions, rather than providing a revised legal text. The issues reflected in that bracket continue to characterize the discussions of this issue since then. In particular, questions remain over which particular situations would be targeted; the relevance of losses by financial institutions to whether a subsidy exists; the potential relevance of the nature and of the creditworthiness or equityworthiness of the recipients of the financing; and how key concepts would be defined.

7. This spring, to see whether progress could be made in clarifying concepts and finding elements of convergence, I established a Contact Group, composed of representatives of a small number of delegations representing a spectrum of views, to consider this issue. Although further developing some of the concepts, and further articulating delegations' positions, that work revealed that the same divergences in position persist.

8. Those favouring the creation of new disciplines seek to address the provision of loans and loan guarantees by government financial institutions that do not operate on an independent, commercial basis, and that benefit from long-term government support to state enterprises unable to obtain financing from commercial lenders, and the provision of equity capital under the same circumstances to the same sorts of enterprises on terms inconsistent with the usual investment practice of private investors. They see these as systemic, long-term situations not adequately disciplined by the existing rules. Those opposed to any such new disciplines consider that such provisions would discriminate against state-owned enterprises, and that subsidy benchmarks for any such situations are not clear. Other concerns raised are how the various terms could be defined in a way that addressed egregious situations without jeopardizing various legitimate government policies including prudential measures taken in regard to financial crises and similar situations, how to avoid a disproportionate impact on developing Members (where, it is argued, state enterprises tend to be more common), how to ensure that concepts of uncreditworthiness and unequityworthiness were fully reflected, and why any such rule would address the covered government financing only when the recipients were state-owned, and not also when provided to uncreditworthy or unequityworthy privately-owned enterprises.

B. EXPORT COMPETITIVENESS

9. This issue originated in a proposal by Egypt, India, Kenya and Pakistan, proposing various changes to the export competitiveness provisions in Articles 27.5 and 27.6. The proposal would lengthen the period over which export competiveness in a product is determined from the current two consecutive calendar years to a five-year moving average, and would create a mechanism to allow reintroduction of export subsidies where export competitiveness in a product was lost after having been reached. The proponents argue that the moving average would prevent aberrational determinations of export competitiveness due to temporary fluctuations, and that the proposal addressing loss of export competitiveness after it has been reached is necessary as the Agreement contains no guidance in respect of such situations. The language in the bracket on this issue in the 2008 Chair text indicates that while many delegations support clarifying the export competitiveness provisions, there are differing views as to how do so, including changing the period involved, or clarifying the definition of "product", and that there also were divergences on whether and under what

conditions to allow reintroduction of export subsidies if export competitiveness is lost after being reached.

10. With a view to further clarifying the issues and exploring whether there were possible bases for convergence this spring I appointed a Friend of the Chair to conduct consultations on this issue. That process did not, however, succeed in bridging the previously-identified gaps.

11. On the period over which to calculate export competitiveness, some delegations have indicated some flexibility, but consider a five-year base period excessive, while others are concerned over the delay this would imply for the date on which export competitiveness would be found to have been reached. Regarding the definition of "product", a number of delegations have stressed the uncertainty over export competitiveness that is caused by the ambiguity in the current text, and some have insisted that their ability to analyse the proposal, and any flexibility they might have regarding other changes to the export competitiveness provisions, are contingent on satisfactorily clarifying that definition. The proponents, however, consider this to be a separate issue that should be addressed separately from their proposal. Finally, regarding the possibility to reintroduce export subsidies if export competitiveness is lost after having been reached, most delegations consider the proposal to be complex and difficult to operationalize, although some delegations are sympathetic to the concerns behind it and are willing to explore possible solutions, subject to transparency and monitoring requirements. Others, however, express considerable scepticism over allowing such reintroduction of export subsidies, which they consider would upset the delicate balance in the export competitiveness provisions between the need to minimize trade distorting effects of subsidies and the important role of subsidies for economic development in developing countries.

C. EXPORT CREDITS – MARKET BENCHMARKS

12. This issue was first raised in a proposal by Brazil to amend item (j) and the first paragraph of item (k) of the Illustrative List of Export Subsidies (Annex I) to reflect a benefit to recipient basis for identifying prohibited export subsidies in the forms of export credits and guarantees, in place of the existing cost to government-based language. One concern underlying the proposal is that the generally higher government costs of funds in developing compared with developed countries means that a cost-to-government standard for export credits and guarantees will put developing country exports of capital goods at a structural disadvantage. If the developing Member provides export credits at rates covering its cost of funds, the rates will be systematically higher than those offered by developed countries using their own cost of funds as the benchmark. If the developing country were to match the terms offered by the developed country, it would have to provide credits at below its own cost of funds, and thus would run afoul of the prohibition in the first paragraph of item (k). A further concern behind the proposal is that the cost to government language of the provision is inconsistent with the Agreement's general definition of "subsidy". Other delegations, however, opposed this proposal, arguing that cost-to-government is the approach in the pertinent international arrangement (see next section), and that a change to benefit-to-recipient would increase uncertainty for providers of export credits and would raise costs to purchasers of financed goods.

13. The 2007 Chair text proposed replacing the cost to government language in the first paragraph of item (k) with language referring to the rates available to the recipient on international capital markets (i.e., a benefit to recipient basis). That text proved to be controversial, and the 2008 text thus addressed the issue in a bracket describing the range of views expressed.

14. This spring, I composed a Contact Group to work on this issue with a view to clarifying positions and exploring whether there were any possible bases of convergence, regarding the language in item (k), and the similar language in item (j) (on export credit and other guarantees and insurance). This proved not to be the case, however. While there were some useful clarifications regarding the positions and reasoning of delegations, those positions remained essentially unchanged. Some

delegations are strongly of the view that the benefit-to-recipient standard should apply in respect of export credits, for reasons of fairness to developing Member providers of export credits, and for consistency with the rest of the SCM Agreement. Some linked this issue to the especially trade distortive nature of these types of export subsidies. These delegations thus support amending item (j) and the first paragraph of item (k) to reflect the benefit-to-recipient basis, and they support as well retaining the unbracketed language in footnote 6 (regarding the role and operation of the Illustrative List of Export Subsidies), which is discussed in the next section of this report. Others are strongly of the opposite view, that the cost-to-government language in item (j) and the first paragraph of item (k) should be retained as is, and that the proposed amendments to footnote 6 should be dropped. In their view, a benefit-to-recipient standard would increase uncertainty over benchmarks, and hence the existence of subsidization, which could reduce the amount of financing available. They also consider that the overall cost of export financing would increase under a benefit-to-recipient standard, and that lower financing costs are beneficial to the importing countries in question, and that most developing countries are importers rather than exporters of capital goods. Concerns have been expressed, however, that flows of imports with cheap financing can be disruptive to competing domestic industries in the importing countries.

D. EXPORT CREDITS – SUCCESSOR UNDERTAKINGS

15. This issue originated in the same proposal by Brazil on export credits, which in respect of the second paragraph of item (k) proposed that any changes made to the "undertaking" referred to therein following the conclusion of the Uruguay Round would need to be adopted by consensus of WTO Members. For Brazil this is an issue of systemic concern, as the "undertaking" in question is the Arrangement on Officially Supported Export Credits, to which only a small number of WTO Members are parties, and changes to which are negotiated and approved at the OECD. Via the second paragraph of item (k), however, that undertaking establishes a safe harbour from the SCM Agreement's prohibition for certain export credit practices, and panels have interpreted the provision's reference to "successor undertaking" to mean the most recent version of the Arrangement adopted by its parties. Brazil thus is concerned that this interpretation means that a small group of countries operating outside the WTO can change WTO rules applicable to all Members. A number of delegations including some parties to the Arrangement objected to this proposal, which in their view would be fatal to the Arrangement. They consider that the Arrangement works well to discipline export credits, and that the frequent updating that it requires to remain current with market developments could easily be blocked at WTO by a Member for political reasons unrelated to the Arrangement itself.

16. The 2007 Chair text proposed that the parties to the Arrangement notify any changes to it to the WTO, for review upon request of a Member within a given period, after which it would take effect for purposes of the second paragraph of item (k). This proposal failed to attract convergence, so the issue was addressed via a descriptive bracket in the 2008 Chair text.

17. The Contact Group on export credits also considered this issue, and their discussions revealed that the divergences in positions persist. On the one hand some delegations consider that any rules that will be binding on WTO Members must be adopted by consensus decision of those Members. (In this regard, the clarification was made that only changes to the "interest rates provisions" of the Arrangement would need to be submitted to the WTO for approval, as only these provisions are relevant to the safe harbour in the second paragraph of item (k)). Others, however, remain concerned over the potential for WTO Members to veto evolutions of the Arrangement. They note that only a small number of non-OECD countries actually provide medium- and long-term export credits, and that these countries often are invited to participate in negotiations of revisions to the Arrangement. They consider that the OECD has expertise in the area, and note its recent outreach initiatives to expand participation in the Arrangement. In their view, WTO Members with no interest in export credits should not have the opportunity to block necessary changes to the Arrangement, and one

institution should not be able to block the coming into force of agreements reached in another institution. The Contact Group also explored some practical questions, including whether to be able to participate in decision-making regarding adopting agreed changes to the Arrangement, a Member would have to demonstrate an interest in export credits, and how transparency regarding the Arrangement could be increased.

III. UNBRACKETED LANGUAGE

18. In addition to the brackets on a range of difficult issues, the 2008 Chair text also proposed a number of unbracketed changes to certain provisions of the SCM Agreement. While there is considerable convergence in respect of some of these proposed changes, others have proven to be controversial.

19. One unbracketed change which as noted above is controversial due to its link to the issue of export credits – market benchmark is that in **footnote 6**. In effect, the proposed language would prevent any item in the Illustrative List of Export Subsidies from being read in an ***a contrario*** sense to establish when a measure is not an export subsidy. A number of delegations oppose this change for the same reasons that they oppose proposed changes to items (j) and (k). In particular, they consider that the language would render the cost-to-government language in items (j) and (k) inoperative by effectively replacing it with a benefit-to-recipient standard. Some also consider that the footnote as amended is unnecessarily broad, as it would apply to the entire Illustrative List, whereas the specific proposals relate only to items (j) and (k). Other delegations, however, consider it important that benefit-to-recipient be the sole standard in the SCM Agreement for determining whether a financial contribution provides a subsidy, and for this reason support the changes to footnote 6.

20. Another highly controversial set of unbracketed changes are those in **Article 2.1(c) and 14(d),** regarding **"regulated pricing"**, an issue first raised in a proposal from the European Union. The language in Article 2.1(c) would introduce guidelines for determining the specificity of subsidies conferred through the provision of goods or services at regulated prices, and the language in Article 14(d) would introduce guidelines for determining the existence of a benefit from goods or services provided at regulated prices. The concern behind the proposal is the trade distortion that can result from subsidized provision of inputs used to produce exported goods.

21. I referred the issue of regulated pricing to a Contact Group for further work, but that work revealed no narrowing of positions. Some delegations question the definition of "regulated", and wonder what sorts of "regulations" would and would not be covered. Some also question what is meant by a "predominant" role of the government. Some consider that the issue of concern is "dual" pricing (selling inputs for less domestically than their export or international market price), rather than regulated pricing. Concerning the specificity language, some consider that the proposal would inappropriately reverse the specificity test, while others believe that the proposed amendment is redundant. Regarding the benefit guidelines, there are major concerns over the basis on which "distortion" of prices in the country of provision of the good or service would be determined, and over the possibility to resort to external benchmarks (whether world prices, export prices or some other external prices), and how it could be ensured that such external benchmarks would sufficiently "relate to" the conditions inside the country in question. Those holding this view consider that estimates of in-country benchmarks should be used instead.

22. Other unbracketed language, while less controversial, nonetheless has not yet reached the stage of real convergence. One such instance is the proposed amendment to **footnote 1**, defining the term **"benefit"** in Article 1.1(b). While a number of delegations support the objective and general direction of this footnote, many questions remain over its drafting, including but not limited to cross-referencing part or all of Article 14, and certain terminology such as "otherwise commercially available".

23. Regarding the proposed change to the **title of Article 14**, most delegations disagree that any amendment is necessary or desirable, and support retaining the original title.

24. Concerning the new unbracketed **Article 14.2, on pass-through** of benefits, many delegations support the introduction of guidelines on this issue. There are a number of questions about the drafting, however, such as the meaning of "unrelated", whether the situation to be addressed is one between related or unrelated parties or both, and the phrase "terms more favourable than otherwise would have been commercially available". **Footnote 46 to Article 14.2** is controversial due to its references to use of world market prices as benchmarks in some situations, for reasons similar to those identified in respect of external benchmarks in the context of regulated prices.

25. New language in **Article 14.3, on allocation of subsidy benefits over time**, has considerable support, with most delegations considering the introduction of guidelines on this issue to be very useful. Some differences have been expressed, however, over a number of the concepts and language used, including "large" and "small" subsidies, whether the recurring or non-recurring nature of a given subsidy may vary over time, how the average useful life of assets should be determined, and how provisions on the time value of money could be made operational if this concept is included. Views differ as well over how prescriptive or open-ended the guidelines should be.

26. Finally, Members have indicated a strong degree of convergence over a number of essentially technical changes to various provisions. These are amendments to **Article 6.4** (displacement or impedance); A**rticle 26** (periodicity of subsidy notifications); **footnote 63** (to item (d) of the Illustrative List of Export Subsidies); **item (j)** of the Illustrative List (parallel construction to that in the first sentence of item (k)); and **Annex VII** (to reflect the technical rectification of the list of Members in paragraph (b); and to amend the definition in footnote 74 of the $1,000 threshold to reflect the respective Ministerial Decision on Implementation-Related Issues and Concerns).

IV. NEW PROPOSALS

27. Contrary to anti-dumping, where the range of issues before the Group has progressively narrowed, there have been a significant number of recent proposals on new or renewed issues relating to subsidies and countervailing measures. This likely reflects significant developments in the real world outside the negotiations. Be that as it may, the Group has, since the 2008 Chair text was issued, received one or more new proposals on the following issues: (i) export financing benchmarks for developing Members; (ii) countervail procedures; (iii) tax and duty rebate schemes; (iv) phase-out period for developing Members graduating from Annex VII; and (v) the presumption of serious prejudice. A brief discussion of the status of these proposals follows.

28. *Export financing benchmarks for developing Members*. In April 2010 India submitted a proposal regarding benchmarks for export finance in developing countries. Specifically, India proposed that the benchmark to be used for export finance in a countervailing duty investigation involving a developing Member exporter be based on the benchmark for government securities of the nearest maturity plus 100 basis points. India explained that it was seeking an approach to short-term export finance benchmarks for developing Members that paralleled the OECD Arrangement's Commercial Interest Reference Rate ("CIRR") for long-term export finance. While some delegations shared India's concerns about finding appropriate commercial benchmarks in developing Members, other delegations were concerned about introducing a cost-to-government based benchmark into Article 14, and in any event doubted that a fixed 100 basis points premium would properly reflect risks. More technically, some delegations questioned whether the proposed text properly captured India's intent to limit its proposal to export finance, much less to short-term export finance.

29. *Countervail procedures*. Proposals regarding countervail procedures submitted since the 2008 Chair text include papers from China in 2009 regarding new subsidy allegations and pre-initiation

consultations[1], and proposals from both India and China in 2010 regarding the creation of a new annex to the Agreement relating to facts available.[2] Regarding new subsidy allegations, China would in effect require that the investigating authorities initiate an investigation of the new programme on the basis of a written application, consultations and a finding of sufficient evidence of subsidization, injury and causation. Regarding pre-initiation consultations, China proposes to require that investigating authorities identify and provide evidence regarding the subsidy programmes to be investigated, to provide sufficient preparation time to exporting Members, and to fully consider, and reply in writing to, points raised during consultations, before initiating. Both India and China propose to transpose to the SCM Agreement, with various revisions, the facts available annex in the AD Agreement.

30. All four proposals have been discussed in plenary and plurilateral formats, and have been the subject of work by Friends of the Chair. On new subsidy allegations, there were clear divergences of view as to whether an investigation is initiated with respect to a subsidized product, or with respect to specific subsidy programmes, as well as to whether the procedure proposed by China would result in an additional burden on investigating authorities and undermine the ability to expeditiously complete investigations. On pre-initiation consultations, concerns were expressed on various aspects of China's proposal, including most notably the meaning and implications of the proposed requirement to fully consider, and reply in writing, to points raised. In consultations with the Friend of the Chair, it was examined whether the transposition of aspects of the proposed revision to Article 5.5 of the AD Agreement might not address China's timing concerns. Concerning a possible facts available annex, there was broad support for the principle that such an annex should be created in the SCM Agreement. There were however divergent views about the extent of the changes that would be required if the annex in the AD Agreement were transposed to the SCM Agreement.

31. *Tax and duty rebate schemes*. India first submitted a proposal on various topics related to tax and duty rebate schemes in 2007 and has submitted two subsequent revisions, most recently in February 2011. There are three aspects to India's proposal. *First*, India asks that "consumables and capital goods" be treated as "inputs consumed in the production process" under footnote 61, such that taxes and duties paid on such goods could be rebated if used for the production of an exported product. *Second*, India proposes that investigating authorities must consider a procedure for confirming which inputs are consumed in the production process as "reasonable and effective" if, *inter alia*, the procedure is "developed fairly and systematically for determining the average amount of various inputs consumed in the production of one unit of the exported product." *Third*, India proposes to specify that, in a countervailing duty investigation, only the excess amount of a tax or duty rebate shall be treated as a subsidy.

32. India's proposal has been discussed in plenary and plurilateral meetings, and has also been the subject of work by a Friend of the Chair. Regarding "consumables and capital goods", many delegations considered that the proposal inappropriately expanded the inputs for which rebates should be allowed, and expressed concerns about the practical difficulties associated with allocating those duties and taxes to particular units of an exported product; India however considered that such allocations did not present insuperable difficulties. Regarding "reasonable and effective" verification procedures, some delegations considered that the proposal was too closely tailored to India's specific system, that it left insufficient discretion to authorities, and more fundamentally that it based the assessment on industry averages rather than on the actual inputs consumed by a particular firm. India responded that its proposal gave sufficient latitude to authorities, and that it was unrealistic to expect thousands of exporters of varying sizes and sophistication to maintain an exacting standard of record-keeping for imported inputs. Regarding the proposal that only the excess amount of rebate be treated

[1] TN/RL/GEN/160 and 161.
[2] TN/RL/GEN/164 and 169.

as a subsidy, while there was support for the principle underlying the proposal, some delegations considered that it would pose significant practical problems for investigating authorities.

33. *Annex VII graduation*. One of the most recent proposals before the Group relates to the phase-out period for export subsidies of developing Members graduating from Annex VII. This proposal was submitted by six developing Members listed in Annex VII (Plurinational State of Bolivia, Egypt, Honduras, India, Nicaragua and Sri Lanka) in March 2011.[3] The proponents seek to ensure that a Member that graduates from Annex VII (on the basis of GNP per capita) can benefit as of that point from the eight-year phase-out period for the elimination of export subsidies provided to other developing Members in Article 27.2(b), as well as the possibility of further extensions pursuant to Article 27.4. The proponents consider that this is a matter of equality of treatment with other developing Members; that it would not be reasonable to expect Annex VII countries, who are at the bottom of the development scale, to eliminate their export subsidies overnight; and that this is a mere clarification of the existing Agreement, not a demand for enhanced S&DT.

34. The proposal was the subject of initial discussions in plenary and plurilateral session, and provoked significant discussion. Some delegations disagreed with the suggestion that this proposal involved a mere clarification, noting that the eight-year transition period in the current Agreement did not apply to Annex VII Members. It was also observed that decisions at Doha, as reflected in footnote 74 to the 2008 Chair text, had already changed the balance struck in the Uruguay Round in respect of Annex VII, and that Annex VII countries now have some forewarning because they only graduate after their GNP per capita, recalculated in constant terms, exceeds $1000 for three consecutive years. Finally, it was observed that some of the proponents represent an important share of world trade.

35. *Presumption of serious prejudice*. The most recent proposal received by the Group, from Canada[4], revives, with revisions, an earlier proposal to restore the presumption of serious prejudice that expired at the end of 1999. More specifically, Canada would restore Article 6.1, would add a fifth category of subsidy giving rise to a presumption, would delete the footnote carving civil aircraft out from the presumption under Article 6.1(a) arising from a 5% *ad valorem* rate of subsidization, and would adjust the rules relating to the calculation of the rate of subsidization. This issue has not been discussed in the Group since mid-2006, and because the revised proposal was only received in mid-March 2011, it has not yet been discussed by the Negotiating Group.

V. TRANSPOSITION

36. From an early stage in the negotiations, there has been recognition within the Negotiating Group that much of the work being done on anti-dumping, and particularly with respect to provisions on injury and procedures, was also potentially relevant in the context of countervailing measures. Thus, many of the proposals tabled on anti-dumping issues specifically call for or raise the possibility of parallel changes in the SCM Agreement.[5] When the previous Chair of the Negotiating Group

[3] TN/RL/GEN/177/Rev.2.

[4] TN/RL/GEN/112/Rev.2.

[5] This includes, for example, proposals or discussion papers by: Brazil, China, the EU, India and the United States concerning "facts available" (respectively, TN/RL/W/19, TN/RL/GEN/169, TN/RL/GEN/93, TN/RL/GEN/164 and TN/RL/W/153); Brazil and the United States on identification of parties (TN/RL/GEN/89); the United States on causation (TN/RL/GEN/128), anti-circumvention (TN/RL/GEN/106), access to non-confidential information (TN/RL/GEN/90), on-the-spot investigations (TN/RL/GEN/132) and preliminary determinations (TN/RL/GEN/133); Canada on product under consideration (TN/RL/GEN/73), sunset (TN/RL/GEN/61) and public interest (TN/RL/GEN/85); Canada and the United States on explanations of determinations and decisions (respectively, TN/RL/GEN/21 and TN/RL/W/35), and the EU on lesser duty rule (TN/RL/W/13 and TN/RL/W/30).

issued the first Chair texts in December 2007, he specifically noted his intention to transpose anti-dumping rules to the countervail context, where relevant and appropriate.[6]

37. Despite this general recognition, the Group did not begin serious work on transposition issues until 2009. In response to the suggestions of various delegations, my predecessor in June 2009 issued two side by side documents as a basis to begin technical work. One of these identified all differences between the un-bracketed language in the 2008 Chair anti-dumping text and counterpart language in the countervail text, while the other identified all differences between the existing (Uruguay Round) AD Agreement and counterpart provisions in the SCM Agreement.[7] By this point, the 2008 Chair text contained no proposed text on a number of important "bracketed" issues, and therefore it was of course not possible to prepare a comparator document on these issues, much less to consider transposition on these issues.

38. The Group conducted a first, preliminary review of these differences in a series of plenary meetings between the summer of 2009 and the spring of 2010. The discussions revealed a notable degree of convergence on the transposition of much, but by no means all, of the un-bracketed text in TN/RL/W/236, although sometimes with necessary modifications, and subject of course to final agreement regarding the anti-dumping text itself. There was less convergence regarding the possible transposition of language from the existing AD Agreement into the SCM Agreement (or vice-versa). It is clear in any event that further work is required to consider the desirability of transposing anti-dumping language into the countervailing context, as well as what adjustments would be required in such cases to ensure that the language is fully suited to the differing circumstances of countervail. Concrete proposals from delegations on transposition could facilitate such work.

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[6] "…since the beginning of these negotiations, there has been a broad acceptance that changes to the anti-dumping rules should, where relevant and appropriate, also be made to the rules regarding countervailing measures, and that is also my intention. I have not in these texts transposed the draft revisions in the anti-dumping rules into the countervail context because our discussions have focused on anti-dumping and because such a transposition will require further technical discussion." (TN/RL/W/236)

[7] TN/RL/W/238 and 240, respectively.

NEGOTIATIONS ON FISHERIES SUBSIDIES

REPORT BY THE CHAIRMAN

I. INTRODUCTION

1. As foreseen in the fax of 8 April 2011 from the Chairman of the Trade Negotiations Committee, I am circulating this report on the fisheries subsidies negotiations. I have prepared the report on my own responsibility as Chairman of the Negotiating Group on Rules, as representative of the current status of the Group's work on this issue. I must emphasize in this regard that the structure and indeed the content of this report of course are without prejudice to the position of any delegation.

2. After careful consideration of the current state of play – described below – I have concluded that I am not now in a position to present a revised legal text on fisheries subsidies. Rather, the only option available to me at this juncture for both capturing such progress as has been made, and more significantly, for identifying the numerous remaining gaps in Members' positions, is to present a detailed narrative report.

3. In reaching this conclusion in these difficult circumstances, I have heard very clearly the main message from Members to Chairs that for now, any Chair-produced documents must be of a bottom-up nature. That is, Members have made plain that they would not welcome compromise proposals from Chairs that would seek artificially to bridge the real gaps in positions that remain. Applying this standard to the fisheries subsidies negotiations, at present there is too little convergence on even the technical issues, and indeed virtually none on the core substantive issues, for there to be anything to put into a bottom-up, convergence legal text, and there are no fisheries subsidies disciplines already in existence to which we could refer or revert. Nor would a text with either a small range of options, or with all positions and proposals presented as "options", be feasible. The former would require me to pick and choose, and thus would not be bottom-up. The latter would probably be impossible to produce as one text that was comprehensible. In any case, such a text would be nothing more than a compilation of proposals, which I consider could only impede movement toward convergence.

4. As will be apparent from the report's description of the issues, this negotiation poses significant challenges, not only for me as the Chair, but also for the negotiators. One main reason is the interlinked nature of the issues involved. In particular, the main elements of the negotiation – the prohibition, general exceptions, special and differential treatment, and fisheries management – are interdependent, and need to be internally balanced for any proposed package of disciplines, whatever its level of ambition, to be coherent. Thus, adjustments to any one of these elements will generally require adjustments in the others. A further main challenge is the lack of agreement over the scope and definition of some of the basic terms and concepts under negotiation, many of which are highly technical and pertain to areas that are new to WTO. These factors underlie and explain the complexity of the proposals on the table and of the discussions, and the difficulty of evaluating alternative visions of the disciplines.

5. The original Chair text, circulated in late 2007 by my predecessor, Ambassador Valles, was an arbitrated, unbracketed comprehensive text, presented in response to the Ministerial mandate from Hong Kong that he should prepare such a text, to serve as the basis for the final stage of the negotiations. Although many delegations supported some elements of that text, it proved to be controversial, and did not attract sufficient convergence even in respect of its approach and core concepts for the Chair to be able in late 2008, when he circulated revised draft anti-dumping and SCM Agreement texts, also to table a revised text on fisheries subsidies. Instead, he circulated a range of detailed questions with the same structure as the 2007 fisheries subsidies text (referred to as the

"Roadmap") to guide the further discussions, in the hope that by returning to a less-detailed, more conceptual debate, some clarity would emerge as to the best way to generate the needed convergence. Discussions based on the Roadmap occupied most of 2009, but little convergence was evident; delegations' comments generally reflected their previously expressed positions. Thus, while some conceptual clarification was achieved, little new flexibility was expressed during the Roadmap discussions.

6. After those discussions ended, Members began to submit new proposals. While initially there were only a few, by late 2010 and to date in 2011 proposals proliferated, with much of the Negotiating Group's time in our intensive meeting schedule since January spent on considering these proposals. While many of the proposals contain new ideas and some suggest new approaches on certain issues, unfortunately in their totality (and with a few exceptions) these could not be characterized as convergence proposals. Rather, they generally reflect and elaborate on the already well-known positions of their proponents. Nor has there been movement toward convergence over the course of the debate on the proposals. Thus, in spite of many meetings since the beginning of the year – indeed a nearly-continuous session of the Negotiating Group – and in spite of the wealth of new proposals, little tangible progress on the core issues has been made. In short, notwithstanding intensive work and greater clarity in scoping several issues, the fisheries subsidies negotiations remain in more or less the same impasse as at the end of 2008 when the Roadmap was circulated, with positions if anything hardening since then.

7. In this report I describe in a detailed and structured way the positions and in particular the blockages on the main issues in the negotiations. It is my hope that as we move forward, this comprehensive presentation will assist negotiators to reframe the debate and refocus the work in a way that has the best chance of increasing convergence in respect of the most difficult and critical issues. I also describe the areas of convergence that have emerged in our discussions. While this convergence is limited, often conditional, and mainly restricted to technical issues, it is nonetheless important and thus is memorialized in detail.

8. The structure of the report follows that of the 2007 Chair text. Virtually all delegations have indicated that that structure is a valid basis for discussions, and most consider it an acceptable structure for eventual disciplines. Furthermore, most of the proposals that have been submitted since circulation of the 2007 text follow its structure.

9. By way of background, the structure of the 2007 Chair text consists of a prohibition, general exceptions, special and differential treatment, general disciplines (mainly related to adverse effects of certain subsidies), fisheries management provisions, notification and surveillance provisions, and transitional and dispute settlement provisions.

10. The proposed prohibition in the 2007 Chair text is in the form of a positive list of subsidies (in the sense of Article 1.1 of the SCM Agreement, insofar as they are specific in the sense of Article 1.2 of the Agreement). The scope of the prohibitions of certain of the listed types of subsidies would be modulated by general exceptions, access to which would be conditional upon compliance with certain fisheries management provisions. For developing Members, in addition to the general exceptions, there would be special and differential treatment consisting of a sliding scale of further exceptions from particular prohibitions, calibrated to the nature, scale and geographic scope of the activities involved. As in the case of general exceptions, access to most of S&DT exceptions would be conditional upon implementing certain fisheries management obligations. The fisheries management obligations would be to establish and implement fisheries management systems based on internationally-recognized best practices, including regular science-based stock assessments, with the operation of the systems and the results of the stock assessments subject to peer review (in a relevant body of the UN Food and Agriculture Organization ("FAO")) prior to the granting of a subsidy for which an exception was being invoked.

11. Under the 2007 Chair text, the general discipline would provide for a remedy where any Member caused, through the use of any specific subsidy (in the sense of Articles 1.1 and 1.2 of the SCM Agreement), certain adverse effects in respect of fish stocks in which another Member had an identifiable fishing interest. It also would attribute subsidies to the Member conferring them, regardless of the flag of the vessel involved or application of rules of origin to the fisheries products. The notification and surveillance provisions would, among other things, require notification in advance of the granting of a subsidy for which an exception (general or S&DT) was invoked, and such notification would need to contain sufficient information demonstrating that the subsidy met the terms and conditions to qualify for the particular exception. Under the dispute settlement provisions, among other things, non-notified subsidies for which exceptions are invoked would be rebuttably presumed to be prohibited. Finally, transition periods (longer for developing than for developed Members) would be provided for Members to bring their (notified) existing inconsistent programmes into conformity with the new disciplines.

II. ASSESSMENT BY THE CHAIR OF THE MAIN CHALLENGES

12. The longstanding blockage in these negotiations exists in spite of the strong consensus among delegations of all sizes and levels of development that the state of global fisheries resources is alarming and getting worse. Indeed all delegations, when referring to data, rely on the same statistics – those published by the FAO – the latest of which show that 85 per cent of world fish stocks are either fully- or over-exploited. All recognize that this is a crisis of exceptionally serious implications for all humankind, and particularly for the poor in many countries who are heavily dependent on fisheries as a source of nutrition and employment. Nor is there disagreement that developing as well as developed countries are major participants in global capture fishing, and that all countries face a common problem and share responsibility to contribute to finding solutions, although not necessarily on a uniform basis. Furthermore, most agree that subsidies play a major role in contributing to these problems, and that this is what is behind the negotiating mandate to strengthen disciplines on fisheries subsidies, including through a prohibition.

13. Given this strong convergence as to the nature and extent of the problem, and as to the role of subsidies, what then is the problem? Why have these negotiations been underway for 10 years with little tangible progress in finding a solution? In my view, it seems that most (although not all) delegations, rather than seeking to build convergence by indicating acceptance of the appropriate level of disciplines (and of the policy changes that this would imply), to effectively address what is undeniably a common and rapidly worsening problem, appear to be focusing principally on maintaining their own status quo by placing on "others" the main responsibility to implement solutions, while minimizing the impact of disciplines on their own activities. Thus in spite of the nearly universal calls for disciplining subsidies in an effective way, many delegations in practice seem to elevate the exceptions above the disciplines. For some developed Members, a main reason given is that subsidies are necessary to protect traditional ways of life, vulnerable coastal communities, and jobs in the fisheries sector. For many developing Members, a main reason often cited is the need for policy space to subsidize in order to harness fisheries as a basis for development, economic growth, and employment. In the face of the sharp and continuing declines in the fisheries resources, however, it is hard to see how such strategies can either protect communities and jobs or be a source of food security and stable growth over the long-term.

14. In spite of all this, I see the logic behind the negotiating mandate as essentially optimistic. That is, that a unified, long-term strategic approach to cooperating to rationalize economic signals – including by giving priority to collectively reducing the level of capacity- and effort-enhancing subsidies – can actively promote and contribute to profitability of global fisheries, with the hugely advantageous additional benefits of economic and environmental sustainability. In particular, fisheries are often compared to the prisoner's dilemma: non-cooperative pursuit of individual payoffs leads to overfishing, which in turn imposes economic loss (not to mention negative environmental

effects) on all parties involved. In fact, it is widely-accepted that the economic benefits lost due to overfishing are significant – a World Bank Report gives an estimate of US$50 billion annually, without counting the out-of-pocket additional costs of subsidies (estimated to be at least $US16 billion annually). To put these figures in context, the value of the total global marine fish catch is around $US90 billion. Like the prisoner's dilemma, however, fisheries are not a zero-sum game. Successful subsidy negotiations can help bring about a situation where profitability and economic and environmental stability are mutually reinforcing, contributing to sustainable wealth creation.

15. In order for the negotiations to make significant progress, I am of the view that negotiators will have to focus more on these incontrovertible realities no matter how inconvenient, and less on protecting their short-term defensive interests. Unless this happens, I do not hold great prospects for the fisheries subsidies negotiations.

III. SPECIFIC AREAS WHERE GAPS REMAIN WIDE

A. PROHIBITION AND GENERAL EXCEPTIONS

1. Underlying situation

16. Concerning the basic discipline to be established, the relevant part of the negotiating mandate from Ministers at Hong Kong is to "strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain fisheries subsidies that contribute to overcapacity and over-fishing".

17. Views are quite divided over the breadth of the eventual prohibition (as modulated by general exceptions). Much of this divergence is a reflection of delegations' different positions as to which types of subsidies should be targeted by new disciplines, given their different views over which subsidies (under what circumstances) contribute to overcapacity and overfishing.

18. Thus, while much of the debate and many proposals continue to be based on the prohibitions as proposed in the 2007 Chair text, there is little or no outright agreement within the Negotiating Group as to how a prohibition of any given type of subsidy should be framed. In particular, although some delegations, while preferring a top-down approach, strongly support both the categories of subsidies proposed for prohibition in the Chair text and the proposed scoping of each category, others strongly disagree, considering the proposed prohibitions in the Chair text to be too numerous and too strict. These latter Members' support for prohibition of certain categories of subsidies is often hedged by proposed reductions in its scope, proposed general exceptions, and proposed conditionalities on the prohibition itself. In turn, however, such proposed limitations on the possible prohibitions are very controversial with the Members advocating a broad and strict prohibition. Such convergence as exists regarding subsidies to be prohibited therefore is limited and in many cases conditional.

2. Horizontal issues and proposals

19. As noted, some delegations strongly support a **broad and strict prohibition** of fisheries subsidies, subject to **narrowly defined exceptions**. In the view of these Members, a broad prohibition is the best way to ensure that the discipline is effective in constraining harmful subsidies, as any subsidy that reduces the costs of fishing and related activities contributes to structural overcapacity, creates incentives to overfish, and places additional pressure on the management systems themselves. Other delegations, while acknowledging the existence of overcapacity and overfishing, attribute this largely to Illegal, Unreported and Unregulated ("IUU") fishing, and consider that there is no *a priori* link between subsidies and overcapacity or overfishing. They therefore favour a more **conditional approach to prohibition**. Specific proposals of this type are to apply a prohibition only if a subsidy has been proven in a particular situation to have caused overcapacity or

overfishing, or only if there is no fisheries management in place or inadequate management, or only in the event that such a subsidy would be contrary to certain parameters such as capacity or purpose. Although all delegations have been willing to engage on the basis of a positive list approach as in the 2007 Chair text, they have very different views as to the length, content and operation of the list, reflecting their underlying differences as to the effect of subsidies on overcapacity and overfishing.

20. One cross-cutting issue where views have remained divided since the outset of the negotiations has to do with whether at least some forms of subsidies benefiting the **"artisanal" or "small-scale" fisheries** of all Members should be exempted from any prohibition. Advocates of a general exception for subsidies to such fisheries point out that regardless of the development status of a Member, small-scale or artisanal fisheries tend to be conducted by individuals who are economically and socially disadvantaged in relation to the rest of the population, and who live in remote, underdeveloped coastal areas, and that due to their small scale, these fisheries have little or no possibility to contribute to global overcapacity or overfishing.

21. Others, however, see no justification for such an exception for developed Members, considering that those Members' artisanal and small-scale fisheries are much wealthier and better-equipped than the artisanal and small-scale fisheries of developing countries, such that no one set of definitions or parameters could be used to describe the potentially eligible fisheries of all Members. These delegations also take the position that the demandeurs for a general exception have advanced neither clear descriptions or criteria for identifying "small-scale" fisheries of developed Members, nor convincing justifications why those fisheries need subsidization. Their view therefore is that any exceptions for subsidies to artisanal and small-scale fisheries should be strictly limited to the special and differential treatment provisions.

22. A somewhat related horizontal issue that has been raised in several proposals is a ***de minimis*** general exception, with a higher threshold for developing Members, possibly differentiated according to their size and/or share of global capture. Under this approach, Members would be able to provide subsidies of any type, up to the threshold (expressed either in absolute terms or as a percentage of total catch value or some other indicator). Advocates of this approach argue that it would be a simple, easily-administered way to address the concerns of developed as well as developing Members in respect of their artisanal or small-scale fisheries, without having to grapple with the difficult-to-resolve definitional issues.

23. Many Members, however, are concerned that the accumulation of individual *de minimis* amounts would add up to large sums of money, with potentially large consequences, and further that individual *de minimis* amounts, if concentrated in a given type of subsidy, or a given fishery, also could have a significant impact on the fisheries involved. In this regard, questions have been raised concerning the relationship of a *de minimis* provision to other provisions, such as a prohibition on subsidies in relation to overfished fisheries, or to the general disciplines. In addition, some delegations have indicated that without knowing the size of the *de minimis* cap (no proponent has suggested a specific figure), they cannot assess the impact of such proposals – a cap set at 0.1 per cent of landed value, for example, would be far different from a cap set at 1 per cent or more, or from a cap based on another parameter. Some also question the simplicity of the approach, noting the potential difficulty of measuring both the subsidy amounts and the thresholds. Furthermore, as noted, many Members are sceptical about the comparability of the small-scale sectors of developed and developing Members, and of the former's need for subsidization.

24. Finally, most if not all delegations take the view that subsidies for **natural disaster relief** should be allowed as an exception from the prohibition. Most consider that the nature and level of such subsidization should be aimed at restoring the activity to its pre-disaster state, subject to the results of scientific assessment to establish the post-disaster state of the fisheries resources. Some argue that other sorts of disaster relief subsidies also should be permitted (e.g. for man-made disasters,

economic or financial crises, wars, etc.). Views remain considerably divided over such a broadening of this possible exception.

3. Specific categories of subsidies proposed for prohibition (modulated by general exceptions)

(a) Subsidies in respect of which differences of view are greatest

(i) Subsidies for vessel construction, repair, modification

25. Most delegations consider that in principle subsidies for construction of fishing and service vessels should be prohibited, on the basis of the large overhang of excess capacity in relation to sustainable fishing levels (estimated at more than twice the level needed). Delegations also generally agree that subsidies for vessel modifications exclusively for improving on-board safety, or for adoption of environmentally-friendly gear and techniques, or for equipment necessary for compliance with fisheries management, should be exempted from the prohibition, and many also support vessel modifications to improve food safety, so long as none of these sorts of modifications increase vessel capacity. There are, in this context, different views on which parameters to use to define capacity, and whether any list of such parameters should be closed or indicative. Most Members also consider that any such exemptions should be conditional on adequate fisheries management being in place. One delegation has proposed, however, based on the argument that fisheries management should be the core of the discipline or central to determining the scope and application of the prohibition, that subject to fisheries management and adverse effects rules, such a prohibition would be inapplicable in a variety of circumstances (including for new vessels with lower total capacity than older ones being replaced, for vessels for certain small-scale operations, and for certain vessel modifications, including for safety or fisheries-management reasons that do not increase certain capacity-related parameters). Many others consider that such carve-outs would render a prohibition on vessel capital cost subsidies completely ineffective, and disagree as well with the premise that fisheries management, rather than subsidies disciplines, should be the core element of the disciplines.

(ii) Subsidies for operating costs of vessels and of in- or near-port processing activities

26. In respect of subsidies for operating costs of fishing and service vessels, a number of Members consider that all such subsidies should be prohibited because they contribute directly to overcapacity and overfishing, allowing vessels to operate at lower cost, thus to fish longer and further from shore than otherwise would be possible, and thus to continue to exploit overfished stocks in spite of diminishing yields. Some others consider that with proper fisheries management, operating cost subsidies will not contribute to overcapacity and overfishing, and one proposal would move operating cost subsidies from the prohibited list to an adverse effects provision. Some who generally favour a prohibition of operating costs nevertheless consider that different operating cost subsidies may have different natures and degrees of severity and thus should not necessarily all receive the same treatment. For example, one proposal would limit the prohibition to "direct" operating costs, with exemptions in respect of certain small-scale fishing activities, and for certain social welfare purposes. A number of delegations have questioned how subsidies for personnel costs can be differentiated from income supports and social welfare payments, and whether different rules should apply. Some have questioned the link between subsidies for on-shore activities such as processing and overcapacity or overfishing, while others consider that such subsidies artificially stimulate demand for fish and fishing by increasing the profitability of such activities.

27. Among the operating costs proposed by most delegations for prohibition, fuel subsidies are by far the most controversial. Some delegations point to fuel subsidies as the most harmful of all operating cost subsidies, indeed of all fisheries subsidies, given their absolute magnitude (estimated at $6 billion annually), their direct relationship to fishing effort, and the large share of operating costs

(approximately 60 per cent) accounted for by fuel, especially in respect of high seas fishing. It has been suggested that fuel subsidies perhaps be broken out into a separate category in the disciplines, given their importance and particularities. Some consider that all fuel subsidies, whether provided on a specific or horizontally-available basis, should be prohibited, and some have indicated a willingness to find a tailored solution to this issue. Some go further, considering that the questions related to fuel in the fisheries sector go beyond subsidies and in fact involve Members' fuel pricing policies, which in turn are a function of their fuel tax policies. For these Members it would be an unfair and anti-environment outcome if fuel tax exemptions for the fisheries sector by Members with environmentally-motivated high fuel taxes and prices were treated as prohibited subsidies, while Members that as a matter of policy maintained low fuel taxes and prices and gave no tax exemptions were thus not affected by the disciplines. Others, however, are greatly concerned over the possible intrusion of WTO rules into Members' domestic taxation policies and systems as such. Furthermore, some doubts have been expressed over the link between fuel subsidies and overcapacity and overfishing.

(iii) Subsidies for certain infrastructure

28. Views are considerably divided regarding "general" and other infrastructure, and regarding what if any infrastructure subsidies should be prohibited under new disciplines. On the first issue, some delegations consider that all forms of "port" infrastructure (even that which is exclusively or predominantly for marine wild capture fishing) constitute "general" infrastructure, which is not covered by the SCM Agreement and thus should not be captured by or even referred to in the new disciplines. Some others, however, consider that while certain kinds of port infrastructure may be "general", port infrastructure and other physical port facilities exclusively or predominantly for activities related to marine wild capture fisheries do not fall within the rubric of "general" infrastructure, and that subsidies for such infrastructure thus are covered by the SCM Agreement and are relevant to new disciplines on fisheries subsidies.

29. Concerning whether any port infrastructure subsidies should be prohibited, some delegations take the view that to the extent that any port infrastructure subsidies related to marine wild capture fishing are covered by the SCM Agreement, these should not be subject to new fisheries subsidies disciplines. In the opinion of these delegations, such subsidies do not and cannot contribute to overcapacity and overfishing, and to the contrary are beneficial for sustainability, as fishing ports are often the centres for management operations (measuring catch, inspecting and monitoring vessels, etc.)

30. The opposite view also is held, however. A number of delegations consider that at least some kinds of infrastructure in ports (e.g. fish landing and storage facilities) are directly related to fishing activities, and that subsidies to these kinds of infrastructure would directly reduce costs that fishers otherwise would have to bear themselves, thus encouraging increased fishing effort. Thus, they advocate prohibiting infrastructure subsidies of this sort. Some have noted that if user fees reflecting the value of the services were collected, there would be no subsidy.

31. Finally, the further proposal has been made to discipline infrastructure subsidies on the basis of an adverse effects test. That is, rather than being prohibited outright, such subsidies would subject to remedies if in particular cases they were found to contribute to overcapacity and overfishing.

(iv) Income support

32. Views are divided regarding the meaning and scope of the term "income support", including the extent to which it overlaps with the term "personnel costs", and regarding whether some or all income supports for natural and/or legal persons engaged in marine wild capture fishing should be prohibited. Concerning the term "income support", different types of supports have been identified,

including payments to fishworkers not to fish or while not fishing, payments to fishworkers to top up their income while fishing, unemployment insurance payments to fishworkers, payments to vessel owners/employers for personnel costs, social charges, etc. One issue pointed out in this regard is that in some countries, fishworkers do not qualify for the generally available unemployment or social security payments, necessitating the establishment of fisheries-specific schemes. No consensus has been found as to which sorts of payments should be considered "income supports", and which if any should be prohibited under new disciplines.

33. Some consider that disciplines should distinguish between income support payments to enterprises and those to individuals. In this regard, one suggestion is to make clear in the context of a prohibition on operating cost subsidies that "personnel costs" and "social charges" referred to therein do not cover early retirement or redeployment payments.

34. Delegations favouring a prohibition on income supports argue that such subsidies contribute to maintaining in the industry individuals and enterprises that otherwise might exit the business, and that this in turn maintains overcapacity and creates pressure to overfish. In the view of some, temporary payments to respond to unexpected crises are not the problem, but rather structural, on-going payments, which have a systemic effect – if the fishers know that they will receive the payments they will have every incentive to continue to fish without regard to the profitability of the activity, and no incentive to seek other economically self-sustaining occupations. One proposal in this regard is to define prohibited income supports as including support for active or latent fishing effort.

35. Those opposed to a prohibition on income supports consider that paying fishworkers not to fish is beneficial to fisheries resources, and that if good fisheries management is in place overfishing will not occur. Some also consider all such payments to be part of the "social safety net" that should be completely exempt from new disciplines, on the grounds that this is necessary government policy.

(v) Price support for products of marine wild capture fishing

36. Views also remain divided on price supports. Many delegations strongly support a prohibition, considering that such subsidies are among those most directly contributing to overcapacity and overfishing, by enhancing the revenues and profits of fishing. Some delegations have concerns, however, that a prohibition on price supports could interfere with domestic food security programmes, including government purchasing programmes. One delegation proposes instead of prohibiting price supports to subject them to a discipline based on adverse effects. Some point to the adverse trade effects that can be caused by price supports, while others consider that any such trade effects already are covered by the existing provisions of the SCM Agreement.

(vi) Subsidies that support destructive fishing practices

37. Some proposals address the issue of destructive fishing practices. One such proposal would add to the prohibited list any subsidy provided to vessels engaged in practices that have or may have negative effects on vulnerable marine ecosystems and habitats (examples given being bottom fishing and large scale drift-net fishing), which practices are not conducted in accordance with relevant international instruments. Some delegations support such a prohibition in principle, in view of the importance of the issue of destructive fishing practices, but note that the drafting would need to be precise. Others, while supporting the international work being done in other fora to halt destructive fishing practices, question whether the WTO is the right institution to take the lead on this issue given the absence of an international consensus to ban such practices. Some disagree with the proposal on the grounds that its scope, and that of the subsidies it would affect, could not be known in advance, such that the discipline would be unclear and potentially very sweeping in its impact.

38. Other proposals refer to destructive fishing practices (examples – dynamiting, poisoning) in the context of conditionalities for S&DT exceptions. In particular, under these proposals, engaging in destructive fishing practices would disqualify a vessel or fisher from access to the exceptions in question.

(vii) Subsidies in respect of overfished fisheries

39. Many delegations consider that if the prohibition is to take the form of a positive list of prohibited subsidies, it must be backed up with a further prohibition on any other types of subsidies (not contained in the prohibited list) that are provided in respect of any fishing vessel or fishing activity affecting fisheries in an already-overfished condition. These delegations further argue that the shorter the eventual list of prohibited subsidies, the more important this back-up prohibition becomes. In the view of these delegations, there is no possible justification for subsidized fishing on stocks that already are depleted, and a major loophole for harmful subsidization in respect of the most vulnerable fish stocks would be opened without such a backup prohibition.

40. A number of other delegations strongly disagree with the concept of such a back-up prohibition. Reasons include that the scope of a prohibition of this type would be unclear and could potentially be very broad, even possibly sweeping in subsidies necessary for stock recovery; that the particular subsidies that would be subject to such a prohibition could not be known with certainty; that it is unclear how and by whom the overfished fisheries, in respect of which the prohibition would apply, would be identified; and that the overall effect of such a provision would be to convert the bottom-up list to a top-down broad prohibition.

(b) Subsidies in respect of which some convergence exists

(i) Subsidies for transfer of vessels

41. The 2007 Chair text proposes the prohibition of subsidies on the transfer of fishing or service vessels to third countries, including through the creation of joint ventures with third country partners. This proposed prohibition is relatively uncontroversial, and a number of delegations have pointed out that such transferred vessels often become engaged in IUU fishing activities. Most delegations support elimination of such subsidies as a way to contribute to control of those activities.

42. One (developed) Member has proposed exempting developing Members from this prohibition, subject to certain conditionalities. There has been little interest from developing Members in this proposal, however.

(ii) Subsidies to IUU vessels

43. The 2007 Chair text also proposes the prohibition of subsidies on vessels engaged in IUU fishing. Delegations generally support the principle behind this provision, but a number question how it would work in practice, as no government would knowingly subsidize such activities. Rather, it would be the individuals operating the vessels that would make the decision to engage in IUU fishing, after receiving a subsidy that was otherwise permitted. Given these considerations, some alternative proposals have been tabled, including establishing domestic procedures to address IUU fishing, requiring repayment of subsidies, and certain legal presumptions concerning subsidies to IUU fishing. Questions have been raised over how far into the substance of addressing IUU fishing *per se* the WTO can go, beyond disciplining subsidization supporting such activities.

(iii) Subsidies for onward transfer by a payer government of foreign access rights acquired under fisheries access agreements, subject to provisions for developing Members

44. The 2007 Chair text proposes the prohibition of subsidies arising from the further transfer, by a payer government, of access rights that it has acquired from another Member government to fisheries within the jurisdiction of the other Member, subject to the clarification that government-to-government payments for access rights are not deemed to be subsidies. Thus, it is the subsidized transfer of the rights by the payer government to its own distant water fishing fleet that would be prohibited. In recognition of the economic importance to a number of developing Members, particularly certain Pacific Island States, of the access fees that they receive from foreign governments, the Chair text further proposes, however, that the payer government's subsidized transfer of the fishing rights to its distant water fleet would be exempt from the prohibition if the access is to fisheries in the waters of a developing Member, and provided that a range of sustainability and transparency conditions are met.

45. Most Members support these provisions as proposed in the Chair text, although some question that text's placement of the exception in the S&DT provisions, given that the principal distant water fleets benefitting from it would be from developed Members. Delegations also see a distinction between these situations, which involve cash for access in distant waters, and arrangements between neighbouring countries for reciprocal access to one anothers' Exclusive Economic Zones ("EEZs") or jurisdictional waters. Most consider that the latter situations should not be subject to the new disciplines.

B. SPECIAL AND DIFFERENTIAL TREATMENT OF DEVELOPING MEMBERS

1. Underlying situation

46. The two negotiating mandates make clear that special and differential treatment of developing Members is to be an integral part of new disciplines on fisheries subsidies, and this view is shared by all delegations. As a general matter, virtually all of the proposals for special and differential treatment are based on permanent exceptions from various prohibitions, in various circumstances and subject to various conditions. That said, there are fundamentally different visions as to how S&DT should be structured, what particular exceptions should be provided in which particular circumstances, and what conditions should apply to the different exceptions.

47. Among the considerations cited frequently in this context is the important role of developing countries in world marine capture production. According to FAO statistics, six of the top ten fishing nations, and 11 of the top 15, are developing countries, and developing countries collectively account for about 70 per cent of global capture production. For many Members, given these facts S&DT cannot simply be a blanket carve-out from the disciplines for all developing Members, as in their view this would render the overall discipline ineffective. A number of developing Members, while stressing that they do not seek a simple blanket carve-out, nevertheless consider the absolute figures to be misleading in that they mask the comparative efficiency and magnitude of countries' fishing activities, and thus their relative impacts on global fisheries resources. They argue instead that the use of catch per capita, or catch per fisher, as alternative measures, show that developing countries make less impact on global resources than do developed countries.

48. Some of the differences in the approaches advanced by different Members appear to relate to the different rationales advanced for S&DT in the particular context of fisheries subsidies disciplines. In this regard, objectives of S&DT that have been referred to in the discussions and proposals include: (1) poverty alleviation, i.e., assistance for vulnerable, disadvantaged populations; (2) development of the fisheries sector as a source of jobs, income and trade, both to lift people out of poverty and to create new opportunities for economic development and linkages; (3) building up domestic capacity

to exploit the fisheries resources within the national jurisdiction; (4) enhanced policy flexibility for Members with a small share of global fish catch, on the grounds that they have at most a negligible impact on global overcapacity and overfishing; (5) extending domestic fishing activities beyond coastal areas, both into the EEZ and (in some cases) into the high seas, to relieve pressure on coastal fisheries resources, including spawning and juvenile populations; (6) "catching up" to the developed world in terms of vessels, technology, scale, and areas of operation; and (7) exercising rights under international law to exploit commercially valuable fish stocks in international waters, the products of which are traded internationally. All proposals and discussions emphasize the need for the subsidies to be deployed and the subsidized activities to be conducted in a sustainable manner, although like the different approaches to the S&DT exceptions, the proposed approaches to the accompanying sustainability conditionalities vary greatly.

2. Treatment of LDCs

49. There is general agreement that least-developed country ("LDC") Members should have the greatest degree of flexibility under new disciplines, given their needs and their economic vulnerability. Under the 2007 Chair text, this view is reflected in a complete carve-out from all of the prohibitions as well as from the fisheries management provisions. Subsequent discussions and proposals have revealed, however, that many delegations are concerned over the potential for circumvention if a non-LDC Member worked through an LDC Member to take advantage of the latter's exemption from disciplines. Other concerns raised by some delegations are that any agreed disciplines related to IUU fishing should apply to all Members, and that all Members should be subject to rules relating to overfished fisheries and to adverse effects. Thus, while there seems to be substantial comfort with LDC Members having the most flexibility under the new disciplines, and while some LDC delegations have explicitly indicated willingness to be subject to at least some of these additional provisions, this issue requires further clarification.

3. Whether S&D treatment provisions should be further subdivided beyond the separate treatment of LDCs

50. One important issue regarding S&D treatment is whether for developing Members other than LDCs the special and differential treatment should be uniform (one-size-fits-all), or instead should be differentiated on some basis. Most proposals suggest some sort of differentiation, on the basis of two main possible approaches, which could stand alone or be combined. These are differentiated treatment of subcategories of developing Members themselves (i.e., an approach analogous to that under Article 27 of the SCM Agreement), and/or differentiated treatment of different types of fisheries activities of developing Members.

51. The proponents of proposals that would establish an essentially uniform S&DT for all non-LDC developing Members have expressed a certain preference for some differentiation, in the first instance in respect of certain small-scale activities from other activities, but they would address subsidization of such activities via general exceptions and/or *de minimis* provisions. Some have indicated they would consider providing higher *de minimis* caps for the smallest developing Members as measured by share of global capture.

52. The 2007 Chair text proposes a differentiated S&DT for different types of fisheries activities. In particular, subsidies to the smallest-scale, least commercial, near-shore activities would be subject to the fewest restrictions and conditionalities, with increasing levels of discipline as the scale, degree of commercialization, and area of operation of the subsidized activity expanded, and no subsidization would be permitted for any fisheries activities on the high seas. The categories of fisheries activities and the associated limitations as proposed in the 2007 Chair text have proven controversial, however, and a variety of alternative proposals re-scoping and redefining the categories have been submitted. No one proposal has generated significant convergence, however.

53. In addition, some proposals would provide extra flexibilities for fisheries activities of Members that have only a small percentage share (variously defined) of the global marine wild fish harvest, either via particular exceptions or, as noted above, via a higher *de minimis* level under a general exception for such a subset of developing Members. These proposals as well have proven to be controversial, principally due to concerns about creating new subcategories of developing Members. Thus, there is only limited convergence as to the basic structure of the S&DT provisions, and even less regarding their content.

4. Expanded flexibilities for developing Members with a small share of global wild fish capture

54. Delegations favouring expanded flexibilities for developing Members with not more than a defined, small, share of global wild fish capture argue that the impact on global fisheries resources of developing countries with a small fishing presence is not comparable to that of larger fishing countries. For some, if all developing Members need to be subject to the same S&DT provisions, those provisions will have to be stricter than if a differentiation based on the level of fishing activity is possible.

55. One of the proposals for such differentiated flexibilities uses a two-part criterion, combining the share of global fish capture and the share of NAMA trade during a reference period. Another proposes as its unitary criterion a (smaller) share of global fish capture during a reference period. Under both of these proposals, developing Members falling below the proposed thresholds would be allowed to subsidize vessel capital costs and operating costs, including but not limited to fuel, for all of their fisheries activities, regardless of scale or area of operation, subject to fisheries management conditionalities. The proponents' main argument in favour of these expanded flexibilities is that any country with such a small share of total fishing activity cannot have contributed in the past to the global problems of overcapacity and overfishing, and will not be able to do so in the future. They further argue that they do not want to remain small forever, and need to be able to subsidize to help their fisheries sectors to become larger-scale and more commercial. A third proposal would allow subsidization of capital and operating costs, and price supports by developing Members with a small share of global catch, but limited to operations within the Member's EEZ. Finally, as noted, some proposals for a *de minimis* general exception would set a higher *de minimis* cap for developing Members with a small share of global capture.

56. As indicated, a number of delegations are concerned over these proposals due to systemic concerns over sub-categorization of developing Members in the context of WTO rules. They consider that the only acceptable subdivision of developing Members is between LDCs and all others. A further objection is that figures on absolute shares of global fish capture are misleading and that per capita or per fisher figures are more appropriate indicators of which countries are "large" and "small" fishers. Other suggested criteria (level of development, fleet size or tonnage, etc.) also have failed to attract convergence.

57. A number of other questions and concerns have been raised concerning these proposals. One has to do with the thresholds proposed. Some delegations consider these thresholds to be both arbitrary and too high. On the latter point, they note that if all of the developing Members that are currently below the threshold were to increase their shares of global capture up to the threshold, the Members involved would cumulatively account for a very large share of total global capture (approximately 25 per cent under one of the proposals). Another question is whether the list of eligible Members would be permanently fixed or instead would vary as Members' shares of global fish capture rose or fell. For some, a permanently fixed list would be unfair to those not on the list who met the criteria after the fact. For others, if the subsidization succeeded in establishing a large-scale, commercial fisheries sector, the initial rationale for the subsidization – small size and participation – would no longer exist.

5. Issues to be addressed if S&DT were to be based on subcategories of fishing activities

(a) "Bottom" tier of activities (e.g. "subsistence", "artisanal", "small-scale")

58. While there is substantial support for the principle of a "sliding-scale" approach to S&DT as proposed in the 2007 Chair text, as noted there is no convergence on how many categories of fisheries activities there would be nor on how they would be defined. One important question in this regard is what the "bottom" tier would cover and what flexibilities would apply to it. The 2007 Chair text proposes three categories, the first of which essentially corresponds to a subsistence-type activity, with parameters describing inshore activities using simple gear, principally for own consumption and with no major employer-employee relationships involved. Under that text, governments would be able to provide all forms of subsidies listed in the prohibition provision, essentially without conditions (fisheries management provisions would be indicative, not mandatory, and could draw on indigenous institutions and measures).

59. Members in favour of a subsistence-based definition for the bottom tier of activities consider that these activities are less likely than larger-scale and more commercial activities to negatively affect fisheries resources. In any case, in recognition of the extreme vulnerability of populations engaged in this sort of activity, they generally consider that governments should have maximum flexibility to provide all necessary support to such activities. That said, these Members caution that because of the great degree of flexibility that they would envision for this category, the category itself must remain very narrowly defined.

60. Many developing Members, however, consider that this category is too narrowly circumscribed, and/or relies on parameters that are inappropriate. In their view, concepts such as "small-scale" or "artisanal" fisheries are more relevant and closer to their reality than pure subsistence. Some take the view that creating a category of subsistence-type activities, to which extra flexibilities for subsidies would apply, would "incentivize backwardness", and that poor populations should not lose access to certain subsidies just because they move slightly beyond a subsistence level of activity. The approach of most of these proposals thus is to expand this bottom tier to encompass activities beyond the subsistence level, extending it to "artisanal" or "small-scale commercial" fisheries.

61. Reflecting Members' significant differences of view as to its nature, a number of alternative proposals have been tabled relating to the "bottom tier" activities, cumulatively encompassing a wide range of suggested parameters and criteria, including: socio-economic criteria (low income, resource poor, livelihood fishing activities, classified within the lowest category of economic activity); mode of organization (individual or family basis, micro-enterprises, associations, individual boat owners, cooperatives, small producer organizations); purpose of the subsidies (food security, development of local communities, poverty reduction); physical characteristics of the vessels involved (not more than 15 meters in length, not equipped with on-board freezing or refrigeration); gear type and techniques (simple gear, tools and techniques, predominantly manual labour, no destructive fishing practices); area of operation (territorial waters, waters under national jurisdiction); use of catch (mainly for direct human consumption, not beyond a small profit trade).

62. The proposals and the discussions thereon have revealed that very significant differences remain as to the nature and operation of a "bottom tier" of activities if special and differential treatment were structured on the basis of different categories of fishing activities. Some proposals point to economic vulnerability as the main or only criterion, and explicitly reject as arbitrary and unfair any "static" criteria related to physical characteristics of vessels, area of operation, use of the catch, etc.; and refer instead to socio-economic criteria. Other proposals, however, envisage a range of criteria that their proponents consider necessary to prevent the creation of a large loophole via this provision, in some cases combining static and socio-economic parameters, along with additional

factors such as the purpose of the subsidy. Some proposals in respect of the bottom category would limit the activities to territorial waters, and some would limit them to the Member's EEZ. Others would allow subsidization for activities in neighbouring countries' EEZs under reciprocal access arrangements, and still others contain no explicit geographical limits or references. Most proponents for the time being appear to strongly prefer their own descriptions of and proposals concerning the bottom tier category of activity.

63. Moving beyond the descriptors, there also are very different views as to the extent of the exemption for subsidies to the activities covered by the bottom tier category. As noted, many Members argue that the broader the coverage of this category, the more circumscribed the exemption will need to be, both in terms of which otherwise-prohibited subsidies should be available and what the conditions for accessing these should be. These Members are sceptical of proposals that would, subject only to best-efforts fisheries management, permit provision of the entire range of otherwise-prohibited subsidies to activities and actors described exclusively by socio-economic or similar criteria, with no explicit limitations in respect of physical parameters (vessels, areas of operation, gear, techniques, etc.), or other more directly-observable criteria such as use of the catch and degree of employer-employee relationship. In their view, such a definition is too loose and would create a category that was much too broad to warrant the expansive exemption contemplated.

64. Reflecting this point of view, some proposals would allow only certain subsidies for bottom tier activities, and would establish limits as to the circumstances under which these could be given and the conditionalities that would have to be met. Examples include limiting subsidies to this category to vessel construction and operating costs, and (certain) infrastructure subsidies, and possibly income supports, with the category defined using a range of limitations, and in one case making fisheries management mandatory. In the view of these proponents, the subsidies envisaged are those most likely in practice to be needed by the most vulnerable fishing populations of developing Members. Members seeking a broader exemption for the bottom tier of activities, however, consider these proposals to be too restrictive, as to the subsidies that would be allowed and the conditions that would need to be met.

65. An additional issue, which potentially cuts across the entire S&DT debate, has to do with whether any subsidization of fishing activities on the high seas should be permitted and if so under what circumstances. Because of its horizontal nature, this question is addressed separately below.

66. Finally, further complicating the discussion of what should be covered in the "bottom tier" of an S&DT provision based on categories of fishing activities, as noted some Members (almost all of them developed) consider that subsidization of certain "small-scale" fisheries activities is not an exclusive concern of developing Members, and instead should be permitted for all Members, via a general exception, rather than being treated exclusively as an S&DT issue. In this context, proposals for such a general exception have advanced various descriptors and parameters for the activities that would be covered. (As also noted, some proposals would address this issue via a generally available *de minimis* exception, with a higher threshold for developing Members.)

67. The parameters used in the proposals for a general exception for certain "small-scale" activities in some cases vary considerably from those advanced in the various proposals on this issue in the S&DT context (including, for example, gross tonnage of the vessel, limits on refrigeration, flag of registry, domestic landing of catch without calling at a foreign port or transhipping at sea, maintenance of livelihood, impoverished fishworkers, EEZ of adjacent Member providing access, coverage of household living expenses by fishing activities, cap on total catch of the Member accounted for by such activities). Furthermore, as noted, some delegations remain sceptical as to the definitions advanced for, and the need to subsidize, "small-scale" fisheries of developed Members. Efforts to try to identify and build on commonalities, with a view to finding solutions for legitimate

situations faced by vulnerable fishing populations of developed Members in addition to those of developing Members, have failed to generate convergence.

(b) S&DT for activities beyond the bottom tier

(i) How many additional tiers and how to define

68. In the event that S&DT were to be based on a multi-tiered, sliding scale approach, another important question that has been debated but thus far not resolved is how many additional tiers beyond the bottom tier there would be, and how these would be defined. While most proposals envisage just one additional category, some delegations prefer more subcategories, which in their view would permit better targeting of subsidies to where they were needed, and better monitoring and control of their impact.

69. The 2007 Chair text, for non-LDC Members' activities beyond the first (subsistence) tier, first established a horizontal exception, for all such activities, from the prohibitions on infrastructure subsidies, income support and price support, and then established two additional categories of fishing activities. These were, first, (non-subsistence) activities using "small" vessels (defined as decked vessels up to 10 meters in length, and undecked vessels of any size), which would be exempted from the prohibitions on subsidies for vessel construction and modification, and on operating cost subsidies. Second, activities using all other types of vessels (i.e., larger decked vessels) would be exempted from the prohibition on subsidies for vessel construction and modification, so long as the activities took place within the Member's EEZ. In addition, as a horizontal condition for all of these exemptions, the developing Member would need to adhere to the fisheries management provisions.

70. Subsequent proposals generally have suggested a single further category of fisheries activities, beyond the bottom tier of activities. In this respect, many delegations have taken issue in general with the use of static parameters such as vessel characteristics, and many also have indicated in particular that the 10-meter limit for decked vessels in the 2007 Chair text does not correspond to their smaller-scale commercial fisheries. Thus, as indicated above, most proposals suggest characteristics for the bottom tier of activities that would go beyond the subsistence level to encompass "artisanal" and/or "small-scale commercial" activities, and then define the second tier as the residual. As discussed, however, delegations are far from agreement on the characteristics of the bottom tier, meaning that discussion of the residual second (larger-scale) tier has been similarly inconclusive.

71. It has been suggested, in the light of this difficulty, that it might be easier to find convergence regarding what artisanal or small-scale fisheries are not, than on what they are. Suggested parameters include the type of fishing, the targeted species and the vessel characteristics. No specific proposal has yet been made in this regard, however, and presumably some of the same general issues (such as doubts about the appropriateness of static parameters) would arise in taking such a negative listing approach.

(ii) What exemptions, under what conditions, for the additional tier(s) of activities

72. The absence of convergence on the definition of the additional tier or tiers of activities that might be established under S&DT provisions in turn has inhibited convergence on the nature and scope of the exceptions that would be allowed for such additional tier(s). The main area of divergence in this respect is the extent to which subsidization should be limited to vessel construction and modification, or whether in addition subsidization of operating costs should be permitted. Many although not all proponents seek exceptions in respect of both of these categories of subsidization for larger-scale activities, with fuel subsidies being identified as the operating cost subsidy of highest priority for exceptions.

73. Thus, the debate over which exceptions should be allowed in respect of the tier(s) covering larger-scale activities essentially centres on fuel subsidies. As discussed above, the issue of fuel subsidies, and how they should be addressed in the context of the prohibition, is very divisive. This divisiveness carries over into the S&DT debate, particularly as the scale of the activities in respect of which fuel subsidies (and other operating cost subsidies) would be permitted under S&DT provisions increases. In particular, a number of delegations have indicated openness to an exception for developing Members to subsidize construction and modification of vessels including for commercial or industrial-scale activities, up to a level of capacity consistent with the sustainable exploitation of their own fisheries resources, on the basis that vessel capital costs can present an insurmountable hurdle for operators in developing countries. Many of these delegations, however, have concerns over an exception to provide fuel subsidies to such activities. In their view, the rationales for the two types of subsidies are very different, and in particular they see no convincing developmental rationale for providing on-going operating support to industrial-scale fishing activities. To the contrary, they consider that the activity should not be taking place at all if it requires such support in order to be profitable. The concerns of these delegations become more pronounced the broader the proposed category is.

74. Demandeurs, however, argue that subsidies for vessel capital costs, while necessary, are not sufficient. They view operating cost subsidies as integral to their fishers' ability to exploit the resources to which they have a right, noting *inter alia* the difficulties brought on by fuel price spikes. Some point to their ambitions to grow beyond a small share of global fish catch, which they argue will be impossible to realize if they do not have the ability to subsidize operating costs as they deem necessary.

6. Subsidies to high seas fishing activities

75. One of the most difficult issues in the S&DT discussions is whether flexibilities for developing Members should extend to subsidization of activities on the high seas, i.e., beyond the limits of the Member's EEZ. Closely related to this is the similarly controversial question of what role, if any, should be given to Regional Fisheries Management Organizations ("RFMOs") in the new disciplines if such subsidies were allowed. The question of RFMOs also is addressed below, more generally, in the context of fisheries management.

76. Demandeurs for flexibilities in respect of high seas fisheries advance a number of arguments. One is equity-based, i.e., that developing countries are latecomers to high seas fisheries, and should be able to use whatever means they deem necessary in order to catch up to the developed world. In this respect, the demandeurs note that under international law, all countries have the right to a share of fisheries resources in international waters, but that the cost advantages of developed Members' fishing fleets are too great for them to overcome without subsidies. They consider that, including through the use of subsidization, developed countries are responsible for the overfishing of high seas stocks and now are denying developing countries the use of subsidies, and thus are attempting to impose a standstill on high seas fishing, which would be unfair to developing countries. Some also argue that allowing subsidies only within a Member's own EEZ would put undue pressure on the vulnerable resources there (notably spawning stocks and juveniles).

77. A further argument advanced is that the distinction between the EEZ and the high seas is artificial. One point made in this regard is that where straddling and highly migratory stocks spend only part of their time in a given EEZ and then move beyond the EEZ boundary, as a practical matter the boats fishing those stocks cannot stop their activity when they reach the boundary. Another point made is that straddling and highly migratory stocks that are fished while inside a given Member's EEZ are subject to quotas set by RFMOs, and that those quotas cover the stock wherever it is at a given moment – inside or outside the EEZ. Thus, the quota-holder has the right to fish where the stock is (including on the high seas), but also is subject to limits on fishing within the EEZ. In the view of the

demandeurs, for these reasons as well it would be unrealistic to stop a boat at the EEZ boundary just because it had received a subsidy while within the EEZ. Significantly, some of the demandeurs have identified the ability to subsidize high seas fisheries as critical.

78. The demandeurs argue that allowing high seas subsidies could be done in a sustainable way, subject to the quotas and other rules set by the RFMO charged with managing the stock(s) in question. Some demandeurs indicate in this regard that they could accept RFMO-plus conditionalities, to address concerns of other Members over the weakness of at least some RFMOs in establishing and enforcing sustainable quotas and other management measures in respect of the fish stocks assigned to them. RFMO-plus elements given as possible examples in this context include strengthening compliance with RFMOs' conservation and management measures as a precondition for S&DT, specific conditionality based on types of subsidies or vessels, application to RFMOs of management conditionalities as proposed for Members, disciplines in respect of vessels that use support vessels and thus tend to operate as part of distant water fleets, precautionary provisions, surveillance, collection of data, and production of reports, and similar measures.

79. Many other delegations have great concerns over the prospect of any Member being allowed to subsidize high seas fishing. These delegations consider the high seas resources to be the most biologically and politically vulnerable, given the absence of national jurisdiction, and thus accountability, in the high seas, and given the poor performance of many RFMOs in sustainably managing internationally-shared fisheries resources. In this regard, they point to the fact that RFMOs frequently set quotas at levels above those recommended by scientists, in response to political pressure, and express doubt that RFMO members will be able to agree to strengthen them. While recognizing the rights of all countries under international law to share in high seas resources, these Members are concerned that enormous overcapacity already exists, and that creation of additional capacity with subsidies will further distort the economic incentives involved in high seas fishing, to the detriment of the sustainability of the stocks, many of which already are fully- or over-exploited. They also express concerns over the provision of fuel subsidies to such activities, given the large percentage of operating costs accounted for by fuel, especially for fishing far from shore.

80. More generally, these delegations consider any fishing activity taking place so far off shore by definition to be highly industrialized, and argue that all such activities by all Members, regardless of their development status, should face the same subsidy rules. Thus, they do not see a development rationale for subsidizing high seas fishing comparable to that advanced in favour of subsidies for developing Members' subsistence or artisanal or small-scale fisheries. Nor do the delegations opposing S&DT exceptions for subsidies to high seas fisheries accept the argument that subsidizing such activities is beneficial to fisheries resources by reducing fishing pressure within the EEZ. In their view, the conservation of the fish stocks in question within in the EEZ, including juveniles and spawning stocks, is in any case a responsibility of national fisheries management, as required under international law, including the UN Convention on the Law of the Sea and the UN Fish Stocks Agreement.

81. By the same token, these delegations question how the sustainability conditionalities that would apply to S&DT exceptions for subsidies to high seas fishing could be effectively enforced in practice. In this respect, they consider the concept of the EEZ to be both meaningful and relevant, given that it demarcates the limits of national jurisdiction and responsibility. In the view of these delegations, the absence of strong jurisdiction and enforcement power on the high seas is a principal reason for the poor performance of many RFMOs. While recognizing that RFMOs are, under international law, the entities charged with managing internationally-shared fisheries, these Members are sceptical of relying on them too heavily in subsidy disciplines as the main instrument of or proxy for sustainability, unless and until RFMOs were substantially strengthened, which they consider unlikely in practice. Significantly, some delegations consider a universally-applicable prohibition on subsidies to high seas fisheries to be critical.

7. Technical assistance

82. Technical assistance for developing Members to implement new obligations has been widely recognized as an important element that would need to be addressed in the fisheries subsidies disciplines. There are considerably different visions as to what would be involved, and how it would be structured and implemented, however. The 2007 Chair text proposes that Members give due regard to the needs of developing Members in complying with the disciplines, including the conditionalities on S&DT and fisheries management in general, and provides for the establishment of mechanisms for, and the facilitation of, the provision of technical assistance.

83. Proposals to expand and enhance the technical assistance provisions have been submitted. Some proposals would make the provision of such assistance essentially mandatory upon the request of a developing Member, and certain new institutional structures have been proposed, including the establishment of a dedicated sub-committee of the SCM Committee to coordinate and monitor the implementation of the technical assistance provisions. Questions and concerns over these proposals include whether it is appropriate or practicable to create mandatory or near-mandatory technical assistance obligations; whether developing Members' compliance with their obligations should be conditional upon their receipt of technical assistance (as some perceive the proposals to suggest); and how to ensure that technical assistance for the implementation of fisheries obligations does not indirectly facilitate the provision of additional subsidies, by freeing up government funds that otherwise could and should be spent on fisheries management. Some delegations also have linked the degree of their flexibility on technical assistance provisions in the disciplines to the level of obligations that developing Members are willing to accept. In their view, if the obligations are light there is little to implement and thus little or no need for technical assistance to do so.

C. GENERAL DISCIPLINES (ADVERSE EFFECTS)

84. As a complement to the prohibition, the 2007 Chair text proposes provisions on general disciplines. These provisions would provide for a remedy where any Member caused, through the use of any specific subsidy (in the sense of Articles 1.1 and 1.2 of the SCM Agreement), i.e., including non-prohibited subsidies, certain adverse effects in respect of fish stocks in which another Member had an identifiable fishing interest. It also would attribute subsidies to the Member conferring them, regardless of the flag of the vessel involved or application of rules of origin to the fisheries products. While there is considerable support among delegations for the principle of such general disciplines, there also are considerable differences of view as to the specific details of what should be covered and what the rules should be.

85. Many delegations consider that such general disciplines or adverse effects provisions must be a complement to and not a replacement for the subsidy prohibition, and are concerned over the heavy emphasis in some proposals on general discipline provisions compared to prohibitions. Others, however, consider that the prohibitions should be limited and that fisheries management complemented by adverse effects provisions should be the core discipline.

86. On the subsidies that would be covered, proposals on general disciplines would cover all specific subsidies in the sense of the SCM Agreement, and many delegations support this. Some are concerned, however, that imprecise drafting as to the covered subsidies could vitiate the general exceptions and special and differential treatment provisions, or could give rise to trade barriers.

87. As for covered effects, many delegations consider that only adverse effects in relation to fish stocks and/or fishing interests should be addressed in the fisheries subsidies disciplines, and that trade effects should be dealt with exclusively under the existing provisions in the main body of the SCM Agreement. Concerning the nature of adverse effects, issues identified relate to both overcapacity and

overfishing in respect of particular stocks, but views differ as to the precise concepts and terminology to be used.

88. Regarding the fish stocks in question, and Members' interest in them, some consider that the general disciplines would have most relevance to straddling or highly migratory stocks which spend part of their time in a given Member's waters and part of their time elsewhere, including in the high seas. In terms of demonstrating standing, in the sense of having an interest in a given fish stock, some delegations consider that such interests should be limited to fishing interests in the stock in question, while others consider that cognizable interests also should encompass trade and commercial interests, such as a commercial interest in fish from the same stock or in a directly competitive product.

89. On establishing the existence of adverse effects and their causal link with subsidization, views diverge. Some proposals contain deeming provisions, mainly based on the absence of management, but reject the idea that the existence of strong management, on its own, would be sufficient to rebut an adverse effects claim. Others consider that management is the central consideration, however, and some caution that other factors, including environmental and natural influences, might cause harm to wild fish stocks that should not be attributed to subsidization. Still others are concerned that deeming provisions could put developing Members at a disadvantage. In addition, the need to avoid general disciplines inadvertently causing a race to subsidize by attributing adverse effects to the last to subsidize has been raised. As for remedies, some take the view that these should be the remedies set forth in Article 7 of the SCM Agreement, while others would leave the question of remedy to the dispute settlement panels to decide.

90. Finally, delegations generally support the proposal, in the 2007 Chair text and other proposals, that subsidies be attributed to the subsidizing Member, regardless of the flag of the vessel or the application of rules of origin to the fish products. Some consider that this provision should be placed so as to make clear that it applies to the fisheries subsidies disciplines in their entirety.

D. FISHERIES MANAGEMENT

1. Role in the disciplines

91. From the outset of the negotiations, the issue of fisheries management has figured prominently in the debates. Some delegations argue that if proper management is in place, subsidies cannot cause either overcapacity or over-fishing. Others, however, consider that while fisheries management is important, it cannot on its own combat the pressure for overcapacity and overfishing brought to bear by subsidization. In their view, the global crisis in fish stocks is ample evidence that fisheries management by itself is inadequate to control overcapacity and overfishing. In this regard, the example of the North Atlantic cod industry has been cited.

92. These differences of view in turn are reflected in very different proposals as to the role that fisheries management should play in the disciplines. Delegations holding the former view consider that fisheries management should form the core of the new rules, and that the subsidy disciplines should play the auxiliary role of creating incentives for Members to adopt strong management systems. Their proposals thus are to shorten the list of subsidies to be prohibited, and to make these prohibitions subject to certain management-related conditions (such as subsidizing the replacement of retired vessels with vessels of smaller capacity), and/or to put greater emphasis on adverse effects provisions, in which the existence and operation of the fisheries management system would play a pivotal role in determining whether subsidization had caused overcapacity and overfishing in a particular situation.

93. Other delegations, however, maintain that the core of the disciplines must be a prohibition of certain subsidies, and that fisheries management should be a conditionality for making use of

exceptions from the prohibition (whether general exceptions or exceptions under special and differential treatment). They further consider that while having fisheries management in place can be a relevant factor in assessing whether non-prohibited subsidies have caused adverse effects to fish stocks, this by itself should not be sufficient for a successful rebuttal of a claim.

2. Nature, prescriptiveness, possible bases for differentiation

94. Regarding fisheries management, a considerable degree of convergence has emerged in respect of what should be the core, mandatory elements of fisheries management that should apply to all Members, and that these core elements should be guided or inspired by relevant international fisheries management instruments.[1] Delegations also generally agree that Members should have considerable flexibility to implement the core elements in a way that is adapted to different kinds of fisheries. In this respect, it is recognized that different kinds of management tools will be best suited to implementing core elements in different kinds of fisheries. For example, while all fisheries should be subject to stock assessments, the tools to perform such assessments may be different for single-species and multi-species fisheries.

95. Notwithstanding this convergence, divergent views remain as to the degree to which the requirements to be set forth in the new disciplines should be differentiated for different categories of Member and/or in respect of different kinds of fisheries. For example, some S&DT proposals would require that fisheries management systems be informed by international fisheries management instruments only if the Member in question had ratified those instruments. Some others propose fisheries management on a "best-efforts" basis, at least for small-scale or artisanal fisheries of developing Members. Other proposals would apply the core management elements uniformly, to all Members and all fisheries. Finally, one proposal contains a list of core mandatory elements that would apply to all fisheries of all Members, except that certain developing Members with a small share of global fish capture would be subject to a shortened list, while developed Members and other "major fishing powers" would be subject to additional mandatory management elements.

3. Role of RFMOs

96. Finally, the question of what if any role RFMOs should have in management conditionalities remains unresolved. As discussed in the context of high seas fisheries, views are divided as to how heavily RFMOs can be relied upon as instruments of or proxies for fisheries management, and in particular the extent to which having a quota allocation from an RFMO, and fishing within that quota, are sufficient indicators of sound fisheries management and sustainable fishing. In this respect, as already noted, a number of delegations point to instances where the scientific advisers to RFMOs are ignored by the member governments, who set the quotas not based on the science but at a higher level in response to political pressure. Others however consider that for many stocks, management is delegated to RFMOs, that they are the main tool for ensuring international cooperation on those stocks, and that they generally perform valuable functions in terms of monitoring, data collection, scientific research, etc. Some consider that in spite of their limitations, it would be better under the disciplines at least to have a basis to know what RFMOs are doing and to encourage them to improve their performance than to exclude them completely.

E. NOTIFICATION AND SURVEILLANCE

97. Delegations generally agree that the new disciplines should contain enhanced notification and surveillance provisions in relation to fisheries subsidies, beyond those in the existing SCM

[1] A legal and institutional framework for fisheries management; stock assessment; vessel and vessel composition control; effort control measures or "capacity management"; monitoring, control and surveillance measures; and enforcement measures.

Agreement. A number of questions remain, however, where views are divided. These include the nature of the information and the level of detail to be notified, the timing of notifications, the forum for and timing of reviews of notifications, and whether non-notified subsidies should be presumed to be prohibited. A further issue is whether the notification requirements should be the same for all Members or instead should be reduced for developing Members.

1. Content, level of detail, and timing of notifications

98. Subsidy notifications under the new disciplines would be made where exceptions were invoked. In this regard, delegations generally agree that the information to be notified should correspond with, and be sufficient for Members to evaluate compliance with, the conditions and criteria that have to be met for the exception in question. Differences arise, however, in respect of the notification of information related to fisheries activities as such. Under the 2007 Chair text and in some proposals, a stock assessment would be required prior to the granting of certain subsidies pursuant to an exception, and the results of the stock assessment would need to be notified. Under some proposals, the pre- and expected post-subsidization level of capacity also would need to be notified, in advance, as a means to prevent subsidies from contributing to overcapacity.

99. Both the issue of notification of fisheries-related information in the context of WTO rules, and the question of advance notification of some or all of this information, are controversial. Some Members consider it inappropriate and outside the WTO's mandate to gather and review such information, and they are concerned lest the WTO become, *de facto*, a fisheries organization. Others, however, consider that such information is a necessary element of monitoring implementation of the rules.

100. In addition, some Members are concerned over the prospect of advance notification of subsidy-related information. Reasons range from Cabinet privilege to uncertainty, delays and burden, especially on developing Members. Others consider that advance notification is indispensable, given the long-term effects subsidies can have on fisheries resources, particularly when they are used to increase capacity and effort.

2. Nature of and forum for review

101. The question of how, where and by whom notifications should be reviewed has been the subject of considerable debate, and positions remain divided. Under the 2007 Chair text, the envisaged notifications of fisheries-related information (stock assessments, laws and regulations, information as to the implementation of fisheries management systems) would be made to a relevant body of the Food and Agriculture Organization, where it would be subject to "peer review". The references to such notifications and reviews would then be included in the subsidy notifications submitted to the WTO. While the Chair text does not define the term "peer review", Ambassador Valles explained to Members that what he had had in mind was a multilateral transparency review (comparable to that in a WTO Committee or under the Trade Policy Review Mechanism). He indicated that he had not conceived of it either as a review by a small "peer review" body, or as a process that would render a judgement on the notifier's compliance with the rules. As for the subsidy-related information, the 2007 Chair text proposes that that information would be notified to and reviewed by the WTO Committee on Subsidies and Countervailing Measures.

102. Most delegations have expressed concerns over the prospect of the FAO or any other outside organization receiving notifications or conducting substantive reviews pursuant to WTO rules. In their view, the WTO needs to monitor and enforce all aspects of its own rules. A number of proposals and suggestions have been made for modifying the notification provisions of the 2007 Chair text along these lines, including the creation of a fisheries sub-committee of the SCM Committee. While the delegations taking this view recognize that at present the WTO has no in-house fisheries expertise,

they believe that this could be addressed by hiring staff with a fisheries background and/or by drawing on resources of other, expert, organizations, principally the FAO, but also possibly some RFMOs and other fisheries organizations, as needed. Some delegations, however, prefer the approach in the Chair text, which they see as the most efficient and technically sound way to address the complex fisheries-related information that would be generated under the new disciplines.

103. Concerning the nature of the reviews that would be undertaken (in whatever forum), most delegations consider that these should be for the purposes of transparency only, and should not be aimed at rendering judgements as to the soundness of a fisheries management system, the accuracy of a stock assessment, the compliance of a given subsidy with the pertinent criteria, or similar questions. Others however, favour a more binding outcome. One proposal in this regard is for a report that would render a legal judgement, which could be used in dispute settlement.

3. Whether non-notified subsidies should be presumed prohibited

104. A further proposal, contained in the 2007 Chair text and supported by a number of delegations, is that there should be a presumption that a non-notified subsidy that is the subject of dispute settlement is prohibited, with the burden on the subsidizer to demonstrate that the subsidy is not prohibited. Other delegations are concerned over such a presumption, including because they disagree that the legal status of a measure should be determined by a procedural failure, and because they do not consider burden shifting to be a useful incentive to comply with notification requirements. Some developing Members also have concerns that failure to notify might be the result of resource constraints rather than deliberate action and that this should be taken into account.

F. OTHER ISSUES

105. Other issues addressed in the 2007 Chair text and in some proposals include provisions on dispute settlement and transition rules. Regarding **dispute settlement**, many delegations consider that the corresponding provisions in the 2007 Chair text are largely or entirely redundant, and should be at least partially deleted. One issue that remains to be resolved, however, is the above-described presumption that non-notified subsidies should be prohibited. Another issue about which views remain divided is whether dispute settlement panels should be required or merely have the option to resort to outside fisheries experts where scientific or technical questions related to fisheries are raised.

106. Regarding **transition rules**, while most delegations consider that disciplines would need to allow transition periods for Members to bring their existing inconsistent measures into conformity once the disciplines entered into force, the prevailing view is that this issue can meaningfully be discussed only once the substantive disciplines have been clarified. It has been noted, in particular, that the need for and length of a transition period would directly depend on the scope and strictness of the discipline to be applied.