WORLD TRADE ORGANIZATION
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# ADVANCED TRADE NEGOTIATIONS SIMULATION SKILLS COURSE

## PART IV

(Specialist path)

***RTAs and Contingency Trade Remedies:***
***Antidumping, subsidies and countervailing measures (including fisheries subsidies) and safeguards***

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## SECTION 1

### Overview of Contingency Trade Remedies

1. Trade liberalization may expose domestic industries to unfair trade practices or excessive competition from imports resulting in an injurious situation. WTO Members therefore recognize the need for commercial protection in particular circumstances for specific products and authorize the adoption of trade remedy measures. To avoid abuse of trade remedy measures which might negatively affect the principles of the WTO, Members have agreed on specific rules for the application of those measures.

2. Trade-defence measures include anti-dumping measures, countervailing measures and safeguards. Anti-dumping and countervailing measures are set at different rates for each exporter from the countries investigated, while safeguard measures are identical for all exporters from all WTO Members. In general, recourse to trade-remedy measures would appear to be unnecessary if the tariff for the product concerned is not bound, or if the tariff applied is below the bound rate.

3. The application of anti-dumping (countervailing) measures is limited to situations where the imports concerned are dumped (subsidized) and cause (or threaten to cause) "material injury" to a domestic industry, while the application of safeguard measures is restricted to situations where the investigated imports cause "serious injury" to a domestic industry producing like or directly competitive products. This is why trade-remedy measures are said to afford *contingent protection*.

4. In the case of Safeguards, there is, of course, no need to show that the imports concerned are dumped or subsidized. The imposition of either anti-dumping or countervailing measures does not require compensating the trading partner affected, as under the WTO Agreements, Members do not have the right to export dumped or subsidised imports that cause injury. The Safeguards Agreement does not, however, require compensation to affected trading partners during the first three years that a safeguard measure is in effect.

5. The existence of dumping (subsidisation) and injury has to be established through an investigation conducted by national authorities according to the many procedural and substantive requirements detailed in the respective Agreements. Anti-dumping (countervailing) investigations normally must be completed within one year. To avoid the possibility that injury occurs while the investigation unfolds, Members may impose provisional measures, although not sooner than 60 days after initiation. Members may also take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury.

6. The anti-dumping duty cannot be greater than the margin of dumping calculated. However, the anti-dumping duty can be less than the margin of dumping, if a lower duty is sufficient to offset the injury caused. Injury data used in investigations cover data for the previous three years, while dumping data are based on the previous one year. In principle, a country can use the duties collected like any other income from taxes or customs duties.



7. Definitive anti-dumping measures can last up to five years, and they can be renewed if a review confirms the need for the continued imposition of such duties. Definitive safeguard measures can last up to four years, and can be extended for another four years (for total of eight years), although they cannot be renewed right away. Developing countries have the flexibility of applying safeguard measures for a total of ten years, and can renew safeguard measures sooner than developed countries.

8. Whether developing countries (including LDCs) should build the capacity to use trade instruments to protect their industries remains a policy decision of the countries concerned. There is an apparent correlation between openness of an economy and use of trade contingency measures; i.e. that generally, closed markets do not need further protection by trade measures. Since the implementation of the Uruguay Round Agreements, developing countries have become major users of the trade policy instruments.

9. Countries intending to establish a capacity to use trade policy instruments would need to acquire sufficient technical knowledge of the subjects and procedures concerned. In particular, the transformation of the WTO Agreements into national laws, the creation of administrative structures such as the capability to issue public notices explaining findings of legal and technical nature, accounting and data processing capacities, as well as a duty collection system and quota management, would be indispensable elements for an investigating authority. Most important for the functioning of a proper application of trade measures would be the training of personnel. All the above-mentioned requirements would need to be established before any proceeding could be considered.

10. A Member needs not have domestic legislation before being able to impose antidumping or countervailing duties. However, the country has to observe all the relevant procedures before imposing any such duties. The situation with safeguards is different. Article 3.1 of the agreement on Safeguards

specifically provides that: " A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of the "GATT 1994". Thus without prior legislation, a country cannot impose a safeguard measure even if it could satisfy all the relevant requirements. It will be advisable for a country to have trade remedy laws even if it does not apply them

11. It needs to be pointed out that practices by foreign or domestic corporations with considerable market power, which result in higher rather than lower import prices as compared to prices in other (more competitive) markets, would not be a case for trade defence measures, but rather for the enforcement of competition disciplines.

## SECTION 2

## Rules Negotiations

12. There are three types of contingent trade protection measures: (i) action against dumping (**anti-dumping**), (ii) **countervailing duties** and (iii) temporary emergency measures (**safeguards**).

13. The Rules negotiations cover:

- **Anti-dumping** (Agreement on Implementation of Article VI of GATT 1994)
- **Subsidies** and **Countervailing Measures**
- Fisheries Subsidies
- Disciplines on Regional Trade Agreements (RTAs)
- (Safeguards not included in the mandate).

14. The mandate of the rules negotiations:

"In the light of experience and of the increasing application of these instruments by Members", "negotiations shall aim at clarifying and improving disciplines"

"while preserving the basic concepts, principles and effectiveness of these agreements and their instruments and objectives,"

"and taking into account the needs of developing and least developed countries".

15. There are two phases involved. In the initial phase: "participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the..."

"...subsequent phase": drafting.

16. Negotiators reiterate their belief in the importance of achieving a substantial outcome in the Anti-dumping negotiations and avoiding hard-won market access benefits being undermined by protective trade remedy measures. Six broad objectives have been identified pertaining to changes to be introduced to the Anti-Dumping Agreement (ADA), namely:

(a) mitigating the excessive effects of Anti-dumping measures;

(b) preventing Anti-dumping measures from becoming permanent;

(c) strengthening due process and enhancing the transparency of proceedings;

(d) reducing costs for authorities and respondents;

(e) terminating unwarranted and unnecessary investigations at an early stage; and

(f) improving and clarifying substantive rules for dumping and injury.

## SECTION 3

## ANTI-DUMPING

### 1. Background

17. Anti-dumping measures consist of anti-dumping duties and price undertakings (committing individual exporters to cease dumping). An Anti-dumping measure requires:

(i) a determination of **dumping**

(ii) a determination of **injury** to the domestic industry

(iii) a **causal link** between dumping and injury.

### 2. What is dumping?

18. When an exporter sells a product to the importing country at a lower price than the price at which the same (*"like"*) product is sold on its own domestic market. This implies that the domestic price of the exporter should be greater than the export price. Dumping can therefore be viewed as "price discrimination between international markets".

### 3. Factors influencing dumping

- Exploration of new markets - normal market expansion
- Cyclical product - domestic market in downward phase
- Saturation of domestic market
- Price resistance in domestic market - economies of scale can lower per unit cost
- Economic downswing in domestic market and
- Predatory intent

### 4. Normal Value

19. Formally, normal value is defined as

- the *comparable* price
- in the *ordinary course of trade*
- for the *like product*
- when destined for consumption in the exporting country.

Normal value is therefore the price of domestic sales in the exporting country. Other prices that can be used as alternatives for normal value under the Anti-dumping Agreement are domestic prices in the exporting country, export price to a third country or constructed value in the exporting country.

### 5. A "Like Product"

20. A "like product" is a product which is identical, i.e., alike in all respects, to the product exported (subject product) OR a product, although not identical to the subject product, having characteristics closely resembling those of the subject product.

### 6. Injury

21. There are three definitions to the term "injury"

- Material injury to a domestic industry ("current or present injury")
- Threat of material injury to a domestic industry ("future injury")
- Material retardation of the establishment of a domestic industry.

### 7. Criteria for Affirmative Injury Finding: Injury and Causation

- Injury

- Is domestic industry injured (i.e., materially injured, threatened, or materially retarded from establishment)?

- Causation
  - Are dumped / subsidized imports (themselves or through their effects) causing the injury?

**8. Definition of the term "domestic industry"**

- "Domestic industry" has two meanings:
  - the domestic producers as a whole of the like product **OR**
  - the producers whose collective output of the product constitutes a major proportion of the domestic production of the like products.

- Domestic industry determination is important for:
  - Who may file a petition?
  - Whose data are considered in injury analysis?

**9. Exclusion of domestic producers from the definition of domestic injury**

- When producers are related to the exporters or importers or are themselves importers of the investigated product, the term "domestic industry" **may** be interpreted as referring to the rest of the producers;

- May exclude such producers if there are grounds to believe or suspect that such relationship causes the producer to behave differently from non-related producers;

- Issue of definition of "related".

**10. Article 3.4: Injury Factors.**

22. The examination of the impact of dumped 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:
  - Sales
  - Profits
  - Output
  - Market share
  - Productivity
  - Return on investment
  - Utilisation of capacity
- Factors affecting domestic prices
- The magnitude of the margin of dumping
- Actual and potential negative effects on:
  - Cash flow
  - Inventories
  - Employment
  - Wages.
  - Growth
  - Ability to raise capital
  - Ability to raise investment

**11. Causal Relationship**

It must be demonstrated that the dumped imports cause injury *through the effects of dumping*.

**12. Causality**

- In the causal relationship analysis, known factors, other than the dumped imports which are injuring the domestic industry shall be examined.

- Illustrative list of such "other factors" are:
  - » The volume and price of imported goods
  - » Contraction in demand
  - » Restrictive trade practices of, and competition between, foreign and domestic producers
  - » Developments in technology
  - » Export performance and productivity of domestic producers

- And shall not attribute the injuries caused by such other factors to the dumped imports (*Non-Attribution Provision*) Article 3.5.

**13. Imposition of Anti-Dumping Duties**

- Once determined that all requirements of the Anti-dumping Agreement have been established on dumping, injury and causality, it is not mandatory to impose anti-dumping duties (Desirable to be permissive)
- Amount of anti-dumping duty shall not exceed the margin of dumping
- "It is desirable" that the duty be less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry ("Lesser duty principle")
- Public interest

**14. Format of Investigation (≥Article 5)**

(i) Initiation
(ii) Information gathering
(iii) Preliminary determination
(iv) Further investigation
  - response to preliminary determination
(v) Verification of information
(vi) Final determination.

**15. Anti-dumping: Price Undertaking, Duration, Reviews**

• Upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices, proceedings could be suspended or terminated without the imposition of provisional measures or anti-dumping duties (Article 8.1).

In price undertaking, any price increases by the exporter are limited to the amount of the margin of dumping calculated. A price undertaking may be advantageous for an exporter if, for instance, the price revision accepted in an undertaking is less than the margin of dumping.

• Duration: Except in special cases, anti-dumping investigations are expected to be concluded within **one year** after their initiation. (Article 5: 10).

• "**Sunset" provision:** Any anti-dumping duty shall be terminated no later than **5 years** after first being applied, unless authorities determine in a review that **continued imposition of the duty** is necessary to prevent the continuation or recurrence of injury by dumped imports. The 5-year "sunset" provision also applies to "price undertakings".

23. Some of the major players in the anti-dumping negotiations: The "Friends of the Anti-dumping Negotiations (FANs)" are: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Chinese Taipei; Singapore, Switzerland; Thailand; Turkey, United States, India, EU, Canada, Australia, Egypt, China. The process is open to all WTO Members.

24. More than 50 issues have been presented to the Negotiating Group . These are mostly technical issues. On Article 2 (Determination of Dumping), more than 10 issues have been identified by Members as deserving clarification or improvement. There are also general issues such as transparency, technical assistance and reducing cost of investigations.

25. The main objectives of the "Friends of Anti-dumping" in the negotiations are: preventing abusive anti-dumping measures; avoiding excessive burden on respondents; enhancing predictability and fairness in the system.

26. Moreover, senior officials criticize the abuse of anti-dumping, imposition of inconsistent anti-dumping measures and increasing protectionism.

27. More than 30 different issues have been included in the specific proposals submitted by the "Friends of Anti-dumping" – examples

- Determination of Normal Value
  » Art. 2.2 (footnote 2) : quantity of sales in the domestic market
  » "particular market situation" (lack of definition).
- De Minimis thresholds (Art 5.8)
  » (2% margin, 3% negligible volume)

- Article 6.8, Annex II: facts available
- Article 8: Price Undertakings
- Article 9.1: lesser duty (mandatory application)
- Article 11.3: sunset review (max. 5 years)
- Public interest clause

28. **Position of Major Players**

- **United States**
  » effectiveness of trade remedy laws
  » transparency in the operation of these laws
  » enhanced disciplines on trade-distorting practices
  » respect for "standard of review" (Art. 17.6) rule by panels and Appellate Body, in interpreting obligations related to trade remedy laws;
  » procedural fairness – public record and hearings, content of determinations, protection of and access to confidential information, and
  » circumvention

- **Australia**
  » treatment of confidential information

- **Canada**
  » transparency, predictability (codification of decisions), efficiency (limit repeated dumping findings).

- **Morocco, Egypt**
  » importance of trade remedies and need to preserve their effectiveness
  » material retardation [Egypt alone]

- **EC**
  » Swift Control Mechanism for Initiations
  (Problem: Article 17.4 – Anti-dumping initiations cannot be attacked.
  » Fast Track Initiation Panels
  » Arbitration
  » Standing Advisory Body

- **Friends of Anti-dumping Negotiations ("FANs")** Brazil, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong (China), Israel, Japan, Korea Rep., Norway, Singapore, Switzerland, Thailand
  » Determination of injury

- **Friends of Anti-dumping Negotiations ("FANs")** Chile, Chinese Taipei, Costa Rica, Hong Kong (China), Israel, Japan, Korea Rep., Norway, Switzerland, Thailand
  » Public interest

- **Textile-Exporting countries (18)**
  (Bangladesh, China (PR), Hong Kong-China, India, Indonesia, Korea, Macao, Pakistan, Thailand, Vietnam ...)

  » concern that quotas might be replaced by Anti-dumping measures which could lead to repeated investigations on textile products and have a chilling effect on global commerce.

29. ***Zeroing*** is a dumping calculation method which excludes non-dumped transactions from the calculation of the weighted average dumping margin in anti-dumping investigations, and thereby artificially inflating dumping margins. This method leads to the finding of dumping margins where none exist, or to the finding of higher dumping margins than actually occurred. WTO panels have ruled that zeroing violates Articles 2.4 and 2.4.2 of the Antidumping Agreement requiring "fair comparison" between the export prices and home market prices of the targeted product. WTO Anti-dumping rules require that the dumping margin calculation include all comparable transactions. All uses of zeroing, except in targeted-dumping investigations, are WTO illegal.

The inclusion of zeroing in the new antidumping text has led to opposition by a number of WTO Members including Japan, China, and Brazil.

## SECTION 4

## Subsidies and Countervailing Measures

28. Countervailing measures consist of countervailing duties and undertakings. The Agreement on Subsidies and Countervailing Measures addresses:

» multilateral disciplines regulating the provision of subsidies, and the
» use of countervailing measures to remove injury caused by subsidized imports

29. The three main areas of negotiations (Mandate) under Subsidies and Countervailing measures are:

- Subsidies Disciplines
- Countervailing Measures and
- Fisheries

30. Countervailing duty:

- is a duty imposed on an imported product to offset a subsidy
- is a unilateral measure by a WTO Member
- can only be applied after an investigation and a determination that there are:
  - » subsidized imports,
  - » injury to a domestic industry, and
  - » a causal link between the subsidized imports and the alleged injury

31. Definition of Subsidy

- The Agreement defines a "subsidy" as a financial contribution by a government or any public body within the territory of a Member which confers a benefit (*to the recipient*)—Article 1.

- Specific (Article 2)

32. To be found countervailable, a subsidy must be specific. Examples of specific subsidies are:

» Low-cost loans contingent upon export performance;
» Transportation rates more favourable for export shipments than for domestic shipments;
» Excessive remission of taxes upon export

### 16. Types of specificity—actionable subsidies (*amber light*)

- *Enterprise specificity*: a government targets a particular sector or sectors for subsidization.
- *Industry specificity*: a government targets a particular sector or sectors for subsidization.
- *Regional specificity*: a government targets producers in specified parts of its territory for subsidization.
- *Prohibited subsidies* deemed to be specific: a government targets export goods or goods using domestic inputs for subsidization (Article 3).

33. *De Facto* Specificity is defined in terms of :

- Use by limited number of certain enterprises;
- Predominant use by certain enterprises;
- Grant of disproportionately large amounts of subsidy to certain enterprises; and
- The manner in which discretion is exercised by administering authorities.

34. In determining *de facto* subsidy, one needs to consider the following factors:

- Diversification of economic activities in the subsidizing country;
- Length of time the programme has been in operation;
- Discretionary nature of the programme;
- Information on frequency with which applications for a subsidy are approved or refused and reason for those decisions

35. Prohibited Subsidies (Article 3) (*red light*). There are two types:

- Subsidies contingent upon export performance (Annex I – Illustrative List), or
- Subsidies contingent on the use of domestic over imported goods (local content)

36. Non-actionable subsidies, Articles 8 and 9 *(green light)*. These are

- ***Assistance for research activities:*** Research subsidies should be up to 75% of industrial research, 50% of pre-competitive development activity, and up to first, non-saleable prototype. It is not applicable to civil aircraft.

- ***Assistance to disadvantaged regions:*** This should be within the general framework of regional development and non-specific within the region. Objective criteria for disadvantaged regions include GDP/Income per capita not above 85% of national average and unemployment at least 110% of national average.

- ***Assistance to promote adaptation of existing facilities to new environmental requirements:*** The environmental subsidies should be a one-time measure, limited to 20% of the cost of adaptation and available to all firms.

37. Article 31 - Provisions regarding non-actionable subsidies to apply for five years - Committee review of provisions took place in 1999 – The provisions lapsed on 31 December 1999.

**17. Special and Differential Treatment**

- Categories of Members:
  - » Annex VII (LDC or listed Member with GNP per capita below US$1,000)
  - » Other developing countries (Article 27)
  - » In transformation into a market economy (Article 29)

- Differing level of obligations and / or transition periods

- Subsidies by developing countries are to be regarded as *de Minimis*: if the overall level is not above 2% of the value of the product; 3% for Annex VII countries. For other Members, the *de Minimis* is 1% if the volume represents less than 4% of total imports of like product in the importing Member.

- Prohibition of Export Subsidies
  - •Annex VII countries (Article 27) – LDCs and countries listed in Annex VII(b) plus Honduras
    - » Prohibition of export subsidies is not applicable
    - » Graduation at US $1,000 GNP per capita, in constant 1990 dollars for three consecutive years

- Other developing country Members (Art.27)
  - » 8-year phase-out (expired end 2002)
  - » No increase in level of export subsidies as these subsidies remain actionable (Article 27.7)

- Export Competitiveness (Article 27.6)

  » Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25% in world trade of that product for 2 consecutive calendar years.

  » A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of 2 years.

  » 8-year phase-out for Annex VII countries

- Countries in transformation (Article 29)
  - » 7-year phase-out
  - » prompt notification to SCM Committee of such subsidy programmes.

38. Import substitution subsidies, Article 3(1b). These are subsidies contingent upon the use of domestic over imported goods.

- Prohibition of Import Substitution subsidies
  - » Developed countries: 3 years (End-1997) (Art. 28)
  - » Developing countries: 5 years (End-1999) (Art. 27.3)
  - » Least developed countries: 8 years (End-2002) (Article. 27.3)
  - » Countries in transformation 7 years: (End-2001) (Article 29.2)

39. Actionable subsidies are subsidies whose use cause adverse effects

  » Serious prejudice

» Injury to a domestic industry
» Nullification or impairment

The suggested remedies are (i) multilateral dispute settlement, and (ii) countervailing action.

## 18. SERIOUS PREJUDICE (Articles 5 and 6)

40. Serious prejudice may arise in any case where one or several of the following apply:

» the effect of the subsidy is to displace or impede imports of a like product in the market of the subsidizing Member (Article 6.3a). Need to demonstrate factually that subsidies to products within importing country have caused complainant's sales of like product to be displaced (sales reduced) or impeded (sales prevented).

» the effect of the subsidy is to displace or impede exports of a like product from third country market (Article 6.3b). Simplified proof: there should be a change in relative shares of market to the disadvantage of non-subsidized like product
- Increase in market share of subsidized product
- Market share of a subsidized product remaining constant where it would have declined
- Market share of a subsidized product declining at slower rate than it would have absent subsidy.

» Absence of need for factual demonstration of causation where change in market share can be shown

» Reason for simplified proof may be the difficulty of obtaining, in third country, the detailed information needed to prove causation.

» Significant price undercutting, price suppression, price depression, or lost sales of like product in the same market (Article 6.3c)

» Increased world market share in specific subsidized product compared with market share over previous 3 years.

» Increasing trend is consistent since subsidy was granted (Article 6.3d).

41. A "Like Product", for purposes of serious prejudice claims and countervailing action, is defined as a product which is identical, i.e. alike in all respects to, or has characteristics closely resembling those of the product in question (footnote 46).

42. The negotiations

• Key players in the negotiations include the United States, EU, Canada, Brazil, Venezuela, Australia and India. The process is open to all Members.

• Some proposals on disciplines submitted:
» Venezuela: re-introduction of non-actionable subsidies;
» Brazil and India: definition of prohibited subsidies;
» India: amplification of the "lesser duty rule";
» Brazil: discussion of export credit rules;
» EU: "disguised" subsidies, environmental subsidies, notification procedures
» EU, United States / developing countries: views on S & D Treatment

United States

- tougher disciplines;
- expansion of prohibited subsidies category;
- presumption of serious prejudice;
- tougher remedies for actionable subsidies;
- rules on natural resource / energy pricing;
- rules on royalty-based financing;
- rules on equity infusion

African Group

- Special and Differential Treatment (Art. 27);
- Recognition that subsidies play an important role in development strategy;
- Increased flexibility to use subsidies.

Proposals on countervailing action

- Countervailing duties: need to harmonize countervailing and anti-dumping rules, where applicable;
- Issues on standing rules, *de minimis*, definition of product under investigation, calculation of the amount of subsidy, price undertakings, cumulation, sunset review

## 20. Fisheries subsidies

43. The Mandate:

- "clarify and improve WTO disciplines on fisheries subsidies",
- "taking into account the importance of this sector to developing countries".

- Demandeurs' view

  » over-capacity, over-fishing due to subsidies
  » effects on access to resources
  » current rules do not address these problems
  » improved WTO disciplines required

- "Friends of Fish"

Argentina, Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines, United States

  » Need to identify fisheries subsidies on the basis of their effects
  » Categorization of subsidies by other international organizations (FAO, APEC, OECD, UNEP) needs to be looked at.

- New Zealand

  » Impact of subsidies: price suppression, price undercutting, displacement of imports
  » difficult to demonstrate in fisheries
  » difficult to resort to serious prejudice or injury provisions of the Agreement on Subsidies and Countervailing measures

- United States

  » expanded "red light" category (overcapacity, overfishing)
  » presumption of serious prejudice ("dark amber" category)
  » improved notification
  » public outreach (expertise from other institutions)

- EC

  » Prohibition ("red light")
    (i) Subsidies for marine fishing fleet renewal,
    (ii) Subsidies for transfer of fishing vessels to third countries.

  » Permission ("green light")
    - support to fishermen, improve safety of fishing conditions, stoppages, withdrawal of capacity.
  » Notification requirements

- Japan, Korea, Chinese Taipei

  » problems are not unique to fisheries;
  » no specific disciplines needed;
  » focus on trade-distorting effects, on a cross-sectoral manner;
  » issue of over-exploitation

44. Rules negotiations

- New submissions are expected from Members
- Proposals are contained in document TN/RL/W
- New series are found in document TN/RL/GEN.

## SECTION 5

## SAFEGUARDS

45. Safeguard measures consist of tariff hikes, import quotas or other kinds of measures such as tariff rate quotas. Safeguards in GATT 1947 were regulated by Article XIX only. The Uruguay Round created the Safeguards Agreement; it adds clarity and introduces changes, but Article XIX still applies.

46. The Agreement on Safeguards contains fewer procedural rules than either the Anti-dumping or the Subsidies and Countervailing Measures (SCM) Agreements. This is explained in part by the fact that the Agreement on Safeguards is the first GATT Agreement on this matter, whereas both the Anti-dumping and SCM Agreements had two predecessors (the Tokyo Round and Kennedy Round Codes on Anti-Dumping and Subsidies, respectively).

47. Safeguards differ from Anti-dumping and Countervailing duties in the following respects:

» Don't require "unfair" practice
» To be taken on MFN basis (more or less)
» Have to "pay" when take them (sometimes).

The Agreement on Safeguards "delegates" to national legislation to a much greater extent many of the procedural details governing investigations. As the Agreement on Safeguards is silent with respect to many procedural details governing investigations, the Agreement provides that investigations have to track national procedures previously established and disseminated through public notice.

48. Safeguards- Basic requirements: Article XIX of GATT 1994

- A determination that,
- As a result of (i) unforeseen developments and (ii) the effect of a Member's obligations under GATT 1994
- A product is being imported in such increased quantities
- As to cause or threaten to cause
- Serious injury
- To the domestic industry
- Producing like or directly competitive products.

• Increased quantity of Imports needs to be absolute, relative to domestic production, and the increase must be sufficiently recent, sudden, sharp and significant.

49. Serious injury is understood to mean a significant overall impairment in the position of the domestic industry [Article 4.1(a)]. The "serious injury" required is expected to be at a higher level than material injury required in Anti-dumping and countervailing action.

50. The competent authorities shall evaluate all relevant factors having a bearing on the situation of that industry, in particular, the rate and amount of increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

• Threat of serious injury is understood to mean serious injury that is clearly imminent, and its determination shall be based on facts and not allegation, conjecture or remote possibility [Article 4.1(b)].

51. Domestic industry. In determining injury or threat thereof, a "domestic industry" is understood to mean the producers as a whole of the like or directly competitive products or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products [Article 4.1(c)].

This definition allows a broader consideration of effects than in Anti-dumping or countervailing action cases.

52. Causation of injury. The investigation should demonstrate, on the basis of objective evidence, the existence of a causal link between increased imports of the product concerned and serious injury or threat thereof. There should also be a "genuine and substantial relationship of cause and effect between increased imports and serious injury". For example, when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports [Article 4.2(b)].

• Safeguards- Unforeseen developments
  » Unforeseen, not unforeseeable

» Either the increase in imports may have been unforeseen, or there might have been a change in conditions of competition between the imported and domestic product.

53. Need for investigation. A Member may apply a safeguard measure only following an investigation by the competent authorities. The investigation shall include reasonable public notice to all interested parties and public hearings in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to address public interest. The competent authorities shall publish a report setting forth their findings and conclusions (Article 3).

» Treatment of confidential information (Article 3)

54. Safeguards: Content of determinations

» Injury finding
  - Detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors.

» Final determination
  - Report setting forth the findings and reasoned conclusions reached on all issues of fact and law.

55. Safeguards: Application of measures (Article 5)

- General principles
  » Applied to all imports irrespective of their source (MFN)
  » Only to the extent necessary to prevent injury/facilitate adjustment

- Quantitative restrictions
  » Level of quotas:
    - Not below average level of last 3 years
    - Unless clear justification for another level is given.

56. Provisional measures (Article 6). In critical circumstances where delay would cause damage difficult to repair, a Member may take a provisional safeguard measure. The duration of the provisional measure is 200 days (maximum), during which period the pertinent requirements of the Agreement shall be met. Such measures take the form of tariff increases to be promptly refunded if the subsequent investigation does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry.

57. Safeguards- Measures

- Duration:

Only for such period of time as may be necessary to prevent or remedy serious injury and facilitate adjustment
  - Not to exceed 4 years
  - Extend to 8 years if continuation necessary and industry adjusting (no extension of modulated quota)
  - Progressive liberalization if longer than 1 year
  - Mid-term review if longer than 3 years
- Special rules limiting re-imposition
  - Non-application for a period equal to duration of previous measure
  - 2 year minimum period of non-application.

58. Safeguards Compensation and Suspension of Equivalent Concessions

- When a safeguard measure is applied, exporting countries face a level of commercial protection higher than the tariff bound before the WTO by the country of import and therefore experience nullification or impairment of the tariff concession that was granted by that country.

- Under the WTO rules, Members do not have the right to unilaterally modify their level of concessions (this would mean backtracking on previous negotiations).

- For this reason, the Safeguard Agreement provides that Members taking safeguard actions must compensate their trading partners affected through such measures, with a view to maintaining the value of their existing tariff concessions intact.

- The compensation should be agreed to in the course of consultations with the affected Members, or Members having substantial export interests.

• If compensation is not agreed in 30 days, then the affected Members have the right to retaliate (by suspending equivalent concessions) unless Council on Trade in Goods disapproves.

• However, the Agreement suspends the right to retaliate during the first 3 years of application of a safeguard measure provided certain conditions are met. This effectively means that for the first 3 years after application, safeguard measures are "free".

• Right of suspension cannot be exercised in first 3 years, provided:
  - There is an absolute increase in imports
  - Measure is consistent with Agreement.

• Finally, the Safeguard Agreement provides that all initiations, findings and decisions to impose safeguard measures have to be notified immediately to the WTO Committee on Safeguards. This requirement underlines the principle that safeguard actions have a global impact and therefore must be subject to multilateral scrutiny.

59. Safeguards: Special and Differential Treatment (Article 9)

• When developing countries are affected by a safeguard measure
  » Measures shall not apply to developing countries with imports
    - That do not exceed 3 per cent of total imports individually
    - Unless developing countries under 3 per cent together account for more than 9 per cent of total imports.
• When developing countries are applying measures, they
  - Benefit from longer extensions-- extra two years in total application;
  - Can re-apply safeguard measures after a period equal to half of the duration of the original measure.

60. Notifications of actions

• Notify Committee immediately upon
  - Initiation of an investigation
  - Finding of serious injury or threat
  - Decision to apply or extend a final measure
• Also notify prior to taking a provisional safeguard measure
• Consult with interested Members
  - Prior to applying a final measure
  - Immediately after taking a provisional safeguard measure.

## SECTION 6

## PROPOSALS I FOR NEGOTIATIONS

### 21. Proposal to clarify the standard of "in fact" export contingency [Article 3.1(a)] of the Agreement on Subsidies and Countervailing measures (SCM)]

The proposal seeks to clarify:

- what facts or factors must be considered in determining "in fact" export contingency;
- the fact of export propensity should not be taken in isolation and this fact should not necessarily have greater weight in any case-specific examination; and
- the need for parallel consideration of the application of the subsidy analysis in countervailing duty investigations.

61. The expressed concern relate to not only whether or not any particular fact is in itself relevant, but also whether in considering several facts, no one fact on its own is sufficient a basis to determine "in fact" export contingency. It is considered that export orientation is a relevant fact which may be taken into account as one of several facts. Under the existing textual formulation of SCM Article 3.1(a), it remains open for undue and unfair emphasis to be placed on the issue of export propensity or export orientation.

62. It is considered that SCM Article 3.1(a) can, and should, be clarified without disturbing the important presumption that prohibited subsidies cause serious trade effects.

63. ***Proposed textual Amendments***: The following is intended to outline how SCM Article 3.1(a), including the relevant part of footnote 4, is to be meaningfully clarified.

> 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) Subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I....

Alternatively, the footnote could read as follows:

> FACTORS THAT SHOULD BE CONSIDERED IN DETERMINING "IN FACT" CONTINGENCY INCLUDE THE SIZE OF THE DOMESTIC MARKET, ....

### 22. Withdrawal of a Subsidy

64. Initial focus on the meaning and scope of the term "withdraw the subsidy":

i. What constitutes "withdrawal" of the subsidy;
ii. If "withdrawal" of the subsidy can be defined as compliance with the rules; and
iii. If "withdrawal" of the subsidy is, or should be, more than compliance with the rules.

(i) *What constitutes "withdrawal" of the subsidy"*

65. Clarification is needed on whether SCM Article 4.7 relating to "withdrawal" of the subsidy is intended to ensure compliance with the rules, that is whether a subsidy found to be prohibited is to be brought into conformity with the rules. The requirement in SCM Article 4.7 to "withdraw" the subsidy is a special or additional rule that is different from the requirement under Article 19.1 of the Dispute Settlement Understanding (DSU). A remedy for prohibited subsidies must be meaningful and effective regardless of the form in which a prohibited subsidy is found to exist.

66. There is a presumption in the SCM of the serious trade effects of prohibited subsidies. "*Withdrawal*" of a subsidy is "to enforce the absolute prohibition on the grant or maintenance" of prohibited subsidies.

67. "*Withdrawal*" of the subsidy of itself could be taken to have removed the adverse effects if *withdrawal of the subsidy* meant the complete cessation or termination of benefits. However, if the

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

subsidy has been fully disbursed or if a fully disbursed subsidy has ongoing benefits (for example, the useful life of assets), the question arises as to whether the prohibited subsidy has been "withdrawn" in the sense of the adverse effects removed.

68. It could be argued that while a subsidy or programme exists or continues, it is susceptible to a claim that it causes adverse effects in future. Further, the very nature or type of prohibited subsidy may also have an impact or implication for what may constitute "*withdrawal*" of the subsidy. For example, should a different or separate remedy be applied for recurring subsidies which are expensed annually? Should the design of a subsidy influence what constitutes "*withdrawal*" of the subsidy? For example, a prohibited subsidy contingent '*in fact*' upon export performance may be differently designed to a prohibited subsidy contingent '*in law*' upon export performance. The former may have been designed to target companies with export potential. Cessation of the programme may or may not remove the serious trade effects caused by the subsidy in world markets. Similarly, a prohibited subsidy contingent '*in law*' upon export performance and containing explicit export performance targets may arguably be made compliant by the removal of the targets. A replacement subsidy may still constitute an actionable subsidy and potentially still be prohibited as it may '*in fact*' be contingent on export performance if the government had targeted sectors which are export-based.

69. The suggestion is not being made that "*withdrawal*" of the subsidy is the equivalent of "removing the adverse effects". But it is considered that clarification is necessary within SCM Article 4 on the extent of the remedy to be applied.

70. Such clarification is particularly desirable when it is recalled that a prohibited subsidy is also an actionable subsidy. In a prohibited subsidy case where the adverse effects are assumed, the text of SCM Article 4.7 provides that the remedy is "*withdrawal*" of the subsidy. "*Withdrawal*" of the subsidy could therefore arguably be intended to include removal of the adverse effects.

71. It needs also to be made explicit that in removing the adverse effects of the subsidy, the benefit of subsidies fully disbursed prior to the end of the compliance period be allocated over the total production of the products. It is noted that the "withdrawal" of the subsidy "would not, in and of itself, be a sufficient remedy in those cases where subsidies fully disbursed under a withdrawn programme clearly benefited future production, allocation becomes necessary in order to ensure that the adverse effects of the measure are removed."

*(ii) If "withdrawal" of the subsidy is compliance*

72. It is considered that there is merit in clarifying whether "withdrawal" of the subsidy may allow for the replacement of the prohibited subsidy with an actionable subsidy. If "withdrawal" of a subsidy is to bring a prohibited subsidy into conformity with the SCM without requiring "removal of adverse effects", then the issue arises as to whether a prohibited subsidy could be replaced by an actionable subsidy. This could undermine the effectiveness of the remedy provided under SCM Article 4.7.

*(iii) If "withdrawal" of the subsidy is more than compliance*

73. In the context of examining whether repayment is required, including partial or full repayment, the remedy under SCM Article 4.7 is not "intended to fully restore the *status quo ante* by depriving the recipient of the prohibited subsidy of the benefits it may have enjoyed in the past". It is considered that there needs to be clarification on whether "withdrawal" of a subsidy requires more than compliance, that is, that there needs to be a deterrent effect or punitive remedy, and if so, clarification also on what the extent of that penalty should be.

74. In addition to issues concerning removal of adverse effects, does it also encompass a retrospective remedy and the possibility of repayment, including repayment in full? Repayment of course may encompass a situation where there are portions of a subsidy which are deemed allocated over future periods of time. A retrospective application should only be applied if the withdrawal of the subsidy at the time of the panel decision would not remove the adverse trade effects. However, putting aside whether or not a retrospective and punitive remedy were appropriate, removal of the adverse trade effects may have implications for the presumption of such effects in prohibited subsidy cases.

**23. Proposed Amendment to Article 4 of the SCM Agreement**

(i) The text of SCM Article 4 should be elaborated to clarify the parameters of what is required in order to "*withdraw*" the subsidy, depending on the facts and circumstances surrounding the granting of the subsidy;

(ii) Specifically, clarify the text of SCM Article 4 to ensure that a subsidy claim should require the panel to make a finding to elaborate on what in broad terms would constitute "*withdrawal*" of the subsidy.

- For example, if findings related to a one-off subsidy, then a panel could provide the parameters of what could constitute "withdrawal" on the basis of a claim made on what must be withdrawn (as outlined under proposed amendment (i) above).

**24. Fisheries subsidies: "Bottom-up" and "Top-down" Approaches**

75. There have been disagreements among Members on whether a "bottom-up" or "top-down" approach should provide the framework for disciplines on fisheries subsidies. It is considered that the "top-down" approach is inconsistent with the basic principles of the Agreement on Subsidies and Countervailing Measures (ASCM); lacks flexibility in response to future policy needs; could cause a race for exceptions, and involves inequity among sectors. The "top-down" approach could oblige Members to bring their subsidy programmes to the WTO and get permission on a programme by programme basis from other Members, a process that would require substantial human and financial resources and could be prohibitive for even benign subsidies, especially for developing countries.

76. By contrast, the proposed "bottom-up" approach identifying the "red light" and "green light" subsidies from the viewpoint of sustainable resource management is consistent with the provisions of the Agreement on Subsidies and Countervailing Measures. The proposal identifies five types of subsidies that could lead to over-capacity and over-fishing, and thus could be classified as "red light" subsidies subject to prohibition[1]. This proposal also identifies six types of "green light subsidies" that contribute to resource management and conservation and are not trade distorting[2], thus should be recognized as non-actionable. It was emphasised that government support for general infrastructure did not fall under the coverage of the ASCM and thus should be outside the scope of the new disciplines.

77. Questions that are raised include: what percentage of subsidies would be covered by the proposed red and green boxes; what percentage of subsidies would fall into a grey area; how subsidies falling into the grey area such as subsidies to current costs, price and income supports, and fisheries-specific infrastructure, should be tackled; and how would it address the recognized failure of the amber box given the problems of the effects-based approach? Questions are also posed regarding the definition of capacity enhancement; how such a concept could be effectively captured in WTO rules; what is meant by small-scale subsistence fisheries; and why price support is not included in the list of prohibited subsidies.

78. On S&D, it is viewed that flexibility in the application of the prohibited subsidy category to assist developing countries in achieving capacity expansion, vessel modification, sound resource management, disaster relief and infrastructure development is crucial. A clear differentiation should be made between capacity enhancement and over-capacity. The challenge would, however, be how to deliver such treatment in a way which would distinguish between those Members with developed fishing industries and those with fishing resources available for domestic development. Many developing countries are already major fishing nations and already have serious problems of overcapacity. It is thus presumed that they would wish to join in the application of disciplines on harmful subsidies and thereby contribute to the sustainability of fish stocks on which they depend. ***An important next step would be for developing countries to outline how they consider S&D treatment should be delivered in the new disciplines***.



**25. Fisheries subsidies: Government expenditures for management frameworks**

79. Proposal to the effect that government expenditures for management frameworks should not be prohibited under new fisheries subsidies rules. Most Members would agree on the need for government intervention in fisheries resource management. Government assistance in this area is often referred to as a "good" subsidy in that it can contribute to achieving environmental objectives.

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[1] (i) Subsidies for the construction of new fishing vessels resulting in capacity enhancement; (ii) Subsidies for fishing vessel modification for capacity enhancement; (iii) Subsidies for shipbuilding yards for fishing vessels; (iv) Subsidies for overseas transfers of fishing vessels to non-CPCs (contracting parties, cooperating non-contracting parties, entities or fishing entities) of RFMOs (regional fisheries management organizations); and (v) Subsidies relating to illegal, unreported and unregulated (IUU) fishing.

[2] (i) Fishing vessel decommissioning with vessel scrapping and withdrawal of fishing licence; (ii) Resource enhancement and protection of environment (artificial reef, ocean ranching, fingerlings release, fishing ground clean-up, etc.); (iii) Expenditure for fisheries resource management; (iv) R&D for the sustainable fishery (development of environmentally friendly fishing gear and technology, stock sampling and assessment, etc.); (v) Retraining of fishermen and early retirement schemes; and (vi) Assistance for the fishermen in terms of social safety net (crew insurance, disaster relief, compensation for suspension of fishing activity, etc.).

80. Management services programmes also create benefits. Government provision of management services can benefit the fishing industry in three ways. First, management services programmes aim to manage the fish stock in a way that maximises yields over the long run. As such, they create conditions under which output can be maintained over time. Second, management services can reduce the competition for fish within a fishery, leading to a reduction in the cost per unit of effort. Third, management services can increase the fishery's return per unit of output – for example, where a management control allows a fish to grow to a larger and potentially more profitable size before being harvested.

81. Government management services transfers are generally not considered to contribute, whether directly or indirectly, to overcapacity, overfishing, or other trade distortions. For example, a 2004 UNEP commissioned study noted that, except for some subsidies for research, management services are not considered harmful to fisheries resources.[3] It is on this basis that management services subsidies are considered worthwhile candidates for exemption from any prohibition.

**26. Identification and definition of fisheries subsidy category**

82. To ensure new rules are predictable and enforceable, any permitted subsidies will need to be explicitly and clearly defined. This will most likely require identification of sub-categories of specific types of programmes. Relevant questions for Members to consider are:

- How is the type of subsidy programme defined?
- Can this category be broken down into sub-categories or programme types?
- What are actual examples of current subsidy programmes in this category?

83. It is proposed that subsidies for conservation, such as stock enhancement programmes, be treated as a distinct category. As well, capacity reduction programmes (such as vessel decommissioning) and effort reduction programmes (such as permit buybacks and licence retirement) should be treated as separate categories.

Three sub-categories are proposed for incorporation in any list of permitted fisheries subsidies:

(i) Research to inform fisheries management decision makers

84. This sub-category includes data collection, surveys, data analysis and stock assessment. The objective of these activities is usually to meet the information needs of the decision makers implementing the management rules.

85. It is considered that the following research programmes fall outside the category of 'research to inform fisheries management decision makers', given the clear commercial nature of the activities and their ability to increase fishing effort:

- R&D for exploratory fishing;
- R&D for the identification and development of new fisheries; and
- R&D for the development of new fisheries technologies.

(ii) Creating and implementing fisheries management systems

86. This sub-category comprises programmes oriented towards policy development, process and procedure. It can be disaggregated further into the following three functions:

(a) Establishing and administering management systems. For example, monitoring fishing licences, permits, vessel numbers and catch returns

(b) Adjusting management settings within an existing management system. For example, the annual process of setting the 'total allowable catch' for a fishery

(c) Recommending amendments or additions to the existing management system. For example, introducing new effort or output controls.

(iii) Enforcing fisheries management rules

87. This sub-category includes government expenditures for the surveillance of compliance with fisheries laws and the prosecution of non-compliers. International estimates for costs of managing

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[3] Porter, G (2004), "*Analysing the Resource Impacts of Fisheries Subsidies: A Matrix Approach*", commissioned by Economics and Trade Branch, United Nations Environment Programme, p. 45.

fisheries in OECD countries are $m 835 (research services); $m 650 (management services) and $m 970 (enforcement services).

88. Treatment under new rules

It is proposed that subsidies to management services should not be prohibited under new disciplines on fish subsidies. Discussions on the desirability of maintaining some form of actionability, or requirements with respect to notification are, however, welcome.

**27. Treatment of Government Support for Export Credits and Guarantees**

89. The fundamental concern in this proposal is that items (j) and (k) of Annex I of the Agreement on Subsidies and Countervailing Measures favour countries with lower perceived risk (i.e. *developed countries*), to the disadvantage of countries with higher risk (e.g. *developing countries*).

90. Item (j) prohibits governments from providing export credit guarantee or insurance programmes (or other specified risk guarantees) at premium rates that are inadequate to cover "long-term operating costs and losses of the programmes". The net effect of some interpretations of this provision is to provide countries with lower perceived risk (and generally higher credit ratings) a much larger safe harbour than is provided to countries with higher perceived risk (and generally lower credit ratings). Based on their higher credit ratings, the former group of countries are able to provide export credit guarantees or insurance programmes that lower the overall interest rate to below market levels, if compared to the overall interest rate offered by international capital markets without the cited guarantee.

91. This safe harbour institutionalizes a bias in favour of countries with lower perceived risk at the expense of countries with higher perceived risk.

92. To remedy these problems, a new text for Item (j) is proposed:

> "(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 either: (i) the long term operating costs and losses of the programmes or (ii) the difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee."

93. The net effect of the new language at the end of proposed Item (j) would be to help establish a level playing field for all WTO Members regarding the provision of export credit guarantees or insurance programmes. The added language would include in the illustrative list, for the sake of clarity, the practice where countries with lower perceived risk provide guarantees at rates that are so low that the overall interest rate is below market, thus conferring a benefit as measured in Article 14(c) of the Agreement on Subsidies and Countervailing Measures.



94. The first paragraph of Item (k) of Annex I ties each Member to its cost of capital, precluding negotiation of more competitive rates, such as those offered by Members with lower cost of funds. This aspect of the ASCM regime creates a larger safe harbour for countries with lower perceived risk as opposed to countries with higher perceived risk. The cost of capital for developing countries is higher than that for developed countries, due primarily to perceived risk.

95. To address these problems, a new text for Item (k) is proposed:

> "(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 available on international capital markets (absent any government guarantee or support), for 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.

96. The changes suggested would ensure that export credits are not supplied at rates below market level.

97. Other proposals relate to tougher disciplines, expansion of prohibited subsidies category, presumption of serious prejudice, tougher remedies for actionable subsidies, rules on natural resource/energy pricing, rules on royalty-based financing and rules on equity infusion.

## SECTION 7

## PROPOSALS II FOR NEGOTIATIONS

### I. PROPOSAL ON NEGLIGIBLE IMPORTS (ANTI-DUMPING)

98. Article 5.8 of the Anti-Dumping Agreement sets out the determination of negligibility. Pursuant to the said Article, the volume of dumped imports shall be regarded as negligible, in case the volume of dumped imports from a particular country account for less than 3 per cent of imports of the like product in the importing Member. Furthermore, there is an additional cumulation clause in the same Article, which allows the authorities to cumulate imports from countries, which individually account for less than 3 per cent of imports of the like product in the importing Member, but collectively account for more than 7 per cent of total imports of the like product in the importing Member.

99. It is considered that negligibility is one of the important issues in the Anti-Dumping Agreement, for it determines whether the producer/exporters against whom an anti-dumping investigation is initiated would continue to be subject to that investigation, or would be left out due to their volume of imports found to be negligible according to the provisions of Article 5.8. Thus, there is merit in improving the criteria and methodology to determine negligibility, which plays such a critical role in the determination of whether to initiate and continue or to terminate an Anti-dumping investigation.

*(i)* *Proposal 1*

100. Introduce in Article 5.8 a second methodology to find out whether the volume of dumped imports are to be regarded as negligible, according to which negligibility shall be determined on the basis of apparent market share of dumped imports in the importing Member.

101. For this purpose, it is proposed to amend Article 5.8 as follows:

"...There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume or the estimated market share of dumped imports, actual or potential, or the injury is negligible. ..... The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than (X)[4] per cent of imports of the like product in the importing Member, or if the market share of dumped imports is less than (Y)[5] per cent.

102. In a nutshell, it is proposed to maintain the currently existing negligibility criterion, namely, the share of dumped imports in total imports, while incorporating an additional methodology in determining negligibility, which is the share of dumped imports in apparent domestic consumption in the importing Member. One way to estimate apparent domestic consumption is to sum up total domestic sales and total imports.

*(ii)* *Proposal 2*

103. Amend Article 5.8 so as to increase the current 3 per cent threshold for negligible volume of imports to (X) per cent. Such amendment would guarantee the exclusion from the scope of anti-dumping investigations of import sources that are too small to cause injury to the domestic industry.

*(iii)* *Proposal 3*

104. Delete the cumulation clause in Article 5.8, which defines an exceptional circumstance under which authorities are allowed to initiate or continue the investigation in cases where the volume of dumped imports individually account for less than the current negligibility threshold.

105. Under Article 5.8, imports, which individually account for less than 3 per cent are considered to be negligible and are therefore kept out of an investigation when they are examined on their own, whereas these imports from a particular country are not considered as negligible when they cumulatively account for more than 7 per cent of total imports. This cumulation clause in Article 5.8 might encourage industries to include as many small import sources as necessary to satisfy the 7 per cent requirement to have an anti-dumping investigation initiated and continued.

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[4] The level of the percentage threshold for negligible imports is open to discussion.

[5] The appropriate level of market share below which the dumped imports shall be considered as negligible is open to discussion.

106. As regards the impact of dumped imports on the domestic industry, it is questionable whether imports with a share in total less than 3 per cent may cause injury to the domestic industry of the importing Member. Article 3.3 stipulates the conditions under which an authority may cumulatively assess injury to the domestic industry. According to the provisions of this Article, authorities are not allowed to cumulatively assess possible adverse impacts of those imports, which individually account for less than 3 per cent of total imports but collectively account for more than 7 per cent. Thus, in such cases, authorities should carry out an individual injury assessment for dumped imports, which only satisfy the cumulation clause in Article 5.8. It is believed, however, that such assessment does not seem fairly practicable, especially considering the non-attribution requirement under Article 3.5. For the reasons explained above, it is proposed that the cumulation clause in Article 5.8 be deleted.

## II. PROPOSAL ON MANDATORY APPLICATION OF LESSER DUTY RULE

107. The Anti-Dumping Agreement envisages that the anti-dumping duty shall not exceed the margin of dumping as established under Article 2 of the Agreement. However, Article 9.1 leaves it to the discretion of the authorities of the importing Member whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and whether the amount of anti-dumping duty to be imposed shall be the full dumping margin or less. Article 9.1 further states that the duty may be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

108. The "lesser duty rule" is in the nature of a best endeavour clause and no rules have been framed which could act as guidelines for the various anti-dumping authorities who are desirous of applying this rule. Despite the non-mandatory nature of the clause, several users of anti-dumping follow the "lesser duty rule" as a part of their anti-dumping practice.

109. Based on the premise that the non-application of the "lesser duty rule" tends to protect the injured domestic industry of the importing Member more than what is adequate, a large number of economists and trade analysts are of the opinion that the "lesser duty rule" should be made mandatory under the Anti-Dumping Agreement. This issue has also been identified by many Members for improvement and clarification during the Rules negotiations.

110. Developing countries are of the view that there is a need to make the application of the "lesser duty rule" mandatory. This, in turn, would require Members to agree on disciplines for determination of the injury margin (see proposed Annex III on developing disciplines on determination of the injury margin).

111. Following are the main elements of the developing countries' proposal:

- Amend Article 9.1 of the Anti-Dumping Agreement to provide for mandatory application of the "lesser duty rule" by requiring that the anti-dumping duty shall not exceed the margin of dumping or the injury margin, whichever is lower.

- Injury margin shall be determined in accordance with the principles that could be set out in the proposed Annex to the Anti-Dumping Agreement.

- Two broad options are proposed for determining the injury margin. Under the first option, injury margin shall be the difference between the price of the like product produced by the domestic industry and the price of the dumped imports, for each exporter or producer under investigation. Under the second option, injury margin shall be the difference between the target price for the domestic industry and the price of the dumped imports for each exporter or producer under investigation.

- For determining the target price, four options are proposed namely: (i) the price of the domestically produced like product prior to being affected by dumping; (ii) the price of the product concerned, when exported by those exporters or producers who are found not to have dumped the product concerned during the investigation period; (iii) the price of the like product, when exported during the investigation period from appropriate third countries; and (iv) the cost of production method.

- Depending on the option used, the target price is proposed to be determined for the period of investigation or a period that is comparable to the period of investigation.

- A provision is to be made in order to ensure a fair comparison between the price of the domestically produced like product, or the designated target price, as the case may be, and the price of the dumped imports.

- The existence of injury margins is proposed to be established on the basis of a comparison on a weighted average basis of all comparable transactions or by a comparison on a

transaction-to-transaction basis. The Authorities shall also ensure that all negative values are taken into account.

112. This proposal is intended to promote a discussion on disciplines on determination of injury margin.

## Appendix

### Initial Framework for Certain Aspects of the Disciplines on Determination of the Injury Margin

Article 9.1 of the Anti-Dumping Agreement may be replaced by the following:

*9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled is a decision to be made by the authorities of the importing Member. However, the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2 or the injury margin, whichever is lower. For purposes of this Agreement, the term "injury margin" shall be interpreted to mean the margin calculated in accordance with the principles set out in the proposed Annex III to this Agreement.*

## Proposed Annex III

### Principles for Determination of the Injury Margin

1. For the purpose of implementing the provisions of Article 9.1 of this Agreement, the "injury margin" shall be determined as:

1.1. The difference between the price of the like product produced by the domestic industry and the price of the dumped imports[6], for each exporter or producer under investigation; or,

1.2. The difference between the target price[7] for the domestic industry and the price of the dumped imports for each exporter or producer under investigation. The target price for the purpose of this sub-paragraph shall mean:

(a) The price of the domestically produced like product prior to being affected by dumping; or,

(b) The price[8] of the product concerned, when exported by those exporters or producers who are found not to have dumped the product concerned during the investigation period; or,

(c) The price of the like product, when exported during the investigation period from appropriate third countries other than the countries under investigation; or,

(d) The cost of production of the like product of the domestic industry, administrative, selling and general costs, and a reasonable profit margin. For the purpose of this sub-paragraph, a reasonable profit margin may be determined on the basis of:

(i) the profit margin normally earned by the domestic industry on representative domestic sales of the like product when the price of such product was not affected by dumping keeping in view the principles set out in sub-paragraphs 2.1 and 2.2 of this Annex; or,

(ii) the actual profit margin earned by the domestic industry in respect of sales made in the domestic market in the same general category of products during the investigation period; or,

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[6] For the purpose of this Annex, the term "price of the dumped imports" shall be interpreted as meaning import prices at any level such as cost, insurance and freight, or ex-customs area, or resale price to the importer, or delivered price to the customer, provided that the comparisons with the price of the like product under sub-paragraph 1.1, or with the target price under sub-paragraph 1.2, for the purpose of arriving at the injury margin, are made only at a comparable level.

[7] The target price determined under sub-paragraph 1.2(d) shall never be higher than the weighted average for the domestic industry. It may be less, for example, if there are substantial discrepancies in costs of the producers constituting the domestic industry.

[8] For the purpose of this Annex, the term "price" referred to in 1.2 (b) and 1.2 (c) shall be interpreted as meaning import prices at any level such as cost, insurance and freight (CIF), or ex-customs area, or resale price to the importers, or the delivered price to the customers, provided that the comparisons with the price of the dumped imports, for the purpose of arriving at the injury margin, are made only at comparable level.

(iii) when profit margin cannot be determined under (i) and (ii) above, or when either method is not considered to be appropriate, profit margin may be determined by any other reasonable method, including a reasonable return on investment, provided that an explanation is given as to why the methods available in (i) and (ii) above are not appropriate.

2. The authorities of the importing Member shall ensure that the determination of the injury margin under subparagraphs 1.1 and 1.2 of this Annex conform to the following rules:

2.1. A fair comparison shall be made between the price of the domestically produced like product, or the designated target price, as the case may be, and the price of the dumped imports. This comparison shall be made at the same level of trade, and in respect of sales made at as nearly as possible the same time. Due adjustments shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability;

2.2. For the purpose of sub-paragraph 1.2(a), the authorities shall also ensure that such target price pertains to a period that is comparable to the investigation period. The authorities shall also ensure that the duration of the two periods is comparable and as close to each other as possible.

2.3. For the purpose of sub-paragraphs 1.2(b) and 1.2(c), the authorities shall also ensure that the volume of imports taken into account for arriving at the target price constitute a significant proportion of total imports of the product concerned from the countries under investigation, and that this price is representative.

2.4. For the purpose of sub-paragraph 1.2(d), the costs shall be calculated on the basis of records kept by the domestic industry, provided that such records are in accordance with the generally accepted accounting principles of the importing Member and reflect the costs associated with the production and sale of the product under consideration only. Such costs shall, to the extent possible, pertain to the period of investigation only. Authorities shall ensure proper allocation of costs and that such allocations have been historically utilized by the domestic industry, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations. The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

2.5 It is desirable to make comparisons for the purpose of this Annex as close to the point of consumption as is reasonably possible.

113. Subject to the provisions governing fair comparison in paragraph 2, the existence of injury margins shall normally be established on the basis of a comparison on a weighted average basis of all comparable transactions or by a comparison on a transaction-to-transaction basis. For the purposes of paragraph 2 and this paragraph, the Authorities shall also ensure that all negative values are taken into account.

## III. PROPOSAL ON THE DETERMINATION OF INJURY

### (i). <u>Overarching framework of determination of material injury caused by dumped imports</u>

114. Amend Article 3 in order to clarify "when the authorities examine whether dumped imports cause material injury,[9] "

- A determination of material injury shall be based upon determinations of (1) whether the domestic industry in the importing country is experiencing material injury, and (2) if the domestic industry is experiencing material injury, whether the dumped imports under investigation are causing material injury.

[9] Since this proposal focuses only on one of the three types of injury, the determination of threat of material injury and material retardation of the establishment of a domestic industry is not addressed in this proposal.

115. Explanation: GATT Article VI stipulates that "dumping ... is to be condemned if it causes ... material injury to an established industry in the territory of a contracting party ..." For a situation to meet these criteria, two conditions have to be met: (1) the domestic industry in the importing country must be materially injured, and (2) the dumped imports must be causing material injury. Dumped imports cannot be the cause of material injury, when material injury to the domestic industry does not exist at all.

116. This concept is already implicit in GATT Article VI and Article 3 of the Agreement on Anti-dumping. However, Article 3 is still confusing with regard to the relationship of the two concepts in injury determinations, since it does not contain an explicit statement anywhere of the overarching framework of an injury determination. It is essential to make explicit what is implicit in the existing Article 3.

117. This proposal simply clarifies the basic principle that the existence of material injury to the domestic industry in the importing country is an essential element of any determination. Therefore, in the absence of material injury to a domestic industry, the strength of the causal relationship between dumped imports and any injury to the domestic industry that falls short of being material is not relevant. Conversely, in the absence of a causal relationship between the dumped imports and injury, the magnitude of the injury is not relevant.

**(ii) Definition of material injury**

118. Amend footnote 9 in order to clarify the definition of material injury,

- The term 'material injury to a domestic industry' means the state of the domestic industry as demonstrated by an important and measurable deterioration in the operating performance of the domestic industry, based on an overall assessment of all relevant economic factors and indices having a bearing on the state of the domestic industry including those enumerated in Article 3.4.

119. Explanation: While Article 3.4 articulates the factors to be considered in determining the state of the domestic industry, it does not provide a framework for analysing those factors. Similarly, while the current footnote 9 attempts to define the scope of the term "injury", it does not do so either by specific reference to the factors in Article 3.4 or by establishing a framework for the analysis. Thus, this proposal intends to clarify the concept of "material injury to the domestic industry" and clarify that the burden of proof for injury determination is on the authorities through the words "as demonstrated."

120. Also, this proposal simply seeks to clarify that not just any deterioration in the operating performance of the domestic industry is sufficient to warrant a determination that the industry is experiencing material injury. Rather, the industry must be experiencing injury that is important and measurable in terms of its impact on the operating performance of the industry.

121. It is well recognized that the situation in each case is not the same, and, thus, a certain amount of discretion has to be left to the authorities to arrive at an appropriate finding of injury which reflects the particular situation of each case. The intention is to clarify the rules, which will help reduce the risks associated with injury determination for the authorities as well. This may particularly benefit those authorities who have limited resources.

**(iii) Causation**

122. Amend the first sentence of Article 3.5 as follows:

- It must be demonstrated that the dumped imports in and of themselves are, through the effects of dumping, as set forth in paragraph 2 and 4, causing injury within the meaning of this agreement.

123. Explanation: When the domestic industry is found to be experiencing "material injury", the state of the domestic industry may have been affected by a combination of several factors, one of which may be dumped imports. Where injury is caused by factors in addition to dumped imports, all of these factors, in conjunction with each other, have "contributed" to the material injury of the domestic industry to some extent. However, in order to justify the imposition of Anti-dumping measures, it is not sufficient that dumped imports merely have "contributed" to the material injury to some extent. If the dumped imports only played a minor role in contributing to the material injury to the domestic industry while other factors, such as contraction of the market, were the primary cause of material injury, then the imposition of Anti-dumping measures will not eliminate the material injury. Therefore, in such circumstances, the imposition of Anti-dumping measures will only have the effect of hindering trade without effectively curing the injured state of the domestic industry.

124. This is precisely why Article 3.5 requires the authorities to demonstrate "that the dumped imports are, through the effects of dumping, as set forth in paragraph 2 and 4, causing injury within the meaning of the Anti-dumping Agreement." It is also the reason why Article 3.5 further imposes the so-called non-attribution requirements whereby authorities must not attribute injury from other factors to injury from

dumped imports. This requires that the impact of dumped imports on the state of the domestic industry must be analysed separately from the impact of other factors. In order to fulfil this non-attribution requirement, it follows that the authorities must analyse the causal relationship focusing on the injurious effects that the dumped imports alone have on the domestic industry.

125. Indeed, the state of the domestic industry may have been adversely affected by several factors, namely the dumped imports and other factors. Thus, it is not necessary that dumped imports be the sole factor causing material injury to the domestic industry. On the other hand, it is essential for the authorities to determine whether material injury would have existed even in the absence of the factors other than the dumped imports. In other words, the effects of dumped imports alone should be sufficient to cause material injury to the domestic industry.

126. It might be difficult, in most cases, to quantify precisely the degree to which dumped imports have contributed to the injury being experienced by the domestic industry relative to the effects of other factors. Thus, this proposal is not intended to require authorities to precisely and scientifically quantify the impact of the dumped imports alone on the domestic industry. Such an analysis might have to rely on qualitative information or less than perfect quantitative information or estimates based on such information. Nevertheless, they must give a reasoned and adequate explanation of how they determine whether the dumped imports in and of themselves are causing material injury and what evidence was analyzed in reaching the conclusion.

## IV. PROPOSAL ON PUBLIC INTEREST

### (i). Description of the Problem

127. The Anti-Dumping Agreement allows an anti-dumping measure to be used to protect the domestic industry of an importing member from injurious dumping. However, the effects of an anti-dumping measure are not confined to the domestic industry of the importing member, but also on trade and economy of the importing member. The existence of an anti-dumping measure affects the trade flow between the importing member and the members where the dumped products originate or pass through. Within the domestic context, the effects of an anti-dumping measure spread to other sectors of the economy such as purchasers of the investigated products (industrial users and consumers) and the import, wholesale and retail services sectors, affecting productivity, competition, allocation of resources, purchasing and consumption decisions. While an anti-dumping measure directly addresses the concerns of the domestic industry, the cost of such measures is borne by the economy of the importing member as a whole, ultimately passing to taxpayers.

128. Given the widespread effects anti-dumping measures may have on the economy of the importing member as a whole, besides affecting external trade flows and potentially reducing market access benefits secured by a member under the WTO agreements, the current Anti-Dumping Agreement nevertheless contains no provision for the broader economic interest of the importing member to be taken into account before a decision is taken to impose an anti-dumping measure, nor, from that perspective, provides opportunities for relevant parties to present their views on the broader economic consequences that the measure may entail.



129. Providing for the broader economic interest of an importing member to be considered before anti-dumping measures are applied would help ensure that, while Members still have the right to use anti-dumping measures, the application of such measures will be consistent with the overall economic interest of the importing member. Such analysis, if properly conducted, would help ensure that the use of anti-dumping measures has a sound economic basis, and would help dispel concerns that some members may use anti-dumping measures as a convenient tool to reduce access to their markets. This would have a positive effect on promoting trade of the importing member and on the economic development in the importing member.

### (ii). Provisions on Public Interest

(a). **public interest**: include a provision in the Anti-Dumping Agreement providing for authorities to determine, before applying an anti-dumping measure, whether the proposed measure is in the overall economic interest of that Member. The anti-dumping measure should not be applied, or the measure should be mitigated, if the application of the measure is not in the overall economic interest of that Member;

(b). **minimum factors for consideration**: to ensure a balanced and meaningful consideration of public interest, it is proposed that the Anti-dumping Agreement specifies certain key economic factors which should be taken into account when considering public interest, for example, the cost effect of the proposed anti-dumping measure on industrial users, consumers, importers, wholesalers and retailers, productivity effect on downstream users, competition and availability of

choice to users. Such list would be non-exhaustive and would not preclude Members from taking into account other economic factors which they consider relevant for the purpose of the consideration;

(c). **right for interested members of the public to present information**: interested members of the public should be able to present facts and views in connection with the consideration of public interest[10], and to access relevant information for this purpose;

(d). **transparency**: authorities should disclose their findings and explain how relevant facts have been evaluated in their determination.

***Negotiations are open on how the public interest provision could work in practice, both in terms of substance and procedures.***

## V. PROPOSAL ON MATERIAL RETARDATION

### (i). Description of the Problem

130. Article VI of GATT provides that "*the contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry*."

131. Footnote 9 to Article 3 of the Anti-Dumping Agreement further provides that "*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*".

132. It is noted that, while determinations of both "*material injury*" and "*threat of material injury*" are specifically addressed in the Anti-Dumping Agreement, no provision defines nor governs "material retardation" determinations. The concept of "*material retardation*" is intimately connected to the definition of the concept of "*industry in the process of establishment*". It is generally accepted that material injury refers to actual injury and threat of material injury to clearly foreseen and imminent injury but material retardation remains to be precisely defined. There is currently no indication in the Anti-Dumping Agreement of how the terms "*material retardation of the establishment of the industry*" should be interpreted. Also the Anti-Dumping Agreement fails to identify tests similar to those laid down in Article 3 of the Anti-Dumping Agreement concerning material injury and threat thereof with respect to material retardation. The criteria set forth under Articles 3.4 and 3.7 of the Anti-Dumping Agreement cannot be used to determine whether industries in the process of establishment suffer injury.

133. In order to ensure the effectiveness of the Anti-Dumping Agreement, it is essential that the concept of "*material retardation*" be defined in terms similar to those defining the concepts of "*material injury*" and "*threat of material injury*". A common definition of the concept of "*material retardation*" will also serve to ensure a more consistent implementation of the Anti-Dumping Agreement by all Members. The interpretation of the concept of "*material retardation*" and the determination of specific criteria will no longer be left to the discretion of each Member. Furthermore, as detailed below, a definition of the concept of "*material retardation*" will ensure that Members and, in particular, developing countries, whose domestic industries are not very developed, can seek remedies against injurious dumping.

### (ii). Illustrative example of situations unaddressed under Article 3 of the Anti-Dumping Agreement:

- New company in a developing domestic market

134. Developing countries are generally characterized by small domestic markets and small domestic industries. When domestic consumption is limited, it is common to have single-company domestic industries. With the development of domestic consumption, opportunities for new domestic investors are generally created. During the initial period of growth in the domestic market, the transition from a single-company domestic industry to a multiple-company domestic industry, the domestic industry is delicate. The growth of the domestic market gives rise to fiercer competition as newcomers on the market are eager to rapidly conquer market shares. In such circumstances, exporting producers may be tempted to sell their products at dumped prices in order to make them more competitive on a new market.

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[10] For this purpose, public notice should be published, notification sent to known interested persons (e.g. industrial users, consumer organisations, wholesalers, retailers, importers and parties to the investigation), and members of the public given a reasonable period to present their facts and views.

135. During the transition period, until new domestic companies are established and have begun producing, the domestic industry, within the meaning of Article 4 of the Anti-Dumping Agreement, is composed of the company(ies) that were producing before the development of the domestic market. As a result, companies that have not begun production cannot request, by themselves, the initiation of an anti-dumping investigation even if their establishment is materially retarded. This situation can be particularly problematic when the company(ies) that were established before the development of the domestic market have decided not to develop themselves to meet increasing market demand and may not be suffering any material injury or threat thereof. In such circumstances, it is submitted that investors cannot protect their domestic investment against effects of injurious dumping under the current version of the Anti-Dumping Agreement.

- Upgrade of production facilities

136. Domestic industries in developing countries are also generally characterized by their limited level of technological development. With the development of domestic consumption, companies in developing countries, however, invest to upgrade their production facilities and to better satisfy market demand. The introduction of new products, can even lead existing domestic companies to make significant investments to meet domestic market demand for these new products. If the new products for which investments are being made, but which are not yet produced, are not considered like or directly competing with the products that these companies normally produce, they will not be in a position to claim that they are materially injured or suffer a threat of material injury as a result of dumped imports of the new products that they intend to produce.

137. Some Members may argue that these companies could claim that their establishment is materially retarded under the current wording of the Anti-Dumping Agreement. However, other Members may consider that since these companies are part of established domestic industries that are not suffering material injury or threat thereof for their current production, they cannot claim that their establishment is materially retarded.

- Privatization

138. In a number of developing country Members, the privatization of important sectors of the economy that were previously controlled by the state constitutes one of the essential features of the economic reforms undertaken in recent years. Privatization is encouraged by international organizations, such as the World Bank and the International Monetary Fund, as well as by developed countries and contributes to the liberalization of international trade.

139. The privatization of state-owned companies may give rise to specific situations that are not addressed under the current version of the Anti-Dumping Agreement. Privatization is often linked with market liberalization. State-owned monopolies are privatized at the same time the domestic market is open to domestic and foreign competition. The transformation of former state-owned companies which were not previously led by market considerations, such as profit and consumer demand, into commercial companies in a highly competitive environment can be very problematic if the market is disrupted by dumped imports. It is submitted that the concepts of *"material injury"* and "*threat of material injury*", as defined in the current version of the Anti-Dumping Agreement, do not always ensure that former state-owned companies can initiate investigations to remedy the negative effects of dumped imports. For example, shortly after privatization and market liberalization, it is difficult for investigating authorities to assess the causal link between dumped imports and the material injury or threat thereof that may have been established since a comparison between a non-market and a market situation has to be made. In summary, ***investigating authorities must establish whether a newly privatized company must be considered as a newly established company or as a successor of the state-owned company***.

IV

### (iii). Elements of a Solution

- Definition of the concept of material retardation

140. In order to address the above-described situations and situations that may be specific to developing countries, that do not fall within the definition of the concepts of "*material injury*" and "*threat of material injury*", it is proposed to clarify the current text of footnote 9 to Article 3 to clarify that the concept of "*material retardation*" is not limited to industries which are established from zero, but should apply to all domestic industries which are characterized by a limited level of development and/or a new organization.

141. Explanation: This proposal intends to clarify in which cases investigating authorities should examine whether material retardation occurs. It is crucial not to limit the "*material retardation*" test to industries which are newly established. Embryonic, restructuring and newly privatized industries should

also be regarded as industries in the process of establishment. This matter is of specific concern to developing country Members since their domestic industries are rarely developed.

- Material retardation test

142. In addition, in order to ensure that the concept of material retardation is uniformly applied, it is proposed to clarify Article 3 of the Anti-Dumping Agreement to specify criteria determining in which circumstances material retardation occurs.

***Proposals are welcome to reach a common definition of the concept of "material retardation" and to set forth criteria to determine when material retardation is occurring***.

143. Explanation: While Article 3 of the Anti-Dumping Agreement clearly identifies the factors and elements which must be considered in order to determine whether material injury or threat of material injury is established, it does not indicate which factors are relevant for the determination of whether the domestic industry suffers from material retardation. ***It is essential to identify tests which will help the investigating authorities to determine whether there is material retardation, thereby avoiding uncertainty***.

144. Footnote 9 to Article 3 specifies that injury which shall also mean material retardation shall be interpreted in accordance with the provisions of Article 3 of the Agreement. Therefore, the understanding is that investigating authorities should consider and evaluate the factors listed in Article 3.4 also in case of material retardation. In the Panel's findings in *Mexico – HFCS* case, the Panel explained that Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4. In other words, according to the Panel, investigating authorities should consider both the factors listed in Article 3.7 as well as the factors listed in Article 3.4 in a threat case. The Panel explained that this conclusion is mandated by the text of Article 3 which, as a whole deals with the determination of injury which is defined as material injury, threat of material injury, or material retardation of the establishment of a domestic industry.

145. Even if investigating authorities are required to consider the factors listed in Article 3.4 in the framework of a material retardation case, the Agreement does not include any indication as to *when* there is material retardation. ***The purpose of a new paragraph in Article 3 would be to list factors on the basis of which investigating authorities can establish that there is material retardation***.

146. Other proposals concern the importance of trade remedies and the need to preserve their effectiveness, re-introduction of non-actionable subsidies, definition of prohibited subsidies and discussion of export credit rules.

## SECTION 8

## REGIONAL TRADE AGREEMENTS

### I. INTRODUCTION

147. A global proliferation of regional trade agreements (RTAs) has been witnessed in recent years. This development has accentuated the potential challenges to the multilateral trading system. By December 2013, 434 physical RTAs have been notified to the GATT/WTO Secretariat, of which 252 are currently in force (136 covering goods only, 1 covering services only and 115 covering both goods and services) [11]. The Secretariat furthermore estimates that there are around 100 agreements in force but that have not been notified to the WTO. Such prodigious growth in RTAs, if not subject to prudent disciplines, could dramatically erode the impetus for trade liberalisation at the multilateral level.

148. It is therefore crucial to establish a discipline that institutes a rigorous standard which would apply at the time of entry into force of the agreement. This standard needs to be sufficiently high to ensure that RTAs are comprehensive and do not 'backload' an unreasonable amount of liberalisation commitments to the end of the implementation period.

149. The substantive WTO rules for regional trade agreements (RTAs) are meant to ensure that regional agreements support the open, rules-based multilateral trading system as well as further its objective of promoting growth in international trade and integration of developing countries into the world economy.

150. While RTAs have become an indispensable trade policy tool for the pursuit of most WTO Members of their economic and developmental objectives, all Members face the risk that the agreements to which they are not parties could have negative implications for their own legitimate trade interests. It should therefore be in the interest of the entire WTO Membership to clarify the existing WTO rules on RTAs. Fundamentally, ensuring the proper functioning and good health of the open, rules-based multilateral trading system stand to benefit all Members.

151. The WTO rules relevant to the formation of Customs Unions or FTAs in the area of trade in goods are set out in Article XXIV of GATT 1994 while the rules relevant to Economic Integration Agreements covering the area of trade in services are set out in Article V of the GATS.

### II. MANDATE

152. "Members also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements".

### III. UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXIV OF GATT 1994

*Members,*

*Having regard* to the provisions of Article XXIV of GATT 1994;

*Recognizing* that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

*Recognizing* the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

*Recognizing* also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade and diminished if any major sector of trade is excluded;

*Reaffirming* that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

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[11] Notifications to the WTO are made separately for goods and services aspects of Agreements. The total number of notifications that had been made to the GATT/WTO up to December 2013 was 580 of which 384 cover agreements that are in force.

*Convinced* also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

*Recognizing* the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby *agree* as follows:

153. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

**28. Article XXIV: 5**

154. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

155. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members who are parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

**29. Article XXIV: 6**

156. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

157. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

158. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

**30. Review of Customs Unions and Free-Trade Areas**

159. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

160. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

161. Members who are parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

162. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

163. Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

### 31. Dispute Settlement

164. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

### 32. Article XXIV: 12

165. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

166. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

167. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

## IV. ARTICLE V OF GATS

### 33. Economic Integration

168. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage[12], and

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

[12] This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.

169. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

170. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

171. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

172. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

173. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

174. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

175. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

*Article V bis*

*Labour Markets Integration Agreements*

176. This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration[13] of the labour markets between or among the parties to such an agreement, provided that such an agreement:

(a) Exempts citizens of parties to the agreement from requirements concerning residency and work permits;

(b) Is notified to the Council for Trade in Services.

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[13] Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.

## SECTION 9

## REGIONAL TRADE AGREEMENTS: PROPOSALS

177. Negotiations shall be based on specific proposals introduced by WTO Members. The potential scope of the proposals shall encompass all WTO provisions dealing with RTAs, in particular Article XXIV of GATT 1994, the relevant provisions of the Enabling Clause and Article V of the GATS.

### I. PROPOSAL ON CLARIFICATION OF WTO RULES RELATING TO RTAs

178. The views on this issue are guided by three parameters: guaranteeing the proper functioning and continued good health of the open, rules-based multilateral trading system for the benefit of both developing and developed countries; market access interests in respect of third country markets and own regional agreements.

179. It is widely believed that regional trade agreements are "stepping stones" towards multilateral liberalisation, rather than "stumbling blocks" and that regionalism and multilateralism must be mutually supportive rather than contradictory. Regional agreements can serve to open markets by pushing forward a pattern of tariff reduction and elimination in participating countries, thereby helping them prepare for further multilateral liberalisation. Regional agreements can also provide the basis for much more far-reaching trade liberalisation, regulatory initiatives and elimination of non-tariff barriers to trade than have yet been possible within the WTO, enabling Members who are ready to "experiment" with such initiatives before there is an overall WTO consensus.

180. The positive impact of regional integration is particularly strong in cases where regional agreements provide for "deep integration" in the sense of initiatives going beyond elimination of import and export tariffs and measures having equivalent effect to provide for elimination of non-tariff barriers to trade and for regulatory harmonisation and convergence, even to the extent, in some cases, of establishing common regulatory frameworks between RTA partners. Such more far-reaching economic integration within RTAs can also be of great benefit to non-parties, since it is often objectively difficult and economically meaningless to set up a bilateral or regional regulatory framework that still discriminates against non-parties to the RTA. Thus, consideration should be given as to how the WTO framework could serve to encourage and channel such more far-reaching integration and trade liberalisation. In this context, it will be important to try to ensure that regulatory aspects of "deep" regionalism are based, to the fullest extent possible, on multilateral norms.

181. WTO rules recognise that RTAs, whether in the form of Customs Unions or FTAs in the area of trade in goods or in that of Economic Integration Agreements in the area of trade in services, can make a positive contribution to the development of trade. Regional integration can provide an important contribution to stability and development and *ipso facto*, to the objective of sustaining and strengthening a properly functioning multilateral system in the long-term.



### 34. The Development Dimension

182. It is considered that regional integration can play an important role in supporting economic development through the creation of additional trade and investment opportunities as well as accompanying measures and initiatives to support structural and regulatory reforms. This is true both for RTAs between developing and developed countries and for those among developing countries. Regional agreements should also ensure that trade liberalisation at the regional level contributes to sustainable development.

183. It is deemed that the negotiations on RTAs should aim to clarify the flexibilities already provided for within the existing framework of WTO rules. This is likely to involve further consideration of the relationship between GATT Article XXIV and the Enabling Clause, as well as an examination of the extent to which WTO rules already take into account discrepancies in development levels between RTA parties.

184. The economic logic of regional integration indicates that all parties to such agreements should pursue a high level of reciprocal market opening and regulatory harmonisation or convergence while also pursuing an open approach to trade policy with third countries within the multilateral framework if they are to achieve the full potential benefits. This is as true for agreements among developing countries as it is for agreements between developing and developed countries or among developed countries alone.

185. At the same time, it is important to recognise that the ability of many developing countries to adjust to greater competition on their domestic markets or take full advantage of additional market access opportunities can be constrained by their own individual level of development. This points to the need to examine, *inter alia*, the flexibilities available during the transitional or implementation period of RTAs, taking into account the needs of developing countries in a properly focused and appropriate manner so as to support their greater integration into the multilateral trading system. Aspects in respect of which such

flexibilities might be appropriate include the length of the transitional period, the level of final trade coverage and the degree of asymmetry in terms of timetables for tariff reduction and elimination.

**35. The Scope of negotiations**

186. Issues that merit discussion and analysis in the negotiations include the following:

Agreements in the area of trade in goods

Article XXIV of GATT 1994 and the WTO Understanding on the Interpretation of Article XXIV of GATT 1994

- the definitions of key concepts for the application of Article XXIV, including "regulations of commerce", "restrictive regulations of commerce", "substantially all the trade", "applicable duties" and "major sector";

- clarification of the application of provisions relating to the staged implementation of RTAs, including the "exceptional circumstances" in which transitional periods for the formation of a customs union or free trade area might be legitimately expected to exceed ten years;

- closer alignment of the disciplines imposed on parties to FTAs with the disciplines imposed on parties to Customs Unions, particularly in respect of the obligations of GATT Article XXIV:5 concerning the implications of individual RTAs for non-parties;

- treatment of non-tariff measures in trade between RTA partners including rules of origin;

The GATT Decision on Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause)

- the relationship between the provisions of the Enabling Clause relating to regional and global agreements entered into amongst less-developed contracting parties and Article XXIV of GATT 1994;

Agreements in the area of trade in Services

- clarification of key concepts for the application of Article V of the GATS, including "substantial sectoral coverage" and "substantially all discrimination";

- the definition of the "reasonable time frame" for the implementation of economic integration agreements;

- the appropriate combination of elimination of discriminatory measures (roll-back) and prohibition of new or more discriminatory measures (stand-still) in order to achieve the absence or elimination of substantially all discrimination (Article V:1(b)(i) and (ii));

- the appropriate methodology to ensure that the overall level of barriers and restrictions to trade in services with respect to third parties is not raised in the creation or enlargement of economic integration agreements.

187. **Substantial sectoral coverage** is understood in terms of number of sectors, volume of trade affected and modes of supply (no *a priori* exclusion of any mode of supply) covered by the liberalization provisions of the Agreement. These three factors are the basis for the evaluation of substantial sectoral coverage. While each of these factors should be analyzed separately, it must be acknowledged that it is the relationship among all three that will determine whether this criterion has been met.

188. Article V of the GATS does not require the immediate elimination of all discriminatory measures, but that such elimination be accomplished within a **"reasonable time-frame"**. In the case of goods, the Understanding on Article XXIV of GATT 1994 established that the period can be no longer than 10 years. *Should it be different in the case of services? Should there be some sectors that require longer time frames for liberalization*?

**II. PROPOSAL ON "SUBSTANTIALLY ALL TRADE"**

189. This proposal relates to the definition of 'substantially all trade' and provides a possible basis to make progress on the important issue of defining with greater precision the term 'substantially all the trade' as it pertains to Article XXIV of the General Agreement on Tariffs and Trade (GATT). Agreement on the meaning of 'substantially all trade' is important in assessing whether regional trade agreements to which WTO Members are a party are consistent with the WTO commitments of those Members. This

submission responds to the mandate to clarify and improve the WTO disciplines and procedures related to regional trade agreements, and provides a substantive contribution to the development of effective disciplines related to regional trade agreements in the WTO as called for by the report "The Future of the WTO: Addressing Institutional Challenges in the New Millennium".

**36. Background**

190. Members also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations will take into account the developmental aspects of regional trade agreements.

191. This mandate to improve and give certainty of definition and form to the disciplines and procedures of the WTO provisions related to regional trade agreements reflects widely held concerns; specifically, that the current ambiguities have hindered the Committee for Regional Trade Agreements (CRTA) from completing even one assessment of whether an individual trade agreement conforms to WTO provisions.

192. These concerns have most recently been underlined by the report "The Future of the WTO: Addressing Institutional Challenges in the New Millennium"[14]. The Sutherland report articulates the importance of ensuring that regional trade agreements improve the "trading and development prospects of beneficiaries." Furthermore, the report makes a strong call for regional trade agreements to "be subject to meaningful review and effective disciplines in the WTO."

193. As highlighted in the Sutherland report, the existing systemic inability to objectively discern whether regional trade agreements involving WTO Members are consistent with the WTO commitments of those Members presents the danger of a proliferation of regional trade agreements with poor trade-liberalising outcomes and trade distorting effects. Deficient regional trade agreements of this nature, particularly those that deliberately exclude entire sectors, such as agriculture, from liberalising commitments, undermine the multilateral trading system by entrenching protectionism, and give comfort to interest groups that benefit from such protectionism at the expense of the multilateral rules-based international trading system. Conversely, full coverage, high quality RTAs would through their liberalising effect promote further trade liberalisation at the multilateral level.

194. An important element in the development of effective disciplines that apply to regional trade agreements is the definition of 'substantially all trade'. GATT Article XXIV, paragraph 8 requires that, in relation to customs unions and free trade agreements, "duties and other restrictive regulations of commerce ... be eliminated with respect to substantially all the trade ...". On any reading of this provision, the term 'substantially all trade' is pivotal to assessing the WTO-consistency of regional trade agreements.

**37. Substantially All Trade: A Proposed Definition**

195. The objective of defining 'substantially all trade' in the context of Article XXIV and the examination of regional trade agreements must be to ensure that neither entire sectors nor 'highly traded' products are excluded from regional trade agreements. It is therefore necessary to ensure that the definition incorporate quantitative benchmarks in relation to the "duties" aspect of the agreement which preclude such exclusions.

196. In relation to preventing the exclusion of entire sectors, the appropriate quantitative measure needs to be sufficiently ambitious, and yet reflect the reality that some products may be excluded from regional trade agreements, and furthermore, that in some cases, liberalisation commitments may be phased-in over time. An appropriate accommodation of these competing factors could be achieved by prescribing a benchmark of **eliminating all duties on a minimum of at least 95 percent of tariff lines at the six digit level in the harmonised system of tariff classification lines.** A minimum 95 percent is regarded as satisfying the requirements of an effective discipline under Article XXIV, and yet retains sufficient flexibility to accommodate the exclusion of certain product lines.

197. While the benchmark of at least 95 percent of the harmonised system of tariff lines at the six digit level would prevent the exclusion from a regional trade agreement of a particular sector (i.e. at the Chapter or Heading level), it may not be effective in deterring the exclusion of 'highly traded' products. In addressing this issue it is important to first identify clearly what **'highly traded' products are, and in this regard it is proposed that these products be defined as those that constitute at least, say, 2 percent of trade between the parties.** This proposal is not water-tight but rather open to other views as to an appropriate percentage of trade between the parties that would give appropriate specificity to the

[14] Sutherland Peter, Bhagwati Jagdish, Botchwey Kwesi, FitzGerald Niall, Hamada Koichi, Jackson John H., Lafer Celso (2004) The Future of the WTO: Addressing Institutional Challenges in the New Millennium, WTO-Geneva, Switzerland.

term 'highly traded' product. *The important point is to come to an agreement on a clear definition that accurately describes the term 'highly traded'.*

198. Another aspect of preventing the exclusion of 'highly traded' products is to identify those products in the context of trade governed by the regional trade agreements. This would require statistical information on the trade between the parties on a product specific basis, with a historical reach of at least three years prior to the notification and each subsequent review of the regional trade agreements.

199. There is also a need to expose to the examination process those products that Members currently do not, but could trade, if it were not for the protectionist measures of one or more parties. This could involve analysis of the overall export trade of each Member. *Proposals are welcome on how this might most appropriately be achieved.*

200. Phased-in commitments: A plain reading of Article XXIV.8(a) and Article XXIV.8(b) suggests a requirement for regional trade agreements to achieve the elimination of duties and other restrictive regulations of commerce on substantially all trade on entry into force. However, many regional trade agreements to which WTO Members are a party clearly contain significant trade liberalizing commitments that are phased in over time rather than being operative on entry into force. Some WTO Members have sought comfort from the term 'reasonable length of time' in Article XXIV.5(c), but this provision relates specifically to "interim agreements" within the meaning of Article XXIV.5(a) and Article XXIV.5(b). Accordingly, it does not have any direct bearing on commitments related to 'substantially all trade' in Customs Unions or Free Trade Agreements not notified as interim agreements. However, while Article XXIV:5(c) does not directly concern itself with regional trade agreements other than those notified as interim agreements, it nonetheless provides useful guidance when trying to accommodate the common practice of phased-in liberalisation commitments in regional trade agreements by WTO Members.

201. Therefore a pragmatic approach to the development and consistent application of WTO disciplines to regional trade agreements requires the determination of an appropriate period of time after entry into force of the regional trade agreements at which to assess whether the elimination of duties and other restrictive regulations of commerce on substantially all trade has been achieved. As indicated above, the precedent of defining **'a reasonable length of time' in Article XXIV.5(c) as ten years** (articulated in the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, paragraph 3) provides an appropriate model for application to the assessment of the elimination of duties in respect of substantially all trade.

202. The proposed ten year period for the assessment of regional trade agreements has several benefits: it builds on an existing implicit understanding by WTO Members that ten years is a suitable period; is consistent with the period described in Article XXIV.5(c); accommodates the majority of existing regional trade agreements that contain phased-in commitments; and is rigorous enough to prevent the erosion of this requirement as an effective discipline.

203. Complementary to this flexibility in accommodating phased-in commitments, it is appropriate to require an ambitious yet pragmatic percentage for the elimination of duties on 'substantially all trade' upon entry into force of regional trade agreements. It is therefore proposed that a **minimum level of, say, 70 percent of tariff lines at the HS six-digit level is an appropriate benchmark for the elimination of duties on 'substantially all trade' at the time of entry into force** of the regional trade agreement, as it ensures the majority of the trade between the parties is liberalised immediately.

204. The term "Substantially all Trade" calls for comprehensive liberalisation in RTAs. This proposal merely provides a benchmark for this obligation. Accordingly, **these obligations should apply to all regional trade agreements currently in force to which WTO Members are a party.**

205. The approach outlined in this proposal has as its key objectives the conscientious implementation of the rules mandate, the promotion of comprehensive regional trade agreements that deliver genuinely trade-liberalizing and less trade distorting outcomes, and the development of a mutually supportive multilateral, regional and bilateral trade architecture by ensuring that regional trade agreements to which WTO Members are a party accurately reflect their WTO commitments.

## III. PROPOSAL ON CORE SYSTEMIC ISSUES UNDER GATT ARTICLE XXIV

206. The developmental dimension of regional trade agreements (RTAs) must constitute an integral part of the clarification and improvement of WTO rules for RTAs. Regional integration can play an important role in promoting economic development in so far as the agreements are sufficiently ambitious and take into account the specific needs and constraints of developing and least developed countries. The negotiation should include, *inter alia*, clarifications of WTO rules relating to RTAs that support the developmental impacts of RTAs as well as recognition that the potential challenges arising from such RTAs to the trade of third parties, and to the WTO at large, may be very different depending on the share of world trade and the level of development of the parties to the RTAs.

207. The application of the three overriding principles - shared systemic interest, reasonableness, and developmental dimension - will be instrumental for clarifying and improving WTO rules for RTAs. The requirement of GATT Article XXIV, paragraph 8, to eliminate "duties and other restrictive regulations of commerce ... with respect to substantially all the trade" between RTA parties, is one of the key systemic issues for negotiation.

### 38. Transition Periods: "Reasonable Length Of Time" And "Exceptional Cases"

208. GATT Article XXIV, paragraph 5 (c) requires that interim agreements leading to the creation of a Customs Union or Free Trade Area should include a plan and schedule for this process, which should be completed within a "reasonable length of time". In the Uruguay Round, Members clarified that this requirement "should exceed 10 years only in exceptional cases". In the recent surge of RTAs, however, transition periods have been known to go well beyond ten years. These cases are becoming the rule rather than the exception.

209. In part, the present situation is probably due to the lack of authoritative guidance of the concept of "exceptional cases". If at all invoked, "exceptional cases" should only be applied to a limited number of products under RTAs, should not unreasonably postpone the end of the transition periods, and should be used only for prolonged phase-in of commitments by developing and especially least-developed countries, not by developed countries. At the same time, it could also be recognized that some other Members have adopted longer transition periods in a limited number of RTAs where the parties have agreed to go well beyond the requirement of "substantially all the trade" coverage. *Members are invited to consider clarifications of the limited circumstances where such departures from the rule of ten years may be justified.*

### 39. Neutrality: "Other Regulations Of Commerce"

210. GATT Article XXIV, paragraph 5, sets out the requirements which a Customs Union or Free Trade Area must meet in respect of its impact on the interest of non-parties. While the obligations with respect to duties have in part been clarified already, there is no generally agreed definition of what constitutes "other regulations of commerce" for the purposes of this Article, nor of the methodology to be followed in determining whether such other regulations have become more restrictive as a result of the formation of a Customs Union or Free Trade Area.

211. For obvious reasons, the concept of other regulations of commerce appears to be broader than the concept of "other restrictive regulations of commerce" in Article XXIV:8. *Members are invited to clarify and expand the scope of "other regulations of commerce", including the possibility that preferential rules of origin would fall under the concept, but only to the extent that any future definition would be sensible, practical and not give rise to perverse outcomes with regard to the existing neutrality test.* The wider the definition, the more it covers regulations which are only remotely related to trade, or areas where WTO Agreements already establish certain rights and obligations for Members.

212. In particular, the regulations falling under existing WTO Agreements cannot be questioned on grounds of neutrality, if the parties of the RTAs fulfil their rights and obligations under those Agreements. Moreover, any assessment of neutrality will inevitably have to be made on a case by case basis, where also the long term positive effects for third parties from harmonisation and deeper integration under RTAs would need to be fully acknowledged.

### 40. Developmental Aspects: Fair and Equitable Treatment between Different Forms of RTAs to which Developing Countries are Parties

213. Improvements and clarifications to the existing WTO rules for RTAs should aim to ease problems of coherence. For example, no distinction is made in respect of regional trade agreements among developing countries that are relatively sizeable actors in world trade, and whose RTAs therefore are likely to have implications on other WTO Members and for the system as a whole, as compared to those between parties who represent only a small portion of world trade. The disparity appears especially obvious if one compares an RTA between developing countries who would be major traders (and which would fall under the Enabling Clause) with some existing RTAs among relatively small trading nations who are subject to the more comprehensive disciplines of GATT Article XXIV.

214. Firstly, in the negotiations, specific consideration needs to be given to the tangible benefits of deeper economic integration through more ambitious regional trade agreements among developing countries (just as through agreements between developed and developing countries).

215. Secondly, it should be recognized that the ability of many developing countries to adjust to greater competition on their domestic markets, or to take full advantage of additional market access opportunities under RTAs, may depend on their own individual level of development, particularly in RTAs with developed

countries. Therefore, it is believed that the negotiations on RTAs should aim to clarify the flexibilities already provided within the existing WTO rules on RTAs, in order to give greater security to developing country parties to RTAs to ensure that the rules facilitate the necessary adjustments.

216. *Members are invited to explore various ways of achieving this aim, including the extent to which flexibilities might be appropriate with respect to, inter alia, the length of the transitional period, the level of final coverage and the degree of asymmetry for both under GATT Article XXIV. More specifically, Members are invited to consider separate and differentiated, i.e. lower, thresholds for developing countries and least developed countries.*

217. Moreover, longer transition periods might be necessary to facilitate market building and consolidation through gradual openness to trade in weak and vulnerable developing countries, taking into account their specific needs and constraints. It is proposed that these specific justifications for developing country parties to RTAs should depart, where necessary, from the general rule of ten years maximum.

## IV. PROPOSAL ON "OPEN REGIONALISM" AND FOR RTAs TO CONTAIN AN ACCESSION CLAUSE FOR NON-PARTIES

218. This proposal calls for new provisions to be added to Article XXIV of GATT 1994 and Article V of GATS requiring parties to an RTA to allow another interested WTO Member to negotiate in good faith the terms of its accession to the RTA.

### 41. Problems of Current Regional Trade Agreements

219. The basic difference between the multilateral system as embodied in the WTO and RTAs is that the multilateral trading system requires non-discrimination among its members, while RTAs discriminate against goods, services and service-suppliers from non-parties.

220. There may be an economic and other justification for RTAs to deviate from the fundamental principle of most-favoured-nation (MFN) treatment under Article I of GATT 1994 and Article II of the GATS. But the WTO allows the existence of RTAs on the strict condition that they must be trade creating, not trade diverting. Therefore, the justification for RTAs should be scrutinized against the primary goal of supporting the multilateral trading framework, to make sure that RTAs are used solely to advance trade liberalization, and not as a means to undermine MFN treatment.

221. The apparent lack of effective multilateral supervision tend to show that the terms and conditions as specified under Article XXIV of GATT 1994 and Article V of GATS are not strictly observed or adhered to by WTO Members. Consequently, it is proposed that new provisions be adopted in Article XXIV of GATT 1994 and Article V of GATS, requiring parties of RTAs to provide an accession clause for third-party members, which would expand the reach of RTAs and thereby promote broader, more inclusive and comprehensive trade liberalization.

### 42. A Positive Move to balance Multilateralism and Regionalism

222. It is proposed that the WTO obliges its Members to afford adequate opportunity to non-parties to accede to their RTAs. This approach would allow a third party to accede to the RTAs under certain reasonable conditions, and the original parties to the RTAs would have to extend in good faith their preferential treatments to newcomers once they have completed the accession process. Permitting third parties to accede to RTAs would minimize discrimination, as well as ensure that RTAs promote trade liberalization rather than thwart it.

223. It is worth mentioning that, in this proposal, third parties will not be granted automatic accession to RTAs. However, the original parties to the RTAs will be required to afford third parties, in good faith, adequate opportunity to negotiate individual terms of accession to the RTAs, and at the same time the third parties seeking accession will be required to commit themselves to reach the same level of trade liberalization as embedded in the RTAs they seek to enter.

224. RTAs, if properly constructed, can be genuine building blocks of multilateralism. An accession clause for third parties to RTAs would no doubt establish the proper construction of RTAs in order to maintain and further enhance the multilateral trading system.

225. Many free trade agreements concluded among APEC member economies, for example, NAFTA, the Closer Economic Partnership Agreement between Australia and New Zealand, the FTA between Australia and US, the FTA between Singapore and US, the Trans Pacific Strategic Economic Partnership: an FTA involving Brunei Darussalam, Chile, New Zealand and Singapore, do include accession clause for third parties. Moreover, one of the principles declared in the APEC Best Practices for RTAs and FTAs targets specifically the issue of third-party accession.

226. *It is proposed that all WTO Members reflect on this, and to consider making it a standard practice by way of a new RTA discipline to be added to the relevant part of the agreement in the rules negotiations.*

### 43. Proposed Provisions

(a) An RTA shall be open for accession by other WTO Members, on terms to be agreed between the original parties of the RTA and the interested WTO Members.

(b) WTO Members not parties to the RTA may indicate their intention to accede to such RTA to the parties in writing. The parties of the RTA shall respond sympathetically to such requests, and accord in good faith adequate opportunities for other interested WTO Members to negotiate the terms of their accession.

(c) Requests, replies, progress and results of subsequent negotiations conducted in accordance with previous provisions shall be notified to the Committee on Regional Trade Agreements in a timely manner.

227. With this proposal, it is expected that the different interests derived from multilateralism and regionalism could be better reconciled, better coordinated and more mutually supportive of each other.

## V. PROPOSAL ON DEVELOPMENTAL ASPECTS OF RTAs

228. Formation of an RTA should be welfare enhancing for the participants. Meaningful welfare gains require closer integration between the economies of the participants, i.e. the RTA extends to as large a proportion of the trade as possible.

### 44. Substantially all the Trade

229. It is noteworthy that RTAs formed between developed countries under GATT Article XXIV still leave out sectors like agriculture from integration. This limits trade creation and consequently the welfare gains to participants.

230. *Members may define "substantially all the trade" for purpose of GATT Article XXIV in terms of both (i) a threshold limit of the HS tariff lines at the 6-digit level; and (ii) the trade flows at various stages of implementation of the RTA.*

### 45. RTAs under Enabling Clause

231. Certain proposals have been made to bring the RTAs signed under the Enabling Clause between developing countries within the ambit of GATT Article XXIV transparency mechanism, that is, to subject such agreements to review under the Committee of Regional Trade Agreements (CRTA).

232. A number of developing countries believe that the Enabling Clause is inextricably linked to the development needs of developing countries. While developing countries seek greater economic integration with other countries, they also need to have enough policy space to be able to adjust to greater competition in the domestic markets or to calibrate their market liberalization to their individual level of development. The Enabling Clause provides for flexibility in making structural adjustments, a mechanism to build public consensus for trade liberalization-led reforms, and a laboratory to learn the lessons of market opening without paying a prohibitive price in terms of social and economic upheavals, that may, at times, be paid when such an opening-up is at the multilateral level.

### 46. Transparency of RTAs formed under GATT Article XXIV

233. The substantial growth of RTAs formed under GATT Article XXIV and their apparent ineffective examination provides for an urgent need to clarify the principles concerning notification and examination of such RTAs. There is a need for clarification regarding the time of notification. It is proposed to have a 2-step process of notification of an RTA. An outline of the new Agreement could be notified to the WTO at the time of signature of the RTA, but prior to its ratification, and a second notification could be made after the ratification of an RTA, but before its entry into force. The second notification could be a full and a detailed notification. It would also be useful to define a time frame for notifying changes to an RTA. One guiding principle on this issue could be the existing provision in Article 5.1 of the Agreement on Import Licensing Procedures which sets a time frame of 60 days for notifying changes made in import licensing procedures.

234. It is proposed to make the various provisions of an RTA, at as early a stage as possible, of its establishment and also be presented with an analysis of its impact on the multilateral trading system.

Such an analytical report would help all Members to better understand the functioning of the concerned regional trading arrangement and thus enable them to participate more constructively in the examination exercise.

235. In addition to the initial review, there could be a fixed periodicity of summary review of existing RTAs depending on the share of their trade along the lines of the present Trade Policy Review Mechanism (TPRM). To enable the WTO Secretariat to carry out such regular assessment of RTAs, there should be a requirement for RTA Members to submit data concerning trade. This could help in understanding at a broader level as to whether the RTA has served or is serving to create overall expansion of trade.

**47. RTAs and Preferential Rules of Origin**

236. It would be useful to have an understanding that rules of origin are other regulations of commerce and that they should meet the criteria set forth in GATT Article XXIV:4 and XXIV:5, namely, that they shall not raise barriers to trade of non-Members of RTAs. Certain tests can be set to meet this criteria like tests of proportionality, least-trade restrictiveness and non-violation of fundamental provisions of GATT, including GATT Article III:4.

237. Specific criteria to meet these tests could include: (a) there should be no requirement that the raw material used for next stage product conversions should be 100% originating in an RTA Member country; (b) there should be no insistence for use of particular originating items to give origin to a product (like fabrics for apparel, lining for coat); (c) value addition norms of preferential rules of origin for RTAs between developed countries should not be less stringent than the value addition norms provided under GSPs offered by a developed country RTA Member.

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