

# AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

## PART I: GENERAL

### Article 1

#### Definition of a Subsidy

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

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

- (i) Government practice involves a direct transfer of funds (e.g., grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g., loan guarantees);
- (ii) government revenue that is otherwise due, is foregone or not collected (e.g., fiscal incentives such as tax credits)[1];
- (iii) a government provides goods or services other than general infrastructure, or purchases goods;
- (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

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

and

(b) a benefit is thereby conferred.

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

## Article 2

### Specificity

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

- (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
- (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions<sup>[2]</sup> governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
- (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b) above, there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the

granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

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

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

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

## PART II: PROHIBITED SUBSIDIES

### Article 3

#### Prohibition

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

- (a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;[5]
- (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 Members shall not grant nor maintain subsidies referred to in paragraph 1.

### Article 4

## Remedies

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

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

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

4.4 If no mutually acceptable solution has been reached within thirty days<sup>[6]</sup> of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body<sup>[7]</sup> (the DSB) for the immediate establishment of a Panel, unless the DSB decides by consensus not to establish a panel.

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

4.6 The Panel, established pursuant to paragraph 4 above, shall submit its final report to the Members party to the dispute. The report shall be circulated to all Members within ninety days of the date of the composition and the establishment of the Panel's terms of reference.

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

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

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within thirty days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within thirty days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed sixty days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within twenty days following its issuance to the Members.[8]

4.10 In the event the recommendation of the DSB is not followed within the time period specified by the Panel, which shall commence from the date of adoption of the Panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[9] countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), the arbitrator shall determine whether the countermeasures are appropriate.[10]

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

### PART III: ACTIONABLE SUBSIDIES

#### Article 5

#### Trade Effects

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

- (a) injury to the domestic industry of another Member;[11]
- (b) nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT 1994 in particular the benefits of concessions bound under Article II of the GATT 1994;[12]
- (c) serious prejudice to the interests of another Member.[13]

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

## Article 6

### Serious Prejudice

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

- (a) the total ad valorem subsidization[14] of a product exceeding 5 per cent;[15]
- (b) subsidies to cover operating losses sustained by an industry;
- (c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;
- (d) direct forgiveness of debt, i.e., forgiveness of government-held debt, and grants to cover debt repayment.[16]

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

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

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

- (b) the effect of the subsidy is to displace or impede the exports of like product of another Member from a third country market;
- (c) the effect of the subsidy is a significant price undercutting by the subsidized products as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;
- (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[17] as compared to the average share it had during the previous period of 3 years and this increase must follow a consistent trend over a period when subsidies have been granted.

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

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

6.6 Each Member, in the market of which serious prejudice is alleged to have arisen, shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute and to the Committee all relevant information that can be obtained as to the changes in market shares of the disputing parties as well as concerning prices of the products involved.

6.7 Displacement or impedece resulting in serious prejudice shall not arise under paragraph 3 above where any of the following circumstances exist[18] during the relevant period:

- (a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third market concerned;
- (b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;
- (c) natural disasters, strikes, transport disruptions or other force majeure substantially affecting production, qualities, quantities or prices of the product available for exports from the complaining Member;
- (d) existence of arrangements limiting exports from the complaining Member;
- (e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, inter alia, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);
- (f) failure to conform to standards and other regulatory requirements in the importing country.

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

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

## Article 7

### Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in

Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 above shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice[19] caused to the interests of the Member requesting consultations.

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

7.4 If consultations do not result in a mutually acceptable solution within sixty days[20], any Member party to such consultations may refer the matter to the Dispute Settlement Body for the establishment of a Panel, unless the DSB decides by consensus not to establish a panel. The composition of the Panel and its terms of reference shall be established within fifteen days from the date when it is established.

7.5 The Panel, established pursuant to paragraph 4 above, shall review the matter and shall submit its final report to the Members party to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the Panel's terms of reference.

7.6 Within thirty days of the issuance of the Panel's report to all Members, the report shall be adopted by the DSB[21] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within sixty days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within sixty days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed ninety days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within twenty days following its issuance to the Members.[22]

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

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

7.10 In the event that a party to the dispute requests arbitration under paragraph 22.6 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

## PART IV: NON-ACTIONABLE SUBSIDIES

### Article 8

#### Identification of Non-Actionable Subsidies

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

- (a) subsidies which are not specific, within the meaning of paragraph 1 of Article 2 above;
- (b) subsidies which are specific within the meaning of Article 2 above but which meet all of the conditions provided for in paragraphs 2(a) or 2(b) below.

8.2 Notwithstanding the provisions of Parts III and V of this Agreement, the following subsidies shall be non-actionable<sup>[23]</sup>:

- (a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis

with firms if:[24], [25], [26]

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

and provided that such assistance is limited exclusively to:

- (i) personnel costs (researchers, technicians and other supporting staff employed exclusively in the research activity);
  - (ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;
  - (iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;
  - (iv) additional overhead costs incurred directly as a result of the research activity;
  - (v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.
- (b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development[29] and non-specific (within the meaning of paragraph 1 of Article 2 above) within eligible regions provided that:
- (i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;
  - (ii) the region is considered as disadvantaged on the basis of neutral and objective criteria[30], indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;
  - (iii) the criteria shall include a measurement of economic development which shall be based on at least one of the

following factors:

- one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;
- unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

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

- (c) assistance to promote adaptation of existing facilities<sup>[31]</sup> to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:
- (i) is a one-time non-recurring measure; and
  - (ii) is limited to 20 per cent of the cost of adaptation; and
  - (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
  - (iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
  - (v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 above are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII of this Agreement. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2 above. Members shall also provide the Committee with yearly updating of such notifications, in particular by supplying information on global expenditure for each programme, and about any modification of the programme since the previous update. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.<sup>[32]</sup>

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

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

## Article 9

### Consultations and Authorized Remedies

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

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

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

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1 above. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under this provision. In the event the recommendation is not followed within 6 months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

## PART V: COUNTERVAILING MEASURES

### Article 10

#### Application of Article VI of the GATT 1994[33]

Members shall take all necessary steps to ensure that the imposition of a countervailing duty[34] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of the GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated[35] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

### Article 11

#### Initiation and Subsequent Investigation

11.1 Except as provided in paragraph 6 of Article 11, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of

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

- (i) identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;
- (ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
- (iii) evidence with regard to the existence, amount and nature of the subsidy in question;
- (iv) evidence that alleged material injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

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

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed<sup>[36]</sup> by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.<sup>[37]</sup> The application shall be

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

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

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

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

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

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

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

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

## Article 12

### Evidence

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

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least thirty days for reply.[38] Due consideration should be given to any request for an extension of the thirty day period and, upon cause shown, such an extension should be granted whenever practicable.

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

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters[39] and to the authorities of the exporting country and make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information as provided for in paragraph 4 below.

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

12.3 The authorities shall whenever practicable provide timely

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

12.4 Any information which is by nature confidential, (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information) or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[40]

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

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[41]

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

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless the latter objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the Member in question is notified and does not object. The procedures set forth in Annex VI to this Agreement shall apply to investigations on the premises of a firm. The

authorities shall, subject to the requirement to protect confidential information, make the results of any verifications available or provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

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

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

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

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and
- (ii) a producer of the like product in the importing country or a trade and business association a majority of the members of which produce the like product in the importing country.

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

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

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

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to

initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

## Article 13

### Consultations

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in Article 11:1 above and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.[42]

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

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

## Article 14

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

For the purpose of Part V of this Agreement, any method used by the investigating authority to calculate the benefit to the recipient conferred

pursuant to paragraph 1 of Article 1 above shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore any such method shall be consistent with the following guidelines:

- (a) Government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
- (b) A loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;
- (c) A loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay for a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
- (d) The provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

## Article 15

### Determination of Injury[43]

15.1 A determination of injury for purposes of Article VI of the GATT 1994 shall be based on positive evidence and involve an objective examination of

both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products<sup>[44]</sup> and (b) the consequent impact of these imports on the domestic producers of such products.

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

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess effects of such imports only if they determine that (1) the amount of subsidization established in relation to the imports from each country is more than de minimis as defined in paragraph 9 of Article 11 and that the volume of imports from each country is not negligible and (2) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects<sup>[45]</sup> of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The

authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

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

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

- (i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
- (ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importations;
- (iii) sufficient freely disposable or an imminent, substantial increase in capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing country's market, taking into account the availability of other export markets to absorb any additional exports;
- (iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports;
- (v) inventories of the product being investigated.

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

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

## Article 16

### Definition of Domestic Industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2 below, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related<sup>[46]</sup> to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

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

16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 2 above, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of countervailing duties on such a basis, the importing Member may levy the countervailing duties

without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18 of this Agreement, and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

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

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

## Article 17

### Provisional Measures

17.1 Provisional measures may be applied only if:

- (a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;
- (b) a preliminary affirmative determination has been made that a subsidy exists and that there is material injury or threat thereof to a domestic industry caused by subsidized imports; and
- (c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

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

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

17.4 The application of provisional measures shall be limited to as short a

period as possible, not exceeding four months.

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

## Article 18

### Undertakings

18.1 Proceedings may<sup>[47]</sup> be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

- (i) the government of the exporting country agrees to eliminate or limit the subsidy or take other measures concerning its effects; or
- (ii) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

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

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

18.4 If the undertakings are accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so

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

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

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

## Article 19

### Imposition and Collection of Countervailing Duties

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

19.2 The decision whether or not to impose a countervailing duty in cases

where all requirements for the imposition have been fulfilled and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties[48] whose interests might be adversely affected by the imposition of a countervailing duty.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to co-operate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

19.4 No countervailing duty shall be levied[49] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

## Article 20

### Retroactivity

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

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

been applied.

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

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

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

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

## Article 21

### Duration and Review of Countervailing Duties and Undertakings

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

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization,

whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.[50] The duty may remain in force pending the outcome of such a review.

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

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

## Article 22

### Public Notice and Explanation of Determinations

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

22.2 A public notice of the initiation of an investigation shall contain or otherwise make available through a separate report[51] adequate information on the following: (i) the name of the exporting country or countries and the product involved; (ii) the date of initiation of the investigation; (iii) a description of the subsidy practice or practices to be investigated; (iv) a summary of the factors on which the allegation of injury is based; (v) the address to which representations by interested parties should be directed; and (vi) the time-limits allowed to interested parties for making

their views known.

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

22.4 A public notice of the imposition of provisional measures shall set forth or otherwise make available through a separate report sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular: (i) the names of the suppliers or when this is impracticable, the supplying countries involved; (ii) a description of the product which is sufficient for customs purposes; (iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined; (iv) considerations relevant to the injury determinations as set out in Article 15; (v) the main reasons leading to the determination.

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

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

22.7 The provisions of this Article shall apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 21 and to decisions

under Article 20 to apply duties retroactively.

## Article 23

### Judicial Review

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

## PART VI: INSTITUTIONS

### Article 24

#### Committee on Subsidies and Countervailing Measures and other Subsidiary Bodies

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

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of

them will serve in rotation every year. The Committee may request the Group of Experts to prepare a proposed conclusion on the existence of a prohibited subsidy, as provided for in paragraph 5 of Article 4 above. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

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

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

## PART VII: NOTIFICATION AND SURVEILLANCE

### Article 25

#### Notifications

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

25.2 Members shall notify any subsidy as defined in paragraphs 1 and 2 of Article 1 above, granted or maintained within their territory.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection and without prejudice to the contents and form of the questionnaire on subsidies<sup>[52]</sup>, Members shall ensure that their notifications contain the following information:

- (i) form of a subsidy (i.e., grant, loan, tax concession, etc.);
- (ii) subsidy per unit or, in cases where it is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the

previous year);

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

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

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

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

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

25.6 Members which consider that there are not measures or schemes in their countries requiring notification under paragraph 1 of Article XVI of the GATT 1994 and this Agreement shall so inform the MTO Secretariat in writing.

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

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

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

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

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

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

## Article 26

### Surveillance

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

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 above at each regular meeting of the Committee. The semi-annual reports shall be submitted on an agreed standard form.

## PART VIII: DEVELOPING COUNTRY MEMBERS

### Article 27

#### Special and Differential Treatment for Developing Country Members

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

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

- (a) developing country Members referred to in Annex VII.
- (b) other developing country Members for eight years from the date of

entry into force of the Agreement Establishing the MTO subject to compliance with the provisions in paragraph 3 below.

27.2bis The prohibition of paragraph 1(b) of Article 3 shall not apply to developing countries for a period of five years, and shall not apply to least developed countries for a period of eight years, from the date of entry into force of the Agreement Establishing the MTO.

27.3 Any developing country Member referred to in paragraph 2(b) above shall phase out its export subsidies within the eight year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies<sup>[53]</sup>, and shall eliminate them within a period shorter than that provided for in this provision when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the eight year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.4 A developing country Member that has reached export competitiveness in any given product shall phase out its export subsidies for such product(s), over a period of two years. However, for a country which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of 8 years.

27.5 Export competitiveness in a product exists if a country's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the country having reached export competitiveness, or (b) on the basis of a computation undertaken by the MTO Secretariat at the request of any Member. For the purpose of this paragraph a product is defined as a section heading of the Harmonized System Nomenclature. Members agree that the Committee shall review the operation of this provision 5 years from the date of the entry into force of the Agreement Establishing the MTO.

27.6 Provisions of Article 4 shall not apply to a developing country Member

in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 4 above. The relevant provisions in such a case shall be those of Article 7.

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

27.8 Regarding actionable subsidies other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 of this Agreement unless nullification or impairment of tariff concessions or other obligations under the GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of like products into the market of the subsidizing country or unless injury to domestic industry in the importing market of a Member occurs in terms of Article 15 of this Agreement.

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

- (a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value/calculated on a per unit basis; or
- (b) the volume of the subsidized imports represents less than 4 per cent of the total imports for the like product in the importing Member, unless imports from developing country Members whose individual shares of total import represent less than 4 per cent collectively account for more than 9 per cent of the total imports for the like product in the importing country.

27.10 For those Members within the scope of paragraph 2(b) of Article 27 which have eliminated export subsidies prior to the expiry of the period of 8 years from the entry into force of the Agreement Establishing the MTO and those in Annex VII, the number in paragraph 9(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that this elimination of export subsidies is notified to the Committee for so long as export subsidies are not granted by the notifying Member. This provision shall expire 8 years from the date of entry into force of the Agreement Establishing the MTO.

27.11 The provisions of paragraphs 9 and 10 shall govern any determination of de minimis under paragraph 3 of Article 15 of this Agreement.

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

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

27.14 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 9 and 10 above as applicable to the developing country Member in question.

## PART IX: TRANSITIONAL ARRANGEMENTS

### Article 28

#### Existing Programmes

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

- (i) notified to the Committee not later than 90 days after the entry into force of the Agreement Establishing the MTO for such Member;
- (ii) brought into conformity with the provisions of this Agreement within 3 years of the date of entry into force of the Agreement Establishing the MTO for such Member and until then shall not be subject to Part II of this Agreement.

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

## Article 29

### Transformation into a Market Economy

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

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3 below, shall be phased out or brought into conformity with Article 3 within a period of 7 years from the date of entry into force of the Agreement Establishing the MTO. In such a case, Article 4 shall not apply. In addition during the same period:

- Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;
- With respect to other actionable subsidies, provisions of paragraph 8 of Article 27 shall apply.

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

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

## PART X: DISPUTE SETTLEMENT

### Article 30

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

## PART XI: FINAL PROVISIONS

### Article 31

#### Provisional Application

The provisions of paragraph 1 of Article 6, and the provisions of Article 8 and Article 9 shall apply for a period of 5 years, beginning with the date of entry into force of the Agreement Establishing the MTO. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

### Article 32

#### Other Final Provisions

- 32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of the GATT 1994, as interpreted by this Agreement.[54]
- 32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.
- 32.3 Subject to sub-paragraph 1, 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 Agreement Establishing the MTO.
- 32.3.1 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the Agreement Establishing the MTO, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.
- 32.4 (a) Each government accepting or acceding to the MTO shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the Agreement Establishing the MTO for it, the conformity of its laws, regulations and administrative procedures with the provisions of

this Agreement as they may apply to the Member in question.

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

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

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

#### ANNEX I

#### ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

- (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
- (b) Currency retention schemes or any similar practices which involve a bonus on exports.
- (c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.
- (d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available<sup>[55]</sup> on world markets to their exporters.
- (e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes<sup>[56]</sup> or social welfare charges paid or payable by industrial or commercial enterprises.<sup>[57]</sup>
- (f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

- (g) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes<sup>56</sup> in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.
- (h) The exemption, remission or deferral of prior stage cumulative indirect taxes<sup>56</sup> on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).[58] This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.
- (i) The remission or drawback of import charges<sup>56</sup> in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.
- (j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.
- (k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit

terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

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

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

## ANNEX II

### GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS[59]

#### I

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

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs

stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

## II

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

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting country has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12 of this Agreement, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.
2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting country based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the importing country deemed it necessary, a further examination would be carried out in accordance with paragraph 1 above.
3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.
4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that

portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used nor sold by the same manufacturer.

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

### ANNEX III

#### Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies

##### I

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

##### II

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

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same

quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting country to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

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

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

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

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

#### ANNEX IV

#### Calculation of the Total Ad Valorem Subsidization

(paragraph 1(a) of Article 6)[60]

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1 of Article 6 above shall be done in terms of the cost to the granting government.
2. Except as provided in paragraphs 3-5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's[61] sales in the most recent twelve-month period, for which sales data is available, preceding the period in which the subsidy is granted.[62]
3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent twelve-month period, for which sales data is available, preceding the period in which the subsidy is granted.
4. Where the recipient firm is in a start-up situation, the overall rate of subsidization shall not exceed 15 per cent of the total funds invested. For purposes of this paragraph a start-up period will not extend beyond the first year of production.[63]
5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the twelve months preceding the month in which the subsidy is to be given.
6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.
7. Subsidies granted prior to the entry into force of the Agreement Establishing the MTO, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.
8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1 of Article 6 above.

## ANNEX V

### Procedures for Developing Information Concerning Serious Prejudice

1. Every Member shall co-operate in the development of evidence to be examined by the Committee or its subsidiary bodies in procedures under Article 7 above, paragraphs 4 through 6. The parties to the dispute and any third-country Member concerned shall notify the Committee, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.
2. In cases where matters are referred to in the Committee under paragraph 4 of Article 7, the Committee shall upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidizations, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.[64] This process may include, where appropriate, presentation of questions to the government of the subsidizing country and of the complaining country to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII above.[65]
3. In the case of effects in third-country markets, a Member party to a dispute may collect information, including through the use of questions to the government of the third-country, necessary to analyze adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g., most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a Member party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.
4. The Committee shall designate a representative to serve the function

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

5. The information-gathering process outlined in paragraphs 2-4 above shall be completed within 60 days of the date on which the matter has been referred to the Committee under paragraph 4 of Article 7 above. The information obtained during this process shall be submitted to the Committee or to a panel established by the Committee in accordance with the provisions of Part X above. This information should include, inter alia, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the Committee or the panel deems relevant in the course of reaching its conclusions.

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

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

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

9. Nothing in the information-gathering process shall limit the ability of the Committee or the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record

where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non co-operation by that party in the information-gathering process.

## ANNEX VI

### Procedures for On-The-Spot Investigations Pursuant to Paragraph 6 of Article 12

- (a) Upon initiation of an investigation, the authorities of the exporting country and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.
- (b) If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting country should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.
- (c) It should be standard practice to obtain explicit agreement of the firms concerned in the exporting country before the visit is finally scheduled.
- (d) As soon as the agreement of the firms concerned has been obtained the investigating authorities should notify the authorities of the exporting country of the names and addresses of the firms to be visited and the dates agreed.
- (e) Sufficient advance notice should be given to the firms in question before the visit is made.
- (f) Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made, provided the authorities of the importing country notify the representatives of the government of the country in question and unless the latter do not object to the visit.
- (g) As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting country is informed by the investigating authorities of the

anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

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

## ANNEX VII

### Developing Country Members Referred to in Paragraph 2(a) of Article 27

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

- (a) Least-developed countries designated as such by the United Nations that are Members of the MTO.
- (b) Each of the following developing country Members shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached \$1,000 per annum: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

Note: The inclusion of countries in the list in (b) is based on the most recent data from the World Bank on GNP per capita.

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

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

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

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

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

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

7. As established in the Agreement Establishing the MTO and hereinafter referred to as the DSB.

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

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

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

11. Injury to the domestic industry is used here in the same sense as it is used in Part V of this Agreement.

12. Nullification or impairment is used in this Agreement in the same sense as it is used in the relevant provisions of the GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

13. Serious prejudice to the interests of another Member is used in this Agreement in the same sense as it is used in Article XVI:1 of the GATT 1994, and includes threat of serious prejudice.

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

15. Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this sub-paragraph does not apply to civil aircraft.

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

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

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

19. In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of Article 6.1 above, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of Article 6.1 have been met or not.

20. Any time periods mentioned in this Article may be extended by mutual agreement.

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

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

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

24. Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this sub-paragraph do not apply to that product. Not later than 18 months after the date of entry into force of the Agreement Establishing the MTO the Committee shall review the operation of the provisions of this sub-paragraph with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this sub-paragraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions. The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

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

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

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

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

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

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

31. The term "existing facilities" means facilities having been in operation for at least two years at the time when new environmental requirements are imposed.

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

33. The provisions of Parts II or III may be invoked in parallel with the provisions of Part V of this Agreement; however, with regard to the effects of a particular subsidy in the domestic market of the importing country, only one form of relief (either a countervailing duty, if other requirements of Part V are met, or a countermeasure under Articles 4 or 7 of this Agreement) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV of this Agreement. However, measures referred to in Article 8.1(a) above may be investigated in order to determine whether or not they are specific within the meaning of Article 2 above. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Parts III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

34. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of off-setting any subsidy bestowed directly or

indirectly upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of the GATT 1994.

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

36. 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.

37. 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.

38. 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 day on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting country or in the case of a separate customs territory Member of the MTO, an official representative of the exporting territory.

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

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

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

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

43. 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.

44. 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.

45. As set forth in paragraphs 2 and 4 of this Article.

46. 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.

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

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

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

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

51. 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.

52. The Committee shall establish a Working Party to review the contents and

form of the questionnaire as contained in BISD, 9S/193-194.

53. For countries not granting export subsidies as of the day of entry into force of the Agreement establishing the MTO, this provision shall apply on the basis of the level of export subsidies granted in 1986.

54. This paragraph is not intended to preclude action under other relevant provisions of the GATT 1994, where appropriate.

55. The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

56. For the purpose of this Agreement:

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

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

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

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

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

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

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

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

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

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

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

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

61. The recipient firm is a firm in the subsidizing country.

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

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

64. In cases where the existence of serious prejudice has to be demonstrated.

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