SUBSIDI PERIKANAN DALAM KERANGKA WTO : SUATU TINJAUAN TERHADAP PROPOSAL INDONESIA DAN KEPENTINGAN NASIONAL

TESIS

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FAKULTAS HUKUM
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JAKARTA
JANUARI 2009

SUBSIDI PERIKANAN DALAM KERANGKA WTO : SUATU TINJAUAN TERHADAP PROPOSAL INDONESIA DAN KEPENTINGAN NASIONAL

TESIS

Diajukan sebagai salah satu syarat untuk memperoleh gelar Magister Hukum

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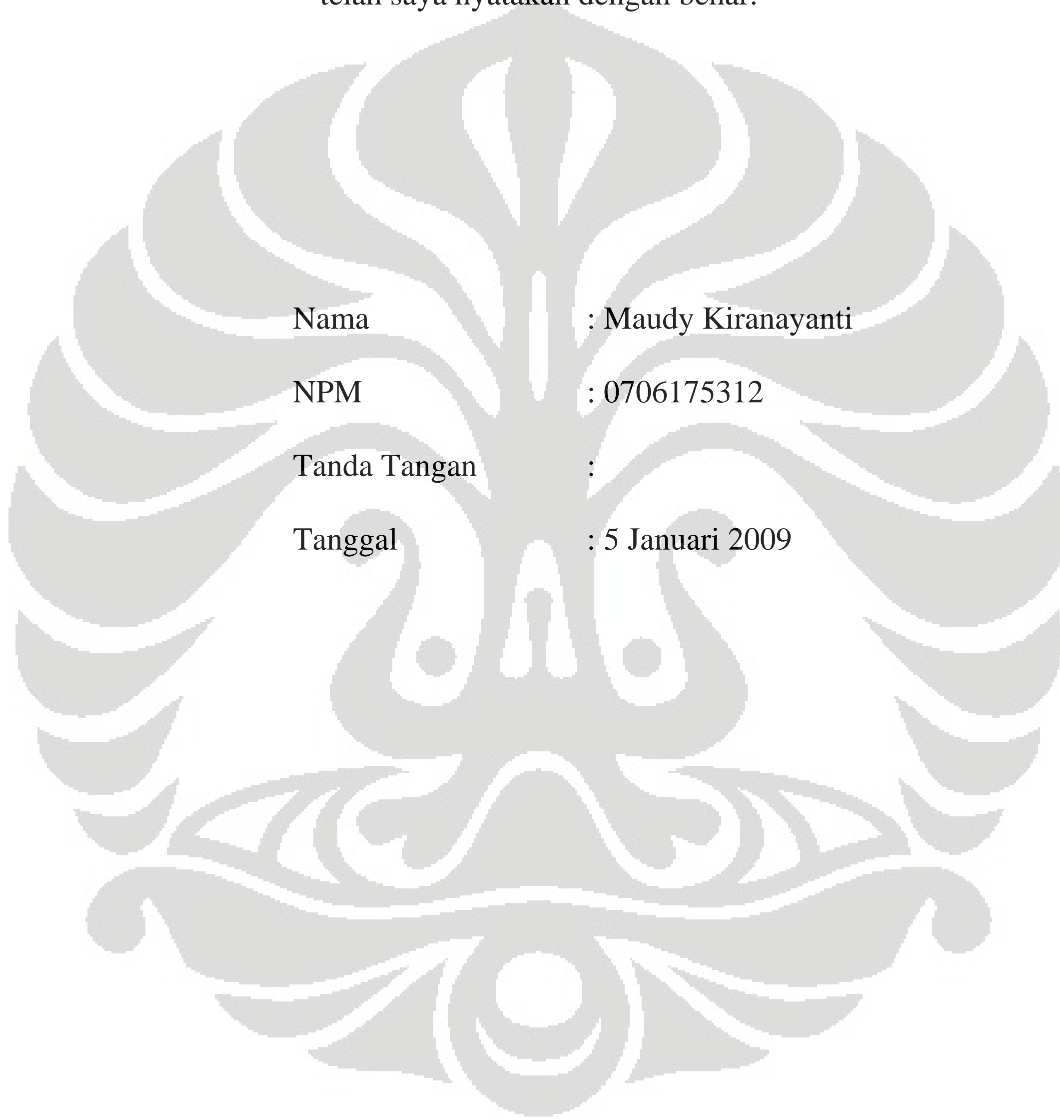

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Telah berhasil dipertahankan di hadapan Dewan Penguji dan diterima sebagai bagian persyaratan yang diperlukan untuk memperoleh gelar Magister Hukum pada Program Studi Magister Ilmu Hukum, Fakultas Hukum, Universitas Indonesia.

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Tanggal : 5 Januari 2009

KATA PENGANTAR

Puji dan syukur Alhamdulillah Penulis panjatkan kehadirat Allah SWT atas segala rahmat dan karunia-Nya sehingga penulisan tesis yang berjudul "Subsidi Perikanan Dalam Kerangka WTO: Suatu Tinjauan Terhadap Proposal Indonesia dan Kepentingan Nasional" dapat diselesaikan dengan baik.

Tesis ini disusun dan diajukan guna memenuhi persyaratan untuk menyelesaikan program Pasca Sarjana di Fakultas Hukum Universitas Indonesia.

Selama proses penulisan skripsi ini, Penulis memperoleh banyak hambatan dan kesulitan, namun berkat bantuan moril maupun materiil, dorongan serta doa dari berbagai pihak maka hal tersebut dapat diselesaikan dan diatasi dengan baik. Oleh karena itu, pada kesempatan yang berbahagia dan dengan segala kerendahan hati perkenankanlah Penulis mengucapkan rasa terimakasih yang sebesar-besarnya dan dengan penuh rasa hormat kepada:

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Jakarta, 5 Januari 2009

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Maudy Kiranayanti

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ABSTRAK

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Tesis ini membahas bagaimana pemerintah Indonesia memanfaatkan perananannya sebagai anggota WTO demi kepentingan nasional. Salah satunya dengan memberikan masukan berupa proposal mengenai subsidi perikanan pada perundingan *rules* di WTO. Hasil penelitian menyarankan bahwa Indonesia harus dapat memanfaatkan semaksimal mungkin keanggotaannya di WTO salah satunya dengan berperan serta aktif dalam merespon setiap perkembangan yang terjadi pada di WTO. Kemudian kesiapan hukum dalam negeri juga harus diperhatikan. Karena peluang dan manfaat dari keanggotaan Indonesia di WTO hanya dapat diperoleh apabila kita menguasai semua persetujuan WTO dan memanfaatkannya sesuai dengan kepentingan nasional.

Kata Kunci :
World Trade Organization, Subsidi, Subsidi Perikanan.

ABSTRACT

Name : Maudy Kiranayanti
Study Program : Magister Ilmu Hukum
Title : Fisheries Subsidies in WTO Framework: A Review from Perspective of Indonesia's Proposal and National Interest

The focus of this study is to review on how Indonesian government using their capacity as WTO Member for national interest, for instance by submitting a proposal regarding fisheries subsidies in WTO rules negotiation. The purpose of this research is to suggest that Indonesia shall optimalize it WTO membership by, for instance, actively participate in responding any progress at WTO. Furthermore the legal instruments in Indonesia must also be prepared. Because opportunities and utilities from Indonesian WTO Membership can only be achieved if we understand and take full advantages of WTO law in accordance to our national interest.

Key words:
World Trade Organization, Subsidies, Fisheries Subsidies.

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BAB 1
PENDAHULUAN

1.1. Latar Belakang

Setiap negara selalu berusaha meningkatkan pembangunan, kesejahteraan dan kemakmuran rakyatnya. Salah satu cara yang digunakan untuk mewujudkan peningkatan pembangunan, kesejahteraan dan kemakmuran rakyat pada suatu negara ialah melalui perdagangan internasional. Perdagangan internasional terjadi karena setiap negara memiliki potensi dan kepentingan yang berbeda, sehingga negara-negara di dunia akan saling ketergantungan demi memenuhi kebutuhan mereka.

Keberadaan perdagangan internasional telah menjadi faktor penting dalam meningkatkan kemajuan ekonomi negara-negara didunia. Menurut sejumlah ahli, jika perekonomian dunia ingin makmur perdagangan harus memainkan peranan vital.[1] Oleh karena itu dibutuhkan adanya ketentuan mengenai sistem perdagangan internasional, khususnya multilateral yang dapat dijadikan pedoman bagi negara-negara yang akan melakukan transaksi perdagangan internasional.

Saat ini satu-satunya organisasi internasional yang khusus mengatur masalah perdagangan antar negara di forum multilateral adalah *World Trade Organization* (WTO).[2] WTO pun telah menjadi organisasi yang paling bertanggung jawab untuk pengembangan perdagangan internasional.[3] Setelah persetujuan untuk mendirikan WTO (*Agreement Establishing the World Trade Organization*) ditandatangani pada bulan April 1994 di Marrakesh, Maroko, WTO secara resmi didirikan pada tanggal 1 Januari 1995. [4] Sekretariat WTO bertempat di Jenewa, Swiss.

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[1] Hata, *Perdagangan Internasional dalam Sistem GATT dan WTO, Aspek-Aspek Hukum dan Non Hukum*, (Bandung: PT Refika Aditama, 2006), hal.1.

[2] "The WTO in Brief," <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm>, diakses 25 Mei 2008.

[3] David P Cluchey. *Competition In Global Markets: Who Will Police The Giants?.* Temple International and Comparative Law Journal (2007).

[4] Lihat Peter Van den Bossche, "World Trade Organization : 3.1 Overview," <http://www.unctad.org/Templates/Search.asp?intItemID=2068&lang=1&frmSearchStr=UNCTAD%2FEDM%2FMisc.232%2FAdd.11&frmCategory=all§ion=whole>, diakses 23 Juli 2008.

Keanggotaan di WTO terdiri atas 153 negara di dunia, baik *developed country* (negara maju), *developing country* (negara berkembang), maupun *least developed country* (negara terbelakang atau LDC's) dimana sistem perdagangan multilateral WTO diatur melalui suatu persetujuan yang berisi aturan-aturan dasar perdagangan internasional atas hasil perundingan yang telah disepakati oleh negara-negara anggotanya.[5] Persetujuan tersebut mengikat pemerintah masing-masing negara anggota untuk mematuhinya dalam pelaksanaan kebijakan perdagangan mereka. Keberadaan persetujuan-persetujuan dalam WTO diperoleh melalui rangkaian putaran perundingan perdagangan (*trade round*).[6]

WTO memiliki beberapa tujuan penting, yaitu pertama, mendorong arus perdagangan antar negara, dengan mengurangi dan menghapus berbagai hambatan yang dapat mengganggu kelancaran arus perdagangan barang dan jasa. Kedua, memfasilitasi perundingan dengan menyediakan forum negosiasi yang lebih permanen. Tujuan penting ketiga ialah untuk penyelesaian sengketa, mengingat hubungan dagang sering menimbulkan konflik – konflik kepentingan. Meskipun sudah ada persetujuan – persetujuan dalam WTO yang sudah disepakati anggotanya, masih dimungkinkan terjadi perbedaan interpretasi dan pelanggaran sehingga diperlukan prosedur legal penyelesaian sengketa yang netral dan telah disepakati bersama. Dengan adanya aturan – aturan WTO yang berlaku sama bagi semua anggota, maka baik individu, perusahaan ataupun pemerintah akan mendapatkan kepastian yang lebih besar mengenai kebijakan perdagangan suatu negara. Terikatnya suatu negara dengan aturan – aturan WTO akan memperkecil kemungkinan terjadinya perubahan – perubahan secara mendadak dalam kebijakan perdagangan suatu negara (lebih *predictable*).[7]

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[5] "World Trade Organization (WTO)/Organisasi Perdagangan Dunia", <http://www.deptan.go.id/ kln/berita/wto/ttg-wto.htm>, diakses 17 Juni 2008.

[6] Departemen Luar Negeri, *Sekilas WTO (World Trade Organization),* ed. 4, (Jakarta: Direktorat Perdagangan, Perindustrian, Investasi dan Hak Kekayaan Intelektual, 2007), hlm.1.

[7] Lihat Huala Adolf, *Hukum Ekonomi Internasional.* (Bandung: PT Raja Grafindo Persada), hlm.115.

Selain terikat dengan aturan-aturan WTO, terdapat beberapa prinsip dasar yang harus dipatuhi oleh negara anggota WTO salah satunya ialah *Special and Differential Treatment* (S&D *Treatment*) atau perlakuan khusus dan berbeda. Prinsip ini dibuat demi meningkatkan partisipasi negara berkembang dalam perundingan perdagangan internasional. Dengan adanya prinsip S&D *Treatment*, negara berkembang akan mendapatkan kemudahan-kemudahan dalam melaksanakan ketentuan-ketentuan WTO.[8]

Hal tersebut dimungkinkan karena adanya perbedaan tingkat pembangunan antara negara maju dan negara berkembang. Perlakuan khusus (*special treatment*) dapat diartikan sebagai pemberian masa transisi bagi negara berkembang yang lebih longgar, juga adanya bantuan teknis bagi negara berkembang agar mereka siap dalam mengimplementasikan ketentuan WTO tersebut. Sedangkan perlakuan berbeda (*differential treatment*) dimaksudkan untuk dimungkinkannya adanya pengecualian (*exception)* bagi negara berkembang dalam hal implementasi.[9]

Sejak Indonesia menjadi anggota WTO dan meratifikasinya melalui Undang-undang No. 7 Tahun 1994 tentang Pengesahan *Agreement Establishing The World Trade Organization* (Persetujuan Pembentukan Organisasi Perdagangan Dunia), Indonesia harus melakukan penyesuaian berbagai peraturan kebijakan perdagangannya menurut ketentuan WTO. Karena dengan adanya ratifikasi tersebut, WTO telah menjadi bagian dari perundang-undangan domestik kita dimana Indonesia wajib memenuhi semua kewajiban dalam perjanjian WTO secara konsisten dan menyesuaikan segala peraturan dan kebijakan nasional yang belum serasi (*conform*) dengan instrumen-instrumen yang terdapat dalam perjanjian perdagangan WTO.[10]

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[8] "WTO dan Sistem Perdagangan Dunia", <http://www.depperin.go.id/IND/Publikasi/djkipi/wto.htm>, diakses 25 Nopember 2007.

[9] "Kewajiban Negara Berkembang Sebagai Anggota WTO", <http://ditjenkpi.depdag.go.id/index.php?module=news_detail&news_content_id=408&detail=true>, 5 January 2006.

[10] "World Trade Organization", <http://www.deplu.go.id?category_id=15&news_org_id=128&org_id=>, diakses 25 Nopember 2007.

Oleh karena itu, salah satu aturan yang ada pada WTO *Agreement* yakni mengenai subsidi yang diatur melalui pasal XVI *General Agreement on Tariff and Trade* (GATT 1994) dan *Agreement on Subsidies and Countervailing Measures* (SCM *Agreement*) harus pula diadaptasi oleh Indonesia. Untuk mengakomodir hal tersebut Indonesia mengatur masalah subsidi melalui Undang-Undang Nomor 10 Tahun 1995 tentang Kepabeanan sebagaimana telah diubah dengan Undang – Undang Nomor 17 Tahun 2006 Tentang Perubahan Undang-Undang Nomor 10 Tahun 1995 tentang Kepabeanan, Peraturan Pemerintah Republik Indonesia Nomor 34 Tahun 1996 Tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan, Keputusan Menteri Perindustrian dan Perdagangan RI Nomor 216/MPP/Kep/7/2001 tentang Perubahan Keputusan Menteri Perindustrian dan Perdagangan Nomor 261/Mpp/Kep/9/1996 Tentang Tata Cara dan Persyaratan Permohonan Penyelidikan Atas Barang Dumping dan atau Barang Mengandung Subsidi dan beberapa peraturan teknis lainnya.

Namun dengan menjadi anggota WTO disadari maupun tidak, selain adanya kesempatan (*opportunity*) yang bisa diperoleh melalui keanggotaan kita, terdapat pula ancaman (*threat*) yang perlu kita waspadai. Seperti misalnya dalam isu subsidi, keberadaan subsidi dapat memperbaiki kegagalan pasar dan membantu masyarakat. Namun subsidi dapat pula mendistorsi perdagangan dan memicu reaksi yang keras dari mitra dagang suatu negara.[11]

Keadaan subsidi pada sektor perikanan, secara umum negara-negara dengan tarif yang sangat rendah (negara maju) mampu memberikan subsidi yang tinggi. Sementara negara berkembang dengan tarif yang tinggi memberikan subsidi yang rendah. Ini mengindikasikan bahwa kemungkinan negara maju memberikan subsidi bagi sektor perikanan mereka akan lebih tinggi dibandingkan negara berkembang.[12] Oleh karena itu perlu bagi Indonesia sebagai negara berkembang untuk mengambil

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[11] Iwa, "WTO Akui Subsidi Mendistorsi Pasar," *Investor Daily*, (25 Juli 2006).

[12] "Indonesia dan Liberalisasi Perikanan di WTO", <http://www.walhi.or.id/kampanye/globalisasi /060105_lbrlsasiikanwto_cu/ >, diakses 1 Nopember 2007.

langkah-langkah dan strategi tertentu demi melindungi kepentingan dalam negeri tanpa perlu melanggar komitmen Indonesia di WTO.

Indonesia secara geografis, berada di antara 2 (dua) benua, 2 (dua) samudera dan tempat pertemuan lempengan benua yang menjadikan posisi Indonesia sangat strategis. Tak pelak lagi, kurang lebih 95% jalur pelayaran perdagangan Asia Pasifik melewati perairan kita. Bertemunya lempengan benua, memberi bentuk indah di dasar laut. Palung, laguna, gunung berapi, slope, reef wall bertebaran di seluruh perairan laut Indonesia. Megabiodiversity, demikian para ahli menyebut keragaman potensi sumberdaya laut Indonesia. Cukup banyak landasan pemberian 'gelar' tersebut kepada negara bahari ini, diantaranya luas terumbu karang Indonesia adalah 51.020 km2 atau 17,95 % persentase luasan dari terumbu karang dunia, 37 % species laut, 30 % hutan mangrove.[13]

Merupakan suatu fakta penting bahwa Indonesia merupakan negara kepulauan terbesar di dunia, dengan dua pertiga wilayahnya merupakan lautan dan memiliki lebih dari 17.504 pulau, besar dan kecil yang menyimpan kekayaan alam yang melimpah, 12.000 pulau diantaranya berpenghuni, 9.634 pulau belum bernama. Sumberdaya kelautan dan perikanan Indonesia diperkirakan bernilai USD 136,5 milyar, meliputi perikanan USD 31,9 milyar, pesisir lestari USD 56 milyar, bioteknologi laut USD 40 milyar, wisata bahari USD 2 milyar dan minyak bumi USD 6,6 milyar. Potensi ekonomi untuk pemulihan ekonomi sebesar USD 82 milyar per tahun meliputi perikanan tangkap USD 15,1 milyar, budidaya laut USD 46,7 milyar, perairan umum USD 1,1 milyar, budidaya tambak USD 10 milyar, budidaya air tawar USD 5,2 milyar, bioteknologi kelautan USD 4 milyar dan sekitar 25% dari produk domestik bruto (PDB) Indonesia dihasilkan dari sumberdaya dan aktivitas di wilayah pesisir dan laut.[14]

Segala kekayaan yang dimiliki Indonesia sebagaimana disebutkan diatas mengandung potensi dan juga ancaman yang perlu diperhatikan.

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[13] "Sebuah Kolam Megabiodiversity untuk Misi Penyelamatan Bumi," <http://www.dkp.go.id/ content.php?c=3730>, 22 Pebruari 2007.

[14] *Ibid*.

Potensinya kekayaan laut Indonesia selain sebagai sumber pangan ialah sebagai salah satu pendorong pertumbuhan ekonomi nasional dan penciptaan lapangan kerja. Sementara itu menurut ketentuan WTO sumber daya perikanan diatur sebagai komoditas, barang yang dapat dijual-beli atau barang industri bukan sebagai sumber pangan.[15] Maka, untuk menghindari eksploitasi berlebihan terhadap kekayaan laut Indonesia dan demi mendorong pertumbuhan ekonomi nasional dan penciptaan lapangan kerja, Indonesia dituntut untuk lebih siap dalam mengambil manfaat sebesar-besarnya dari peluang yang dihasilkan dari keanggotaannya di WTO.

Salah satu kesempatan yang dimanfaatkan Indonesia ialah melalui perundingan *Negotiating Group on Rules* (NG *on Rules*). Berdasarkan kesepakatan negara anggota WTO pada saat Putaran Doha berlangsung, telah terjadi kesepakatan bahwa akan dilakukan negosiasi-negosiasi lanjutan dengan tujuan mengklarifikasi dan memperbaiki ketentuan-ketentuan *Agreement of Implementation of Article VI of the GATT 1994* dan SCM *Agreement.* Selain itu telah disepakati pula untuk melakukan proses negosiasi yang membahas isu *fisheries subdisies* (subsidi perikanan).

Oleh karena itu, pada saat perundingan NG *on Rules* di Jenewa pada tanggal 9-13 Juli 2007, Delegasi Republik Indonesia (DELRI) yang diwakili oleh Departemen Perdagangan secara resmi menyampaikan proposal mengenai resolusi pengaturan subsidi perikanan dalam kerangka perjanjian WTO yang berjudul *Fishery Subsidies: Proposed New Discipline.*[16] Proposal tersebut merupakan proposal yang pertama kali diajukan Indonesia ke dalam perundingan WTO. Keberadaan proposal ini diharapkan dapat menjadi peluang bagi Indonesia untuk memanfaatkan keanggotaannya di forum WTO.

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[15] "WTO (World Trade Organization) mengancam sumber daya perikanan Indonesia," <http://kiara.or.id/content/view/7/1/>, diakses 1 Nopember 2007.

[16] Lihat dokumen no. TN/RL/GEN/150 tanggal 2 Juli 2007 perihal *Fishery Subsidies : Proposed New Discipline* (dapat diakses melalui www.wto.org).

Selain Indonesia negara-negara anggota WTO lainnya juga telah mengajukan proposal subsidi perikanan mereka selama perundingan-perundingan NG *on Rules* berlangsung. Setelah melalui beberapa proses perundingan dan menerima proposal-proposal mengenai subsidi perikanan dan proposal yang berisikan isu *rules* dari negara anggota WTO lainnya, pada tanggal 30 Nopember 2007 ketua perundingan WTO bidang *rules* menyampaikan *Draft Consolidated Chair Text of the Anti Dumping and SCM Agreements* (*draft chairman's text*).

Salah satu tujuan dari adanya *draft chairman's text* ialah untuk menjembatani kepentingan masing-masing negara anggota WTO. Setelah *draft chairman's text* tersebut diterbitkan, setiap negara anggota WTO memiliki kesempatan untuk mengajukan tanggapan, untuk menyetujui atau menolak *draft chairman's text* tersebut dan apakah kepentingan mereka telah terakomodir oleh *draft chairman's text* tersebut atau tidak. Hal-hal tersebutlah yang melatar belakangi penulis untuk membuat tesis dengan judul "*Subsidi Perikanan dalam Kerangka WTO : Suatu Tinjauan Terhadap Proposal Indonesia dan Kepentingan Nasional.*"

1.2. Perumusan Masalah

Dari penjabaran latar belakang, maka dapat dirumuskan masalah-masalah sebagai berikut:

1.2.1 Bagaimanakah konsep subsidi perikanan menurut proposal Indonesia dibandingkan dengan *draft consolidated chair text of the Anti Dumping and SCM Agreements*?

1.2.2 Apakah manfaat proposal subsidi perikanan terhadap kepentingan nasional?

1.2.3 Langkah-langkah apa yang seyogianya disiapkan oleh Indonesia untuk memperjuangkan kepentingan nasional dalam isu subsidi perikanan pada perundingan *rules* selanjutnya?

1.3. Tujuan Penulisan

Penulisan ini bertujuan untuk:

1.3.1 Menjabarkan konsep subsidi perikanan menurut proposal Indonesia, kemudian dibandingkan dengan *draft consolidated chair text of the Anti Dumping and SCM Agreements*.

1.3.2 Menjelaskan manfaat proposal subsidi perikanan terhadap kepentingan nasional.

1.3.3 Merekomendasikan langkah-langkah yang seyogianya disiapkan oleh Indonesia untuk memperjuangkan kepentingan nasional dalam isu subsidi perikanan pada perundingan *rules* selanjutnya.

1.4 Kerangka Teori

Keberadaan WTO sebagai forum perdagangan multilateral tidak dipungkiri telah membawa pengaruh terhadap peningkatan pembangunan ekonomi negara-negara anggotanya. Namun mengingat negara anggota WTO terdiri dari bukan hanya negara maju tetapi juga negara berkembang dan LDC's membuat tingkat pembangunan yang mereka terima tidaklah sama. Karena walaupun liberalisasi perdagangan internasional melalui WTO telah memberikan keuntungan terhadap pembangunan ekonomi negara berkembang dan LDC's namun keuntungan yang mereka terima tidak sebesar yang diperoleh oleh negara-negara maju. Hal ini berarti ada kesenjangan yang lebar dalam hal perolehan negara-negara maju dengan negara berkembang dan LDC's. Dengan kata lain, sementara peningkatan kesejahteraan di negara berkembang dan LDC's terjadi baik secara tetap maupun mungkin lebih besar, peningkatan kesejahteraan secara absolut terjadi lebih besar di negara-negara maju.[17]

S&D *Treatment* dapat dijadikan suatu instrumen untuk tercapainya keadilan dalam perdagangan internasional khususnya WTO. Sebagaimana

[17] Nandang, Eksistensi Ketentuan Khusus WTO, <http://nandang.staff.uii.ac.id/2008/08/28/artikel/>, 28 Agustus 2008.

diungkapkan oleh Frank J. Garcia[18] menurut konsep *justice as fairness,* keadilan adalah distribusi yang merata barang-barang sosial dalam transaksi-transaksi perdagangan internasional antara negara-negara maju, negara berkembang dan LDC's. Tetapi bukan berarti bahwa semua ketimpangan harus ditiadakan. Hanya ketimpangan yang tidak adil (*unjust inequalities*), yakni yang merugikan mereka yang paling tidak beruntung (dalam hal ini negara berkembang dan LDC's), yang harus ditiadakan. Oleh karena itu, ketidaksamaan yang didedikasikan untuk keuntungan mereka yang paling tidak beruntung seperti ketentuan-ketentuan S&D *Treatment* dibenarkan. Konsep S&D *Treatment* akan dapat memainkan peran esensial dalam merealisasikan konsep *justice as fairness,* sebagaimana yang diungkapkan oleh Frank J. Garcia:

> *"...[t]he principle of special and differential treatment, a key element of the developing world's trade agenda, plays a central role in satisfying the moral obligations that wealthier states owe poorer states as a matter of distributive justice. Seen in this light, the principle of special and differential treatment is more than just a political accommodation: it reflects a moral obligation stemming from the economic inequality among states..."*[19]

Dari pendapat Frank J. Garcia tersebut bisa kita tarik kesimpulan bahwa menurut beliau prinsip S&D *Treatment* merupakan elemen utama dalam agenda pembangunan perdagangan dunia, dimana S&D *Treatment* memainkan peranan penting dalam memenuhi kewajiban moral dari negara yang lebih kaya yang memiliki hutang moral terhadap negara yang lebih miskin dalam hal *distributive justice.*[20] Jadi, prinsip S&D *Treatement* lebih dari sekedar alat politik, namun lebih merefleksikan akan suatu

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[18] Frank J. Garcia melakukan perluasan terhadap konsep *justice as fairness* sebagaimana tercermin dalam *A Theory of Justice* dari John Rawls. Karena John Rawls menerapkan konsep tersebut hanya dalam lingkup nasional, dan menolak memperluas konsep tersebut dalam konteks internasional. Perluasan yang dilakukan oleh Frank J. Garcia didasarkan atas pandangannya bahwa terdapat pararelitas antara problem dalam lingkup nasional dan internasional.

[19] Frank J. Garcia, *Trade And Inequality: Economic Justice And The Developing World*, (Michigan: University of Michigan Law School, 2000).

[20] *Distributive justice* menurut Aristoteles merupakan keadilan yang sifatnya merata, dikaitkan terutama dengan alokasi hak-hak, kewajiban dan beban (tanggung jawab) diantara para anggota komunitas agar dapat dijamin keseimbangan.

kewajiban moral yang dapat membendung ketidakseimbangan antara negara-negara anggota WTO.

Menurut Ricardo Melendez-Otiz dan Ali Dehlavi, S&D *Treatment* dapat didefinisikan sebagai berikut:

> *"...... the term special and differential treatment (SDT) refers to the set of provisions in trade accords which have been negotiated to grant developing country exports preferential access to markets of developed countries, and operationalise the notion that developing countries taking part in trade negotiations have no obligation to reciprocate fully the concessions they receive. SDT also implies longer timeframes and lower levels of obligations for developing countries for adherence to the rules. It is a fundamental cross cutting issue for developing countries in the Multilateral Trading System (MTS) and is an integral part of the balance of rights and obligations in the Uruguay Round Agreements (URAs)"*[21]

Dari definisi tersebut secara singkat S&D *Treatment* dapat diartikan sebagai hak-hak khusus atau keistimewaan-keistimewaan yang diberikan oleh WTO dimana S&D *Treatment* hanya diberikan terhadap negara berkembang maupun LDC's. S&D *Treatment* juga berguna untuk mengatasi ketimpangan, khususnya yang disebabkan oleh perbedaan tingkat pembangunan antara negara maju dengan negara berkembang dan LDC's.[22] Adanya perbedaan tersebut menggambarkan suatu ketidakadilan yang harus diatasi oleh WTO yang dalam hal ini melalui S&D *Treatment*.[23]

Oleh karenanya, apa yang dilakukan oleh pemerintah Indonesia dalam proposalnya adalah sejalan dengan pandangan Frank J. Garcia tersebut. Dalam proposalnya, Indonesia menggunakan S&D *Treatment* untuk mengesampingkan ketentuan subsidi demi kepentingan *artisanal* dan *small-scale fisheries* di Indonesia. Sebagaimana kita ketahui keberadaan

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[21] Ricardo Melendez-Ortiz dan Ali Dehlavi, 'Sustainable Development and Environmental Policy Objectives: A Case for Updating Special and Differential Treatment in the WTO' (paper disampaikan dalam the CUTS/CITEE Conference on Southern Agenda for the Next Millenium, Bangalore, India, 18-19 Agustus 1999).

[22] Nandang, Eksistensi Ketentuan Khusus WTO, *op.cit.*

[23] Di sisi lain beberapa anggota WTO yang tergolong sebagai negara berkembang merasa bahwa keberadaan S&D *Treatment* dalam WTO *Agreements* merupakan suatu *empty promises.* Lihat Raj Bhala and David Gantz, "WTO Case Review : 2001", Vol.19 No.2, *Arizona Journal of International and Comparative Law*, (Arizona: 2002): 542.

S&D *Treatment* untuk melindungi *artisanal* dan *small-scale fisheries* merupakan salah satu fokus Indonesia pada proposalnya tentang *Fishery Subsidies: Proposed New Discipline* yang telah diajukan saat perundingan *rules* di WTO.

1.5 Kerangka Konsepsional

Untuk memperoleh pemahaman dan persepsi yang sama tentang makna dan definisi konsep-konsep yang digunakan dalam penulisan ini, dapat didefinisikan istilah istilah yang sering dijumpai antara lain:

Subsidi adalah kontribusi finansial yang diberikan oleh pemerintah atau *public body* atas perintah pemerintah yang diberikan terhadap individu atau perusahaan yang terhadapnya dapat membawa keuntungan.[24]

Bea Masuk Imbalan dikenakan terhadap barang impor dalam hal :

a. ditemukan adanya subsidi yang diberikan di negara pengekspor terhadap barang tersebut; dan
b. impor barang tersebut: menyebabkan kerugian terhadap industri dalam negeri yang memproduksi barang sejenis dengan barang tersebut; mengancam terjadinya kerugian terhadap industri dalam negeri yang memproduksi barang sejenis dengan barang tersebut; atau menghalangi pengembangan industri barang sejenis di dalam negeri.[25]

World Trade Organization (WTO) ialah satu-satunya organisasi internasional yang mengatur bidang perdagangan di forum multilateral. Saat ini anggota WTO berjumlah 153 negara.[26]

Fishery Subsidies: Proposed New Discipline dokumen No. TN/RL/GEN/150 adalah proposal Indonesia di WTO perihal subsidi perikanan, resolusi ini merupakan intervensi pertama kalinya oleh Indonesia dalam persidangan WTO tentang subsidi perikanan yang telah

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[24] Lihat *Article* 1.1 SCM *Agreement*.

[25] Indonesia, *Undang-Undang Tentang Perubahan Atas Undang-Undang Nomor 10 Tahun 1995 Tentang Kepabeanan,* UU No. 7 Tahun 2006, LN. No. 93 tahun 2006, TLN. No. 4661.

[26] "Understanding the WTO : The Organization, Members and Observers," <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, diakses 22 Juni 2008.

dimulai sejak tahun 2001 mencakup nota penjelasan dan usulan regulasi penyempurnaan perjanjian WTO tentang subsidi perikanan yang dapat mengadopsi kepentingan nasional Indonesia sebagai negara perikanan khususnya dan kepentingan negara berkembang umumnya.[27]

Fishery Subsidies: Proposed New Discipline dokumen No. TN/RL/GEN/150/Rev.1 tertanggal 10 September 2007 adalah revisi pertama atas proposal Indonesia *Fishery Subsidies: Proposed New Discipline* dokumen No. TN/RL/GEN/150.[28]

Fishery Subsidies: Proposed New Discipline dokumen No. TN/RL/GEN/150/Rev.2 tertanggal 9 Oktober 2007 adalah revisi kedua atas proposal Indonesia *Fishery Subsidies: Proposed New Discipline* dokumen No. TN/RL/GEN/150.[29]

Draft Consolidated Chair Text of the Anti Dumping and SCM Agreements dokumen No. TN/RL/W/213 tertanggal 30 Nopember 2007 merupakan *draft chairman's text* atas ketentuan Anti Dumping, Subsidi dan *Fisheries Subsidies* dari ketua Komite NG *on Rules* setelah melalui rangkaian proses persidangan *rules* yang berasal dari hasil kompilasi dari berbagai proposal (menyangkut isu Anti Dumping dan Subsidi) yang diperoleh dari negara-negara anggota WTO. Seluruh negara anggota WTO memiliki kewenangan untuk menyalurkan tanggapan mereka atas *draft chairman's text* tersebut.[30]

Need for Effective Special & Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies text: Submission by India, Indonesia and China dokumen No.TN/RL/GEN/155/Rev.1 tertanggal 29 May 2008 merupakan proposal bersama (*joint paper*) yang

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[27] Lihat dokumen no. TN/RL/GEN/150/Rev.2 tanggal 2 Juli 2007 perihal *Fishery Subsidies:Proposed New Discipline* (dapat diakses melalui www.wto.org).

[28] Lihat dokumen no. TN/RL/GEN/150/Rev.1 tanggal 10 September 2007 perihal *Fishery Subsidies : Proposed New Discipline* (dapat diakses melalui www.wto.org).

[29] Lihat dokumen no. No. TN/RL/GEN/150/Rev.2 tanggal 9 Oktober 2007 perihal *Fishery Subsidies: Proposed New Discipline* (dapat diakses melalui www.wto.org).

[30] Lihat dokumen no. TN/RL/W/213 tanggal 30 Nopember 2007 perihal *Draft Consolidated Chair Text of the Anti Dumping and SCM Agreements* (dapat diakses melalui www.wto.org).

diajukan oleh India, Indonesia dan China terhadap isu subsidi perikanan di Putaran Doha WTO.[31]

1.6 Metode Penelitian

Pada penelitian ini penulis menggunakan metode penelitian[32] hukum normatif. Dalam melakukan penelitian ini penulis menggunakan kajian normatif guna memahami penerapan norma-norma terhadap fakta-fakta. Penelitian ini hanya menggunakan data sekunder, karena penulis murni menggunakan penelitian kepustakaan.

Penelitian hukum normatif akan menghasilkan kajian yang bersifat preskriptif – kritis.[33] Melalui kajian preskriptif – kritis, penulis akan berusaha mencari jalan keluar untuk mengatasi masalah yang ada pada penelitian ini, salah satunya mencari solusi jalan atau upaya apa yang seyogianya dilakukan oleh Indonesia agar kepentingan Indonesia khususnya dalam bidang subsidi perikanan dapat terakomodir dengan baik di forum WTO.

Pendekatan yang digunakan dalam penelitian ini adalah pendekatan kualitatif. Seperti telah disebutkan sebelumnya, penelitian dilakukan dengan cara meneliti data sekunder yang meliputi:

a. Bahan hukum primer, yaitu bahan-bahan hukum yang mengikat, misalnya peraturan perundang-undangan.[34] Dalam hal ini penulis menggunakan Undang-Undang Nomor 10 Tahun 1995 tentang Kepabeanan sebagaimana telah diubah dengan Undang – Undang

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[31] Lihat dokumen no. TN/RL/GEN/155/Rev.1 tanggal 19 May 2008 perihal *Need for Effective Special & Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies text: Submission by India, Indonesia and China* (dapat diakses melalui www.wto.org).

[32] Metode penelitian, menurut C.F.G. Sunaryati Hartono, ialah cara atau jalan atau proses pemeriksaan atau penyelidikan yang menggunakan cara penalaran dan berpikir yang logis-analitis (logika), berdasarkan dalil-dalil, rumus-rumus dan teori-teori suatu ilmu (atau beberapa cabang ilmu) tertentu, untuk menguji kebenaran (atau mengadakan verifikasi) suatu hipotesis atau teori tentang gejala-gejala atau peristiwa alamiah, peristiwa sosial atau peristiwa hukum tertentu. Lihat C. F. G. Sunarjati Hartono, *Penelitian Hukum Di Indonesia Pada Akhir Abad Ke-20*, Cet.1., (Bandung: Alumni, 1994), hlm. 10.

[33] Agus Brotosusilo, Paradigma Kajian Empiris dan Normatif, *Materi Kuliah Teori Hukum*, Program Pascasarjana Ilmu Hukum, (Jakarta: FH-UI, 2008), hlm. 1

[34] Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI-Press, 1986), hlm. 112.

Nomor 17 Tahun 2006 Tentang Perubahan Undang-Undang Nomor 10 Tahun 1995 tentang Kepabeanan, Peraturan Pemerintah Republik Indonesia Nomor 34 Tahun 1996 Tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan, Undang-undang Nomor 31 tahun 2004 tentang Perikanan, Undang-undang Nomor 24 tahun 2000 tentang Perjanjian Internasional serta ketentuan-ketentuan dalam WTO *Agreements* salah satunya SCM *Agreements*.

b. Bahan hukum sekunder, yang memberikan penjelasan mengenai bahan hukum primer seperti rancangan undang-undang, hasil-hasil penelitian, hasil karya dari kalangan hukum, dan seterusnya.[35] Pada penelitian ini, penulis menggunakan bahan-bahan hukum yang berisi penjelasan terhadap bahan-bahan hukum primer, berupa buku, majalah, artikel, proposal Indonesia pada persidangan *rules* di WTO, makalah dalam seminar yang berkaitan dengan topik penelitian sebagai bahan hukum sekunder. Antara lain, buku-buku mengenai WTO, jurnal hukum internasional, buku-buku mengenai perdagangan internasional, dan lain-lain.

c. Bahan hukum tertier, yaitu bahan yang memberikan petunjuk maupun penjelasan terhadap bahan hukum primer dan sekunder, contohnya kamus, ensiklopedia, dan seterusnya.[36] Sebagai bahan hukum tertier penulis menggunakan beberapa kamus, yakni *Black's Law Dictionary,* Kamus *Terms of Trade,* dan lain-lain.

1.7 Sistematika Penelitian

Dalam pembuatan tesis ini penulis membagi penulisan ini dalam lima bab, yang terdiri dari:

- Bab 1 Pendahuluan. Bab pertama, merupakan Bab Pendahuluan, menguraikan latar belakang masalah, perumusan masalah, tujuan penelitian, kerangka teori, kerangka konsepsional, metode penelitian serta sistematika penulisan yang dipergunakan oleh penulis.

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[35] Soerjono Soekanto dan Sri Mamudji, *op.cit.*, hlm. 13
[36] *Ibid.*

- Bab 2 Tinjauan Umum Mengenai Subsidi. Bab ini akan membahas mengenai sejarah subsidi, subsidi dalam kerangka WTO (dimana didalamnya menjelaskan mengenai maksud dan tujuan subsidi, pengertian subsidi, kewajiban notifikasi dalam ketentuan mengenai subsidi di WTO), selain itu bab ini juga menjelaskan jenis-jenis subsidi, bea masuk imbalan (*countervailing measures*) dan *special and differential treatment* terhadap negara berkembang.
- Bab 3 Tinjauan Terhadap Proposal Indonesia Tentang *Fisheries Subsidies* (Subsidi Perikanan). Bab ini akan memusatkan pembicaraan pada beberapa proposal yang telah diajukan oleh Indonesia selama perundingan WTO *on Rules* pada putaran perundingan Doha di WTO, antara lain: proposal pertama-nya yang berjudul *Fishery Subsidies – Proposed New Disciplines* berikut revisi pertama dan kedua atas proposal tersebut. Selain itu, bab ini juga menjelaskan mengenai *draft consolidated text chair texts of the Anti Dumping and SCM Agreements* dan *join paper* antara India, Indonesia dan China perihal ketentuan S&D *Treatment* dalam kerangka *fisheries subsidies.*
- Bab 4 Pembahasan. Bab ini akan memaparkan pembahasan serta analisis dari teori-teori dan permasalahan yang terkait dengan perumusan masalah. Melalui Bab ini maka dapat diperoleh gambaran sesungguhnya yang di angkat.
- Bab 5 Penutup. Bab ini akan memuat kesimpulan sesuai dengan permasalahan yang diangkat, serta saran yang disusun berdasarkan perspektif penulis.

BAB 2
TINJAUAN UMUM MENGENAI SUBSIDI

2.1 Sejarah

Semakin tingginya tingkat saling ketergantungan dan integrasi antar negara-negara dalam ekonomi global, mendorong negara-negara untuk terlibat dalam sebuah sistem perdagangan multilateral. Kondisi tersebut semakin meningkatkan arti penting WTO sebagai badan dunia yang mengatur perdagangan global.

World Trade Organization (WTO) lahir setelah lebih dari 7 tahun Putaran Uruguay dimulai di Punta del Este. Putaran Uruguay berakhir di Jenewa pada bulan Desember 1993. Kemudian, pada bulan April 1994, para *Contracting Parties* GATT menandatangani persetujuan pendirian WTO (*Agreement on Establishing the World Trade Organisation*) di Marrakesh, Maroko. Setelah itu pada tanggal 1 Januari 1995, WTO resmi didirikan.[37]

Ketentuan didalam *Agreement on Establishing the World Trade Organization* (WTO *Agreement*) terdiri dari 4 Annex. Annex 1 terdiri atas 3 bagian yakni Annex 1 A, Annex 1B dan Annex 1C. Annex 1A terdiri dari 13 *Agreement* mengenai perdagangan barang (*trade in goods*), Annex 1B berisi ketentuan mengenai perdagangan jasa (GATS) dan Annex 1C berisi ketentuan mengenai hak kekayaan intelektual yang terkait dengan perdagangan (TRIPS). Annex 2 berisi segala ketentuan mengenai penyelesaian sengketa atau biasa disebut dengan *understanding on rules and procedures governing the settlement of disputes* (DSU). Sementara itu, Annex 3 mengatur mengenai *Trade Policy Review Mechanism* dan Annex 4 berisi ketentuan mengenai *Plurilateral Trade Agreements.*[38]

Ketentuan mengenai subsidi dan *subsidised trade* terdapat pada *Article* VI dan XVI GATT 1994. Selain terletak dalam dua ketentuan

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[37] Peter Van den Bossche, “World Trade Organization : 3.1 Overview,” <http://www.unctad.org/Templates/Search.asp?intItemID=2068&lang=1&frmSearchStr=UNCTAD%2FEDM%2FMisc.232%2FAdd.11&frmCategory=all§ion=whole>, diakses 23 Juli 2008.

[38] *Ibid.*

tersebut, ketentuan mengenai subsidi dan *subsidised trade* yang paling utama terletak pada *Agreement on Subsidies and Countervailing Measures* (SCM *Agreement*). Ketentuan subsidi diciptakan untuk mencegah terjadinya *unfair practice*. SCM *Agreement* tersebut ditujukan kepada timbulnya peningkatan daya saing yang berlebihan akibat adanya subsidi pemerintah.[39]

Awalnya keberadaan GATT 1947 tidak menjelaskan ketentuan mengenai subsidi dengan jelas dan komprehensif. *Article* XVI hanya mengatur bagaimana *contracting parties* di dalam GATT harus menotifikasikan subsidi yang memiliki efek terhadap perdagangan dan harus mempersiapkan cara untuk membatasi subsidi tersebut bila terjadi kerugian serius (*serious damage*) terhadap *contracting parties* yang lainnya.[40]

Pada saat Tokyo Round (1973-1979) *Contracting Parties* GATT melakukan negosiasi yang kemudian menghasilkan *the Agreement on Interpretation and Application of Articles* VI, XVI *and* XXIII *of the General Agreement* (kemudian dikenal dengan *Tokyo Round Subsidies Code*). Keberadaan *Tokyo Round Subsidies Code* menandai pencapaian yang substansial dari para negosiator karena *Tokyo Round Subsidies Code* tidak diragukan lagi merupakan suatu kemajuan dari ketentuan GATT mengenai notifikasi, konsultasi dan penyelesaian sengketa.[41]

Code ini bertujuan untuk mengelaborasi ketentuan dalam GATT mengenai *subsidies and countervailing measures* agar menjadi seragam serta untuk menjamin kepastian dalam pelaksanaannya. *Tokyo Round Subsidies Code* merupakan suatu *plurilateral Agreement* yang diterima oleh kurang dari 25 *Contracting Parties* termasuk Amerika Serikat dan Uni Eropa. Hal ini tentunya mencerminkan suatu keadaan dimana sesungguhnya *Code* tersebut tidak dapat mengakomodir pengertian dan

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[39] H.S. Kartadjoemena, *GATT, WTO dan Hasil Uruguay Round*, (Jakarta: UI - Press, 1997), hlm. 145.

[40] Peter Van den Bossche, *The Law and Policy of the World Trade Organization : Text, Cases, Materials*, (Cambridge: Cambridge University Press, 2005), hlm. 552.

[41] Clive Stanbrook dan Philip Bentley, *Dumping and Subsidies : The Law and Procedures Governing The Imposition of Antidumping and Countervailing Duties In The European Community*, ed.III, (London: Kluwer Law International, Ltd, 1996), hlm. 5.

ketentuan *Subsidies and Countervailing Duties* yang diharapkan oleh *Contracting Parties* lainnya. Ketidakjelasan mengenai aturan *subsidies and countervailing duties* menyebabkan banyak terjadi sengketa diantara para *contracting parties* GATT selama masa tahun 1970an-1980an.

Maka dalam masa Putaran Uruguay, mandat untuk mengadakan perundingan di bidang subsidi yang terurai dalam Deklarasi Punta Del Este yang berbunyi sebagai berikut:

> *... Negotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN Agreement on subsidies and countervailing measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade. A negotiating group will be established to deal with this issues.*[42]*...*

Berdasarkan deklarasi Punta Del Este diatas para negosiator akhirnya diinstruksikan untuk meninjau kembali keberadaan *Article* VI dan XVI GATT 1947.

Negosiasi pada saat Putaran Uruguay inilah yang akhirnya melahirkan *Agreement on Subsidies and Countervailing Measures* (SCM *Agreement*) yang kemudian menjelma ke dalam Annex 1A WTO *Agreement*. Maka kini ketentuan multilateral mengenai subsidi dan *subsidised trade* diatur melalui *Article* VI dan XVI GATT 1994, dan yang paling penting ialah melalui *SCM Agreement.*[43]

2.2 Subsidi Dalam Kerangka WTO

Terkadang pemerintah memberikan subsidi terhadap industri dalam negeri dan ekspor mereka melalui penyerahan kontribusi finansial secara langsung atau membebaskan kewajiban pembayaran yang seharusnya dibayarkan oleh para pelaku industri tersebut. Hal ini tentunya semakin meningkatkan persaingan dibidang industri dan perdagangan, yang pada situasi tertentu dapat mengakibatkan kerugian terhadap industri dan perdagangan negara lain. Oleh karena itu WTO mengatur ketentuan

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[42] H.S. Kartadjoemena, *GATT, WTO dan Hasil Uruguay Round*, *op. cit.,* hlm. 147.

[43] Peter Van den Bossche, *The Law and Policy of the World Trade Organization : Text, Cases, Materials*, *op. cit.,* hlm. 553.

perihal subsidi dan tindakan untuk melawan subsidi yang mengakibatkan kerugian melalui WTO Agreement.[44]

SCM *Agreement* berisikan ketentuan mengenai aturan multilateral yang mengatur masalah subsidi dan juga mengatur mengenai penggunaan *countervailing measures* (bea masuk imbalan) sebagai suatu *remedy* untuk mengganti kerugian yang diakibatkan oleh subsidi impor. Melalui SCM *Agreement*, setiap negara anggota WTO akan dapat mengetahui sejauh mana suatu kegiatan subsidi dapat atau tidak dapat dilakukan.[45] Subsidi yang diatur melalui SCM *Agreement* hanya berlaku terhadap perdagangan barang sedangkan untuk ketentuan yang mengatur subsidi yang menyangkut masalah pertanian dan produk pertanian diatur tersendiri melalui *Agreement on Agriculture*.[46]

2.2.1 Maksud dan Tujuan

Maksud dan tujuan dari SCM *Agreement* berdasarkan putusan panel pada kasus Brazil – *Aircraft,* adalah:

> *The object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade.*[47]

Sementara itu putusan panel Canada – *Aircraft* menyatakan:

> *The object and purpose of the SCM Agreement could more appropriately be summarised as the establishment of multilateral disciplines on the premise that some forms of government intervention distort international trade [or] have the potential to distort [international trade].*[48]

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[44] Bhagirath Lal Das, *Deficiencies Imbalances and Required Changes,* cet.II, (Penang: Thirld World Network, 2002), hlm. 45.

[45] "Subsidies and Countervailing Measures: Overview,"<http://www.wto.org/english/trarop_e/scm_e/ subs_e.htm> , diakses 7 Oktober 2008.

[46] Peter Van den Bossche, "World Trade Organization : 3.7 Subsidies and Countervailing Measures,"<http://www.unctad.org/Templates/Search.asp?intItemID=2102&lang=1&frmSearchStr=UNCTAD%2FEDM%2FMisc.232%2FAdd.15&frmCategory=all§ion=whole>, diakses 19 Juli 2008.

[47] Peter Van den Bossche, *The Law and Policy of the World Trade Organization : Text, Cases, Materials*, *op.cit.,* hlm. 553.

[48] *Ibid.*

Dari kedua putusan panel diatas, dapat kita tarik kesimpulan bahwa maksud dan tujuan dari SCM *Agreement* ialah sebagai suatu sarana dalam forum multilateral (dalam hal ini WTO) untuk mengatasi masalah subsidi yang dapat menganggu perdagangan internasional.

Struktur SCM *Agreement* itu sendiri dibagi kedalam 11 (sebelas) bagian. Bagian I mengatur bahwa SCM *Agreement* hanya berlaku terhadap subsidi yang secara spesifik diberikan terhadap perusahaan atau industri. Bagian ini juga mengatur mengenai definisi subsidi dan konsep subsidi. Bagian II, III dan IV berisi penjelasan (baik ketentuan maupun prosedur) atas jenis-jenis subsidi yaitu: *prohibited, actionable* dan *non-actionable*. Kemudian bab V menjelaskan persyaratan substantif dan prosedur yang harus dipenuhi sebelum anggota WTO menerapkan bea masuk imbalan dalam melawan subsidi impor. Bagian VI dan VII berisikan struktur institusi dan notifikasi / *surveillance modalities* untuk pelaksanaan SCM *Agreement*. Bagian VIII berisikan aturan mengenai *special and differential* untuk berbagai kategori negara berkembang. Bagian IX berisikan ketentuan transisi terhadap negara maju dan negara anggota yang dulunya menggunakan sistem ekonomi terpusat (*former centrally-planned economy members*). Terakhir Bagian X dan XI berisikan mengenai penyelesaian sengketa dan ketentuan akhir.[49]

Konsep dan definisi subsidi secara detail dan komprehensif dapat ditemukan sebagian besar pada SCM *Agreement*. Selain melalui SCM *Agreement* subsidi juga diatur melalui *Agreement* on Agriculture (hingga saat ini isu subsidi dalam bidang perdagangan jasa masih diagendakan untuk dibahas pada negosiasi-negosiasi yang akan datang).[50]

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[49] Peter Van den Bossche, "World Trade Organization : 3.7 Subsidies and Countervailing Measures,"*op.cit.*

[50] Alan Sykes, "The Economics of WTO Rules and Subsidies and Countervailing Measures", section 6, (Makalah disampaikan pada One-Day Seminar on WTO *Agreement* on Subsidies and Countervailing Measures : Law and Practice, Jakarta 24 Agustus 2006), hlm. 00221.

2.2.2 Pengertian

Pengertian subsidi secara harfiah dapat diartikan sebagai adalah suatu keuntungan ekonomi yang diberikan oleh pemerintah terhadap individu atau perusahaan.[51] Sedangkan menurut *Black's Law Dictionary* definisi subsidi ialah:

> "*a grant, usually made by the government, to any enterprise whose promotion is considered to be in the Public Interest. Although governments sometimes make directs payments (such as cash grants), subsidies are usually indirect. They may take in the form of research –and- development support, tax breaks, provision of raw materials at below market prices, or low interest loans or low interest export credits guaranteed by a government agency.*"[52]

Dengan kata lain, subsidi diartikan sebagai bantuan atau hibah yang diberikan oleh pemerintah terhadap perusahaan manapun yang berhubungan dengan kepentingan masyarakatnya. Meskipun kadang-kadang bantuan tersebut diberikan dalam bentuk dana langsung/tunai (misalnya bantuan uang), namun biasanya subsidi diberikan secara tidak langsung. Jenis subsidi dapat berupa bantuan penelitian dan pembangunan, pengurangan pajak, bahan baku dengan harga murah atau bunga pinjaman yang rendah atau bunga pinjaman ekspor yang dijamin oleh instansi pemerintah.

Namun sesungguhnya GATT dan *Tokyo Round Subsidies Code* sendiri tidak mencantumkan secara jelas mengenai pengertian apa itu 'subsidi'.[53] Meskipun demikian, *Article* 1 SCM *Agreement* menjelaskan beberapa elemen yang dapat mengindikasikan keberadaan subsidi yaitu:

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

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

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[51] Thomas F. O'Herron, *ed., Terms of Trade: The Language of International Trade Policy, Law and Diplomacy*, ed. III, (Washington DC: IAS Publishing, 1999), hlm, 149.

[52] Bryan A. Garner, *Black's Law Dictionary,* edisi.8, (USA: West, Thomson Business, 2004), hlm. 1469.

[53] Alan Sykes, *op.cit.,* hlm. 00221.

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

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

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

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

or

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

and

(b) a benefit is thereby conferred.

Jadi, pengertian subsidi menurut *Article* 1.1 SCM Agreemet secara luas dapat diartikan sebagai suatu kontribusi finansial (*financial contribution*) yang diberikan oleh pemerintah atau *public body,* yang dapat memberikan keuntungan. Subsidi dianggap ada apabila terdapat kontribusi finansial oleh pemerintah atau badan pemerintah dalam wilayah suatu negara (anggota WTO), yang melibatkan hal-hal sebagai berikut antara lain: transfer dana langsung, penerimaan yang hilang atau tidak dipungut, pengadaaan barang atau jasa oleh pemerintah, atau pembayaran oleh pemerintah pada mekanisme pendanaan sehingga menimbulkan keuntungan dari kontribusi ini sehingga dapat memberikan keuntungan terhadap individu atau perusahaan-perusahaan tertentu.[54] Berikut ini 3 (tiga) elemen pokok atas konsep subsidi, yaitu:

[54] Lihat *Article* 1 paragraf 1 dan 2 SCM *Agreement*.

a. *A financial contribution* (kontribusi finansial),

Berdasarkan *Article* 1.1 SCM *Agreement*, untuk dapat dikategorikan sebagai subsidi harus ada indikasi bahwa terdapat suatu *financial contribution.* Yang dapat digolongkan sebagai suatu *financial contribution* berdasarkan *Article* 1.1 SCM *Agreement* adalah:

- suatu kegiatan pemerintah melibatkan penyerahan dana secara langsung (misalnya hibah, pinjaman, dan penyertaan), kemungkinan pemindahan dana atau kewajiban secara langsung (misalnya jaminan hutang) (*Article* 1.1 (a)(1)(i)),
- pendapatan pemerintah yang seharusnya sudah dibayar menjadi hapus atau tidak ditagih (misalnya insentif fiskal seperti keringanan pajak) (*Article* 1.1 (a)(1)(i)),
- pemerintah menyediakan barang atau jasa selain dari infrastruktur umum (*Article* 1.1 (a)(1)(ii)),
- pemerintah melakukan pembelian barang (*Article* 1.1(a)(1)(i)), dan
- pemerintah melakukan pembayaran pada mekanisme pendanaan, atau mempercayakan atau menunjuk suatu badan swasta (*Article* 1.1 (a)(1)(iv)).

b. *A financial contribution by a government or any public body* (kontribusi finansial yang dilakukan oleh pemerintah),

Financial contribution yang dimaksud dalam *Article* 1.1 SCM *Agreement* haruslah merupakan kontribusi finansial yang diberikan oleh pemerintah atau *public body*, termasuk otoritas regional dan lokal dan juga Badan Usaha Milik Negara (BUMN). Namun, apabila terdapat suatu *financial contribution* yang dilakukan oleh perusahaan swasta berdasarkan penyerahan atau petunjuk dari pemerintah agar suatu kegiatan tertentu (yang telah memenuhi salah satu

elemen yang terdapat pada *Article* 1.1 (a)(1)(i) sampai dengan (iii) *Article* 1.1 (a)(1)(iv)) untuk dilaksanakan oleh perusahaan swasta yang bersangkutan dapat juga dikategorikan sebagai *financial contribution* yang dilakukan oleh pemerintah.[55]

c. *A financial contribution conferring a benefit* (kontribusi finansial yang memberikan keuntungan).

Financial contribution oleh pemerintah yang dikategorikan sebagai subsidi sebagaimana tercantum dalam *Article* 1.1 SCM *Agreement* hanya *financial contribution* yang menimbulkan keuntungan (*confers a benefit*).

Sebagaimana disebutkan sebelumnya agar suatu kontribusi finansial dapat dikategorikan sebagai subsidi, subsidi tersebut harus dilakukan oleh atau menurut perintah dari pemerintah atau *public body*. Maka, SCM *Agreement* berlaku tidak hanya terhadap pemerintah nasional namun berlaku juga bagi pemerintahan sub-nasional dan *public body* sebagai perusahaan swasta serta badan usaha milik pemerintah.[56]

Secara logika suatu "*benefit*" dapat timbul apabila seseorang, badan hukum, atau sekelompok orang, secara nyata sebagai penerima memperoleh atau mendapatkan sesuatu dari pihak pemberi.[57] Kontribusi finansial itupun harus memberikan keuntungan, karena suatu kontribusi finansial tidak dapat dikategorikan sebagai subsidi apabila tidak memberikan "*benefit*."[58]

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[55] Lihat *Article* 1.1(a)(i)(iv) SCM *Agreement.*

[56] "Subsidies and Countervailing Measures: Overview," <http://www.wto.org/english/trarop_e/scm_e/ subs_e.htm> , 7 Oktober 2008.

[57] Peter Van den Bossche, "World Trade Organization : 3.7 Subsidies and Countervailing Measures," *op.cit*.

[58] Dalam konteks Countervailing Duties, *Article* 14 SCM *Agreement* mengatur mengenai beberapa tatacara untuk dapat menentukan beberapa kategori yang dapat menunjukkan tindakan

Dengan adanya subsidi, harga barang yang diproduksi di negara pensubsidi akan menjadi lebih rendah. Oleh karena itu, kepentingan negara anggota WTO lainnya dapat terganggu. Mereka akan terkena kerugian (*adverse effect*) dari barang yang disubsidi diatas.

Dalam hal ini terdapat tiga kemungkinan dimana subsidi dapat mendistorsi perdagangan, sebagaimana dikemukakan oleh Michael J. Trebilcock & Robert Howze berikut ini:

- Pertama, jika negara A mensubsidi ekspornya ke negara B, menyebabkan produsen domestik di negara B kehilangan daya saing, negara B dapat menjawab dengan mengenakan tarif terhadap impor barang tersebut.
- Kedua, jika negara A memberikan subsidi pada produksi domestik, menurunkan daya saing ekspor negara B ke negara A, satu-satunya tindakan yang dapat dilakukan oleh negara B adalah menjawabnya dengan subsidi yang setara atau menyampaikan tentang pelanggaran kepada dewan resolusi sengketa GATT.
- Ketiga, jika negara A mensubsidi ekspor ke negara C, sehingga terjadi penurunan daya saing ekspor negara B ke negara C, kembali ada kemungkinan negara B dapat melakukan secara sepihak dengan menjawab melalui subsidi yang setara.[59]

Selain kontribusi finansial dan benefit, ada syarat lain yang harus dipenuhi untuk dapat melawan tindakan subsidi yakni *specificity* / spesifik.[60] Menurut *Article* 2 SCM *Agreement* hanya kontribusi finansial yang secara spesifik diberikan kepada perusahaan, industri atau kelompok-kelompok perusahaan atau

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yang menimbulkan benefit. Sementara itu didalam ketentuan multilateral belum ada definisi khusus mengenai apa itu benefit.

[59] Yulianto Syahyu, *Hukum Antidumping di Indonesia : Analisis dan Panduan Praktis*, (Jakarta: Ghalia Indonesia, 2004), hlm. 27.

[60] United Nations Conferences on Trade and Development, "*Subsidies, Countervailing Measures and Negara berkembang : With A Focus on The Agreement of Subsidies and Countervailing Measures*," (laporan dibuat oleh Sekretariat UNCTAD, No. UNCTAD/DITC/COM/23), hlm. 4.

kelompok-kelompok industri yang dapat dikategorikan sebagai subsidi. SCM *Agreement* membagi kategori 'spesifik' ke dalam empat kategori, yakni:

- *Enterprise specificity.* Kategori ini merupakan situasi dimana pemerintah memberikan subsidi kepada target-nya yakni terhadap suatu perusahaan atau beberapa perusahaan.[61]
- *Industry specificity*. Situasi dimana pemerintah mentargetkan subsidi kepada suatu sektor tertentu atau beberapa sektor.[62]
- *Regional specificity.* Pemerintah mentargetkan pemberian subsidinya kepada produsen-produsen yang berada dalam suatu wilayah yang sama.[63]
- *Prohibited subsidies.* Keadaan dimana pemerintah mentargetkan untuk memberikan subsidinya apabila barang tersebut diekspor atau memberikan subsidi terhadap pengekspor yang menggunakan *domestic inputs* (barang-barang produksi dalam negeri).[64]

Maka dapat kita tarik kesimpulan bahwa tiga hal utama yang dapat membuktikan keberadaan subsidi ialah adanya kontribusi finansial baik yang dilakukan atau diamanatkan oleh pemerintah yang *beneficial* dan sifatnya spesifik.

2.2.3 Notifikasi

Ketentuan SCM *Agreement* mengharuskan negara anggotanya untuk melakukan notifikasi terhadap keberadaan subsidi spesifik yang ada di negara mereka masing-masing (yang berada pada seluruh level pemerintahan dan meliputi seluruh sektor barang, termasuk pertanian) kepada *Committee on Subsidy and Countervailing Measures* (komite SCM). Tujuan notifikasi

[61] Lihat *Article* 2.1SCM *Agreement.*
[62] Lihat *Article* 2.1 SCM *Agreement.*
[63] Lihat *Article* 2.2 SCM *Agreement.*
[64] Lihat *Article* 2.3 SCM *Agreement.*

terhadap keberadaan subsidi adalah sebagai subjek diskusi dan peninjauan oleh komite SCM.[65]

Selain terhadap ketentuan subsidi, keharusan notifikasi juga wajib dilakukan terhadap tindakan bea masuk imbalan. Berdasarkan Seluruh negara anggota wajib untuk menotifikasikan ketentuan & peraturan perundang-undangan mereka yang mengatur mengenai bea masuk imbalan kepada komite SCM. Negara anggota juga diwajibkan untuk menotifikasikan pengenaan bea masuk imbalan yang sedang mereka lakukan pada saat mereka melakukan pengenaan tersebut. Selain kewajiban-kewajiban tersebut negara anggota juga wajib menotifikasikan otoritas / *authority* dalam negeri mereka masing-masing yang berwenang untuk menginisiasi dan melakukan investigasi terhadap pengenaan bea masuk imbalan.[66]

2.2.4 Jenis – Jenis Subsidi

SCM *Agreement* membagi subsidi kedalam tiga kategori, yakni *prohibited, actionable* dan *non-actionable*.

2.2.4.1 *Prohibited Subsidies* (Subsidi yang Dilarang)

Adakalanya pemerintah memberikan subsidi kepada perusahaan untuk mengejar target ekspor atau mengharuskan penggunaan barang-barang domestik daripada barang impor. Hal ini dilarang karena akan mengakibatkan distorsi perdagangan internasional dan mengganggu perdagangan negara lain. Tindakan pemberian subsidi seperti ini dapat dibawa ke Badan Penyelesaian Sengketa / *Dispute Settlement Body* WTO (DSB).

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[65] Lihat *Article* 25 SCM *Agreement.*

[66] "Subsidies and Countervailing Measures: Overview," <http://www.wto.org/english/trarop_e/scm_e/ subs_e.htm> , 7 Oktober 2008.

Prohibited Subsidies yang dikenal juga sebagai *red light subsidies* diatur melalui *Article* 3 SCM *Agreement*, sebagaimana tercantum dalam paragraf pertamanya:

> *"...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, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I,*
> *(b)subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic products..."*

Pendek kata, negara anggota WTO dilarang untuk memberikan atau melakukan *export subsidies* atau *import substitution subsidies* (mendahulukan penggunaan barang-barang hasil produksi dalam negeri dibandingkan barang impor).[67] Berikut ini penjelasan atas *export subsidies* dengan *import subsidies* yakni:

a. *Export Subsidies* (Subsidi Ekspor)

Export subsidies merupakan jenis subsidi yang menurut ketentuan formal atau menurut kenyataan,[68] baik semata-mata atau sebagai satu dari beberapa persyaratan lainnya berkaitan dengan dan menyangkut masalah kinerja ekspor.[69] Dibawah ini merupakan daftar *non-exhaustive list export subsidies* antara lain:

(a) Penyediaan subsidi langsung oleh pemerintah kepada perusahaan atau suatu industri tergantung pada persyaratan kinerja ekspor,

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[67] Indonesian Trade Assistance Project, "METI Chapter 6 : Subsidies and Countervailing Measures," section 7, (Makalah disampaikan pada One-Day Seminar on WTO *Agreement* on Subsidies and Countervailing Measures : Law and Practice, Jakarta 24 Agustus 2006), hlm. 0240.

[68] Biasa dikenal dengan *de facto* dan *de jure.*

[69] H.S. Kartadjoemena, *op.cit.,* hlm. 152.

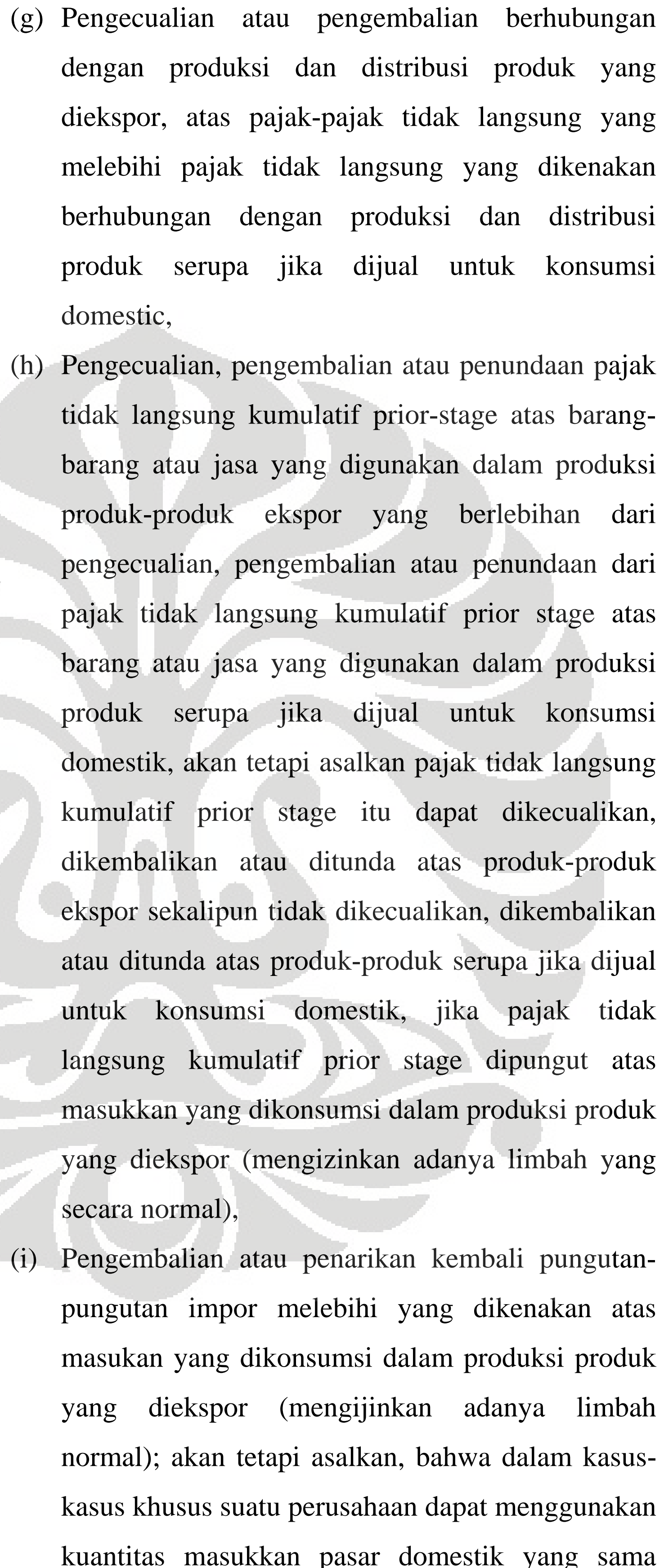
(b) Rencana penahanan mata uang atau praktek-praktek sejenis yang menyangkut bonus atas ekspor,

(c) Biaya transport dan muatan dalam negeri atas pengapalan ekspor, disediakan atau dimandatkan oleh pemerintah, dengan syarat lebih menguntungkan daripada pengapalan domestik,

(d) Ketentuan pemerintah atau instansi baik secara langsung atau tidak langsung melalui pola yang dimandatkan pemerintah atas produk atau jasa, baik impor maupun domestik, yang digunakan dalam produksi barang ekspor, dengan nilai atau syarat yang lebih menguntungkan daripada yang disediakan untuk produk atau jasa yang sejenis atau yang bersaing secara langsung untuk digunakan dalam produksi barang-barang untuk konsumsi domestik, jika (dalam hal produk) kondisi dan persyaratan yang ada lebih menguntungkan daripada nilai dan persyaratan yang telah tersedia secara komersial di pasar dunia terhadap eksportir mereka,

(e) Pengembalian, baik penuh maupun sebagian, atau penangguhan yang secara tegas dikaitkan dengan ekspor, atas pajak-pajak langsung atau iuran kesejahteraan sosial yang dibayar oleh perusahaan-perusahaan industrial atau komersial,

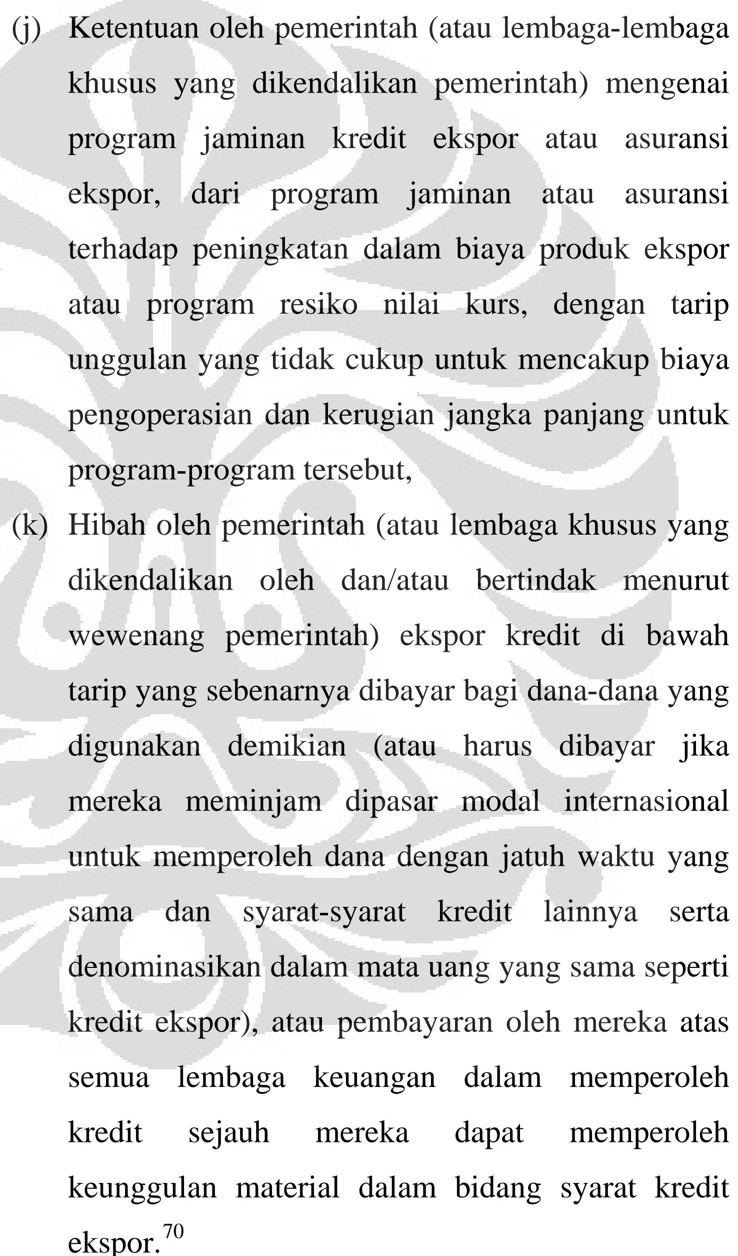
(f) Penyesuaian penghitungan melalui pengurangan khusus yang secara langsung dikaitkan dengan ekspor atau kinerja ekspor, yang melebihi pengurangan yang diberikan berhubungan dengan produksi untuk konsumsi domestik, dalam perhitungan dasar perhitungan pajak langsung,



(g) Pengecualian atau pengembalian berhubungan dengan produksi dan distribusi produk yang diekspor, atas pajak-pajak tidak langsung yang melebihi pajak tidak langsung yang dikenakan berhubungan dengan produksi dan distribusi produk serupa jika dijual untuk konsumsi domestic,

(h) Pengecualian, pengembalian atau penundaan pajak tidak langsung kumulatif prior-stage atas barang-barang atau jasa yang digunakan dalam produksi produk-produk ekspor yang berlebihan dari pengecualian, pengembalian atau penundaan dari pajak tidak langsung kumulatif prior stage atas barang atau jasa yang digunakan dalam produksi produk serupa jika dijual untuk konsumsi domestik, akan tetapi asalkan pajak tidak langsung kumulatif prior stage itu dapat dikecualikan, dikembalikan atau ditunda atas produk-produk ekspor sekalipun tidak dikecualikan, dikembalikan atau ditunda atas produk-produk serupa jika dijual untuk konsumsi domestik, jika pajak tidak langsung kumulatif prior stage dipungut atas masukkan yang dikonsumsi dalam produksi produk yang diekspor (mengizinkan adanya limbah yang secara normal),

(i) Pengembalian atau penarikan kembali pungutan-pungutan impor melebihi yang dikenakan atas masukan yang dikonsumsi dalam produksi produk yang diekspor (mengijinkan adanya limbah normal); akan tetapi asalkan, bahwa dalam kasus-kasus khusus suatu perusahaan dapat menggunakan kuantitas masukkan pasar domestik yang sama



(j) Ketentuan oleh pemerintah (atau lembaga-lembaga khusus yang dikendalikan pemerintah) mengenai program jaminan kredit ekspor atau asuransi ekspor, dari program jaminan atau asuransi terhadap peningkatan dalam biaya produk ekspor atau program resiko nilai kurs, dengan tarip unggulan yang tidak cukup untuk mencakup biaya pengoperasian dan kerugian jangka panjang untuk program-program tersebut,

(k) Hibah oleh pemerintah (atau lembaga khusus yang dikendalikan oleh dan/atau bertindak menurut wewenang pemerintah) ekspor kredit di bawah tarip yang sebenarnya dibayar bagi dana-dana yang digunakan demikian (atau harus dibayar jika mereka meminjam dipasar modal internasional untuk memperoleh dana dengan jatuh waktu yang sama dan syarat-syarat kredit lainnya serta denominasikan dalam mata uang yang sama seperti kredit ekspor), atau pembayaran oleh mereka atas semua lembaga keuangan dalam memperoleh kredit sejauh mereka dapat memperoleh keunggulan material dalam bidang syarat kredit ekspor.[70]

[70] Lihat Annex I *Illustrative List of Export Subsidies,* SCM *Agreement.*

b. *Import Substitution Subsidies*

Ketentuan mengenai *import substitution subsidies* tertuang dalam *Article* 3.1 (b) SCM *Agreement*. Jenis subsidi ini bertujuan baik semata-mata atau sebagai salah satu persyaratannya mengharuskan penggunaan produk domestik.[71] Jadi, *import substitution subsidies* atau dikenal juga dengan '*local content subsidies*' merupakan subsidi yang lebih memprioritaskan penggunaan produk domestik dibandingkan produk impor.

SCM *Agreement* juga mengatur upaya hukum yang dapat dilakukan terhadap prohibited subsidies yakni melalui *Article* 4 SCM *Agreement*. Dimana berdasarkan Article 4 tersebut apabila anggota WTO merasa bahwa telah terjadi tindakan subsidi yang tergolong prohibited subsidies maka terhadap anggota WTO tersebut diperbolehkan untuk memohon dilakukannya konsultasi. Apabila proses konsultasi gagal, sengketa tersebut bisa diajukan ke panel DSB. Jika DSB memutuskan bahwa subsidi yang diberikan termasuk dalam *prohibited subsidies*, maka berdasarkan *Article* 4.7 SCM *Agreement*:

> *"...the Panel shall recommend that the subsidizing Members withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn..."*

Maksud dari *Article* diatas adalah bahwa apabila DSB menemukan bahwa jika memang benar telah terjadi pelanggaran yang terkategorikan sebagai *prohibited subsidies* baik itu berupa *export subsidies* maupun *import substitution subsidies*, negara tersebut

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[71] H.S. Kartadjoemena, *op.cit.,* hlm. 152.

diharuskan untuk segera mencabut aturannya mengenai subsidi. Jika tidak dipatuhi, negara penggugat diperbolehkan melakukan tindakan imbalan (*countervailing measures*) karena dapat merugikan industri domestiknya.[72]

2.2.4.2 *Actionable Subsidies* (Subsidi yang Dapat Ditindak)

Actionable Subsidies atau bisa juga disebut sebagai *yellow-light subsidies* merupakan jenis subsidi yang tidak dilarang namun apabila menimbulkan kerugian (*adverse effect*), misalnya berupa *serious prejudice* terhadap kepentingan negara anggota lainnya, maka terhadap subsidi tersebut diperbolehkan untuk di *challenge.*[73] *Article* 5 (a) sampai (c) SCM *Agreement* membagi 3 jenis *adverse effect* yang dapat merugikan kepentingan negara anggota WTO, antara lain[74]:

a. *Injury* (kerugian) terhadap industri dalam negeri negara anggota lainnya (*Article* 5 (a)),

Kerugian terhadap industri dalam negeri (*domestic industry*) dalam hal ini ada kaitannya dengan konsep '*like products*'. Karena kerugian yang diderita oleh suatu negara pengimpor berasal dari barang sejenis / *like products* bersubsidi dari negara pengekspor. Berdasarkan catatan kaki 46 SCM *Agreement*,

> *".. a product which identical, i.e. alike in all respects to the product under consideration, or in the absemce of such product which, although not alike in all respects has characteristic closely resembling those of the product under consideration..."*

[72] Departemen Luar Negeri, *Sekilas WTO (World Trade Organization), op.cit.*, hlm. 40.
[73] Indonesia Trade Assistance Project, *op.cit.,* hlm. 00240.
[74] Marc Benitah, *The Law of Subsidies under the GATT/WTO System,* (London: Kluwer Law International, 2001), hlm. 30.

Berdasarkan *footnote* tersebut yang disebut dengan barang *like products* adalah produk yang identik. Dalam hal ini identik ialah kesamaan terhadap berbagai unsur pada produk dimaksud secara menyeluruh. Namun, walaupun produk dimaksud tidak sama secara keseluruhan setidaknya produk tersebut memiliki karakteristik yang hampir mirip.

b. *Nullification or Impairment* (penghapusan atau pengurangan) terhadap keuntungan yang diderita baik secara langsung maupun tidak langsung terhadap negara anggota lainnya menurut GATT 1994 khususnya keuntungan dari konsesi tarif yang sudah diikat[75] (*Article* 5 (b)), dan

c. *Serious Prejudice* (kerugian yang serius) terhadap kepentingan negara anggota lainnya (*Article* 5(c)).[76] Terhadap *serious prejudice* harus dikenakan batasan agar kerugian di pihak lain dapat diatasi.[77]

Upaya hukum terhadap *actionable subsidies* diatur melalui *Article* 7 SCM *Agreement*. Jika panel DSB memutuskan bahwa telah terjadi suatu tindakan subsidi yang tergolong dalam *actionable subsidies* maka negara pensubsidi tersebut harus:

> *"... take appropriate steps to remove the adverse effect or... withdraw the subsidy ...*[78]*"*

Berdasarkan *Article* 7.8 SCM *Agreement*, negara pensubsidi harus melakukan tindakan-tindakan tertentu yang dapat menghilangkan *adverse effect* yang diderita oleh negara anggota WTO lainnya. Selain melalui pencabutan subsidi

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[75] H.S. Kartadjoemena, *op.cit.,* hlm. 152.
[76] Lihat *Article* 5 SCM *Agreement*.
[77] H.S. Kartadjoemena, *op.cit.,* hlm. 152.
[78] Lihat *Article* 7.8 SCM *Agreement.*

maupun menghapuskan *adverse effect* yang telah diderita negara anggota WTO lainnya, negara pensubsidi juga bisa memberikan kompensasi yang telah disepakati oleh kedua negara yang bersengketa.[79]

2.2.4.3 *Non-Actionable Subsidies* (Subsidi yang Diperbolehkan)

Non-Actionable Subsidies atau biasa disebut dengan *green light subsidies* merupakan subsidi yang sifatnya non-spesifik.[80] Subsidi non-spesifik ini merupakan yang khusus diberikan untuk riset dan kegiatan pengembangan, subsidi untuk pembangunan daerah, dan bantuan yang ditujukan untuk proses adaptasi terhadap peraturan mengenai lingkungan atau hukum yang baru.[81] Ada syarat-syarat yang harus dipenuhi oleh ketiga jenis kegiatan subsidi non-spesifik diatas, antara lain:

a. Subsidi yang khusus diberikan untuk riset dan kegiatan pengembangan. Terhadap subsidi yang diberikan untuk riset dan kegiatan pengembangan harus berisikan tidak lebih dari 75% pengeluaran, terhadap aktivitas pengembangan yang tidak kompetitif harus tidak lebih dari 50%. Terdapat pula batasan atas penggunaan terhadap dana yang mana yang dapat digunakan, misalnya untuk memenuhi biaya gaji,
b. Subsidi pembangunan daerah. Subsidi ini mencakup bantuan untuk daerah tertinggal di dalam wilayah negara anggota ketika subsidi ini diberikan dibawah skema umum pembangunan daerah. Meskipun demikian subsidi ini tidak harus memiliki syarat specificity didalam wilayahnya dan wilayah yang

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[79] Lihat *Article* 7.9 SCM *Agreement.*
[80] Lihat *Article* 8 SCM *Agreement.*
[81] Peter Van den Bossche, *The Law and Policy of the World Trade Organization : Text, Cases, Materials*, *op.cit.,* hlm. 574.

dilibatkan tersebut harus telah memiliki tingkat pengangguran yang sedikitnya 10% lebih tinggi dari rata-rata nasional atau pendapatan yang setidaknya 15 % lebih rendah.

c. Subsidi untuk konservasi lingkungan. Subsidi untuk konservasi diberikan untuk mempromosikan peningkatan mutu dari peralatan yang ada kepada kriteria lingkungan yang baru yang ditetapkan dalam suatu peraturan adalah diperbolehkan ketika peningkatan tersebut mengenakan atau membebankan rintangan yang berat atau beban finansial perusahaan dan subsidi itu harus memenuhi syarat-syarat sebagai berikut: bahwa pemberian subsidi tersebut hanya boleh diberikan sebanyak satu kali, jumlah subsidi yang diberikan tidak melebihi 20% pengeluaran, subsidi tersebut tidak mencakup biaya untuk mengganti atau mengoperasikan peralatan, subsidi tersebut secara langsung berhubungan dan seimbang dengan rencana perusahaan untuk mengurangi gangguan dan polusi, subsidi tidak mencakup simpanan biaya pabrikan yang mungkin dapat diterima, subsidi tersedia untuk semua perusahaan yang dapat mengadopsi peralatan baru dan atau proses produksi.[82]

Non-actionable subsidies tidak dapat diajukan ke DSB dan tidak dapat dikenai tindakan imbalan. Namun apabila terdapat suatu tindakan *non-actionable subsidies* yang terbukti mendatangkan kerugian yang dapat mengakibatkan industri dalam negeri kesulitan untuk mengatasi kerugian yang mereka derita maka terhadap *non-actionable subsidies* ini diperbolehkan untuk di *challenge.*[83] Keberadaan *non-actionable subsidies* hanya berlaku 5 (lima) tahun terhitung

[82] Alan Sykes, *op.cit.,* hlm. 00211.
[83] *Ibid.*

dari lahirnya WTO *Agreement*.[84] Jadi semenjak tanggal 1 January 2000, *non-actionable subsidies* telah dihapuskan.

2.3 *Countervailing Measures* (Tindakan Imbalan)

Prohibited dan actionable subsidies yang menyebabkan *injury* terhadap industri dalam negeri selain dapat di *challenge* secara multilateral juga dapat di *offset* melalui penerapan bea masuk imbalan. Negara anggota WTO yang merasa industri dalam negerinya mengalami *injury* dikarenakan adanya subsidi impor bisa memilih dua cara penyelesaian baik secara multilateral maupun unilateral.[85] Menurut *Article* VI GATT 1994 dan footnote 36 SCM *Agreement* tindakan imbalan adalah:

> "*... a special duty levied for the purpose of offsetting.. any subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise ...*"

Berdasarkan *Article* diatas tindakan imbalan dapat diartikan sebagai suatu kegiatan untuk menghapuskan kerugian yang diderita akibat adanya subsidi baik secara langsung maupun tidak langsung terhadap proses pembuatan, produksi atau ekspor atas suatu barang / produk dalam bentuk pembebanan bea masuk.

Menurut SCM *Agreement* penerapan tindakan imbalan berlaku untuk semua jenis barang, termasuk produk pertanian.[86] Tindakan imbalan dapat diterapkan oleh negara anggota WTO setelah melalui proses investigasi dan melalui kriteria tertentu. Sebagaimana ditegaskan dalam *Article* 10 SCM *Agreement*:

> *"... Members shall take all necessary steps to ensure that the imposition of a countervailing dury on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed*

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[84] Lihat *Article* 31 SCM *Agreement.*

[85] Peter Van den Bossche, *The Law and Policy of the World Trade Organization : Text, Cases, Materials*, *op.cit.,* hlm. 574.

[86] United Nations Conferences on Trade and Development, *op.cit.,* hlm. 7.

pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement of Agriculture ...

Berdasarkan *Article* diatas, tindakan ialah suatu instrumen yang dapat diterapkan oleh negara anggota WTO setelah melalui proses investigasi dan melalui kriteria tertentu. Terdapat tiga hal yang perlu diperhatikan di dalam pengenaan bea masuk imbalan, antara lain:

a. Pada kondisi yang bagaimana suatu tindakan imbalan dapat dikenakan terhadap subsidi impor,

Negara anggota WTO hanya dapat mengenakan tindakan imbalan apabila memenuhi kondisi-kondisi sebagai berikut:

(a) Terdapat subsidi impor, [87]

(b) Terjadinya injury terhadap industri dalam negeri atas produk sejenis sebagaimana diatur dalam *Article* 15 dan 16 SCM *Agreement*, dan

(c) Terdapat *causal link* antara subsidi impor dan *injury* terhadap industri dalam negeri.[88]

Jadi, negara anggota WTO tidak dimungkinkan mengenakan tindakan imbalan apabila tidak ada subsidi impor, *injury* yang diderita industri dalam negeri dan *causal link* antara subsidi impor dengan *injury*-nya.[89]

b. Bahwa pelaksanaan suatu proses investigasi mengarah terhadap pengenaan tindakan imbalan,

Seperti telah disebutkan sebelumnya salah satu kriteria untuk melakukan pengenaan bea masuk imbalan tindakan imbalan, *complainant party* diharuskan melalui proses investigasi. Penting bagi negara anggota lainnya untuk mengetahui bagaimana proses investigasi dilakukan. Hal ini diperlukan guna menjamin bahwa investigasi dilakukan secara transparan, selain itu berguna agar seluruh pihak yang berkepentingan memiliki kesempatan untuk

[87] Subsidi impor dalam hal ini adalah subsidi menurut Article 1, 2 dan 14 SCM *Agreement.*
[88] *Lihat Article* VI GATT 1994 dan *Article* 10 SCM *Agreement.*
[89] United Nations Conferences on Trade and Development, *op.cit.,* hlm. 7.

mempertahankan kepentingan mereka, dan yang terakhir berguna agar *investigating authorities*[90] dapat menjelaskan dengan baik dasar putusan mereka.[91]

c. Sistem penerapan tindakan imbalan.

Terdapat 3 (tiga) jenis tindakan imbalan yang diatur di dalam SCM *Agreement*, yakni:

(a) *Provisional countervailing measures,*

Setelah menemukan keputusan awal bahwa terdapat subsidi yang menyebabkan atau mengancam terjadinya injury[92] terhadap industri dalam negeri, negara importir dapat mengenakan *provisional countervailing measures* terhadap subsidi tersebut.[93] Namun, pengenaan *provisional countervailing measures* tersebut tidak boleh diterapkan lebih awal 60 hari dari tanggal inisiasi investigasi. Selain itu penerapannya harus dibatasi sesingkat mungkin dan tidak boleh lebih dari empat bulan.[94]

(b) *Voluntary undertakings, dan*

Keberadaan investigasi dapat ditunda atau diakhiri tanpa adanya pengenaan *provisional measures* atau *countervailing duties*, apabila terdapat *voluntary undertaking* yang dianggap cukup, yakni:

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[90] *Investigating authorities* di Indonesia adalah KADI (Komisi Anti Dumping Indonesia).

[91] Lihat Peter Van den Bossche, *The Law and Policy of the World Trade Organization : Text, Cases, Materials*, *op.cit.,* hlm. 576.

[92] Kerugian yang mungkin timbul dari subsidi antara lain menggantikan atau menghalangi impor produk sejenis dari anggota lain ke pasar negara pemberi subsidi, menggantikan atau menghalangi ekspor produk sejenis anggota lain dari pasar negara ketiga, pemotongan harga yang jauh lebih rendah dari produk yang disubsidi dibandingkan dengan harga produk sejenis dari negara lain dalam pasar yang sama atau penekanan harga yang besar, penurunan harga atau kehilangan pangsa pasar dalam pasar yang sama dan kenaikan pangsa pasar dunia dari negara yang memberi subsidi.

[93] Lihat *Article* 17 SCM *Agreement.*

[94] Lihat *Article* 17.3 dan 17.4 SCM *Agreement.*

- Pemerintah negara eksportir setuju untuk menghapuskan atau membatasi subsidi mereka atau mengambil tindakan lain yang sehubungan dengan dampaknya, atau
- Pihak eksportir setuju untuk merevisi harga mereka, sehingga *investigating authorities* akan puas karena efek kerugian yang diderita akibat subsidi dapat dieliminasi.[95]

(c) *Definitive countervailing duties.*

Sementara itu, pengenaan *definitive countervailing duties* hanya dapat dilakukan setelah adanya keputusan final (final determination), yakni adanya subsidi; serta adanya subsidi yang menyebabkan, atau berpotensi menyebabkan, terjadinya *injury* terhadap industri dalam negeri.[96]

Selain hal-hal diatas, hal lain yang perlu diperhatikan adalah perihal pengenaan tindakan imbalan. Pengenaan tindakan imbalan tidak boleh melebihi jumlah subsidi. Kemudian apabila jumlah *injury* kurang dari jumlah subsidi, maka jumlah *definitive countervailing duties* dibatasi sebesar jumlah yang dimungkinkan untuk mengatasi *injury* yang diderita.[97] Pengenaan tindakan imbalan itu sendiri harus dilakukan berdasarkan asas non-diskriminasi (*non-discrimination basis*). Maksudnya adalah pengenaan tindakan imbalan harus diterapkan secara non-diskriminatif terhadap seluruh import dari seluruh negara yang diketahui mengabulkan subsidi.[98]

Ketentuan mengenai tindakan imbalan di Indonesia sendiri diatur melalui Undang-undang Nomor 10 Tahun 1995 tentang Kepabeanan sebagaimana telah diubah dengan Undang – Undang Nomor 17 Tahun 2006 tentang Perubahan Undang-Undang Nomor 10 Tahun 1995 tentang

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[95] Lihat *Article* 18.1 SCM *Agreement*.

[96] Lihat Article 19.1 SCM *Agreement*. Sebelum putusan final dibuat, *investigating authorities* memberitahukan kepada seluruh anggota yang berkepentingan dan pihak-pihak yang terkait.

[97] Lihat *Article* 19.2 SCM *Agreement.*

[98] Lihat *Article* 19.3 SCM *Agreement.*

Kepabeanan serta melalui Peraturan Pemerintah Republik Indonesia Nomor 34 Tahun 1996 tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan. Peraturan-peraturan tersebut memberikan wewenang kepada otoritas di Indonesia untuk mengenakan tindakan imbalan.

2.4 Perlakuan Khusus dan Berbeda Terhadap Negara Berkembang (*Special and Differential Treatment for Developing Countries*)

Integrasi negara-negara berkembang ke dalam sistem perdagangan multilateral merupakan suatu hal yang penting bagi perkembangan ekonomi dan bagi perluasan perdagangan dunia. WTO sebagai suatu forum multilateral menyadari pula hal tersebut, oleh karena itu WTO mengatur suatu ketentuan yang memberi perlakuan khusus dan berbeda atau *special and differential treatment* (S&D *Treatment*) yang tersebar di berbagai persetujuan WTO (WTO *agreements*). S&D *Treatment* ditujukan terhadap negara-negara berkembang dan juga kepada negara terbelakang.[99]

Pada dasarnya keberadaan S&D *Treatment* dalam kerangka WTO merefleksikan suatu pengakuan bahwa sistem perdagangan multilateral terdiri dari negara-negara dengan tingkat pembangunan yang berbeda. Karena adanya perbedaan pada situasi dan kapasitas ekonomi, terdapat perbedaan yang signifikan akan keuntungan yang diperoleh dari adanya sistem perdagangan global. Oleh karena itu keberadaan S&D *Treatment* dapat ditujukan untuk menjembatani perbedaan-perbedaan tersebut.[100] Karena prinsip ini ditujukan untuk kepentingan negara berkembang dan terbelakang, maka negara maju tidak berhak untuk mendapatkan S&D *Treatment.*[101]

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[99] Hata, *Perdagangan Internasional Dalam Sistem GATT dan WTO* : *Aspek-Aspek Hukum dan Non Hukum. Op.cit*., hlm. 243.

[100] T. Ademola Oyejide, "Special and Differential Treatment" dalam *Development, Trade and the WTO : A Handbook,* edited by Bernard Hoekman, Aaditya Mattoo dan Philip English. Washington DC: The World Bank, 2002, hlm. 504.

[101] Menurut dokumen WTO Nomor WT/COMTD/W/77/Rev.1/Add.1 tertanggal 21 Desember 2001 S&D *Treatment* terbagi atas 6 (enam) tipe yang kemudian dijelaskan menurut WTO *agreements* yang bersangkutan yaitu: *provisions aimed at increasing the trade opportunities of developing country Members*; *provisions under which WTO Members should safeguard the interests of developing country Members*; *flexibility of commitments, of action, and use of policy instruments*; *transitional time periods*; *technical assistance*; *andprovisions relating to least-developed country Members*.

SCM *Agreement* secara khusus mengatur ketentuan perihal S&D *Treatment* yakni melalui *Article* 27 SCM *Agreement*. Menurut *Article* 27.1 SCM *Agreement* keberadaan subsidi dianggap bisa membawa peranan penting dalam program pembangunan ekonomi pada negara-negara anggota WTO yang tergolong negara berkembang (*developing country Members*).[102] Negara terbelakang (*least-developed countries*) dan negara berkembang yang memiliki GNP per kapita kurang dari US$ 1,000 per tahun dapat di bebaskan dari larangan *export subsidies*, sampai mereka dapat memenuhi level *export competitiveness*.[103]

Pada negara berkembang keberadaan subsidi dapat dijadikan sebagai alat yang penting guna pembangunan ekonomi. Negara berkembang dapat menggunakan subsidi sebagai alat untuk diversifikasi pembangunan dan mengembangkan produksi dan ekspor mereka. Selain itu subsidi juga dianggap penting untuk mengatasi hambatan yang mungkin mereka alami akibat ketidakmampuan industri dalam negeri dari negara berkembang untuk bersaing dipasar dunia.

Ketidakmampuan negara berkembang untuk bersaing dengan negara maju bisa terjadi karena dalam bidang industri dan perdagangan negara maju lebih unggul dibandingkan negara berkembang. Faktor yang membuat mereka lebih unggul antara lain: kecukupan modal yang mereka miliki, keberadaan teknologi yang canggih, infrastruktur yang baik, dan sebagainya.[104] Jadi penting bagi negara berkembang untuk meningkatkan peranan dan *support* pemerintah masing-masing terhadap industri dan perdagangan mereka demi mengatasi masalah yang mungkin diderita oleh beberapa industri dalam negeri-nya masing-masing.

Disadari maupun tidak masih terdapat beberapa bidang industri yang memerlukan subsidi dari pemerintah agar dapat berkompetisi dengan *counterparts*-nya di WTO. Begitupula yang dialami Indonesia sebagai

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[102] Lihat *Article* 27.1 SCM *Agreement.*

[103] *Export competitiveness* dapat diartikan sebagai suatu tingkatan dimana ekspor atas suatu produk tertentu pada suatu negara telah mencapai level 3.25% dari ekspor dunia atas produk yang bersangkutan (Article 27.6 SCM *Agreement*).

[104] Bhagirath Lal Das, *Deficiencies, Imbalances and Required Changes, op.cit.,* hlm. 48.

negara berkembang,[105] dimana pemberian subsidi terhadap bidang industri tertentu dirasakan perlu dilakukan demi kelangsungan industri dalam negeri yang masih membutuhkan sokongan.

[105] Berdasarkan penilaian World Bank, sebagaimana tercantum dalam *World Bank list of economies, as of* Juli 2008, Indonesia masuk ke dalam kategori *lower middle income.* Lihat: <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html>.

BAB 3
TINJAUAN TERHADAP PROPOSAL INDONESIA TENTANG *FISHERIES SUBSIDIES* (SUBSIDI PERIKANAN)

Sejak terbentuknya WTO awal tahun 1995 telah diselenggarakan enam kali Konferensi Tingkat Menteri (KTM). KTM merupakan forum pengambil kebijakan tertinggi dalam WTO yang diselenggarakan setidaknya setiap dua tahun sekali sebagaimana dipersyaratkan oleh *Marrakesh Agreement Establishing the World Trade Organization*.[106] KTM pertama diselenggarakan di Singapura tahun 1996, kedua di Jenewa tahun 1998, ketiga di Seattle tahun 1999, keempat diselenggarakan di Doha, Qatar tahun 2001, kelima di Cancun, Mexico tahun 2003, dan yang terakhir di Hong Kong tahun 2005.[107]

KTM keempat yang diselenggarakan di Doha, Qatar, tahun 2001 telah menghasilkan dokumen utama berupa *Ministerial Declaration* (selanjutnya disebut sebagai Deklarasi Doha). Deklarasi Doha menandai diluncurkannya putaran perundingan baru mengenai perdagangan jasa, produk pertanian, tarif industri, lingkungan, isu-isu implementasi, Hak Atas Kekayaan Intelektual (HAKI), penyelesaian sengketa dan isu-isu lainnya. Deklarasi Doha juga telah memberikan mandat kepada para anggota WTO untuk melakukan negosiasi di berbagai bidang.[108]

Salah satu isu yang disetujui untuk dirundingkan lebih lanjut ialah mengenai WTO *Rules.* Maksud dari diluncurkannya perundingan mengenai WTO *Rules* ialah adanya kesepakatan untuk mengklarifikasi lebih lanjut dan memperbaiki beberapa pasal/aturan yang terkait dengan *Agreement on Anti Dumping* dan SCM *Agreement*.[109] Sektor perikanan (*fisheries*) dibahas pada dua komite yang berbeda yakni *negotiating committee on Non Agricultural Market Access* (NG *on* NAMA) dan NG on *Rules* yang mengatur isu subsidi perikanan (*fisheries subsidies*).

Seperti telah disebutkan sebelumnya, KTM Doha telah menghasilkan suatu *Ministerial Declaration* yang salah satu isinya menyatakan:

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[106] "The Fourth WTO Ministerial Conference," <http://www.wto.org/english/thewto_e/minist_e/ min01_e/min01_e.htm>, diakses 1 Oktober 2008.
[107] Departemen Luar Negeri, *Sekilas WTO (World Trade Organization), op.cit.,* hlm. 70.
[108] *Ibid.*
[109] *Ibid.*, hlm. 72.

... In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreement of Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, 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 participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries[110] *...*

Jadi berdasarkan Deklarasi Doha telah terjadi kesepakatan bahwa akan dilakukan negosiasi-negosiasi lanjutan dengan tujuan mengklarifikasi dan memperbaiki ketentuan-ketentuan *Agreement of Implementation of Article VI of the GATT 1994* dan SCM *Agreement.* Selain itu, telah disepakati pula untuk melakukan proses negosiasi yang membahas isu subsidi perikanan. Karena sektor subsidi perikanan merupakan sektor yang penting bagi negara berkembang.

Kesepakatan yang telah dihasilkan melalui Deklarasi Doha diperkuat kembali melalui Hong Kong *Ministerial Declaration.* KTM keenam yang berlangsung di Hong Kong telah berakhir 19 Desember 2005 lalu dan menghasilkan suatu *Ministerial Declaration* tentang *Doha Work Programme.* Pada Hong Kong *Ministerial Declaration* telah dihasilkan suatu kesepakatan yang bertujuan untuk mempertegas dan mengingatkan kembali akan Deklarasi Doha. Sebagaimana tercantum dalam paragraf 9 annex D Hong Kong *Ministerial Declaration* (untuk selanjutnya disebut dengan Deklarasi Hong Kong):

... recall our commitment at Doha to enhancing the mutual supportiveness of trade and environment, note that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing, and call on Participants promptly to undertake further detailed work to, inter alia, establish the nature and extent of those disciplines, including transparency and enforceability. Appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of

[110] Lihat Paragraf 28, Doha *Ministerial Declaration,* dokumen no. WT/MIN (01)/DEC/1 tanggal 20 Nopember 2001 (dapat diakses melalui www.wto.org).

this sector to development priorities, poverty reduction, and livelihood and food security concerns ...

Pernyataan diatas menegaskan kembali mengenai komitmen negara-negara anggota WTO pada saat KTM ke - 4 di Doha. Bahwa ketentuan mengenai subsidi dalam sektor subsidi perikanan harus lebih diperkuat, termasuk dengan pelarangan akan adanya subsidi perikanan yang dapat menyebabkan terjadinya *overcapacity*[111] dan *overfishing*[112]. Negosiasi subsidi perikanan harus pula menyertakan ketentuan yang mengatur *special and differential treatment* (S&D *treatment*) terhadap negara berkembang dan negara terbelakang supaya sektor ini dapat berpengaruh untuk meningkatkan pembangunan, mengurangi kemiskinan, meningkatkan penghidupan serta mengatasi masalah ketahanan pangan (*food security*).

3.1 Proposal Indonesia tentang Subsidi Perikanan pada Putaran Perundingan Doha di WTO

Sebagai penyedia sumber makanan yang penting, lapangan kerja dan sumber pendapatan serta rekreasi, jutaan manusia di seluruh dunia menggantungkan hidupnya pada sektor perikanan. Di Asia saja, jumlah manusia yang mengandalkan ikan sebagai sumber utama protein hewaninya berjumlah kurang lebih 1 (satu) milyar jiwa. Adapun jumlah nelayan (yang langsung bekerja di kapal ikan) diperkirakan mencapai 15 juta jiwa, sedangkan yang berkerja secara langsung ataupun tidak langsung dengan sektor perikanan berjumlah 200 (dua ratus) juta jiwa.[113]

Indonesia merupakan negara yang memiliki garis pantai terluas di dunia. Selain itu Indonesia juga merupakan *archipelagic state* terbesar di

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[111] *Overcapacity* diterjemahkan sebagai situasi dimana berlebihnya kapasitas input perikanan (armada penangkapan ikan) yang digunakan untuk menghasilkan output perikanan (hasil tangkapan ikan) pada level tertentu. *Overcapacity* yang berlangsung terus menerus pada akhirnya akan menyebabkan *overfishing*.

[112] *Overfishing* terjadi apabila keadaan sumberdaya ikan di suatu daerah yang mengalami tingkat penangkapan yang berlebih. Berlebih di sini menggambarkan tingkat eksploitasi yang tinggi yang tidak sebanding dengan kemampuan sumberdaya ikan untuk pulih kembali. Oleh karenanya dalam keadaan demikian hasil tangkapan nelayan menjadi menurun.

[113] Indonesia dalam kerjasama perikanan tangkap regional: Tinjauan aspek dasar kesiapan dan implementasinya dewasa ini. Jurnal Hukum Internasional, Volume 2 nomor 3 april 2005, hlm 483-484.

dunia.[114] Banyak masyarakat Indonesia yang menggantungkan kesejahteraan hidup mereka melalui sektor perikanan, salah satunya melalui sektor ekspor. Disamping melalui sektor ekspor, disektor perikanan ribuan nelayan kecil menggantungkan hidupnya. Oleh karena itu, sektor perikanan merupakan sektor yang sangat penting bagi perekonomian Indonesia.

Namun sayangnya masih banyak nelayan kita yang masih hidup dalam kemiskinan. Hal tersebut memperjelas bahwa hendaknya keberadaan mereka dilindungi, yakni melalui keberadaan campur tangan pemerintah yang sesungguhnya sangatlah dibutuhkan. Atas dasar ini, Indonesia melalui Departemen Perdagangan menganggap bahwa perundingan subsidi perikanan harus dimanfaatkan semaksimal mungkin untuk mengamankan kepentingan Indonesia.[115]

Selama Putaran Doha berlangsung Indonesia telah mengajukan 3 (tiga) proposal mengenai subsidi perikanan dan 1 (satu) join proposal dengan China dan India mengenai diperlukannya S&D *Treatment* untuk negara berkembang yang kesemuanya diajukan selama sidang NG *on Rules.*

3.1.1 Proposal Indonesia : *Fishery Subsidies – Proposed New Disciplines* (TN/RL/GEN/150)

Pada sidang NG *on Rules* yang diselenggarakan di Jenewa pada tanggal 9-13 Juli 2007, Indonesia secara resmi menyampaikan proposal mengenai subsidi perikanan.[116] Proposal yang diajukan oleh Delegasi Republik Indonesia (DELRI) berjudul *Fishery Subsidies : Proposed New Disciplines* dengan nomor dokumen TN/RL/GEN/150 tertanggal 2 Juli 2007 (terlampir). Menurut proposal ini, ketentuan

[114] "Indonesia's Coral Reef", <http://www.terangi.or.id/en/index.php?option=com_content&task=view& id=65&Itemid=44>, 7 Juli 2006.

[115] "*Sidang Kelompok RULES-DDA/WTO,*" <http://ditjenkpi.depdag.go.id/index.php?module=news_detail&news_category_id=1&news_sub_category_id=0&news_content_id=581&alldate=true>, 02 November 2007.

[116] "Rules Negotiations-Doha Development Agenda-WTO, Proposal Indonesia: Fishery Subsides – Proposed New Disciplines," <http://ditjenkpi.depdag.go.id/index.php?module=news_detail&news_category_id=1&news_sub_category_id=0&news_content_id=551&alldate=true>, 19 Juli 2007

mengenai subsidi perikanan secara spesifik akan diatur melalui Annex VIII yang merupakan satu kesatuan dengan SCM *Agreement*.[117]

Pengertian subsidi yang dimaksud dalam proposal ini ialah subsidi yang sebagaimana yang diatur melalui *Article* 1 SCM *Agreement*.[118] Bahwa seluruh bentuk subsidi perikanan sesungguhnya dilarang kecuali yang diatur atau dikecualikan oleh Annex VIII ini nantinya.[119] Dengan kata lain Indonesia mengusulkan agar subsidi perikanan dilarang sama sekali (*prohibited*) kecuali telah memenuhi syarat-syarat tertentu.[120]

Pada bagian *preamble* proposal dinyatakan bahwa salah satu tujuan dari proposal ini ialah untuk mempertegas bahwa ketentuan S&D *treatment* merupakan satu kesatuan dari WTO *Agreements.* Maka proposal ini juga menyertakan isu S&D ke dalam salah satu *article*-nya.

Selain hal-hal diatas dalam proposal tersebut juga diajukan beberapa hal yang dianggap berguna baik demi kebutuhan dan kepentingan Indonesia maupun negara berkembang lainnya antara lain kebutuhan *technical assistance* bagi negara berkembang, *Artisanal and Smale Scale-Fishing, Archipelagic Water, Adverse Effect to Fishery Resources/Clariffication of Multilateral and Domestic Tracks* dan *Fishery Expertise.*

- <u>*Technical Assistance*</u>

  Selain Indonesia banyak delegasi dari negara anggota WTO lainnya yang telah mengajukan isu dibutuhkannya *technical assistance* atau tenaga ahli dalam proposal mereka. Bagi Indonesia

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[117] Lihat *Article* 1.1, dokumen no. TN/RL/GEN/150 tanggal 2 Juli 2007 perihal *Fishery Subsidies : Proposed New Discipline* (dapat diakses melalui www.wto.org).

[118] Lihat *Article* 1.2, dokumen no. TN/RL/GEN/150 tanggal 2 Juli 2007 perihal *Fishery Subsidies : Proposed New Discipline* (dapat diakses melalui www.wto.org).

[119] Lihat *Article* 2, dokumen no. TN/RL/GEN/150 tanggal 2 Juli 2007 perihal *Fishery Subsidies : Proposed New Discipline* (dapat diakses melalui www.wto.org).

[120] Kelompok negara anggota WTO yang menganut paham bahwa subsidi dilarang sama sekali (*prohibited*) kecuali untuk hal tertentu tergolong kepada kategori negara yang menganut paham *top down approach*. Di sisi yang lain ada beberapa negara yang menganut paham *bottom-up* seperti Jepang dimana terdapat kategori jenis-jenis *prohibited subsidies* sehingga diluar kategori itu subsidi diperbolehkan.

terdapat dua poin penting yang perlu menjadi perhatian dan akan membawa kontribusi bagi negara berkembang. Pertama, dibutuhkannya bantuan/asistensi dalam bidang *fisheries management*. Kedua, Indonesia mengajukan permohonan lain yakni agar negara maju dapat menyediakan bantuan/asistensi terhadap *negara berkembang* dengan tujuan untuk berpartisipasi secara penuh kedalam *regional fishery management organization* (RFMO's)[121] secara berdampingan dengan zona ekonomi eksklusif (ZEE)[122] negara berkembang masing-masing.

- <u>*Artisanal and Small-Scale Fishing*</u>

Terhadap *Artisanal dan Small-Scale Fishing* hendaknya diberikan perlakuan spesial dan khusus (S&D *Treatment*). *Artisanal fishing* (nelayan tradisional) merupakan penangkapan ikan yang dilakukan dengan tujuan utama demi penghidupan dimana dalam situasi tertentu diperbolehkan terhadapnya untuk diberikan bantuan, yakni yang terkait dengan lokasi mereka yang dekat dengan pantai, dan beberapa mesin spesifik – rasionya dimulai dari jenis sampai dengan kapasitas kapal, terutama yang digunakan oleh individu maupun keluarga.

S*mall-scale fishing* (nelayan kecil) dapat didefinisikan sebagai penangkapan ikan yang dilakukan dalam jarak 12 *nautical miles,* dan dibawah 20 meter. Meskipun demikian, dikarenakan *small-scale fisheries* dapat menimbulkan suatu efek yang penting

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[121] Sumber daya ikan selalu bergerak dalam kehidupannya tanpa mengenal batas negara, maka pengelolaan perikanan oleh suatu negara tidak akan efisien kalo negara lainnya yang menangkap sumber daya yang sama tidak peduli dengan upaya pengelolaan. Contohnya beberapa ikan pelagis (ikan-ikan yang hidupnya berada di lapisan atas atau disekitar permukaan) di Selat Malaka menjadi target penangkapan nelayan-nelayan dari Indonesia dan Malaysia bahkan Thailand. Maka negara-negara tersebut perlu melakukan kerjasama didalam pengelolaan perikanan regional diantara negara yang bersangkutan. Lihat: Purwito Martosubroto, "Perkembangan Pengelolaan Perikanan Global," *Jurnal Hukum Internasional*, Volume 1 Nomor 3 (April 2004) : 469.

[122] Zona Ekonomi Eksklusif atau ZEE merupakan suatu daerah di luar laut teritorial yang lebarnya tidak boleh melebihi 200 mil diukur dari garis pangkal yang digunakan untuk mengukur lebar laut teritorial. Lihat: Heru Prijanto, *Hukum Laut Internasional*, (Malang: Bayumedia Publishing, 2007), hlm. 11.

terhadap sumber daya, pengertian *small-scale fisheries* harus diterjemahkan secara sempit dan objektif agar subsidi yang timbul dari suatu tindakan *small-scale fisheries* memiliki keterkaitan dalam menunjukkan bahwa sesungguhnya kegiatan yang dilakukan oleh *small-scale fisheries* tidak merugikan, baik terhadap sumber daya negara itu sendiri maupun sumber daya negara anggota lainnya atau sumber daya yang dikelola oleh RFMO's.

Terhadap hal-hal diatas, proposal ini juga memohon agar negara berkembang dapat meminta bantuan dari negara maju agar hal-hal sebagaimana disebutkan sebelumnya dapat terwujud. Pengecualian yang akan diberikan terhadap *small-scale fishing* dan penangkapan ikan yang dilakukan oleh negara berkembang yang berada dalam ZEE mereka sendiri berlaku terhadap negara berkembang dalam hal membuktikan bahwa baik untuk saat ini maupun pada masa yang akan datang tidak akan ada membawa akibat / pengaruh terhadap sumber daya perikanan.

- *Archipelagic Waters*

Indonesia merupakan suatu negara kepulauan yang memiliki sekitar 17.000 pulau. Oleh karenanya perikanan Indonesia berbagi keunikan dengan negara-negara kepulauan lainnya seperti musim, heterogenitas spesies dan interaksi spesies yang kemudian keadaan tersebut membawa kesulitan bagi Indonesia untuk mengatur perikanannya. Oleh karena itu, Indonesia mengajukan proposal agar *archipelagic waters* tidak dikecualikan dari SCM *Agreement.* Jadi ketentuan mengenai subsidi harus tetap diberlakukan terhadapnya, dengan tujuan untuk melestarikan dan melindungi lingkungan laut kepulauan.

- <u>*Adverse Effect to Fishery Resources/Clarification of Multilateral and Domestic Tracks*</u>

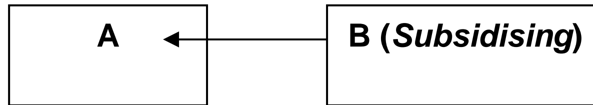
Dikarenakan *adverse effect test* yang ada di dalam SCM *Agreement* tidak bisa mengakomodir suatu keadaan dimana *adverse effect* yang terjadi bukan karena *domestic industry* melainkan kepada lingkungan[123], maka Indonesia mengajukan proposal ini agar ada ketentuan khusus yang bisa menjelaskan apa yang dapat dikategorikan sebagai *adverse effect* dalam bidang subsidi perikanan sebagaimana sebelumnya telah diatur dalam *Article* 5 dan *Part* V SCM *Agreement.*

Selain isu diatas Indonesia juga mengajukan proposal agar upaya hukum baik multilateral maupun domestik *track* dapat digunakan untuk menangani subsidi perikanan. Sehingga apabila kedua cara tersebut berlaku, negara anggota WTO yang dirugikan akibat pemberian subsidi tersebut dapat melakukan investigasi di tingkat nasional (*domestic track*) atau membawa kasus tersebut ke WTO *dispute settlement* (*multilateral track*). Jika terbukti maka negara tersebut dapat mengenakan *countervailing duties* (*domestic track*) atau *countervailing measures* (*multilateral track*) terhadap produk perikanan hasil produksi negara anggota WTO yang mengakibatkan *adverse effect* terhadap industri domestik negara anggota WTO lainnya dengan alasan telah membahayakan sumber daya perikanan. Berikut ini gambar penjelasan yang membedakan antara *domestic track* dengan *multilateral track*:

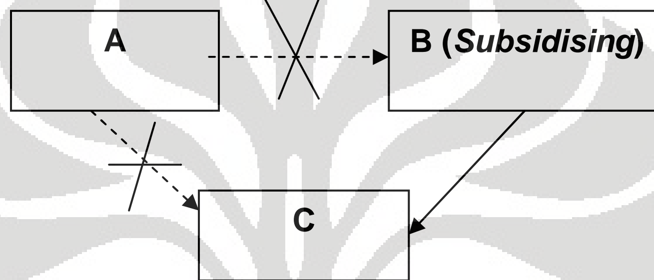
[123] *Adverse effect* dalam bidang *fisheries subsidies* bukan terhadap *domestic industry* melainkan terhadap lingkungan. Karena *fisheries subsidies* sangat terkait dengan penipisan sumber daya perikanan (*fisheries resource*) alih-alih terjadinya *injury* terhadap *domestic industry.*

GAMBAR 3.1

Domestic Track



Multilateral Track



Keterangan:

- *Domestic Track*, merupakan suatu keadaan apabila negara anggota B memberikan subsidi terhadap industri dalam negerinya yang kemudian di ekspor ke negara anggota A, sehingga menyebabkan *material injury* terhadap negara anggota A. Maka negara anggota A diperbolehkan melakukan investigasi atas bea masuk imbalan dengan langkah-langkah yang diatur berdasarkan SCM Agreement.
- *Multilateral Track,* merupakan suatu keadaan apabila negara anggota B memberikan subsidi terhadap industri dalam negerinya, dan dijual di negeri-nya sendiri selain itu juga di ekspor ke negara anggota C. Negara A menjual produk yang sama ke dalam pasar negara anggota B dan pasar negara anggota C. Subsidi yang dilakukan negara anggota B menyebabkan *serious prejudice* kepada negara anggota A, negara anggota B dan negara anggota C, berdasarkan SCM

Agreement negara anggota A diperbolehkan untuk membawa kasus ini ke badan penyelesaian sengketa WTO untuk melawan negara anggota B dan meminta didirikannya panel untuk menindaklanjuti kasus tersebut mengenai klain bahwa telah terjadi *serious prejudice* baik terhadap penjualannya terhadap negara anggota Batau terhadap negara anggota C atau keduanya.

- *Fishery Expertise*

  Dalam proposal ini, Indonesia beranggapan bahwa tenaga ahli perikanan/*fishery expertise* dibutuhkan dalam situasi tertentu. Antara lain, untuk memastikan bahwa keputusan terhadap isu tentang sumber daya perikanan dibuat oleh individu yang memiliki keahlian sebagaimana dipersyaratkan, Indonesia mengajukan proposal bahwa hendaknya *fisheries experts* secara eksplisit dapat dimanfaatkan tenaganya. Secara umum, dibutuhkannya kehadiran *fishery experts* akan berguna untuk membantu para anggota WTO dalam melakukan identifikasi permasalahan subsidi perikanan.[124]

3.1.2 Proposal Indonesia : *Fishery Subsidies – Proposed New Disciplines* (TN/RL/GEN/150/Rev.1)

Pada sidang NG *on Rules* yang diselenggarakan pada tanggal 24-28 September 2007 Indonesia kembali mengajukan proposal mengenai subsidi perikanan. Tujuan Indonesia dalam proposal terbarunya ini ialah untuk meluruskan perundingan sesuai dengan Deklarasi Doha dan mewujudkan perundingan subsidi perikanan yang lebih konstruktif di masa datang. Selain itu, revisi ini dilakukan sebagai upaya Indonesia untuk mengakomodasi pendapat yang datang dari berbagai negara anggota WTO setelah Indonesia mengajukan

[124] Dalam isu ini, Indonesia mengajukan permohonan agar adanya *fisheries expert* di *committee on subsidy* WTO dalam hal *technicallity* dari pembuktian *adverse effect* terhadap *fisheries resource*. Jadi tidak cukup apabila dalam *committee on subsidy* hanya terdiri dari tenaga ahli yang mengerti isu subsidi sajanamun harus ada tenaga ahli perikanan yang dibutuhkan keahliannya untuk menganalisa apakah terdapat *injury* terhadap *fisheries resource* atau tidak.

proposal pertamanya namun dengan catatan bahwa Indonesia tetap mempertahankan posisinya khususnya dalam pasal mengenai S&D *Treatment.*

Proposal dengan nomor dokumen TN/RL/GEN.150/Rev.1 tertanggal 10 September 2007 (terlampir) merupakan revisi atas proposal Indonesia sebelumnya. Masih sama dengan proposal sebelumnya, proposal ini diagendakan untuk menjadi satu kesatuan dengan SCM *Agreement* untuk diletakkan dalam Annex VIII kelak.

Seperti telah disebutkan sebelumnya, proses pembuatan proposal ini dilakukan Deklarasi mandat Doha. Untuk mendisiplinkan *fisheries subsidies* yang menyebabkan terjadinya *overfishing* dan *overcapacity* maka proposal ini dibuat sebaik mungkin agar tujuan tersebut dapat terwujud. Dalam revisi proposal Indonesia ini, terdapat 5 (lima) inti pokok yang merupakan perbedaan dari proposal sebelumnya, yaitu:

- Pertama, menyangkut masalah *prohibited* dan *actionable subsidies.* Dalam revisi ini Indonesia mengajukan permohonan agar diadakan perubahan dari *prohibited subsidies* menjadi *actionable subsidies.* Dasar pemikirannya adalah bahwa pada dasarnya 95% masalah subsidi dapat di kategorikan sebagai *actionable.* Dengan demikian, apabila semua subsidi perikanan dikategorikan sebagai *actionable* dengan *adverse effect test* yang efektif dan ketat (*strong adverse effect*) akan menjadi suatu disiplin yang sangat kuat dalam mengatur *fisheries subsidies.* Jadi dalam revisinya Indonesia mengubah pandangan sebelumnya dari *top down approach* menjadi berada ditengah-tengah ("*middle ground*") antara *top down* dengan *bottom up approach* di dalam mendefinisikan subsidi perikanan.[125]

- Kedua, menyangkut masalah S&D *Treatment.* Terhadap S&D *Treatment*, Indonesia mengusulkan beberapa persyaratan baru.

[125] *Bottom up approach* merupakan pandangan kelompok negara anggota WTO tertentu yang menganggap bahwa subsidi diperlukan sepanjang persyaratan tertentu terpenuhi.

Selain itu Indonesia juga lebih memperjelas ketentuan di bidang S&D. Sementara untuk masalah *artisanal* dan *small-scale fishery* yang diusulkan sebagai pengecualian tetap dipertahankan sebagaimana dengan proposal sebelumnya. Dengan demikian S&D untuk *artisanal* dan *small-scale fishery* sangat tergantung dari *conditionality*-nya yaitu, tipe kapal dan lokasi.

- Ketiga, menyangkut masalah *Adverse Effect Test.* Sebagaimana dijelaskan sebelumnya, bahwa 95% dari subsidi perikanan adalah *actionable subsidies.* Dalam kaitan ini, maka dalam pembuktian apakah *actionable subsidies* merugikan atau tidak, maka harus dilakukan *adverse effect test.* Dengan kata lain, dalam menentukan *remedies* untuk *fisheries subsidies* (yang *actionable*) dibutuhkan *adverse effect test.* Indonesia berpendirian bahwa *adverse effect* sangat berperan dalam rangka mendisiplinkan *fisheries subsidies* yang mengakibatkan *overcapacity* dan *overfishing*. Daripada hanya memberikan penekanan pada *prohibited subsidies* sebagai yang utama dalam menyelesaikan masalah perikanan, Indonesia mengusulkan perlunya memberikan peran besar pada *actionable subsidies* dengan "*strong adverse effect test*" dalam mendisiplinkan *fisheries subsidies.*

- Keempat, menyangkut masalah *Technical Assistance.* Dalam sidang bulan Juli 2007, berbagai negara memberikan berbagai tanggapan atas proposal Indonesia yang menyangkut *technical assistance* karena Indonesia mengusulkan *technical assistance* prioritas dan *mandatory* dalam disiplin *fisheries subsidies*. Ide dibalik proposal ini adalah bahwa masalah *fisheries subsidies* merupakan suatu isu yang sulit bagi negara berkembang dan selama ini negara berkembang masih mengalami kesulitan dalam berbagai kerjasama perikanan termasuk dalam RFMO. Diharapkan dengan *technical assistance* ini negara berkembang dapat

berpartisipasi penuh dalam RFMO. Selanjutnya, dengan adanya *technical assistance*, negara berkembang mampu untuk melaksanakan dan memberlakukan *fishery management plan* sesuai petunjuk dalam *UN Fish Stock Agreement*. Dalam proposal ini Indonesia menginginkan persyaratan untuk *technical assistance* berdasarkan "*on mutually agreed terms and conditions*".[126]

- Kelima, *Fishery Expert.* Mengenai hal ini, Indonesia tidak mengusulkan lagi dibentuknya suatu sub komite dibawah *Commitee on Subsidies and Countervailing Measures* (Komite SCM) yang bertugas khusus untuk menangani masalah subsidi perikanan. Dalam proposal ini, Indonesia mengusulkan agar melakukan *review notification*, Komite SCM dapat melakukan konsultasi dan minta penjelasan dengan para ahli dibidang perikanan (*fishery expert*) sebagaimana diamanatkan dalam Artikel 24.5 SCM *Agreement*. Hal ini dilakukan sejalan dengan mandat ASCM dimana selama ini Komite SCM dibantu oleh *subsidy expert* didalam menangani kasus subsidi.

3.1.3 Proposal Indonesia : *Fishery Subsidies – Proposed New Disciplines* (TN/RL/GEN/150/Rev.2)

Untuk ketiga kalinya Indonesia menyampaikan proposal mengenai subsidi perikanan. Proposal dengan nomor TN/RL/GEN/150/Rev.2 tertanggal 9 Oktober 2007 merupakan penyempurnaan dari proposal Indonesia yang ke-2. Masih sama dengan proposal sebelumnya proposal ini juga diagendakan untuk

[126] Masalah *technical assistance* memang lebih penekanannya terhadap bantuan agar *developing coutry* dapat meningkatkan kemampuan mereka untuk mengimplementasikan *fisheries management*. Mengenai *mutually agreed term* memang terdapat kekhawatiran bahwa dengan adanya *technical assistance* dari negara maju akan disusupi "kepentingan" lain. Karena wilayah perairan itu sangat sensitif yang menyangkut ketahanan negara dan sumber daya alam yg besar. Kita juga mengkhawatirkan efektivitas *technical assistance* itu sendiri. Dikhawatirkan justru keberadaan *technical assistance* tidak memberi dampak yg signifikan terutama dalam mengembangkan kemampuan tenaga kerja dan sarana penunjang lainnya.

menjadi satu kesatuan dengan SCM *Agreement* untuk diletakkan dalam Annex VIII.

Dengan adanya proposal ini Indonesia meyakini bahwa dengan melakukan penyempurnaan terhadap proposal Indonesia yang kedua, perundingan dan pembahasan mengenai isu-isu penting dalam subsidi perikanan dimasa datang akan memiliki dasar/*basis* sendiri. Proposal ini terfokus kepada tiga isu utama, yaitu *prohibited subsidies, adverse effects* dan S&D *Treatment.*

Pertama, pada proposal ini ketentuan mengenai *prohibited* dan *actionable subsidies* menjadi lebih diperjelas. Sebagaimana tercantum dalam *Article* 2 proposal ini, terdapat beberapa prinsip yang perlu dipenuhi untuk dapat mengkategorikan suatu bentuk pemberian subsidi sebagai *prohibited subsidies.* Negara anggota WTO harus mampu membedakan antara *prohibited subsidies* dengan *actionable subsidies.* Dimana *prohibited subsidies* merupakan jenis pemberian subsidi yang "secara otomatis" dapat merugikan negara anggota WTO lainnya sementara *actionable subsidies* merupakan jenis subsidi yang harus dibuktikan terlebih dahulu merugikan atau menimbulkan *adverse effect* terhadap negara anggota WTO lainnya. Perlu diingat bahwa seluruh *fisheries subsidies* yang tidak dapat dibuktikan bahwa subsidi tersebut merupakan *prohibited subsidies* maka kegiatan subsidi dapat digolongkan sebagai *actionable subsidies.* Jadi seperti telah disebutkan dalam proposal *fisheries subsidies* yang kedua, selain *exceptional* subsidies dan S&D *Treatment*, keberadaan seluruh *fisheries subsidies* lainnya tetap akan dapat di tindak.

Kedua, Indonesia juga telah melakukan restrukturisasi terhadap *Article* 6 perihal *Adverse Effect* atas proposal Indonesia nomor TN/RL/GEN/150/Rev.1, yakni dengan membagi *Article* 6 menjadi 2 (dua) *article* yaitu ke dalam *Article* 7 dan *Article* 8. *Article* 7 itu sendiri dibuat paralel dengan *Article* 5, 6 dan 7 SCM *Agreement* yang akan mengatur masalah *actionable subsidies.* Sementara itu *Article* 8 proposal ini paralel dengan *article-article* pada *Part* V SCM

Agreement yang mengatur mengenai masalah investigasi terhadap bea masuk imbalan/*countervailing duty investigations.*

Sesungguhnya Indonesia masih mengalami kesulitan di dalam membuat ketentuan yang dapat menetapkan unsur-unsur apa saja yang harus dilakukan untuk membuktikan bahwa memang telah terjadi *injury* (*adverse effects test*). Terdapat beberapa konsep yang perlu diperhatikan oleh negara anggota WTO sendiri, oleh karena itu didalam proposal ini Indonesia menandai beberapa isu yang masih perlu diperhatikan. Misalnya dalam *Article* 8.1 proposal ini, Indonesia telah mengidentifikasikan beberapa bidang yang akan digunakan dalam penentuan *injury* terhadap *fisheries resource* yang berbeda dengan penentuan *injury* terhadap *domestic industry.* Indonesia mengundang negara anggota WTO untuk memberikan *feedback* terhadap isu tersebut dan isu-isu lainnya. Selain itu Indonesia juga telah menambahkan langkah-langkah praktis untuk mengevaluasi *injury* dalam *Article* 8.2, 8.3 dan 8.4 yang dibuat paralel dengan *Article* 15 SCM *Agreement.*

Ketiga, mengenai isu S&D *Treatment* yang diatur melalui *Article* 6. Tidak banyak revisi yang dilakukan terhadap ketentuan S&D *Treatment* dalam proposal ini dibandingkan dengan proposal sebelumnya. Karena revisi yang dibuat hanya berupa penambahan keterangan agar ketentuan S&D *Treatment* ini menjadi lebih jelas.

3.2 *Draft Consolidated Text Chair Texts of the Anti Dumping and SCM Agreements*

Sejak KTM Doha, sekretariat WTO membentuk badan khusus untuk merundingkan putaran Doha, yang disebut Komite Perundingan Perdagangan (*Trade Negotiations Committee*/TNC) yang terdiri atas Dewan yang bertugas mengadakan sidang khusus/*special sessions* untuk Jasa, TRIPs, Penyelesaian Sengketa, Pertanian, Perdagangan dan Pembangunan,

dan Perdagangan dan Lingkungan. Serta Kelompok Perundingan (*Negotiating Groups*) untuk akses pasar, *rules* dan fasilitasi perdagangan.[127]

Empat tahun kemudian pada saat KTM di Hong Kong, para Menteri negara anggota WTO memberikan arahan terhadap NG *on Rules* untuk melanjutkan kesepakatan pada Deklarasi Doha untuk memperbaiki dan memperjelas aturan subsidi perikanan, selain itu para Menteri juga memberi mandat kepada Ketua NG *on Rules* untuk menyiapkan *consolidated texts* atas Anti Dumping dan SCM *Agreement*.[128]

Setelah melewati masa perundingan-perundingan dan menerima posisi dari negara-negara anggota WTO yang dituangkan dalam proposal mereka masing-masing, ketua perundingan WTO bidang *rules,* Duta Besar Guilermo Vales Games menyampaikan *draft consolidated text* pada tanggal 30 Nopember 2007 dengan nomor dokumen: TN/RL/W/213 (terlampir). Negara anggota WTO diminta untuk memberikan tanggapan atas *draft consolidated text* tersebut (selanjutnya disebut sebagai *"draft chairman's text"*) dengan tujuan untuk melihat parameter yang dibutuhkan dalam *draft chairman's text* sehingga mampu menjembatani perbedaan kepentingan dari setiap negara anggota.

Ketentuan mengenai subsidi di sektor perikanan diatur dalam Annex VIII SCM *Agreement*. Dalam chairman's text tersebut diatur ketentuan mengenai *fisheries subsidies* sebagai berikut:

- *Article* I: Larangan terhadap Subsidi Perikanan Tertentu (*Prohibition of Certain Fisheries Subsidies*)

  Article I *draft chairman's text* ini terdiri dari 2 paragraf. Paragraf pertama menerangkan poin-poin (8 poin) apa saja yang dapat mempertegas bahwa suatu tindakan subsidi tertentu dapat dikategorikan sebagai subsidi yang dilarang. Sementara itu, paragraf kedua dari *Article* I ini menegaskan bahwa selain larangan pemberian

[127] "GATS : Sebuah Pengantar," <http://gatscorner.blogspot.com/>, 30 Oktober 2008.

[128] Lihat dokumen no. TN/RL/W/213 tanggal 30 Nopember 2007 perihal *Draft Consolidated Chair Text of the Anti Dumping and SCM Agreements* (dapat diakses melalui www.wto.org).

subsidi sebagaimana telah dijabarkan pada paragraf 1 *draft chairman's text* dimaksud, kegiatan subsidi yang memberikan kontribusi terhadap *overfishing* merupakan suatu tindakan subsidi yang tidak diperbolehkan/dilarang.

- *Article* II: Pengecualian Umum (*General Exceptions*)

  Dalam *article* ini dijelaskan beberapa ketentuan yang berisikan pengecualian terhadap beberapa tindakan subsidi yang diperbolehkan/tidak dilarang asalkan tindakan subsidi tersebut memenuhi syarat-syarat tertentu sebagaimana dimaksud dalam Article II *draft chairman's text*.

- *Article* III: S&D *Treatment* bagi Negara Berkembang (*Special and Differential Treatment of Developing Country Members*)

  Article III ini terdiri dari 4 paragraf dimana keseluruhan isi paragraf tersebut menerangkan bahwa *negara berkembang* dan *least-developed countries* (LDC's) dapat memanfaatkan keberadaan S&D *Treatment* untuk kepentingan mereka. Bahwa *negara berkembang* dan LDC's diperbolehkan untuk melakukan tindakan subsidi tertentu terhadap sektor perikanan mereka selama pemberian subsidi tersebut telah memenuhi syarat-syarat yang telah ditetapkan sebelumnya. *Article* ini menegaskan bahwa seluruh negara anggota WTO harus menghargai kepentingan *negara berkembang* dan memfasilitasi bantuan teknis baik secara bilateral dan/atau melalui organisasi internasional yang tepat.

- *Article* IV: Disiplin Umum Pemberian Subsidi (*General Discipline on the Use of Subsidies*)

  Article ini berisikan ketentuan yang berlaku umum baik terhadap *negara maju, negara berkembang* dan LDC's dalam hal pemberian subsidi. Pada *article* ini, terdapat 2 paragraf yang harus diperhatikan yaitu: kegiatan subsidi tidak boleh menghabiskan, mengganggu atau

menciptakan *overcapacity* dengan cara: (a) mengganggu perpindahan stok ikan dari suatu ZEE terhadap anggota lainnya, (b) stok yang telah diidentifikasikan sebagai sebuah kepentingan termasuk penggunaan alokasi spesifik kuota kepada individual atau kelompok dengan memberikan akses khusus terbatas, dan program kuota eksklusif. Keberadaan situasi seperti itu akan ditentukan dengan memperhatikan informasi yang tersedia, termasuk dari organisasi internasional lain yang relevan. Informasi tersebut akan memasukkan status pelaksanaan pemberian subsidi oleh Anggota yang dikenal secara internasional sebagai *best practice* untuk *fisheries management and conservation.* Selain it, *article* ini juga mengatur bahwa dalam ketentuan *fisheries subsidies* ini diberikan oleh suatu negara tanpa memperhatikan bendera, kapal atau aplikasi ketentuan asal ikan.

- <u>*Article* V: Manajemen Perikanan (*Fisheries Management*)</u>

  Article V terdiri atas 2 paragraf. Paragraf pertama menjelaskan bahwa bagi setiap tindakan subsidi yang tergolong ke dalam *Article* II mengenai Pengecualian Umum (*General Exceptions*) dan *Article* III.2 (b) mengenai S&D *Treatment* terhadap negara berkembang sebagaimana diatur dalam *draft chairman's text* ini, diwajibkan untuk melaksanakan sistem manajemen perikanan (*fisheries management system*) yang mengatur *marine wild capture fishing* dalam wilayah hukumnya (yurisdiksi) untuk mencegah *overfishing*. Sistem manajemen ini akan mengacu pada ketentuan dan praktek-praktek (yang secara internasional diakui) untuk manajemen perikanan dan konservasi yang menjamin penggunaan konservasi secara *sustainable* untuk spesies laut. Paragraf kedua dari *Article* V ini menerangkan bahwa setiap negara anggota WTO harus mendirikan *enquiry point*[129] untuk menjawab semua *enquiries* dari negara anggota lain dan pihak-

[129] *Enquiry Point* ialah suatu pusat informasi dari negara anggota WTO yang didirikan khusus untuk menyediakan informasi spesifik dan memberikan informasi atas pertanyaan yang berhubungan dengan isu WTO yang dipertanyakan oleh negara anggota WTO lainnya.

pihak yang berkepentingan dan setiap anggota harus menotifikasikan alamat *enquiry point* mereka kepada komite SCM.[130]

- *Article* V: Notifikasi dan Pengawasan (*Notifications and Surveillance*)

  Pada *Article* V ini ketentuan mengenai notifikasi dan pengawasan terbagi atas 7 paragraf. Dimana masing-masing paragraf antara lain menjelaskan mengenai kewajiban negara anggota WTO untuk menotifikasikan sebelumnya kepada komite akan setiap implementasi tindakan subsidi dimana notifikasi tersebut harus berisi informasi yang cukup dan tepat agar anggota lain dapat menilai apakah isi notifikasi tersebut telah memenuhi syarat dan kriteria untuk dapat melakukan tindakan subsidi. Negara anggota WTO lainnya berhak untuk meminta informasi mengenai subsidi yang telah dinotifikasikan. Kemudian setiap notifikasi yang ada akan ditinjau oleh Komite SCM.

- *Article* VII: Ketentuan Transisi (*Transitional Provisions*)

  Ketentuan transisi yang diatur melalui *Article* ini berisikan ketentuan yang harus dipenuhi oleh negara yang telah menerapkan tindakan subsidi perikanan sebelum adanya *Doha Development Agenda*, *Article* 3.1 (c) SCM *Agreement* dan *Article* I *draft chairman's text* ini. Bahwa negara tersebut harus harus menotifikasikan tindakan subsidi-nya kepada komite SCM paling lambat 90 hari, sementara itu khusus untuk negara berkembang paling lambat 180 hari.

- *Article* VIII: Penyelesaian Sengketa (*Dispute Settlement*)

  Article ini berisikan 4 paragraf dimana seluruh paragraf tersebut mengatur mengenai metode penyelesaian apa yang digunakan apabila terjadi sengketa diantara negara anggota WTO. Selain melalui *Article* VIII ini, penyelesaian sengketa juga dilakukan berdasarkan SCM *Agreement,* DSU dan ketentuan lain yang relevan dengan untuk

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[130] Kegiatan subsidi yang belum dinotifikasikan akan dianggap sebagai suatu *prohibited subsidies* kecuali dapat dibuktikan sebaliknya.

diterapkan terhadap sengketa yang disebabkan ketentuan diluar *draft chairman's text* ini.

3.3 Join Proposal Indonesia dengan India dan China perihal *Need for Effective Special and Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies Text*

Seperti telah dijelaskan sebelumnya Deklarasi Doha paragraf 8 menyebutkan bahwa dibutuhkan negosiasi di bidang subsidi perikanan agar ketentuan *fishery subsidies* dapat diperjelas dan diperbaiki. Mandat tersebut diperjelas kembali dan diatur lebih lanjut melalui Annex D Hong Kong *Ministerial Declaration,* yang secara spesifik dititikberatkan pada ketentuan S&D *Treatment* yang tepat dan efektif. Dimana perlakuan S&D tersebut diberikan untuk negara berkembang dan LDC sebagai suatu kesatuan yang tidak terpisahkan dari negosiasi subsidi perikanan, karena hal tersebut diperlukan untuk mengurangi kemiskinan dan kesejahteraan dan ketahanan pangan dari negara anggota WTO yang bersangkutan.

Draft chairman's text yang ada saat ini telah menambahkan Annex VIII tentang *fisheries subsidies* ke dalam SCM *Agreement.* Dengan adanya *draft chairman's text* tersebut banyak negara berkembang yang telah mengutarakan pandangan mereka terhadap khususnya terhadap ketentuan yang berhubungan dengan pemberian S&D *Treatment* terhadap negara berkembang dan kondisi-kondisi atau persyaratan mengenai *fisheries management* yang harus dipenuhi oleh negara berkembang dalam memanfaatkan S&D *Treatment.*

Oleh karena itu, pada tanggal 13 Mei 2008 India, Indonesia dan China mengajukan proposal dengan nomor TN/RL/GEN/155/Rev.1 tertanggal 19 May 2008 dengan judul *Need for Effective Special and Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies Text*[131] (selanjutnya disebut dengan "*Join Paper*") dengan tujuan

[131] Proposal ini merupakan kelanjutan dari proposal bersama yang telah diajukan oleh Indonesia dan India pada bulan April 2008 mengenai *Need for Effective Special & Differential Subsidies* Text (TN/RL/GEN.155).

untuk menyalurkan pendapat mereka agar ketentuan S&D *Treatment* dalam *draft chairman's text* menjadi lebih efektif.

Join Paper ini beranggapan bahwa *draft chairman's text* yang ada saat ini dapat memberatkan/menghalangi kepentingan negara berkembang.[132] Oleh karena itu *joint paper* ini mengusulkan adanya perbaikan *draft chairman's text* mulai dari *Article* I sampai dengan *Article* V, namun dari semua isu-isu tersebut yang menjadi perhatian utama dan isu mendasar dalam kaitannya terutama dengan *negara berkembang* ialah *Article* III (S&D *Treatment*) dan *Article* V (*Fisheries Management*).

Perlu dicatat bahwa *Article* III *draft chairman's text* menyatakan bahwa negara berkembang dikecualikan dari ketentuan *prohibited subsidies* dengan syarat hanya apabila mereka memiliki *fisheries management system* sebagaimana diatur dalam *Article* V *draft chairman's text*. Jadi, *prohibited subsidies* diusulkan agar menjadi *not prohibited* selama pemberian subsidi tersebut memenuhi kondisi-kondisi tertentu. Namun kondisi yang dipersyaratkan tersebut dirasakan masih belum terlalu jelas pengertiannya. Oleh karena itu *join paper* mengajukan proposal agar kondisi-kondisi (*conditions*) yang dipersyaratkan tersebut dapat dihapuskan.[133]

Selain permohonan agar dihapuskannya *conditions* dari ketentuan *prohibited subsidies, join paper* juga menginginkan agar pengecualian dari *prohibited subsidies* harus merujuk kepada *Article* V *draft chairman's text* dihapuskan.[134] Permohonan penghapusan tersebut dilakukan mengingat bahwa negara berkembang memiliki tingkat pembangunan infrastruktur yang beragam sehingga mereka juga membutuhkan fleksibilitas dalam mengejar pembangunan mereka. Apabila suatu pemberian subsidi dikecualikan dari *prohibited subsidies* namun harus memiliki *fisheries*

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[132] Lihat *Introduction*, dokumen no. TN/RL/GEN/155/Rev.1 tanggal 19 May 2008 perihal *Need for Effective Special & Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies text: Submission by India, Indonesia and China* (dapat diakses melalui www.wto.org).

[133] Lihat *Article* 5, dokumen no. TN/RL/GEN/155/Rev.1 tanggal 19 May 2008 perihal *Need for Effective Special & Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies text: Submission by India, Indonesia and China* (dapat diakses melalui www.wto.org).

[134] Lihat *Article* 3, *Need for Effective Special and Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies Text,* TN/RL/GEN/155/Rev.1.

management system maka *policy space* dari negara berkembang tersebut menjadi terbatas.

Maka India, Indonesia dan China percaya bahwa hendaknya prioritas terhadap pembangunan, ketahanan pangan dan kesejahteraan dari *negara berkembang* harus dipertahankan melalui S&D *Treatment* yang efektif.

BAB 4
PEMBAHASAN

Bagi Indonesia sektor perikanan merupakan sektor yang memiliki peranan yang sangat penting dan strategis dalam pembangunan perekonomian nasional, terutama dalam meningkatkan perluasan kesempatan kerja, pemerataan pendapatan, dan peningkatan taraf hidup bangsa pada umumnya, nelayan kecil, pembudi daya-ikan kecil, dan pihak-pihak pelaku usaha di bidang perikanan.[135] Keberadaan Deklarasi Doha yang menyepakati agar dilakukan perundingan lebih lanjut terhadap ketentuan WTO yang berkaitan dengan subsidi perikanan (*fisheries subsidies*)[136] hendaknya dapat menjadi celah bagi Indonesia untuk dapat melakukan suatu tindakan nyata yang dapat mengakomodir kepentingan nasional[137] khususnya terhadap sektor perikanan Indonesia mengingat saat ini belum ada ketentuan WTO yang mengatur mengenai subsidi perikanan.

Menyadari akan pentingnya sektor perikanan di Indonesia, salah satu tindakan yang telah dilakukan Indonesia ialah dengan memanfaatkan kesempatan yang Indonesia miliki sebagaimana telah disepakati dalam Deklarasi Doha, yakni melalui intervensi langsung dalam bentuk pengajuan proposal. Pada saat persidangan *rules* Indonesia telah mengajukan proposal subsidi perikanan dengan nomor TN/RL/GEN/150 tentang *Fishery Subsidies – Proposed New Disciplines*.

Pada perjalanannya proposal subsidi perikanan yang diajukan Indonesia telah mengalami revisi sebanyak 2 (dua) kali. Revisi yang pertama kali dilakukan melalui dokumen nomor TN/RL/GEN/150/Rev.1 dimana salah satu alasan revisi ialah demi mewujudkan perundingan subsidi perikanan yang lebih konstruktif di masa datang. Meskipun demikian, keberadaan proposal kedua tersebut dirasakan masih belum cukup sempurna untuk mengakomodir kepentingan Indonesia. Oleh karena itu, untuk ketiga kalinya Indonesia melakukan revisi kembali terhadap proposal subsidi perikanan mereka. Proposal ketiga dengan nomor dokumen TN/RL/GEN/150/Rev.2 tertanggal 9 Oktober 2007 (untuk selanjutnya proposal

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[135] Indonesia, *Undang-Undang Perikanan.* UU No. 31 tahun 2004. LN No. 118 tahun 2004, TLN No. 4433, Penjelasan Umum,

[136] Departemen Luar Negeri, *Sekilas WTO (World Trade Organization), op.cit.,* hlm. 72.

[137] Kepentingan Nasional menurut Penjelasan Pasal 18 butir (h) UU No. 24 tahun 2000 tentang Perjanjian Internasional ialah kepentingan umum *(public interest),* perlindungan subjek hukum Republik Indonesia, dan yurisdiksi kedaulatan Republik Indonesia.

ini disebut dengan "proposal Indonesia") ini diharapkan dapat menyempurnakan proposal sebelumnya.

4.1 Konsep Subsidi Perikanan Menurut Proposal Indonesia dibandingkan dengan *Draft Consolidated Chair Text of the Anti Dumping and SCM Agreements*

Untuk dapat mengerti mengenai konsep subsidi perikanan pada proposal Indonesia, terdapat 2 (dua) isu utama yang menjadi pusat perhatian penulis yakni isu mengenai definisi subsidi perikanan (*prohibited subsidies, actionable subsidies* dan *non-actionable subsidies*) serta keberadaan S&D *Treatment* (perlakuan khusus dan berbeda) terhadap negara berkembang (khususnya terhadap Indonesia).

4.1.1 Perbandingan Definisi Subsidi Perikanan Menurut Proposal Indonesia dengan *Draft Consolidated Chair Text of the Anti Dumping and SCM Agreements*

Definisi mengenai subsidi perikanan akan menjadi sesuatu yang sangat penting untuk dipahami bagi setiap negara anggota WTO. Karena, penulis beranggapan bahwa memahami definisi subsidi perikanan akan dapat memudahkan negara anggota WTO dalam menentukan tindakan subsidi yang mana yang dapat ataupun tidak dapat dilakukan oleh negara anggota WTO.

Pada dasarnya proposal Indonesia ini menghendaki agar ketentuan mengenai subsidi perikanan nantinya akan menjelma menjadi sebuah Annex dalam SCM *Agreement* dan merupakan satu bagian yang tidak terpisahkan (satu kesatuan) pada SCM *Agreement.* Secara umum definisi subsidi yang dimaksud dalam proposal Indonesia memiliki pengertian yang sama dengan paragraf 1 *Article* 1 SCM *Agreement* yakni setiap bantuan finansial/keuangan yang diberikan oleh pemerintah baik secara langsung maupun tidak langsung kepada perusahaan, industri, kelompok industri, atau eksportir dimana bantuan tersebut akan dapat memberi manfaat/membawa manfaat bagi si penerima. Namun perlu diingat

bahwa subsidi yang tunduk terhadap ketentuan *fisheries subsidies* tidak termasuk ke dalam *inland fisheries*[138] maupun *aquaculture*[139].

Struktur definisi subsidi perikanan pada proposal Indonesia dibuat sama dengan struktur subsidi pada SCM *Agreement* yang membedakan subsidi menjadi tiga kategori *prohibited subsidies*, *actionable subsidies* dan *non-actionable subsidies.* Keberadaan *Article* 2 tentang *Prohibition of Fisheries Subsidies* pada proposal Indonesia bertujuan untuk mengajak negara anggota WTO agar mampu membedakan antara *prohibited subsidies* dengan *actionable subsidies* yakni memahami bahwa yang dimaksud dengan *prohibited subsidies* ialah tindakan subsidi yang memang sudah sifatnya (*by its nature*) serta dengan *actionable subsidies* yang membutuhkan pembuktian terlebih dahulu bahwa tindakan subsidi yang bersangkutan benar-benar menyebabkan kerugian terhadap negara anggota WTO lainnya.

Berdasarkan SCM *Agreement* yang dimaksud dengan *prohibited subsidies* (*red light subsidies*) ialah larangan yang ditujukan pada negara anggota WTO berupa pelarangan untuk memberikan atau melakukan *export subsidies* atau *import substitution subsidies* (mendahulukan penggunaan barang-barang hasil produksi dalam negeri dibandingkan barang impor).[140] Apabila suatu negara melakukan pemberian subsidi yang dikategorikan sebagai *prohibited subsidies,* tanpa melakukan pembuktian atas *injury* yang diderita terlebih dahulu-pun negara tersebut wajib untuk segera mencabut pemberian subsidinya.[141]

Article 2 proposal Indonesia berisikan pasal mengenai *prohibited subsidies.* Berdasarkan *Article* ini, negara anggota WTO harus memahami bahwa pengertian *prohibited subsidies* yang

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[138] "*Inland Fisheries*" merupakan bentuk budidaya perikanan yang dilakukan dalam air tawar (perikanan darat).

[139] "*Aquaculture*" merupakan bentuk budidaya organisme yang hidup di air, termasuk ikan, moluska dan binatang berkulit keras (misalnya udang, kepiting, dll), dimana budidaya dengan cara *aquaculture* tidak melakukan penangkapan ikan untuk memberi makan budidaya tersebut.

[140] Indonesian Trade Assistance Project, "METI Chapter 6 : Subsidies and Countervailing Measures,*"* section 7, (Makalah disampaikan pada One-Day Seminar on WTO *Agreement* on Subsidies and Countervailing Measures : Law and Practice, Jakarta 24 Agustus 2006), hlm. 0240.

[141] Lihat *Article* 4.7 SCM Agreement.

dimaksud dalam *article* ini sama dengan pengertian subsidi sebagaimana diatur dalam *Article* 1 dan *Article* 3 SCM *Agreement.*[142] Namun pada subsidi perikanan terdapat beberapa elemen teknis mengenai spesifikasi tindakan apa saja yang dapat digolongkan sebagai *prohibited subsidies* melalui *Article* 2.1 proposal Indonesia, yaitu

> *(a) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of vessel construction of any fishing vessels;*
> *(b) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of modernization, renovation, repair or upgrading of existing fishing vessels, including engine or gear acquisition, any technical or electronic equipment onboard the vessel, and any other significant capital inputs to fishing;*
> *(c) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of fixed or variable operational costs of fishing vessels and fishing activities, including on-board processing;*
> *(d) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for shipbuilding yards contingent upon the construction of fishing vessels;*
> *(e) subsidies granted, in law or in fact, whether solely or as one of several other conditions, relating to illegal, unreported and unregulated fishing, as well as to any fishing vessels flying "flags of convenience"; and*
> *(f) subsidies granted, in law or in fact, whether solely or as one of several other conditions, upon the transfer of fishing vessels to foreign owners, including through the creation of joint ventures with those countries.*

Keberadaan 6 (enam) elemen diatas menjelaskan jenis-jenis tindakan pemberian subsidi apa yang tergolong sebagai *prohibited subsidies* dalam ruang lingkup *fisheries subsidies.* Jadi, apabila terdapat tindakan subsidi yang memenuhi setidaknya 1 (satu) atau beberapa poin dari 6 (enam) elemen diatas maka negara pemberi subsidi harus mencabut pemberian subsidi-nya[143] atau negara anggota

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[142] *Article 2.1* Proposal Indonesia menyatakan "*... except as provided in this Annex, and without prejudice to Article 3 of the ASCM, the following subsidies, within the meaning of Article 1 of the ASCM and this Annex, shall be prohibited within the meaning of Article 3 of the ASCM ...*"

[143] Lihat *Article* 7.8 SCM *Agreement.*

WTO yang terkena *injury* dapat melakukan konsultasi dengan negara anggota WTO pemberi subsidi untuk mencapai kesepakatan diantara mereka dalam menyelesaikan masalah yang ada secara *mutually agreed solution.* Namun apabila kesepakatan tidak dapat tercapai, negara anggota yang terkena injury dapat mengadukan masalah mereka ke DSB.[144]

Satu hal yang perlu juga untuk diperhatikan, bahwa penyusunan *Article* 2 ini telah dibuat sedemikian rupa agar tetap konsisten dengan struktur dan ruang lingkup subsidi sebagaimana diatur oleh SCM *Agreement.* Dengan adanya *Article* 2 diharapkan dapat menghindarkan kerancuan dalam memahami definisi *prohibited subsidies* antara yang diatur oleh SCM *Agreement* maupun oleh ketentuan subsidi perikanan kelak.

Jenis tindakan subsidi lainnya menurut proposal Indonesia ialah *actionable subsidies. Actionable subsidies* diatur melalui *Article* 3 proposal Indonesia. Seperti telah disebutkan sebelumnya tidak seperti *prohibited subsidies* yang tidak perlu dibuktikan, terhadap *actionable subsidies* perlu adanya pembuktian[145] terlebih dahulu untuk dapat mengatakan bahwa suatu tindakan subsidi tertentu ialah *actionable subsidies.* Sebagaimana disebutkan pada *Article 3.2* proposal Indonesia:

> *"... except as provided in this Annex, and without prejudice to Parts III and V of the ASCM and Articles 2 and 3.1 herein, the following subsidies, within the meaning of Article 1 of the ASCM and this Annex, shall be considered as actionable within the meaning of Article 5 of the ASCM ..."*

Maka dapat dikatakan *actionable subsidies* ialah tindakan pemberian subsidi baik yang diatur melalui *Article* 3 proposal Indonesia maupun tindakan subsidi lainnya selain tindakan subsidi yang digolongkan ke

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[144] Lihat *Article* 2.3 dokumen no. No. TN/RL/GEN/150/Rev.2 tanggal 9 Oktober 2007 perihal *Fishery Subsidies: Proposed New Discipline* (dapat diakses melalui www.wto.org) dan *Article* 4 SCM *Agreement.*

[145] Tindakan pembuktian tersebut biasa disebut dengan *adverse effect test*. Menurut *Article* 5 SCM *Agreement* yang dimaksud dengan *adverse effect* ialah adanya pembuktian bahwa memang benar terjadi *injury* terhadap *domestic industry* negara anggota lainnya, adanya *nullification and impairment* dan *serious prejudice.*

dalam *prohibited subsidies* (tidak termasuk dalam 6 (enam) poin sebagaimana disebutkan dalam *Article* 2.1 proposal Indonesia) atau diatur sebaliknya dalam proposal Indonesia. Dengan kata lain seluruh tindakan subsidi pada *fisheries subsidies* dapat digolongkan ke dalam *actionable subsidies,* kecuali diatur sebaliknya.

Seperti telah disebutkan sebelumnya, perlu suatu pembuktian bahwa telah terjadi *adverse effect* terhadap *domestic industry* negara anggota WTO lainnya untuk dapat mengatakan suatu tindakan subsidi tergolong sebagai *actionable subsidies.* Menurut proposal Indonesia pengertian *adverse effect* selain sebagaimana diatur melalui *Article* 5 SCM *Agreement* ialah *adverse effects* terhadap sumber daya perikanan (*fisheries resource*) yaitu:

(a) *injury to the fishery resource of another Member,*
(b) *nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of concesssions bound under Article II of GATT 194, as a result of an effect on a fishery resource,*
(c) *serious prejudice to a fishery resource of another Member.*[146]

Jadi yang dapat dikatakan sebagai *adverse effect* ialah apabila tindakan subsidi yang bersangkutan telah merugikan (menyebabkan *injury*) terhadap sumber daya perikanan negara anggota WTO lainnya, adanya penghapusan atau pengurangan atas keuntungan yang sesungguhnya bisa diperoleh oleh negara anggota WTO lainnya dari adanya sumber daya perikanan yang baik serta kerugian serius (*serious prejudice*) atas sumber daya perikanan negara anggota WTO lainnya. Selain ketiga faktor tersebut *Article* 7 proposal Indonesia juga mengatur tata cara/metode teknis pembuktian *adverse effect*[147] pada *actionable subsidies.*

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[146] Lihat *Article* 7.1 dokumen no. No. TN/RL/GEN/150/Rev.2 tanggal 9 Oktober 2007 perihal *Fishery Subsidies: Proposed New Discipline* (dapat diakses melalui www.wto.org).

[147] Menurut *Article* 7.2 dokumen no. No. TN/RL/GEN/150/Rev.2 tanggal 9 Oktober 2007 perihal *Fishery Subsidies: Proposed New Discipline*, pemeriksaan atas *adverse effect* terhadap sumber daya perikanan yang dikarenakan adanya aktivitas penangkapan ikan harus memenuhi evaluasi terhadap faktor-faktor yang berhubungan dengan sumber daya perikanan, antara lain: *(a) the total catch or production or trading (in volume terms) by the Member of target species, with breakdown by fishery, and the number of vessels used in those catching or production operations,*

Definisi subsidi perikanan lainnya yang diatur melalui proposal Indonesia ialah *non-actionable subsidies* yang diatur melalui *Article* 4 proposal Indonesia tentang *Exceptions to Actionable Subsidies.* Berdasarkan *Article* 4 proposal Indonesia, hal-hal berikut ini tergolong kepada *non-actionable subsidies* yaitu:

> *(a) Provision of a social safety net for fishermen, including early retirement schemes, re-education, training or alternative employment assistance, unemployment relief, life insurance, support for the temporary suspension of fishing activities;*
> *(b) Fisheries research, including data collection, surveys, data analysis, and stock monitoring, sampling and assessment;*
> *(c) Fisheries stock enhancement, including marine conservation and protection, marine environment restoration, protection and development of a Member's own archipelagic waters, artificial reefs, hatcheries for breeding and by-catch mitigation devices;*
> *(d) Improving vessel and crew safety, provided that the improvement is undertaken to comply with international or domestic standards; and there is no increase in fishing capacity, such as the volume of fish hold or engine power of a vessel subject to such programme;*
> *(e) Construction and maintenance of general infrastructure for fishing activities, such as wharves and fishing ports and related facilities, roadways, water and sanitary waste systems, the provision of housing and other forms of community development infrastructure;*
> *(f) Short-term emergency relief, recovery adjustment programmes and replacement of fishing capacity following natural or environmental disasters, provided that fishing fleet capacity is not restored beyond its pre-disaster state, except that special flexibility shall be given to developing countries pursuant to Article 5 of this Annex;*
> *(g) Assistance and user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes, and other expenses related to*

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with breakdown by operated location areas; (b) the criteria and scientific information used to set the status of the fishery; (c) whether the fishery in question is under management of a regional fisheries management organization or arrangement and which are the nature of the monitoring and the quantitative limits applicable to the Member; (d) national fisheries management plans in place, with sufficient information to enable Members to evaluate and to understand their framework and operation; and (e) government-to-government payment for access by foreign vessels to fishing resources of a developing country's maritime jurisdiction or to quotas or any other rights established by any regional fishery management organization or arrangement ("access rights"), with breakdown by recipient country, total amounts paid, amounts received on the onward transfer of the access rights, fisheries data (in accordance with items (a) and (b) of this paragraph) and other relevant information, (f) information on the biological status of relevant marine ecosystems.

> *administration and operation of fishery management programmes, including allocation and monitoring of licences, permits, quotas, vessel numbers and catch returns.*[148]

Ketujuh elemen diatas menjelaskan hal-hal apa saja yang diinginkan oleh Indonesia untuk dimasukkan ke dalam kategori *non-actionable subsidies.* Keseluruhan elemen tersebut dibuat sedemikian rupa agar tidak menyebabkan *overcapacity* dan *overfishing* sebagaimana yang diagendakan dalam Deklarasi Doha. Tidak seperti yang diatur olah SCM *Agreement Article* 4 proposal Indonesia tidak memasukkan mengenai batasan waktu keberlakuan *non-actionable subsidies* karena sebagaimana tercermin dalam keseluruhan elemen tersebut tujuan diberikannya subsidi sebagian besar ialah untuk riset dan kegiatan pengembangan, lingkungan, infrastruktur dan lain sebagainya sehingga tidak akan menyebabkan *overcapacity* dan *overfishing*.

Berdasarkan penjelasan diatas dapat kita simpulkan definisi subsidi perikanan menurut proposal Indonesia terbagi atas tiga jenis *prohibited*, *actionable subsidies* dan *non-actionable subsidies.* Dalam memahami definisi subsidi perikanan proposal Indonesia memiliki struktur yang sama dengan SCM *Agreement,* dimana proposal Indonesia merekomendasikan bahwa subsidi selain yang secara spesifik dikategorikan sebagai *prohibied subsidies* akan dikategorikan sebagai *actionable subsidies,* kecuali diatur sebaliknya dalam proposal Indonesia. Khusus tindakan subsidi yang merupakan pengecualian terhadap *actionable subsidies* tergolong kedalam *non-actionable subsidies.*

Tidak seperti proposal Indonesia, definisi subsidi perikanan menurut *draft chairman's text* tidak membagi secara jelas antara *prohibited subsidies, actionable subsidies* dan *non-actionable subsidies.* Ketentuan mengenai *prohibited subsidies* dalam *Draft chairman's text* diatur melalui *Article* I tentang *Prohibition of Certain*

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[148] Lihat *Article* 4 dokumen no. No. TN/RL/GEN/150/Rev.2 tanggal 9 Oktober 2007 perihal *Fishery Subsidies: Proposed New Discipline* (dapat diakses melalui www.wto.org).

Fisheries Subsidies. Menurut *Article* I.1 *draft chairman's text* tindakan subsidi yang berupa kontribusi finansial yang dapat menimbulkan keuntungan terhadapnya akan dapat dikategorikan sebagai *prohibited subsidies* apabila memenuhi elemen-elemen sebagai berikut:

> *(a) Subsidies the benefits of which are conferred on the acquisition, construction, repair, renewal, renovation, modernization, or any other modification of fishing vessels or service vessels, including subsidies to boat building or shipbuilding facilities for these purposes.*
> *(b) Subsidies the benefits of which are conferred on transfer of fishing or service vessels to third countries, including through the creation of joint enterprises with third country partners.*
> *(c) Subsidies the benefits of which are conferred on operating costs of fishing or service vessels (including licence fees or similar charges, fuel, ice, bait, personnel, social charges, insurance, gear, and at-sea support); or of landing, handling or in- or near-port processing activities for products of marine wild capture fishing; or subsidies to cover operating losses of such vessels or activities.*
> *(d) Subsidies in respect of, or in the form of, port infrastructure or other physical port facilities exclusively or predominantly for activities related to marine wild capture fishing (for example, fish landing facilities, fish storage facilities, and in- or near-port fish processing facilities).*
> *(e) Income support for natural or legal persons engaged in marine wild capture fishing.*
> *(f) Price support for products of marine wild capture fishing.*
> *(g) Subsidies arising from the further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fisheries within the jurisdiction of such other Member.*
> *(h) Subsidies the benefits of which are conferred on any vessel engaged in illegal, unreported or unregulated fishing.*

Jadi, elemen-elemen sebagaimana disebutkan diatas merupakan penjelasan dari tindakan-tindakan subsidi yang dikategorikan sebagai *prohibited subsidies.* Selain itu, *draft chairman's text* juga mengatur bahwa apabila suatu tindakan subsidi menyebabkan terjadinya

overfishing maka terhadapnya juga digolongkan sebagai *prohibited subsidies.*[149]

Selain *prohibited subsidies,* ketentuan lain yang berhubungan dengan definisi subsidi perikanan dalam *draft chairman's text* ialah ketentuan mengenai *General Exceptions* (pengecualian umum). Berdasarkan *Article* II *draft chairman's text* terdapat beberapa kegiatan pemberian subsidi yang dapat dikecualikan dari *prohibition subsidies*. Maksudnya pemberian subsidi sebagaimana diatur melalui *Article* II tersebut diperbolehkan. *Article* IV *draft chairman's text* tentang *General Discipline on the Use of Subsidies* juga menjelaskan ketentuan lain dari *draft chairman's text* yang menggambarkan mengenai definisi *fisheries subsidies* yaitu:

> *"... IV.1 No Member shall cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, depletion of or harm to, or creation of overcapacity in respect of, (a) straddling or highly migratory fish stocks whose range extends into the EEZ of another Member; or (b) stocks in which another Member has identifiable fishing interests, including through user-specific quota allocations to individuals and groups under limited access privileges and other exclusive quota programmes. The existence of such situations shall be determined taking into account available pertinent information, including from other relevant international organizations. Such information shall include the status of the subsidizing Member's implementation of internationally-recognized best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at the sustainable use and conservation of marine species, such as, inter alia, the Fish Stocks Agreement, the Code of Conduct, the Compliance Agreement, and technical guidelines and plans of action (including criteria and precautionary reference points) for the implementation of these instruments, or other related or successor instruments.*
>
> *IV.2 Any subsidy referred to in this Annex shall be attributable to the Member conferring it, regardless of the*

[149] Lihat *Article* I *paragraph* 2 dokumen no. TN/RL/W/213 tanggal 30 Nopember 2007 perihal *Draft Consolidated Chair Text of the Anti Dumping and SCM Agreements* (dapat diakses melalui www.wto.org).

> *flag(s) of the vessel(s) involved or the application of rules of origin to the fish involved... "*

Bisa dikatakan tujuan utama dari ketentuan ini ialah sebagai suatu perlindungan (*recourse*) dari negara anggota WTO yang dirugikan akibat adanya tindakan subsidi dari negara anggota WTO lainnya. Karena tidak satupun negara anggota WTO diperbolehkan untuk melakukan subsidi sebagaimana *Article* 1 paragraf 1 dan 2 SCM *Agreement* apabila pemberian subsidi tersebut membahayakan atau menyebabkan *overcapacity.*

Dari seluruh penjelasan mengenai definisi subsidi perikanan dan S&D *Treatment* menurut proposal Indonesia dan *draft chairman's text,* penulis berkesimpulan bahwa terdapat perbedaan pandangan mengenai definisi subsidi perikanan diantara keduanya. Secara struktural definisi subsidi perikanan pada *Draft chairman's text* memiliki perbedaan dengan proposal Indonesia dan SCM *Agreements.*

Struktur definisi subsidi perikanan pada proposal Indonesia dan *SCM Agreements* memiliki kesamaan dalam mendefinisikan subsidi yakni dengan membagi secara jelas antara *prohibited subsidies*, *actionable subsidies* dan *non-actionable subsidies.* Seperti telah dijelaskan sebelumnya, alasan Indonesia membagi definisi *fisheries subsidies* ke dalam *prohibited*, *actionable subsidies* dan *non-actionable subsidies* ialah agar struktur *fisheries subsidies* dapat terbagi dengan jelas yang mana jenis subsidi yang tidak perlu dibuktikan bahwa telah terjadi kerugian yang timbul akibat subsidi tersebut dengan jenis subsidi yang perlu dibuktikan bahwa karena subsidi tersebut telah terjadi *adverse effect.*

Selain itu Indonesia beranggapan penjelasan mengenai disiplin umum subsidi beserta mekanismenya, *adverse effect test* terhadap *actionable subsidies,* disiplin atas *prohibited subsidies,* dan penjelasan atas *actionable subsidies* sebagaimana disebutkan dalam proposal Indonesia akan membuat ketentuan subsidi perikanan akan menjadi lebih sistematis dan strategis. Sementara definisi subsidi perikanan

yang diatur melalui *draft chairman's text* memiliki cakupan yang lebih luas dan tanpa menuangkan dengan jelas pembagian antara *prohibited subsidies* dengan subsidi perikanan melainkan membagi definisi subsidi kedalam *prohibited subsidies, general exceptions* dan *general discipline on the use of subsidies.*

4.1.2 Perbandingan Ketentuan Mengenai S&D *Treatment* Menurut Proposal Indonesia dengan *Draft Consolidated Chair Text of the Anti Dumping and SCM Agreements*

S&D *Treatment* atau bisa disebut sebagai perlakuan khusus dan berbeda merupakan suatu ketentuan dalam WTO *Agreements* yang memberikan pengecualian terhadap negara berkembang maupun negara terbelakang (LDC's) untuk mengesampingkan ketentuan WTO.[150] Keberadaan S&D *Treatment* memberikan hak khusus yang mengizinkan negara maju untuk memperlakukan negara berkembang berbeda (*more favorably*) dari negara anggota WTO lainnya. S&D *Treatment* memberikan kesempatan terhadap negara berkembang kebebasan yang lebih dalam menggunakan kebijakan industri mereka termasuk subsidi.[151] SCM Agreement secara khusus juga mengatur ketentuan perihal S&D *Treatment*.[152]

Dengan adanya ketentuan mengenai S&D *Treatment,* negara berkembang maupun LDCs memiliki kesempatan untuk memanfaatkan ketentuan tersebut demi kepentingan masing-masing pribadi negara yang bersangkutan.[153] Oleh karena itu Indonesia sebagai salah satu negara berkembang merasa perlu untuk memasukkan ketentuan S&D *Treatment* ke dalam salah satu *article*

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[150] Departemen Luar Negeri, *Sekilas WTO (World Trade Organization), op.cit.*, hlm. 69.

[151] *Lihat* Joseph E. Stiglitz dan Andrew Charlton, *Fair Trade For All: How Trade Can Promote Development,* (New York: Oxford University Press, 2007), hlm.88.

[152] Ketentuan mengenai S&D Treatment dalam SCM *Agreement* diatur melalui *Article* 27 SCM Agreement.

[153] Bagi negara berkembang S&D treatment bukan hanya adanya *longer timeframe* dalam mengimplementasikan persetujuan-persetujuan WTO, tetapi juga pengecualian-pengecualian lain yang sesuai dengan tingkat pembangunan ekonominya. Oleh karena itulah, salah satu paragraf dalam Deklarasi Doha memberikan mandat untuk meninjau kembali semua ketentuan mengenai S&D dengan tujuan untuk menjadikannya lebih tepat, efektif dan operasional.

dalam proposalnya agar dapat dimanfaatkan demi kepentingan nasional.

Dalam proposal Indonesia ketentuan S&D *Treatment* diatur melalui *Article* 5 perihal *Special and Differential Treatment of Developing Country Members.* Keberadaan S&D *Treatment* dalam proposal Indonesia meminta agar ada pengecualian bagi tindakan subsidi yang telah memenuhi syarat-syarat tertentu untuk diperlakukan sebagai *non actionable.* Pada *Article* 5 proposal Indonesia negara anggota WTO yang tergolong kepada negara berkembang diperbolehkan untuk memberikan atau melaksanakan subsidi perikanan terhadap kegiatan-kegiatan subsidi tertentu antara lain:

- Kegiatan *artisanal fisheries*[154] yang dilakukan antara lain dioperasikan didalam wilayah teritorial negara anggota yang bersangkutan dan kebanyakan lebih dekat pada tepi laut[155];
- Subsidi yang dilakukan oleh *small-scale fisheries*[156] dengan tujuan pembangunan konstruksi kapal, perbaikan, atau modernisasi, atau akuisisi atau perbaikan perkakas (*gear*), atau bahan bakar, atau umpan atau es[157];
- Subsidi yang dilakukan dengan tujuan pembangunan konstruksi kapal, perbaikan, atau modernisasi, atau akuisisi atau perbaikan perkakas (*gear*), atau bahan bakar atau es yang ditujukan untuk mengeksploitasi perikanan pada penangkapan ikan di dalam wilayah ZEE negara anggota WTO sendiri atau hak yang dimiliki oleh negara anggota pada quota perikanan

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[154] *Artisanal fisheries activities* termasuk *on-board handling* (termasuk namun tidak terbatas terhadap ketentuan mengenai *cool boxes, fish holds and other measures to encourage hygieneand sanitation and to preserve fish quality) and port-harvest handling.*

[155] Lihat *Article* 5 *paragraph* 1 dokumen no. No. TN/RL/GEN/150/Rev.2 tanggal 9 Oktober 2007 perihal *Fishery Subsidies: Proposed New Discipline* (dapat diakses melalui www.wto.org).

[156] *Small scale fisheries* ialah nelayan dengan dimensi dibawah 20 meter dan mengoperasikan penangkapan ikan yang dibatasi 12 mil dari pulau terluar atau wilayah *archipelagic waters* negara anggota yang bersangkutan.

[157] Lihat *Article* 5 *paragraph* 2 dokumen no. No. TN/RL/GEN/150/Rev.2 tanggal 9 Oktober 2007 perihal *Fishery Subsidies: Proposed New Discipline* (dapat diakses melalui www.wto.org).

atau hak lain yang ditimbulkan oleh RFMO atau perjanjian perikanan regional lainnya [158];

Selain 3 (tiga) poin diatas Indonesia juga mencantumkan permintaan yang berhubungan dengan posisinya sebagai negara berkembang yakni agar negara maju diwajibkan untuk menyediakan tenaga ahli (*technical assistance*) berdasarkan syarat-syarat yang disetujui oleh kedua belah pihak (negara maju dan negara berkembang) dengan tujuan agar negara berkembang bisa berpartisipasi secara penuh dalam RFMO manapun yang berdampingan dengan ZEE atau *archipelagic waters* dari negara anggota yang bersangkutan,[159] serta permintaan agar negara anggota WTO yang tergolong ke dalam negara maju harus menyediakan tenaga ahli untuk membantu negara anggota yang tergolong negara berkembang dalam syarat-syarat yang disetujui kedua pihak untuk membangun kapasitas negara berkembang dalam menginisiasi dan melaksanakan *fishery management plan*. Permintaan Indonesia akan adanya *technical assistance* dari negara maju sejalan dengan pendapat Frank J. Garcia yang menyatakan bahwa prinsip S&D *Treatment* merupakan elemen utama dalam agenda pembangunan perdagangan dunia, dimana S&D *Treatment* memainkan peranan penting dalam memenuhi kewajiban moral dari negara yang lebih kaya yang memiliki hutang moral terhadap negara yang lebih miskin.[160] Jadi dengan adanya S&D *Treatment* negara maju memiliki kewajiban untuk memenuhi permintaan negara berkembang sebagai suatu bentuk pemenuhan hutang moral.

Berdasarkan penjelasan-penjelasan sebelumnya, bisa dikatakan bahwa pada proposal Indonesia, ketentuan S&D *Treatment* dibuat untuk kepentingan *artisanal* dan *small-scale fisheries.* Pemerintah

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[158] Lihat *Article* 5 *paragraph* 3 dokumen no. No. TN/RL/GEN/150/Rev.2 tanggal 9 Oktober 2007 perihal *Fishery Subsidies: Proposed New Discipline* (dapat diakses melalui www.wto.org).

[159] Lihat *Article* 5 *paragraph* 4 Proposal Indonesia.

[160] Frank J. Garcia, *Trade And Inequality: Economic Justice And The Developing World*, *op.cit.*

dalam hal ini diperbolehkan untuk memberikan subsidi atau mengesampingkan ketentuan subsidi demi kepentingan *artisanal* dan *small-scale fisheries.*

Setelah ketua perundingan WTO bidang *rules* menerbitkan *draft chairman's text,* babak baru perundingan atas masalah anti dumping dan subsidi dimulai kembali, yang mana *draft chairman's text* tersebut akan menjadi acuan bagi negara anggota WTO dalam melakukan perundingan selanjutnya untuk masalah anti dumping, subsidi dan subsidi perikanan dalam Putaran Doha. Sebagaimana telah dijelaskan pada Bab III *draft chairman's text* lahir setelah melewati masa-masa perundingan *rules,* dimana pada masa-masa tersebut negara-negara anggota WTO telah memberikan masukan mengenai bagaimana ketentuan WTO juga dapat mengatur subsidi perikanan. Pada *draft chairman's text* isu subsidi perikanan diatur melalui *Annex* VIII atas SCM *Agreement* atau dengan kata lain ketentuan fisheries subsidies tetap menjadi satu kesatuan yang tidak terpisahkan dari SCM *Agreements.* Namun dengan adanya *draft chairman's text,* Indonesia perlu melakukan peninjauan terhadap *draft chairman's text* dengan proposal Indonesia apakah kepentingan Indonesia sebagaimana telah disebutkan pada proposal Indonesia telah terakomodir dalam *draft chairman's text,* karena hendaknya keberadaan *draft chairman's text* mampu memfasilitasi kepentingan negara anggota WTO khususnya Indonesia.

Oleh karena itu, penulis akan melakukan perbandingan atas konsep subsidi perikanan menurut proposal Indonesia dengan *draft chairman's text* apakah kepentingan Indonesia telah terakomodir dengan baik atau tidak. Berikut ini penjelasan atas perbandingan antara *draft chairman's text* dengan proposal Indonesia mengenai konsep subsidi perikanan khususnya isu mengenai definisi subsidi perikanan serta keberadaan S&D *Treatment*.

Banyak ketentuan-ketentuan dalam WTO *Agreements* yang berkaitan dengan kepentingan negara berkembang dan LDC, salah

satunya adalah pemberian hak khusus atau kelonggaran terhadap negara-negara tersebut dalam melaksanakan kewajiban mereka sebagai negara anggota WTO. Seperti adanya ketentuan S&D *Treatment* yang memperkenankan negara maju untuk memperlakukan negara berkembang "berbeda" dengan negara anggota WTO lainnya.[161]

Ketentuan mengenai S&D *Treatment* pada *draft chairman's text* diatur melalui *Article* III mengenai *Special and Differential Treatment of Developing Country Members*. Menurut *draft chairman's text,* negara berkembang dan LDC's dapat memanfaatkan keberadaan S&D *Treatment* untuk kepentingan mereka. Bahwa negara berkembang dan LDC's diperbolehkan untuk melakukan tindakan subsidi tertentu terhadap sektor perikanan mereka selama pemberian subsidi tersebut telah memenuhi syarat-syarat yang telah ditetapkan sebelumnya. *Article* ini menegaskan bahwa seluruh negara anggota WTO harus menghargai kepentingan negara berkembang dan memfasilitasi bantuan teknis baik secara bilateral dan/atau melalui organisasi internasional yang tepat.

Meskipun S&D *Treatment* pada *draft chairman's text* dengan proposal Indonesia sama-sama bertujuan sebagai suatu pengecualian bagi negara berkembang dan LDC's untuk tetap dapat memperoleh subsidi asalkan memenuhi syarat-syarat tertentu, terdapat perbedaan yang cukup signifikan diantara keduanya dimana persyaratan yang diterapkan pada *draft chairman's text* terlalu ketat dibandingkan dengan persyaratan yang ada pada proposal Indonesia, sehingga akan sangat sulit bagi negara berkembang untuk memenuhi persyaratan tersebut. Perbedaan lainnya, dalam *draft chairman's text* tidak secara tegas memuat pengaturan mengenai *artisanal* dan *small-scale fisheries.* Pada dasarnya Indonesia memuat ketentuan mengenai *artisanal* dan *small-scale fisheries* karena struktur perikanan Indonesia pada dasarnya merupakan perikanan rakyat.

[161] Chapter 6: developing countries, <http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm>, diakses 1 Nopember 2008.

Subsidi perikanan..., Maudy Kiranayanti, FHUI, 2009

Jadi, S&D *Treatment* menurut proposal Indonesia dan *draft chairman's text* sama-sama bertujuan untuk memberikan pengecualian terhadap negara berkembang dan LDC's untuk dapat melakukan tindakan subsidi asalkan negara berkembang dan LDC's yang bersangkutan memenuhi syarat-syarat tertentu. Sementara itu perbedaannya ialah tidak secara spesifik dijelaskan bahwa sasaran utama S&D *Treatment* ialah pemberian subsidi terhadap *artisanal* dan *small-scale fisheries.*

4.2 Manfaat Proposal Subsidi Perikanan Terhadap Kepentingan Nasional

Semenjak berakhirnya Perang Dunia II, pembangunan perikanan khususnya di sektor perikanan laut di beberapa negara mengalami kemajuan pesat. Hal ini tercermin dengan meningkatnya produksi perikanan laut dari 9,7 juta ton pada tahun 1950 menjadi 57,9 juta ton pada tahun 2002 atau meningkat hampir 500% dalam kurun waktu lima dasawarsa atau 4,5% rata-rata peningkatan per tahun. Peningkatan produksi perikanan laut global ini tidak hanya dari kontribusi negara-negara maju tetapi juga negara-negara berkembang dengan masuknya modal dan teknologi penangkapan modern dari negara-negara maju.[162] Sebagai penyedia sumber makanan yang penting, lapangan kerja dan sumber pendapatan serta rekreasi, jutaan manusia di seluruh dunia menggantungkan hidupnya pada sektor perikanan. Di Asia saja, jumlah manusia yang mengandalkan ikan sebagai sumber utama protein hewaninya berjumlah kurang lebih 1 (satu) milyar jiwa.[163]

Secara geografis 75% wilayah negeri ini merupakan laut.[164] Bagian lautan Indonesia yang sangat luas ini merupakan aset nasional jangka panjang yang mengandung potensi sumber daya alam hampir tak terbatas

[162] Purwito Martosubroto, "Perkembangan Pengelolaan Perikanan Global," *Jurnal Hukum Internasional,* vol.1., no.3., (Depok: Fakultas Hukum-Universitas Indonesia, April 2004), hlm. 465-466.

[163] Darmawan, "Indonesia Dalam Kerjasama Perikanan Tangkap Regional: Tinjaun Aspek Dasar Kesiapan Dan Implementasinya Dewasa Ini," *Jurnal Hukum Internasional,* vol. 2., no. 3., (Depok: Fakultas Hukum-Universitas Indonesia, April 2005), hlm. 483-484.

[164] Suadi, *Menelusuri Pola Pertumbuhan Industri Perikanan Laut Indonesia: Beberapa Catatan*, <http://ikanmania.wordpress.com/2007/12/28/menelusuri-pola-pertumbuhan-industri-perikanan-laut-indonesia-beberapa-catatan/>, 28 Desember 2007.

terutama bagi eksploitasi sumber daya lautan, termasuk sumber daya ikan.[165] Perikanan mempunyai peranan yang penting dan strategis dalam pembangunan perekonomian nasional, terutama dalam meningkatkan perluasan kesempatan kerja, pemerataan pendapatan, dan peningkatan taraf hidup bangsa pada umumnya, nelayan kecil, pembudi daya-ikan kecil, dan pihak-pihak pelaku usaha di bidang perikanan dengan tetap memelihara lingkungan, kelestarian, dan ketersediaan sumber daya ikan. [166]

Namun bagaimanapun juga, sumber daya ikan yang melimpah jika dieksploitasi tanpa batas dan tanpa suatu sistem pengelolaan yang baik, dapat menimbulkan berbagai permasalahan terutama yang menyangkut kelangsungan dari sumber daya alam beserta keseimbangan ekosistemnya, seperti musnahnya spesies tertentu, sehingga dapat menimbulkan berkurangnya atau bahkan habisnya sumber daya ikan.[167] Bagi masyarakat pantai miskin, akses menuju dan perlindungan sumber daya ikan merupakan permasalahan keberlangsungan hidup yang sudah demikian rentan. Untuk tahun 2008 rata-rata penghasilan nelayan di Marunda, Pantai Utara Jakarta hanya Rp 5.000 s.d Rp 20.000 per hari dengan akses air bersih yang sangat minim sehingga harus mengeluarkan kocek untuk membeli air Rp 5.000,- per hari, belum termasuk ongkos hidup lainnya.[168]

Konvensi Hukum Laut Internasional 1982 (*United Nations Convention on The Law of the Sea 1982/*UNCLOS 1982) sebagaimana telah diratifikasi oleh Indonesia melalui Undang-undang Nomor 17 tahun 1985 tentang Pengesahan *United Nations Convention on The Law of the Sea* 1982 telah banyak memberikan arahan dan ketentuan mengenai bagaimana sebaiknya lautan dikelola. Konvensi ini merumuskan berbagai acuan dasar yang dapat dianut dan diadopsi oleh negara-negara pantai seperti Indonesia dalam upaya mengelola sumber daya perikanannya. Salah satu klausulnya

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[165] Tim BPHN, *Laporan Penelitian Tentang Aspek-Aspek Hukum Pengelolaan Perikanan Di Perairan Nasional Zona Ekonomi Eksklusif Indonesia*, (Jakarta: Departemen Kehakiman, 1993/1994), hlm. 2.

[166] Indonesia, *Undang-Undang Perikanan,* UU No. 31 Tahun 2004, LN No.118 tahun 2004, TLN No. 4433, Penjelasan Umum.

[167] BPHN, *op.cit.,* hlm. 2

[168] "WTO (World Trade Organization) Mengancam Sumber Daya Perikanan Indonesia", <http://kiara.or.id/content/view/7/1/>, diakses 3 Oktober 2008.

ialah negara pantai memiliki kewajiban hukum (*legal duty*) untuk menjamin bahwa sumber daya hayati di Zona Ekonomi Eksklusif (ZEE) dilindungi dari eksploitasi berlebih tetapi tetap dapat dioptimalkan pemanfaatannya.[169] Jadi, dengan meratifikasi UNCLOS 1982 Negara Kesatuan Republik Indonesia memiliki hak untuk melakukan pemanfaatan, konservasi, dan pengelolaan sumber daya ikan di ZEE dan laut lepas yang dilaksanakan berdasarkan persyaratan atau standar internasional yang berlaku.

Negara Kesatuan Republik Indonesia sebagaimana dimaksud dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 memiliki kedaulatan dan yurisdiksi atas wilayah perairan Indonesia, serta kewenangan dalam rangka menetapkan ketentuan tentang pemanfaatan sumber daya ikan, baik untuk kegiatan penangkapan maupun pembudidayaan ikan sekaligus meningkatkan kemakmuran dan keadilan guna pemanfaatan yang sebesar-besarnya bagi kepentingan bangsa dan negara dengan tetap memperhatikan prinsip kelestarian sumber daya ikan dan lingkungannya serta kesinambungan pembangunan perikanan nasional.[170] Oleh karena itu mengingat perikanan mempunyai peranan yang penting dan strategis dalam pembangunan perekonomian nasional, terutama dalam meningkatkan perluasan kesempatan kerja, pemerataan pendapatan, dan peningkatan taraf hidup bangsa pada umumnya, nelayan kecil, pembudi daya-ikan kecil, dan pihak-pihak pelaku usaha di bidang perikanan salah satu tindakan nyata yang dapat dilakukan oleh pemerintah Indonesia ialah dengan memanfaatkan keanggotaan Indonesia di WTO yakni dengan mengajukan proposal khusus mengenai subsidi perikanan .

Proposal Indonesia[171] tersebut merupakan intervensi pertama kalinya oleh Indonesia dalam persidangan WTO tentang subsidi perikanan yang

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[169] Darmawan, "Indonesia Dalam Kerjasama Perikanan Tangkap Regional: Tinjauan Aspek Dasar Kesiapan Dan Implementasinya Dewasa Ini," *Jurnal Hukum Internasional,* vol. 2., no. 3., (Depok: Fakultas Hukum-Universitas Indonesia, April 2005), hlm. 484-485.

[170] Indonesia, *Undang-Undang Perikanan,* UU No. 31 Tahun 2004, LN No.118 tahun 2004, TLN No. 4433, Penjelasan Umum.

[171] Lihat Proposal Indonesia dokumen Nomor TN/RL/GEN/155 tanggal 2 Juli 2007 tentang *Fishery Subsidies : Proposed New Disciplines*, sebagaimana diubah dengan Nomor TN/RL/GEN/155/Rev.1 tanggal 10 September 2007 sebagaimana diubah dengan Nomor TN/RL/GEN/155/Rev.2 tanggal 9 Oktober 2007 (keseluruhannya bisa diakses melalui www.wto.org).

telah dimulai sejak tahun 2001 tersebut mencakup nota penjelasan dan usulan regulasi penyempurnaan perjanjian WTO tentang subsidi perikanan yang dapat mengadopsi kepentingan nasional Indonesia sebagai negara perikanan khususnya dan kepentingan negara berkembang umumnya. Sebagai informasi dapat disampaikan bahwa selama ini strategi pemerintah Indonesia hanya bersifat responsif terhadap resolusi yang umumnya diajukan oleh kelompok negara maju, maupun negara lainnya dengan mempersiapkan Kertas Posisi. Namun dalam pelaksanaan tugas pemerintah Indonesia kali ini mengambil strategi proaktif dengan mengajukan resolusi pokok-pokok kebijakan dan sekaligus mempertahankannya. Pertimbangan perubahan strategi perundingan oleh pemerintah Indonesia kali ini didasarkan atas perlunya Indonesia sebagai negara kepulauan terbesar mempengaruhi jalannya persidangan selanjutnya dengan mengambil manfaat sebesar mungkin untuk kepentingan nasional khususnya dalam upaya memberikan perlindungan dari kebijakan liberalisasi perdagangan internasional terhadap struktur perikanan Indonesia yang 90% adalah diusahakan oleh nelayan dan usaha kecil.[172]

Keberadaan proposal Indonesia seyogianya dapat memberikan kontribusi positif terhadap kepentingan nasional, oleh karena itu penulis mencoba menjelaskan aspek-aspek apa saja dalam proposal Indonesia yang dapat bermanfaat bagi kepentingan nasional, antara lain:

- Sebagaimana disebutkan pada Deklarasi Hong Kong, terdapat kesepakatan bahwa didalam melakukan proses negosiasi yang membahas isu subsidi perikanan negara-negara anggota WTO dilarang untuk melakukan tindakan subsidi yang dapat menyebabkan terjadinya *overcapacity* dan *overfishing.*

  Dalam bagian *preamble* proposal Indonesia secara jelas disebutkan agar negara-negara anggota WTO menyadari efek negatif dari adanya *overcapacity* dan *overfishing* terhadap sumber daya perikanan. Hal ini

[172] "Persidangan Subsidi Perikanan - WTO di Jenewa, Swiss Tanggal 9-13 Juli 2007," <http://www.dkp.go.id/content.php?c=4300>, 10/08/07.

kian menggambarkan bahwa proposal Indonesia menentang kegiatan *overcapacity* dan *overfishing*.

Keberadaan subsidi yang diberikan oleh suatu pemerintah tanpa kontrol demi meningkatkan kesejahteraan nelayannya telah mendorong terjadinya *overcapacity*.[173] *Overcapacity* merupakan situasi dimana berlebihnya kapasitas input perikanan (armada penangkapan ikan) yang digunakan untuk menghasilkan output perikanan (hasil tangkapan ikan) pada level tertentu. *Overcapacity* yang berlangsung terus menerus pada akhirnya akan menyebabkan *overfishing*, yaitu kondisi dimana eksploitasi perikanan dilakukan berlebihan dari jumlah yang dibutuhkan atau suatu kondisi dimana output perikanan (hasil tangkapan ikan) melebihi batas maximumnya.[174]Bagi Indonesia yang merupakan *archipelagic state* terbesar di dunia, keberadaan *overcapacity* and *overfishing* akan dapat mengancam sumber daya perikanan. Meskipun sumberdaya perikanan merupakan salah satu sumberdaya kelautan yang *renewable* (dapat diperbaharui) tetapi jika tidak dikelola dengan tepat tentu dapat punah juga, terutama pada spesies ikan tertentu. Logikanya, semakin besar upaya (*effort*) yang dilakukan, maka akan semakin besar pula tekanan terhadap sumberdaya perikanan serta persaingan antar nelayan akan semakin ketat pula[175] mengingat kecenderungan negara maju untuk memberikan subsidi kepada nelayan mereka akan lebih besar dibandingkan negara berkembang maupun LDC's yang notabene tidak memiliki "modal".

Oleh karena itu, keberadaan proposal Indonesia akan sangat bermanfaat demi mengontrol lalu lintas pelaksanaan subsidi perikanan

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[173] Eko Sri Wiyono, "Pengembangan Teknologi Penangkapan Dalam Pengelolaan Sumberdaya Ikan," <http://www.beritaiptek.com/zberita-beritaiptek-2005-12-23-Pengembangan-Teknologi-Penangkapan-Dalam-Pengelolaan-Sumberdaya-Ikan.shtml>, 23 Desember 2005.

[174] Eko Sri Wiyono, "Perspektif Baru Pengelolaan Sumber daya Ikan", <http://io.ppi-jepang.org/article.php?id=61>, diakses 1 Nopember 2008.

[175] Sadri, "Krisis Penangkapan Ikan: Overcapacity & Overfishing", <http://arsip.pontianakpost.com/berita/index.asp?Berita=Opini&id=154157>, 20 Maret 2008.

diantara negara-negara anggota WTO. Khususnya untuk mencegah terjadinya *overcapacity* dan *overfishing* terhadap sumber daya perikanan Indonesia, mengingat kondisi perairan Indonesia memiliki wilayah ZEE yang strategis. Selain itu dengan adanya proposal Indonesia, salah satu tujuan Undang-undang No.31 tahun 2004 tentang Perikanan (selanjutnya disebut sebagai UU Perikanan) yang menyatakan bahwa hendaknya pengelolaan perikanan[176] dapat menjamin kelestarian sumber daya ikan, lahan pembudidayaan ikan dan tata ruang[177] akan dapat terakomodir dengan baik.

- Indonesia telah mempertimbangkan untuk menggunakan ketentuan mengenai perlakuan khusus dan berbeda (S&D *Treatment*) terhadap *artisanal*[178] dan *small-scale fisheries*[179].

  Di Indonesia sebagian besar nelayan yang tergolong miskin merupakan nelayan *artisanal* yang memiliki keterbatasan kapasitas penangkapan baik penguasaan teknologi, metode penangkapan, maupun permodalan.[180]Salah satu contoh kegiatan yang dilakukan oleh *artisanal fisheries* di Kabupaten Raja Ampat, Papua, kegiatan penangkapan dilakukan secara tradisional dan masih menggunakan alat tangkap yang sederhana seperti pancing *(hook and lines*), bubu (*fish trap*), jaring insang (*gill net*), dan kelawai/tombak serta panah, beberapa jenis ikan hasil tangkapan tersebut dimanfaatkan untuk konsumsi atau kebutuhan seharihari (rata-rata sekitar 27%)

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[176] Menurut Pasal 1 ayat 7 UU no. 31 tahun 2004 tentan Perikanan, pengelolaan perikanan adalah semua upaya, termasuk proses yang terintegrasi dalam pengumpulan informasi, analisis, perencanaan, konsultasi, pembuatan keputusan, alokasi sumber daya ikan, dan implementasi serta penegakan hukum dari peraturan perundang-undangan di bidang perikanan, yang dilakukan oleh pemerintah atau otoritas lain yang diarahkan untuk mencapai kelangsungan produktivitas sumber daya hayati perairan dan tujuan yang telah disepakati.

[177] Lihat Pasal 3 huruf i UU no. 31 tahun 2004 tentang Perikanan.

[178] *Artisanal fisheries* (perikanan tangkap tradisional) sebagai penangkapan ikan yang dilakukan dengan tujuan utama demi penghidupan dimana dalam situasi tertentu diperbolehkan terhadapnya untuk diberikan bantuan.

[179] *Small-scale fisheries* (nelayan kecil) dapat didefinisikan sebagai penangkapan ikan yang dilakukan dalam jarak 12 *nautical miles,* dan dibawah 20 meter.

[180] "Kemiskinan Nelayan: Permasalahan dan Upaya Penanggulangan," <http://dfwindonesia.or.id/index.php?page=kemiskinan-nelayan-permasalahan-dan-upaya penanggulangan>, diakses 3 Oktober 2008.

selebihnya, yaitu sebesar 73% nelayan menangkap ikan untuk kebutuhan komersial (dijual karena memiliki nilai ekonomis yang tinggi).[181]

Melihat hal tersebut tergambar bahwa sesungguhnya Indonesia memiliki sumber daya perikanan yang potensial dan hendaknya mampu menggenjot penerimaan ekonomi yang tinggi. Namun ternyata tidak tercermin dari kesejahteraan para pelaku perikanan itu sendiri. Karena masih banyak nelayan Indonesia masih tergolong kelompok masyarakat miskin dengan pendapatan per kapita per bulan sekitar 7 sampai dengan 10 dollar AS.[182] Oleh karena itu, pemberian subsidi dirasa masih dibutuhkan terutama terhadap *artisanal* dan *small-scale fisheries.*

Maka upaya yang dilakukan Indonesia demi melindungi nelayan tradisional dan nelayan kecil-nya ialah dengan memanfaatkan kedudukan Indonesia sebagai negara berkembang untuk dapat menggunakan S&D *Treatment.* Sebagaimana pula disebutkan pada Deklarasi Hong Kong, negosiasi subsidi perikanan harus pula menyertakan ketentuan yang mengatur S&D *treatment* terhadap negara berkembang dan LDC's supaya sektor ini dapat berpengaruh untuk meningkatkan pembangunan, mengurangi kemiskinan, meningkatkan penghidupan serta mengatasi masalah ketahanan pangan (*food security).* Jadi dalam proposal Indonesia, disertakan pula ketentuan mengenai ketentuan S&D *Treatment* dimana negara anggota WTO diperbolehkan untuk memberikan subsidi atau menjalankan subsidi perikanan terhadap *artisanal* dan *small-scale fisheries* di negara mereka masing-masing dengan batasan-batasan dan ketentuan-ketentuan sebagaimana diatur pada *Article* 5 proposal

[181] "Total Nilai Ekonomi Sumberdaya Kelautan dan Perikanan Kabupaten Raja Ampat," <http://www.raja4papua.com/index.php?option=com_html&file_html=bab4/valuasi_ekonomi.htm&Itemid=59>, diakses 1 Nopermber 2008.

[182] "'Turning the Tide' Kebijakan Ekonomi Perikanan," <http://duniaesai.com/lingkungan/lingkungan13.html>, diakses 1 Nopember 2008.

Indonesia. Dengan adanya S&D *Treatment* pemberian subsidi dapat digunakan demi keberlanjutan hidup nelayan kecil dan nelayan tradisional sebagaimana diharapkan oleh Pasal 3 huruf a UU Perikanan yakni agar pengelolaan perikanan dilaksanakan dengan tujuan meningkatkan taraf hidup nelayan kecil dan pembudi daya-ikan kecil.

- Selain kedua hal sebagaimana disebutkan sebelumnya, proposal Indonesia mencantumkan ketentuan mengenai perlunya tenaga ahli (*technical assistance*) yang diberikan dari negara maju baik untuk negara berkembang maupun terhadap LDC's. Sebagaimana kita ketahui bahwa sejak tahun 2004 Indonesia telah memiliki Undang-undang No.31 tahun 2004 tentang Pengelolaan Perikanan Indonesia, namun Indonesia belum dapat mengimplementasikan sistem manajemen perikanan karena keterbatasan (sumber daya manusia) dan wilayah perikanan Indonesia berada di perairan tropis yang memiliki multi spesies.[183]

  Oleh karena itu bantuan negara maju dapat dipertimbangkan sebagai suatu langkah alternatif yang diperlukan Indonesia agar dapat mengimplementasikan sistem manajemen perikanan yang memenuhi persyaratan standar internasional. Bantuan yang diberikan dari negara maju ini dibuat dengan perjanjian diantara negara maju dengan negara berkembang berdasarkan persetujuan kedua pihak dan berdasarkan prinsip *mutually agreed solutions*.

  Dengan adanya *technical assistance* tidak berarti membuat Indonesia harus menyerahkan sepenuhnya pengurusan atas suatu isu terkait sepenuhnya terhadap bantuan tersebut. Karena sebelumnya sudah ada perjanjian maka Indonesia tetap dapat mengkontrol secara penuh

[183] Direktorat Kerjasama Multilateral, "Laporan Sidang NG on Rules WTO: Fisheries Subsidies," (Jakarta: Direktorat Jenderal Kerjasama Perdagangan Internasional, Departemen Perdagangan, 26-28 Maret di Jenewa).

apakah bantuan *technical assistance* yang diberikan berjalan sesuai dengan apa yang diperjanjikan. Contoh bantuan yang dapat diberikan misalnya berupa pendampingan terhadap nelayan dalam melakukan penangkapan ikan, pembudidayaan ikan, pengelolaan perikanan atau konservasi perikanan sehingga hasil yang diperoleh oleh nelayan Indonesia dapat diperoleh semaksimal mungkin dan hasilnya selain bisa dimanfaatkan demi kepentingan sendiri juga bisa memenuhi standar internasional yang dibutuhkan Indonesia dalam keanggotaannya dalam suatu kerjasama internasional.

Jadi proposal Indonesia beranggapan bahwa keberadaan *technical assistance* akan dapat mengoptimalkan pengelolaan sumber daya perikanan, mencapai pemanfaatan sumber daya ikan, lahan pembudidayaan ikan, dan lingkungan sumber daya ikan secara optimal dan menjamin kelestarian sumber daya ikan, lahan pembudidayaan ikan, dan tata ruang dengan semaksimal mungkin.

Dari penjelasan-penjelasan tersebut penulis beranggapan bahwa sebetulnya dengan menjadi anggota WTO, Indonesia memiliki kesempatan untuk memanfaatkan semaksimal mungkin keanggotaannya demi kepentingan nasional. Salah satu kesempatan untuk memanfaatkan keanggotaannya di WTO ialah melalui proposal Indonesia. Dengan adanya proposal Indonesia, setidaknya pemerintah Indonesia sudah berusaha melakukan suatu langkah penting untuk mengakomodir kepentingan masyarakatnya, khususnya nelayan. Oleh karena itu dalam menyusun proposal Indonesia, pemerintah sebisa mungkin mengakomodasi kepentingan nasional secara maksimal ke dalam proposal Indonesia.

4.3 Langkah-Langkah yang Seyogianya Disiapkan oleh Indonesia Untuk Memperjuangkan Kepentingan Nasional Dalam Isu Subsidi Perikanan Pada Perundingan *Rules* Selanjutnya

Seperti telah di paparkan sebelumnya bahwa pada tanggal 30 Nopember 2007, ketua Komite *Negotiating Group on Rules*, Amb. Guillermo Valles Galmés menerbitkan *Draft Consolidated Texts on Anti-Dumping and Subsidies and Countervailing Measures*, termasuk subsidi perikanan. Menurut Direktur Jenderal WTO Pascal Lamy *draft chairman's text* tersebut merupakan "kendaraan" bagi negara anggota WTO untuk bergerak ke tahapan negosiasi selanjutnya.[184] Beberapa waktu setelah diterbitkannya *draft chairman's text* yaitu pada tanggal 14 Juli 2008, ketua Komite NG *on Rules*, Amb. Guillermo Valles Galmés mengirimkan berita melalui fax terhadap seluruh Negara anggota WTO yang berisikan ringkasan pandangan beliau akan bagaimana perundingan *rules* dapat diproses setelah modalitas dalam bidang pertanian dan *Non-Agricultural Market Access* (NAMA) diterbitkan.

Menurut beliau tidak seperti anti dumping dan subsidi, belum ada ketentuan dalam WTO *Agreements* yang mengatur subsidi perikanan, hal ini menyebabkan banyak terjadi perbedaan pendapat akan konsep dan struktur dari ketentuan subsidi perikanan yang akan datang termasuk bagaimana caranya agar dapat membuat ketentuan yang efektif dalam mendisiplinkan subsidi yang menyebabkan *overcapacity* dan *overfishing* serta ketentuan mengenai S&D *Treatment* yang menjadi penting bagi negara berkembang dengan tujuan memberi prioritas terhadap sektor pembangunan, pengurangan kemiskinan dan kesejahteraan serta ketahanan pangan yang melibatkan jutaan nelayan kecil. Oleh karena itu pada perundingan di masa datang pada saat melakukan revisi terhadap *draft chairman's text* sangatlah penting untuk memberikan masukan yang esensial agar kedua tujuan tersebut dapat terpenuhi.[185]

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[184] "Chair Circulates Draft Text on Rules," <http://www.wto.org/english/news_e/news07_e/rules_draft_text_nov07_e.htm>, 30 November 2007

[185] "Chair Outlines Future Work In Rules Negotiation", <http://www.wto.org/english/news_e/news08_e/rules_14july08_e.htm>, 14 Juli 2008.

Berdasarkan pertimbangan-pertimbangan tersebut maka penulis beranggapan bahwa perlu kiranya bagi Indonesia untuk mempersiapkan langkah-langkah penting yang seyogianya disiapkan Indonesia untuk memperjuangkan kepentingan nasional dalam isu subsidi perikanan pada perundingan *rules* yang akan datang, yaitu:

4.3.1 Memberikan Masukan atau Proposal Sebagai Tanggapan Atas *Draft Chairman's Text*

Pada *draft chairman's text* dijelaskan bahwa sesungguhnya *draft chairman's text* dibuat atas suatu prinsip yaitu kebutuhan untuk mencapai suatu keseimbangan dalam perundingan. Keseimbangan dalam perundingan ialah suatu keadaan dimana kepentingan seluruh negara anggota WTO yang berpartisipasi dalam perundingan *rules* dapat diakomodir sehingga ketua Komite NG *on Rules* berusaha untuk dapat menghasilkan suatu draft atas ketentuan *rules* yang dapat memfasilitasi perundingan untuk hasil yang seimbang (*balanced outcome*). *Draft* ketentuan *rules* pada *draft chairman's text* ini pun dibuat berdasarkan segala aspek sebagaimana dimandatkan dalam Deklarasi Doha.

Terhadap keberadaan *draft chairman's text* ini ketua *NG on Rules* meyakini bahwa semua peserta akan menemukan banyaknya keinginan atau kepentingan mereka yang telah terfasilitasi di dalamnya. Sebaliknya, mereka juga akan menemukan hal-hal yang mungkin tidak mereka sukai atau bahkan mereka tentang dalam *draft chairman's text* ini. Hal ini diyakini sebagai suatu yang wajar atau normal dalam suatu perundingan yang melibatkan banyak peserta. Banyaknya peserta perundingan *rules* ini tentunya juga diikuti dengan tujuan atau kepentingan mereka yang beragam dan bahkan sering bertentangan. Namun *draft chairman's text* ini belum mencerminkan atau mewakili semua proposal yang telah diajukan oleh peserta atau negara anggota WTO kepada *NG on Rules*. Meskipun demikian, isu-isu yang diangkat atau diajukan dalam proposal-proposal negara-

negara anggota WTO pada perundingan *rules* dapat saja ditujukan atau dipertimbangkan pada revisi atau perubahan *draft chairman's text* yang akan datang.

Menurut Direktur Pemasaran Luar Negeri, Departemen Kelautan dan Perikanan selama ini Indonesia telah menyampaikan proposal mengenai fisheries subsidies baik secara individu maupun secara kelompok bersama India dan China. Namun semua subsidi-subsidi yang dilarang (*prohibition of certain fisheries subsidies*) dalam *draft chairman's text* justru merupakan program pemerintah Indonesia yang sedang digalakkan saat ini dalam usaha membantu dan mengamankan perikanan Indonesia yang sebagian besar didominasi oleh usaha skala kecil dan menengah (UKM), misal subsidi BBM.[186]

Hal tersebut mempertegas bahwa setelah ketua Komite NG *on Rules* menerbitkan *draft chairman's text* ternyata masih terdapat isu-isu penting dalam proposal Indonesia yang belum diakomodir di dalamnya. Oleh karena itu Indonesia tidak bisa tinggal diam dengan hanya menerima keberadaan *draft chairman's text* begitu saja. Apabila Indonesia diam tanpa memberikan tanggapan ataupun masukan atas *draft chairman's text,* maka Indonesia dapat dianggap sudah menyetujui isi dari draft ketentuan *rules* khususnya subsidi perolamam dalam *draft chairman's text* tersebut. Oleh karena itu, menurut penulis sangatlah penting pada setiap perundingan *rules* berikutnya Indonesia dapat kembali memberikan masukan berupa tanggapan terhadap *draft chairman's text* yang tentunya dibuat dan disusun dalam sebuah proposal yang komprehensif. Dalam hal ini yang berwenang untuk menanggapi ialah pemerintah Indonesia diwakili oleh Departemen Perdagangan sebagai *vocal point* dan bekerjasama dengan Departemen Kelautan Perikanan sebagai perwakilan pemerintah yang mengetahui secara pasti isu-isu teknis di bidang perikanan.

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[186] Direktorat Kerjasama Multilateral, "Laporan Rapat Bidang *Rules*-WTO tanggal 10 Oktober 2008 di Departemen Perdagangan," (Jakarta: Direktorat Jenderal Kerjasama Perdagangan Internasional, Departemen Perdagangan).

Karena peluang dan manfaat dari keanggotaan Indonesia di WTO hanya dapat diperoleh apabila kita menguasai semua persetujuan WTO dan menerapkannya atau memanfaatkannya sesuai dengan kepentingan nasional.

4.3.2 Kerjasama Dengan Negara Anggota WTO Lainnya yang Memiliki Kepentingan Serupa

Sekarang ini banyak Negara membentuk kelompok-kelompok dan aliansi dalam WTO. Dalam beberapa hal mereka menyampaikan suaranya dengan menggunakan satu juru bicara atau satu tim negosiasi. Hal ini merupakan hal yang wajar mengingat semakin terintegrasinya ekonomi dunia dengan banyaknya daerah perdagangan bebas dan pasar bersama yang sedang dibangun diseluruh dunia. Aliansi ini juga terlihat sebagai suatu alat bagi negara yang lebih kecil untuk meningkatkan posisi tawar mereka dalam melakukan negosiasi dengan mitra dagang yang lebih besar. Keberadaan kelompok-kelompok Negara tersebut berguna untuk mencari terobosan jika terjadi *dead lock* dalam pembahasan suatu isu. Kelompok Negara tersebut seringkali memudahkan pencapaian kompromi, mengingat sudah ada posisi bersama mengenai suatu isu.[187]

Pembentukan suatu kelompok Negara akan lebih mudah diwujudkan apabila dalam kelompok tersebut terdiri dari Negara-negara anggota WTO yang memiliki kepentingan serupa. Salah satu contohnya kelompok Negara yang terdiri dari negara berkembang.

Saat ini berkisar 2/3 dari 153 anggota WTO[188] berasal dari negara berkembang. Negara-negara tersebut diharapkan dapat memainkan peranan yang semakin penting dalam WTO, tidak hanya karena jumlah mereka yang besar tetapi juga karena semakin meningkatnya peranan mereka dalam perekonomian global. Selain itu, kini negara berkembang telah menggunakan sektor perdagangan

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[187] Departemen Luar Negeri, *Sekilas WTO (World Trade Organization), op.cit.,* hlm. 19.
[188] Data terakhir http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

sebagai sarana yang vital di dalam meningkatkan upaya pembangunan mereka.[189] Hal-hal tersebut dapat dijadikan alasan yang kuat bagi Indonesia untuk memilih membuat suatu kelompok Negara (untuk selanjutnya disebut dengan "*groupings*") dengan bekerjasama dengan sesama negara berkembang.

Indonesia sendiri telah menjadi anggota dari beberapa *groupings* di WTO seperti Cairns Group dan G-33, dimana dalam G-33 Indonesia menjadi koordinatornya. Pada isu subsidi perikanan Indonesia telah melakukan kerjasama dengan India dan China dalam suatu proposal bersama yang khusus membahas mengenai S&D *Treatment.*[190] Sejalan dengan penjelasan sebelumnya Indonesia melakukan kerjasama dengan India dan China melalui suatu join proposal dikarenakan Indonesia memiliki kepentingan yang sama dalam memperjuangkan isu S&D *Treatment.* Melalui kerjasama ini para pihak akan memiliki kesempatan yang lebih besar untuk diperhatikan dalam proses perundingan. Indonesia sendiri akan sangat diuntungkan karena India dan China merupakan golongan negara berkembang yang cukup diperhitungkan eksistensinya di WTO. Hanya saja yang perlu diingat hendaknya meskipun Indonesia melakukan kerjasama dengan Negara anggota manapun, Indonesia harus tetap memperhatikan isi kerjasama tersebut dengan seksama, jangan sampai Indonesia hanya sebagai pengikut dan kemudian terjebak pada suatu kebijakan ataupun perjanjian yang sebenarnya tidak sesuai dengan kepentingan nasional. Hal ini dipertegas oleh Pasal 4 ayat (2) Undang-undang Nomor 24 tahun 2000 tentang Perjanjian Internasional dimana dalam pembuatan perjanjian internasional, Pemerintah Republik Indonesia berpedoman pada kepentingan nasional dan berdasarkan prinsip-prinsip persamaan

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[189] Lihat *Understanding the WTO*, 3rd edition, (Geneva: World Trade Organization Information And Media Relations Division, 2007), hlm. 1.

[190] Proposal dengan nomor dokumen TN/RL/GEN/155/Rev.1 tertanggal 19 May 2008 dengan judul *Need for Effective Special and Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies Text,* Proposal ini merupakan kelanjutan dari proposal bersama yang telah diajukan oleh Indonesia dan India pada bulan April 2008 mengenai *Need for Effective Special & Differential Subsidies* Text (TN/RL/GEN.155).

kedudukan, saling menguntungkan, dan memperhatikan, baik hukum nasional maupun hukum internasional yang berlaku.[191]

Sesungguhnya pada perundingan-perundingan *rules* yang berjalan setelah proposal Indonesia disampaikan, terdapat tanggapan positif dari negara anggota lainnya bahwa keberadaan proposal Indonesia dinyatakan sangat baik dan diapresiasi sebagai masukan yang sangat berguna ke arah ketentuan fisheries subsidies. Perlu dicatat bahwa negara anggota yang menyatakan proposal Indonesia sangat baik namun perlu diadakan beberapa penyempurnaan antara lain: Norway, Solomon Island, China, China Taipei, Korea, India, New Zealand, Mauritius, EC dan South Africa.[192] Keberadaan negara-negara yang setuju mengenai beberapa hal dalam proposal Indonesia inilah yang dapat Indonesia pertimbangkan untuk menjadi *partner* dalam menjalin kerjasama.

Oleh karena itu, menurut penulis pada perundingan *rules* mendatang hendaknya Indonesia melakukan lebih banyak kerjasama dengan Negara anggota WTO lainnya yang juga memiliki kepentingan dan pemikiran yang serupa, mendukung, serta sepakat dengan isi proposal Indonesia. Agar posisi dan suara Indonesia dalam perundingan akan menjadi semakin kuat dan solid.

4.3.3 Memastikan Kesiapan Aturan Domestik Bilamana Ketentuan *Fisheries Subsidies* di Sepakati

Tidak seperti ketentuan anti dumping maupun subsidi, ketentuan subsidi perikanan merupakan ketentuan yang mungkin akan baru dilahirkan setelah perundingan bidang *rules* disepakati dan putaran Doha berakhir. Apabila ketentuan subsidi perikanan lahir, sangatlah perlu kiranya agar tersedia peraturan-peraturan domestik yang dapat memfasilitasi hal ini. Karena seperti telah dijelaskan pada bagian

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[191] Indonesia. Undang-Undang Perjanjian Internasional. UU No.24 tahun 2000. LN No.185 Tahun 2000. TLN No. 185.

[192] Direktorat Kerjasama Multilateral, "Intisari Hasil Kerjasama Perdagangan Internasional Tahun 2007," (Jakarta: Direktorat Jenderal Kerjasama Perdagangan Internasional, Departemen Perdagangan).

pendahuluan bahwa dengan meratifikasi ketentuan WTO[193] berarti ketentuan tersebut telah menjadi bagian dari perundang-undangan domestik kita dimana Indonesia wajib memenuhi semua kewajiban dalam perjanjian WTO secara konsisten dan menyesuaikan segala peraturan dan kebijakan nasional yang belum serasi (*conform*) dengan instrumen-instrumen yang terdapat dalam perjanjian perdagangan WTO.

Saat ini ketentuan domestik yang mengatur mengenai subsidi terdiri dari Undang-Undang Nomor 10 Tahun 1995 tentang Kepabeanan sebagaimana telah diubah dengan Undang – Undang Nomor 17 Tahun 2006 Tentang Perubahan Undang-Undang Nomor 10 Tahun 1995 tentang Kepabeanan, Peraturan Pemerintah Republik Indonesia Nomor 34 Tahun 1996 Tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan, Perdagangan Nomor 261/Mpp/Kep/9/1996 Tentang Tata Cara dan Persyaratan Permohonan Penyelidikan Atas Barang Dumping dan atau Barang Mengandung Subsidi serta beberapa peraturan teknis lainnya.

Peraturan-peraturan domestik yang sudah ada tersebut perlu kiranya agar ditambahkan dengan ketentuan domestik baru yang khusus dan spesifik dan bisa mengakomodir ketentuan subsidi perikanan kelak. Jadi keberadaan peraturan domestik diperlukan untuk menjamin agar ketentuan subsidi perikanan dapat berlaku efektif dan dapat melindungi kepentingan nasional.

[193]Indonesia Meratifikasi WTO Melalui UU No. 7 Tahun 1994 Tentang Pengesahan *Agreement Establishing The World Trade Organization* (Persetujuan Pembentukan Organisasi Perdagangan Dunia).

BAB 5
PENUTUP

5.1 Kesimpulan

Berdasarkan paparan pada bab-bab terdahulu, dapat dikaji kesimpulan yang sekaligus merupakan pokok permasalahan ialah sebagai berikut:

- Terdapat perbedaan yang signifikan atas definisi subsidi perikanan dan ketentuan S&D *treatment* menurut proposal Indonesia dibandingkan dengan *draft chairman's text.* Pada proposal Indonesia definisi subsidi perikanan terbagi dengan jelas yakni *prohibited subsidies*, *actionable subsidies* dan *non-actionable subsidies*. Sementara definisi subsidi perikanan dalam *draft chairman's text* tidak dibagi antara *prohibited subsidies*, *actionable subsidies* dan *non-actionable subsidies* dengan jelas, karena dalam *draft chairman's text* definisi subsidi dibuat lebih luas pengertiannya (*broader*). Selain itu, pada isu S&D *Treatment,* ketentuan S&D *Treatment* pada *draft chairman's text* juga masih berbeda dengan konsep S&D *Treatment* pada proposal Indonesia, dimana pada *draft chairman's text* konsep S&D *Treatment* memiliki persyaratan wajib yang lebih banyak jumlahnya daripada ketentuan S&D *Treatment* pada proposal Indonesia, dimana persyaratan tersebut harus dipenuhi oleh negara berkembang maupun LDC's ingin memberikan subsidi kepada nelayannya. Kemudian, *draft chairman's text* tidak secara jelas menyatakan bahwa tujuan dari S&D *Treatment* ialah untuk memberikan pengecualian bahwa subsidi perikanan boleh diberikan terhadap *artisanal* dan *small-scale fisheries*.
- Proposal Indonesia memberikan beberapa kontribusi positif terhadap kepentingan nasional, antara lain untuk melindungi sumber daya perikanannya dari *overcapacity* dan *overfishing*. Hal ini perlu dilakukan karena Indonesia merupakan *archipelagic state* terbesar di dunia yang menyebabkan sumber daya perikanan Indonesia sangat potensial. Perlindungan terhadap *overcapacity* dan *overfishing* juga

dibutuhkan agar pengelolaan perikanan dalam wilayah perairan Indonesia dapat menjamin kelestarian sumber daya ikan, lahan pembudidayaan ikan dan tata ruang akan dapat terakomodir dengan baik. Selain perlindungan terhadap *overcapacity* dan *overfishing*, proposal Indonesia juga bermanfaat untuk melindungi *artisanal* dan *small-scale fisheries* melalui kebijakan S&D *Treatment.* Dengan adanya S&D *Treatment* subsidi yang digunakan demi keberlanjutan hidup nelayan kecil dan nelayan tradisional akan dapat tetap dilakukan. Kontribusi terakhir yang dapat diperoleh dengan adanya proposal Indonesia ialah untuk memperoleh bantuan dari negara maju berupa *technical assistance.* Jadi proposal Indonesia berasumsi bahwa keberadaan *technical assistance* akan dapat mengoptimalkan pengelolaan sumber daya perikanan, mencapai pemanfaatan sumber daya ikan, lahan pembudidayaan ikan, dan lingkungan sumber daya ikan secara optimal dan menjamin kelestarian sumber daya ikan, lahan pembudidayaan ikan, dan tata ruang dengan semaksimal mungkin.

- Dalam perundingan *rules* yang akan datang Indonesia perlu mempersiapkan langkah-langkah yang seyogianya bermanfaat untuk memperjuangkan kepentingan nasional khususnya dalam isu subsidi perikanan. Langkah-langkah tersebut ialah dengan memberikan masukan atau proposal sebagai tanggapan atas *draft chairman's text* baik berupa keberatan maupun persetujuan terhadap *draft chairman's text*. Langkah kedua ialah dengan melakukan kerjasama dengan negara anggota WTO lainnya yang memiliki kepentingan serupa dengan Indonesia agar posisi Indonesia dalam perundingan akan lebih solid dan didengarkan. Langkah terakhir ialah memastikan kesiapan aturan domestik bilamana ketentuan subsidi perikanan disepakati.

5.2 Saran

Setiap negara selalu berusaha meningkatkan pembangunan, kesejahteraan dan kemakmuran rakyatnya. Salah satu cara yang digunakan untuk mewujudkan peningkatan pembangunan, kesejahteraan dan

kemakmuran rakyatnya ialah melalui perdagangan internasional. Satu-satunya organisasi perdagangan internasional yang mengurus bidang perdagangan ialah WTO. Indonesia yang merupakan salah satu negara anggota WTO harus mampu memanfaatkan keanggotaannya di WTO demi kepentingan nasional.

Oleh karena itu Indonesia harus dapat berperan aktif dan nyata dalam forum WTO. Mengajukan sebuah proposal merupakan langkah awal yang baik bagi Indonesia untuk memanfaatkan keanggotaannya. Yang perlu diingat ialah dalam pembuatan proposal Indonesia selain harus sesuai dengan komitmen kita di WTO, isi proposal harus tetap memperhatikan kepentingan nasional. Karena pemanfaatan kepentingan nasional secara maksimal sangatlah mungkin kita lakukan. Selain itu hendaknya pemerintah Indonesia selalu berperan serta aktif dalam merespon setiap perkembangan yang terjadi pada perundingan-perundingan WTO khususnya apabila pada perundingan tersebut terdapat isu yang berhubungan dengan kepentingan nasional.

Hal lainnya yang juga perlu diperhatikan ialah kesiapan hukum dalam negeri. Karena setelah Indonesia menjadi anggota WTO, kesiapan hukum negara ini akan dapat menentukan berhasil atau tidaknya kita memanfaatkan keanggotaan kita di WTO yang salah satu tujuan utamanya untuk meningkatkan perekonomian nasional. Karena peluang dan manfaat dari keanggotaan Indonesia di WTO hanya dapat diperoleh apabila kita menguasai semua persetujuan WTO dan menerapkannya atau memanfaatkannya sesuai dengan kepentingan nasional.

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LAMPIRAN I

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Members hereby *agree* as follows:

PART I: GENERAL PROVISIONS

Article 1

Definition of a Subsidy

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

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

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

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

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

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

or

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

and

(b) a benefit is thereby conferred.

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

Article 2

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

Specificity

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

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

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

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

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

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

PART II: PROHIBITED SUBSIDIES

Article 3

Prohibition

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

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

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

(a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5];

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

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

Article 4

Remedies

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

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

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

4.4 If no mutually agreed solution has been reached within 30 days[6] of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts[7] (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

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

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

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

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

[7] As established in Article 24.

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

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

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[8]

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

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.[10]

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

PART III: ACTIONABLE SUBSIDIES

Article 5

Adverse Effects

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

(a) injury to the domestic industry of another Member[11];

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994[12];

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

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

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

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

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

(c) serious prejudice to the interests of another Member.[13]

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

Article 6

Serious Prejudice

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

(a) the total ad valorem subsidization[14] of a product exceeding 5 per cent[15];

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

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

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

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

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

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

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

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

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[17] as compared to

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

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

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

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

the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

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

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

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

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

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

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

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

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

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

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

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

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

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

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

Article 7

Remedies

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

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

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

7.4 If consultations do not result in a mutually agreed solution within 60 days[20], any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

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

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB[21] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by

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

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

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

the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[22]

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

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

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

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of Non-Actionable Subsidies

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

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

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

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

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:[24], [25], [26]

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

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

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

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

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

the assistance covers[27] not more than 75 per cent of the costs of industrial research[28] or 50 per cent of the costs of pre-competitive development activity[29], [30]; and provided that such assistance is limited exclusively to:

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

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

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

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

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

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development [31] and non-specific (within the meaning of Article 2) within eligible regions provided that:

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

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria[32], indicating that the region's difficulties arise out of more

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

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

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

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

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

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

than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

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

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

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

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

(c) assistance to promote adaptation of existing facilities[33] to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

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

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

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

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

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

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.[34]

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining

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predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

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

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

whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

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

Article 9

Consultations and Authorized Remedies

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

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

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

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

PART V: COUNTERVAILING MEASURES

Article 10

Application of Article VI of GATT 1994[35]

[35] The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered

Members shall take all necessary steps to ensure that the imposition of a countervailing duty[36] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated[37] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

Article 11

Initiation and Subsequent Investigation

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

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

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

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

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

(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors

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non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

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

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

and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

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

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[38] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[39] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

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

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

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

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

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

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

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

Article 12

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

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

Evidence

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

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.[40] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

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

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters[41] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

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

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

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[42]

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries

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

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

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

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

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[43]

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

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

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

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

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

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

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

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

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

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

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

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

Article 13

Consultations

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

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.[44]

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

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

Article 14

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

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

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

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

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

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

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Article 15

Determination of Injury[45]

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products[46] and *(b)* the consequent impact of these imports on the domestic producers of such products.

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

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of

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

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

such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

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

15.5 It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

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

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

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

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

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

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

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

(v) inventories of the product being investigated.

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

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

Article 16

Definition of Domestic Industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related[48] to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

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

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

16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single,

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

unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.

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

Article 17

Provisional Measures

17.1 Provisional measures may be applied only if:

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

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

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

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

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

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

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

Article 18

Undertakings

18.1 Proceedings may[49] be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

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

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

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

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

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

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

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

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

Article 19

Imposition and Collection of Countervailing Duties

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

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

representations made by domestic interested parties[50] whose interests might be adversely affected by the imposition of a countervailing duty.

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

19.4 No countervailing duty shall be levied[51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

Article 20

Retroactivity

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

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

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

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

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

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury,

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

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

to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

Article 21

Duration and Review of Countervailing Duties and Undertakings

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

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

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.[52] The duty may remain in force pending the outcome of such a review.

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

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

Article 22

Public Notice and Explanation of Determinations

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

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[53], adequate information on the following:

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

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

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

(ii) the date of initiation of the investigation;

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

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

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

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

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

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

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

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

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

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

(v) the main reasons leading to the determination.

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

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

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

Article 23

Judicial Review

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

PART VI: INSTITUTIONS

Article 24

Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

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

24.2 The Committee may set up subsidiary bodies as appropriate.

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

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

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

PART VII: NOTIFICATION AND SURVEILLANCE

Article 25

Notifications

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

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

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies[54], Members shall ensure that their notifications contain the following information:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 26

Surveillance

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

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

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27

Special and Differential Treatment of Developing Country Members

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

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

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

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

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

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing

country Member shall not increase the level of its export subsidies[55], and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

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

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

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

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

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

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

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

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

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

4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

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

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

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

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

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

PART IX: TRANSITIONAL ARRANGEMENTS

Article 28

Existing Programmes

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

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

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

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

Article 29

Transformation into a Market Economy

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

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

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

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

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

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

PART X: DISPUTE SETTLEMENT

Article 30

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

PART XI: FINAL PROVISIONS

Article 31

Provisional Application

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

Article 32

Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[56]

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

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

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

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

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

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

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

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

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

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

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

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available[57] on world markets to their exporters.

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

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

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes[58] or social welfare charges paid or payable by industrial or commercial enterprises.[59]

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

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes58 in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes58 on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).[60] This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges58 in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the

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[58] For the purpose of this Agreement:

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

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

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

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

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

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

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

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

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

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

production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

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

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

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

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

ANNEX II

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

I

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

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

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

II

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

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

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

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

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

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

ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product

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

II

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

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

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

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

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

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

ANNEX IV

CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION (PARAGRAPH 1(A) OF ARTICLE 6)[62]

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

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

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's[63] sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.[64]

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

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.[65]

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

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

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

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

ANNEX V

PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

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

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.[66] This process may include, where appropriate, presentation of questions to the

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

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

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

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

government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.[67]

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

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

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

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

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

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

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not

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

adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

ANNEX VI

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

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

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

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

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

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

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

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

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

ANNEX VII

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

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

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

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum[68]: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

[68] The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

LAMPIRAN II

PROPOSAL INDONESIA ke-I
FISHERIES SUBSIDIES* : *PROPOSED NEW DISCIPLINES
Nomor. TN/RL/GEN/150 tanggal 2 July 2007

WORLD TRADE ORGANIZATION

TN/RL/GEN/150
2 July 2007

(07-2782)

Negotiating Group on Rules Original: English

FISHERIES SUBSIDIES: PROPOSED NEW DISCIPLINES

Proposal from the Republic of Indonesia

The following communication, dated 29 June 2007, is being circulated at the request of the Delegation of the Republic of Indonesia.

Introduction

1. Indonesia has noted the broad range of views expressed by Members in this group on many of the issues involved in this negotiation. The United States (TN/RL/GEN/145), New Zealand (TN/RL/GEN/100 and TN/RL/GEN/141) and Brazil (TN/RL/GEN/79/Rev.3) have offered legal text for framework proposals based on a broad prohibition of subsidies that can contribute to overcapacity and overfishing. Alternative proposals from Japan, Korea and Chinese Taipei (TN/RL/GEN/114/Rev.1), the European Communities (TN/RL/GEN/134) and Norway (TN/RL/GEN/144) have addressed a much narrower range of subsidies, and much narrower concerns. In addition, work such as Argentina's proposal for special and differential treatment for developing countries (TN/RL/GEN/138/Rev.1) has been helpful, as have other contributions. We note that much of the technical work in the Group over the last year, including the identification of appropriate exceptions and the discussions of Argentina's proposals, has been premised on a broad prohibition as the backbone of new disciplines, which we support.

2. This statement follows on our remarks in the May and June meetings, and introduces a draft text that we hope will serve as the basis of discussion for issues critical to Indonesia as a developing country, and critical to this negotiation.

3. The text articulates a proposed resolution of some of the issues with which we in the Rules Committee have been struggling, and also lays out a new framework for the work of the Committee in several important areas. Namely:

- It requires technical assistance to developing countries in several areas important to their participation in this effort to discipline subsidies that contribute to overfishing and overcapacity. This includes assistance to develop the capacity to initiate, implement and enforce compliance with fishery management plans, full membership in regional fishery management organizations (RFMO's) adjacent to their exclusive economic zones, assistance to develop and maintain an enquiry point, and flexibility in terms of responding to requests for sophisticated fisheries management data. It also includes longer transition periods to implement the agreement;

- It defines artisanal fishing and small scale fishing in ways that allow for control of their capacity to access fishery resources and to utilize the flexibility to which they should be entitled;

- It specifically allows for enhanced ability to protect marine resources in archipelagic waters;

- It lays the basis for a new interpretation of Article 5 and Part V of the Agreement on Subsidies and Countervailing Measures for adverse effects to a Member's fishery resources, and also clarifying that both the multilateral and domestic tracks should be available for this purpose; and

- It provides that those parts of this agreement requiring assessment of issues related to the status of fishery and biological resources will be addressed by fishery experts.

Each of these five areas are summarized below.

Explanation of the Proposal

4. ***Technical Assistance.*** Many delegations have spoken to the need for technical assistance to developing countries in the context of this negotiation. Indonesia would like to point to two areas in which developing countries have specific needs, both of which relate to the content of this agreement. The first is for assistance for fisheries management. In several areas of the agreement we have proposed that subsidies be allowed contingent on a showing that they are not harming the resource. However, many developing countries cannot do this unless they have the capacity to initiate, implement and enforce compliance with a fishery management plan. We have previously observed in this Committee that attention paid to subsidies in the fisheries sector without recourse to stock assessment has the potential to lead to overexploitation of fisheries resources and subsequent distortion of the sector. We therefore propose that on the request of a developing country Member, developed countries shall provide technical assistance to develop the capacity to initiate, implement and enforce compliance with a fishery management plan adequate to participate fully in this agreement.

5. We likewise propose that developed countries shall provide assistance to developing country members so requesting it to participate fully in regional fishery management organizations adjacent to their exclusive economic zones. For developing countries that may have only a handful of vessels capable of fishing in such waters, full participation in RFMO's is costly and often unlikely to be funded. This sometimes means that such vessels must either take the risk of fishing illegally or cease fishing altogether. We feel that there should be no such barrier to full developing country participation in RFMO's. Full participation by developing countries, including in RFMO scientific and research program activities, can only help to address the overcapacity and overfishing that now characterize many of the world's fisheries.

6. ***Artisanal and Small-Scale Fishing.*** Indonesia has carefully considered attributes of both kinds of fisheries and has concluded that both should receive special and differential treatment. Artisanal fishing is primarily subsistence fishing and assistance should be allowed subject to conditions, which we have noted relate to their being close to shore, and certain specified engine-size to tonnage ratios, primarily operated by individuals or families. Small scale is defined as operating within 12 nautical miles, and below 20 meters. However, since small-scale fisheries can have considerable effects on resources, they should be narrowly and objectively defined and subsidies to them made contingent on a showing that they are not harming the resources of a Member's own fisheries management plan, the resources of another Member or the resources governed by an RFMO. As noted, developing countries may need help to make this kind of showing, and should be able to request assistance from developed countries for this. These exceptions for small scale fishing and fishing in a developing country's own EEZ are available to developing countries contingent on a showing that there is no present or likely future effect on the fishery resource.

7. ***Archipelagic Waters.*** As previously noted, Indonesia is an archipelago of over 17,000 islands. As such, its fisheries share with other archipelagic states unique features of seasonality, species heterogeneity and species interactions that make it especially problematic to manage. Indonesia has therefore proposed, not to exempt archipelagic waters from this agreement because we believe subsidies disciplines should apply there, but rather to exempt from the prohibition measures to conserve and protect the archipelagic marine environment, and to protect and develop archipelagic waters as a unit.

8. ***Adverse Effect to Fishery Resources/Clarification of Multilateral and Domestic Tracks.*** Building on proposals made by the United States and Brazil, Indonesia proposes that an additional measure of harm to a domestic industry be added, as an "adverse effect on fishery resources" to Article 5 and Part 5 of the ASCM. It also proposes to clarify that both the multilateral and domestic tracks should be available to address fisheries subsidies. This would in effect allow countries to investigate, and if warranted impose, countervailing duties on the fishery products of Members causing an adverse effect upon the domestic industry in part because of harm to the fishery resource. Indonesia has also retained the language proposed by the United States on "serious prejudice" to ensure that the multilateral track is also available under this Annex.

9. ***Fishery Expertise.*** Finally, in order to ensure that decisions on fishery resource issues are made by individuals with the requisite expertise, Indonesia proposes that fisheries experts be explicitly engaged on matters arising under this agreement. Indonesia proposes that decisions on showings of compliance with exceptions to the general prohibition, and in particular, a request by a member to examine whether there is an adverse effect in the case of a particular subsidy notification, be made by a subcommittee of the SCM Committee that includes fishery experts from member governments and those identified by relevant international organizations. Fisheries experts would also be required in domestic injury proceedings involving adverse effects to a fishery resource.

10. There are many other elements of this text that will warrant discussion, and we have identified here only those major areas where the text breaks new ground. While we have provided explicit text, we are interested in exploring the precise wording to capture agreement on these concepts.

Attachment

ANNEX [VIII] TO THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Preamble

Members,

Recalling the commitment at Doha to clarify and improve WTO disciplines on fishery subsidies.

Noting the current state of world fishery stocks and the desire of Members to address subsidies that have a harmful effect on them;

Conscious of the negative effects of overcapacity and overfishing on these fisheries resources;

Reaffirming that provisions for special and differential (S&D) treatment are an integral part of the WTO Agreements;

Determined to strengthen ASCM provisions with a view to making them more precise, effective and operational in relation to fisheries;

Considering the social and economic importance of the fisheries sector to developing country Members;

Hereby *agree* as follows:

Article 1

Definitions and coverage

1.1 This Annex provides for specific provisions regarding fisheries subsidies and it is an integral part of the Agreement on Subsidies and Countervailing Measures (ASCM).

1.2 A subsidy as used in this Annex is a subsidy within the meaning of paragraph 1 of Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM). A subsidy subject to this Annex must be specific, pursuant to Article 2 of the ASCM.

1.3 This Annex shall not apply to inland fisheries[1] or to aquaculture.[2]

1.4 This Annex covers any subsidy that confers a benefit to or on behalf of any company and/or person linked in fact or in law, directly or indirectly[3], to enterprises engaged in the harvesting of marine wild capture fisheries. Fisheries subsidies shall encompass any subsidy programme and/or the disbursement made under such programme.

[1] "Inland fisheries" are fisheries which are carried out in freshwater or estuaries of a Member and whose target species are those that spend all of their life-cycle therein.

[2] "Aquaculture" is the farming of aquatic organisms, including fish, molluscs and crustaceans, provided that no capture fisheries is used to feed raised fish or is farmed.

[3] The term "directly or indirectly" is used in this Annex in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994.

1.5 Harvesting includes the on-vessel processing of fish and transport of fish from one vessel to another or from a vessel to shore, but it does not include inland or on-shore processing or other post-harvest handling or activity.

1.6 This Annex does not cover government-to-government payments to obtain access for a Member's distant water fishing fleet to fisheries resources within the territorial sea or exclusive economic zone of a developing country, or to quotas or other rights established by any regional fishery management organization (RFMO) or arrangement. The further transfer of such rights to the Member's fishing fleet is covered by this Annex but is not prohibited under Article 2, provided that a benefit is not conferred by the onward transfer of such rights to the Member's fishing fleet, in that:

(a) The Member's fleet pays compensation comparable to the value of the access of the resource;

(b) The access arrangements provide for compliance with applicable fishery management plans and for a science-based assessment and monitoring of the status of the fishery resources covered by the access arrangements; and

(c) Such payments are notified pursuant to Article 5 herein.

Article 2

Prohibition

A Member shall neither grant nor maintain any fishery subsidy, except as otherwise provided in this Annex.

Article 3

Exceptions to the Prohibition

3.1 Nothing in Article 2 of this Annex shall prevent government assistance for:

(a) Provision of a social safety net for fishermen, including early retirement schemes, re-education, training or alternative employment assistance, unemployment relief, life insurance, support for the temporary suspension of fishing activities.

(b) Fisheries research, including data collection, surveys, data analysis, and stock monitoring, sampling and assessment;[4]

(c) Fisheries stock enhancement, including marine conservation and protection, marine environment restoration, protection and development of a Member's own archipelagic waters[5], artificial reefs, hatcheries for breeding and by-catch mitigation devices;[6]

(d) Improving vessel and crew safety[7], provided that the improvement is undertaken to comply with international or domestic standards; and there is no increase in fishing

[4] This is limited to fisheries research that does not result in commercial sale of the fish harvested.

[5] Archipelago is as defined in Article 46 of UNCLOS 1982, and calculation of the archipelagic baselines is defined in Article 47 thereof.

[6] This provision is aimed at measures that enhance marine resources rather than capacity to harvest those resources.

[7] Programmes or activities aimed primarily at vessel modernisation or repair do not fall within this sub-paragraph. The construction of vessels is not permitted under this sub-paragraph.

capacity[8], such as the volume of fish hold or engine power of a vessel subject to such program.

(e) Construction and maintenance of general infrastructure for fishing activities, such as wharves and fishing ports and related facilities, roadways, water and sanitary waste systems, the provision of housing and other forms of community development infrastructure.[9]

(f) Short-term emergency relief, recovery adjustment programs and replacement of fishing capacity following natural or environmental disasters, provided that fishing fleet capacity is not restored beyond its pre-disaster state[10], except that special flexibility shall be given to developing countries pursuant to Article 4.

(g) Assistance and user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programs, and other expenses related to administration and operation of fishery management programs, including allocation and monitoring of licences, permits, quotas, vessel numbers and catch returns.

(h) Vessel decommissioning programmes, provided that the:

(i) vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;[11]

(ii) fish harvesting rights associated with such vessels, whether they are permits, licenses, fish quotas or any other form of harvesting rights, are permanently revoked and may not be reassigned; and

(iii) owners of such vessels, and the holders of such fish harvesting rights, are required to relinquish any claim associated with such vessels and harvesting rights that could qualify such owners and holders for any present or future harvesting rights in such fisheries;

(iv) there are in place fisheries management plan designed to prevent over-fishing in the targeted fishery, such as limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups, provided that special flexibility should be given to developing countries, including any technical assistance requested by any such developing country as provided in Article 4 below.

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[8] Fishing capacity is understood here to mean the ability of a vessel or fleet of vessels to catch fish.

[9] General infrastructure for fishing communities shall also not be considered to be regionally specific under the ASCM.

[10] Restoration to pre-disaster state is not intended to restore a pre-disaster state of over-capacity.

[11] Vessels decommissioned for legitimate research and training purposes, with no commercial functions, need not comply with the conditions of this exception.

Article 4

Special and Differential Treatment of Developing Country Members

4.1 Notwithstanding the provisions of Articles 2 and 3, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities[12], defined herein as those which:

(a) Operate within its territorial waters and mostly close to shore;

(b) Use vessels of [proportional ratio between gross tonnage and engine power] and which utilize primarily manual gear; and

(c) Are operated by individual fishermen or family members for the purpose of subsistence or local trade.

4.2 Notwithstanding the provisions of Articles 2 and 3, a developing country Member shall be allowed to grant or maintain subsidies to its small-scale fisheries for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel. For the purposes of this section, small-scale fisheries shall be defined as those that:

(a) Are below 20 meters dimension; and

(b) Operate within the Member's 12 nautical mile limit or the Member's own archipelagic waters.

4.3 Notwithstanding the provisions of Articles 2 and 3, a developing country Member shall be allowed to grant or maintain subsidies for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel, provided that the purpose is to exploit:

(a) Fisheries in the Member's own Exclusive Economic Zone; or

(b) Rights held by the Member in high seas fishing quotas or any other rights established by a regional fisheries management organization (RFMO) or a regional fisheries management arrangement.

4.4 Upon the request of developing country Members, developed country Members shall provide technical assistance to developing country Members to allow them to participate fully in any RFMO adjacent to their exclusive economic zone or archipelagic waters.

4. 5 Fishing subsidies under part 4.2 shall be allowed contingent on a showing that:

(a) The Member has a fishery management plan in place that is effectively monitored and adequately enforced;

(b) The fishery does not adversely affect resources governed by the fishery management plan;

(c) The small-scale fishing activities will not adversely affect fishery resources of other Members or the resources governed by relevant RFMO's; and

[12] Artisanal fisheries activities shall include on-board handling (including but not limited to provision of cool boxes, fish holds and other measures to encourage hygiene and sanitation and to preserve fish quality) and post-harvest handling.

(d) Determinations of adverse effects on fishery resources will be made by fisheries experts convened by the Committee pursuant to procedures under Sections 5 and 6.

4.6 Fishing subsidies under part 4.3 shall be allowed contingent on a showing that the developing country Member has:

(a) Underexploited resources in its EEZ; or

(b) A right to high seas fishing quotas or extra quota in a RFMO.

4.7. Upon the request of developing country Members, developed country Members shall provide technical assistance to developing country Members to develop the capacity to initiate, implement and enforce compliance with a fishery management plan adequate to provide the showing required by Sections 4.3, 4.4 and 4.5 herein.

Article 5

Notifications and Enquiry Points

5.1 A Member asserting that a subsidy covered by this Annex qualifies for an exception pursuant to Sections 3 and 4, with the exception of artisanal fisheries under Section 4.1, shall include in its annual notification, *mutatis mutandis,* under Article 25 of the ASCM, information fully describing the fisheries benefiting from the subsidy and describing how the subsidy conforms to the conditions set forth in the exception. Information shall include, where relevant, measures to address fishing capacity and effort, and the biological status of managed stocks.

5.2 The Committee on the ASCM will annually review such notifications and report to Members on the extent to which Members are availing themselves of such exceptions. The Committee may appoint a special subcommittee including fishery experts drawn from Member governments and those individuals recommended by relevant multilateral institutions with fisheries expertise for this purpose.

5.3 Upon the request of any Member, the Committee shall convene a subcommittee composed pursuant to Section 5.2 to review a particular notification and report to the Committee its findings on whether the subsidy or subsidies of a Member conforms to the conditions of the exception claimed, including whether the subsidy adversely affects the fishery resources of a Member. The subcommittee's report shall indicate whether:

(a) The Member claiming the exception has a national fisheries management plan in place, which includes, *inter alia*: conservation and management measures based on the best scientific evidence available; fisheries management control measures (fisheries monitoring, surveillance, control and enforcement mechanisms); mechanisms established to identify and quantify fishing capacity; vessel registration and licensing system; limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels; and timely and reliable statistics available on catch and fishing effort in sufficient detail to allow sound statistical analysis; and

(b) The volume of the total catch by a Member of target species and the number of vessels used in those fishing operations are decreasing, as compared to the total catch volume and number of vessels it had during the previous year, and

(c) Whether the subsidy claimed is causing or likely to cause adverse effect to the fishery resources of a Member or fishery resources governed by a relevant RFMO or other arrangement.

5.4 Each Member shall maintain an enquiry point to answer all reasonable enquiries from other Members and interested parties in other Members concerning its fisheries management plan, including measures in place to address fishing capacity and fishing effort and the biological status of managed stocks. Special flexibility shall be given to developing countries with respect to instituting enquiry points, including flexibility to develop such enquiry points with the help of technical assistance. Upon the request of developing country Members, developed country Members shall provide technical assistance to develop the capacity to initiate and implement compliance with this Section.

Article 6

Serious Prejudice and Adverse Effects Notification

6.1 Serious prejudice in the case of a fishery subsidy covered by this Annex shall be presumed to arise under Article 6.3 of the ASCM when:

(a) There is an increase in the subsidizing Member's capacity to produce the product due to the subsidy; or

(b) An increase in the subsidizing Member's relative share of production of the like product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.

6.2 An adverse effect to the domestic industry shall be presumed to arise under Article 5 of the ASCM and Part V of the ASCM when there has been found an adverse effect to the fishery resources of a Member. Other than a countervailing duty investigation under Part V, a finding of adverse effect to the fishery resources of a Member shall be determined by a panel including fisheries experts, drawn from Member governments and those individuals recommended by relevant multilateral institutions. In an investigation under Part V, the investigating authorities shall include fisheries experts in their investigative process. They may base their finding of injury to the domestic injury either as defined in Article 6.3 below in terms of fisheries adverse effects, or according to the regular material injury standard for a countervailing duty investigation, or both.

6.3 A panel's or investigating authority's determination of fisheries adverse effect[13] shall be based on information including:

(a) The total catch (in volume terms) by the Member of target species and by-catch, with breakdown by fishery, and the number of vessels used in those catching operations, with breakdown by operated location areas;

(b) The criteria and scientific information used to set the status of the fishery;

(c) Whether the fishery in question is under management of a regional fisheries management organization or arrangement and which are the nature of the monitoring and the quantitative limits applicable to the Member;

(d) National fisheries management plans in place, with sufficient information to enable Members to evaluate and to understand their framework and operation; and

[13] Nothing in the concept of fisheries adverse effects shall prejudice the ability of a panel or investigating authority to find adverse effects as otherwise defined in Article 5 of the ASCM. A fisheries adverse effect is an alternative additional means of meeting the adverse effects standard.

(e) Government-to-government payment for access by foreign vessels to fishing resources of a developing country's maritime jurisdiction or to quotas or any other rights established by any regional fishery management organization or arrangement ("access rights"), with breakdown by recipient country, total amounts paid, amounts received on the onward transfer of the access rights, fisheries data (in accordance with items (a) and (b) of this paragraph) and other relevant information.

(f) Information on the biological status of relevant marine ecosystems.

Article 7

Prevention of circumvention

Members shall not have recourse to rules of origin (preferential or non-preferential), the flag of a vessel and access rights, among others, as a means to undermine the objectives set out in the preamble and to circumvent their obligations under this Annex.

Article 8

Review

The provisions of this Annex shall be reviewed by the Committee after a period of 8 (eight) years from the date of its entry into force, with a view to determining whether any modification is necessary.

Article 9

Transitional provisions

9.1 Any fisheries subsidy which has been established within the territory of a Member before the date of the entry into force of this Annex shall be notified to the Committee in no later than 90 days after that date.

9.2 From the entry into force of this Annex, there shall be a period of three years for developed country Members and a period of five years for developing country Members to gradually phase out and eliminate fisheries subsidies that are inconsistent with the provisions of this Annex. The starting point of the reduction shall be the 2003-2005 average of the fisheries subsidies prohibited under Article 2. Members shall not be allowed to adopt new prohibited fisheries subsidies or to extend the scope of any existing prohibited fisheries subsidy.

9.3 Any least-developed country Member shall phase out its fisheries subsidies within an eight-year period, preferably in a progressive manner, from the date of entry into force of this Annex. If such least-developed country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the Member in question. If the Committee determines that the extension is justified, the Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the least-developed country Member shall phase out those fisheries subsidies within 3 (three) years from the end of the last authorized period.

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LAMPIRAN III

PROPOSAL INDONESIA ke-II
FISHERIES SUBSIDIES* : *PROPOSED NEW DISCIPLINES
Nomor. TN/RL/GEN/150/Rev.1 tanggal 10 September 2007

WORLD TRADE ORGANIZATION

TN/RL/GEN/150/Rev.1
10 September 2007

(07-3766)

Negotiating Group on Rules

Original: English

FISHERIES SUBSIDIES: PROPOSED NEW DISCIPLINES

Revised Proposal from the Republic of Indonesia

Revision

The following communication, dated 5 September 2007, is being circulated at the request of the Delegation of the Republic of Indonesia.

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INTRODUCTION

1. Indonesia has taken into account the views expressed in the Group to date, including papers submitted by Argentina and Brazil to the Group at its last session and discussion of the many issues raised there. In light of this discussion and what Indonesia sees as convergence of the direction of the Group on several issues, Indonesia has undertaken to revise the text it submitted in July to reflect these views, and to clarify several areas of its text that gave rise to certain questions.

2. The delegation of Indonesia is hopeful that its revised text will provide a basis for further discussion and convergence of views around the important issues involved in this negotiation. The revisions focus primarily on five areas of the text. We also submit a version of the Revised Proposal which shows all changes made from the July 2, 2007 Proposal.

3. First, in this revision to the draft Proposal Indonesia seeks an approach that brings together the "top down" and "bottom up" approaches to classifying fishery subsidies. Whereas the July Proposal broadly defined fishery subsidies as "prohibited" in Article 2, and then proceeded in Article 3 and Article 4 (exemptions and special-and-differential treatment, respectively) to make certain subsidies allowable, the Revised Proposal broadly defines fishery subsidies as "actionable", with Article 3 and 4 defining subsidies that are, with conditionality, non-actionable. The reasons for this change are explained below.

4. In studying the ASCM and the draft proposals for fisheries subsidy disciplines, we found that the word "prohibited" was being used differently in the ASCM and in the fisheries subsidies discussions, and we think it is confusing and unwise to have different meanings for the same word. In the ASCM, the term "prohibited" is applied only to export subsidies or import substitution subsidies, and the term is not used – as it was being used often in our fisheries negotiations – as a generic term for a subsidy that is subject to disciplines. Thus, Annex Article 2 was redrafted to make clear that Article 2 fisheries subsidies, unless named as exceptions in Articles 3 or 4 of this Agreement, are "actionable" under existing ASCM multilateral dispute settlement proceedings or domestic-track countervailing duty proceeding if the subsidized fishery activity caused adverse effects as currently defined by the ASCM *or as defined in this Annex as an adverse effect on the fishery resource (Article 6)*. Moreover, by implication of the wording of Annex Article 2, the Fisheries Annex would not prohibit subsidies that were not already defined as "prohibited" under the existing ASCM.

Subsidi perikanan..., Maudy Kiranayanti, FHUI, 2009

5. Accordingly, the Revised Proposal does not prohibit any subsidies not otherwise prohibited by the ASCM. The Revised Proposal can still be considered "top down", however, because it first deems all subsidies as (potentially) actionable, and then carves-out exemptions or S&D treatment in Articles 3 and 4. Indonesia notes that the Revised Proposal represents a significant strengthening of disciplines for fishery subsidies over that of the existing ASCM because of the introduction of the concept of "adverse effect on a fishery resource" as an alternative, additional condition for applying subsidy remedies, including countervailing duties when there is "injury" to a fishery resource.

6. Second, the Revised Proposal makes some changes/clarifications in special and differential (S&D) treatment (Annex Article 4) and, in particular, the conditionality for artisanal and small-scale fisheries. The Revised Proposal represents a clarification, rather than a significant substantive change, from the July Proposal. New Zealand has usefully labelled Indonesia's approach to S&D treatment as a "cascade approach". Thus the cascade approach contained the text of Annex Article 4, which explains the differences in the three categories about which certain Members raised questions, can be summarized in the following table:

S&D Treatment Cascade – Article 4

Type of Fishing	Location	Vessels	Conditionality
Artisanal	Territorial waters and mostly close to shore	Proportional ratio between gross tonnage and engine power and utilize primarily manual gear	Full support for subsistence fisheries allowed
Small Scale	• Within 12 nautical miles; or • The Member's own archipelagic waters	Below 20 meters dimension	• Limited to fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel • Contingent on Art. 4.5 factors
All Vessels	• Within Member's own EEZ; or • High seas fishing quota or RFMO; or • Regional fisheries management arrangement	Not applicable	• Limited to fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel • Contingent on Art. 4.6 factors

7. Third, an area of significant revision is that of Annex Article 6, adverse effects. Indonesia has clarified the language of this Article and made its structure parallel to that of the corresponding structure of the existing ASCM text on adverse effects (ASCM Article 5), serious prejudice (ASCM Article 6), and injury (ASCM Article 15). We believe that the changes will make the application clearer, and by having the ASCM and the Annex consistent in their approach, it will make enforcement and interpretation easier. In short, the Revised Proposal makes clear that, with the

exception of subsidies meeting the exceptions (Article 3) or S&D treatment (Article 4), fishery subsidies remain actionable if they cause adverse effects as under the existing ASCM (Article 5) and/or if they trigger the adverse effects to fishery resources outlined in Fisheries Annex Article 6. We have also clarified where a remedy would apply. For the multilateral track (parallel to ASCM Part III dispute settlement), the adverse effect to the fishery resource can occur in any market in which a Member's interests are shown to be adversely affected. For the domestic countervailing duty track (ASCM Part V), there must be injury to the fishery resource within the Member's exclusive economic zone (EEZ) or archipelagic waters.

8. Fourth, the Revised Proposal addresses technical assistance to developing country Members. In response to comments by a number of other Members, Indonesia has clarified the Proposal that the technical assistance to developing country Members should be on mutually agreed terms and conditions.

9. Fifth, the Revised proposal addresses the role of fishery expertise in the implementation of the new Annex, particularly in assessing conditionality of under Article 3 and Article 4 (exceptions and S&D treatment) and in determining adverse effects to the fishery resource. The July Proposal suggested establishing new bodies and vesting them with certain powers based on their expertise; the Revised Proposal recognizes the issues by other Members, such as the lessons learned from the history of reliance on the Permanent Group of Experts under the existing ASCM process, and has redrafted the text to allow for further exploration of this issue among the negotiating Members.

10. Finally, Indonesia appreciates the written questions and comments which is has received. It has replied to the Members in relation to those Members' particular comments and questions regarding the July Proposal. In many cases, Indonesia believes that the revisions and clarifications incorporated in the Revised Proposal provide the best response to these submissions.

Attachment

ANNEX [VIII] TO THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Preamble

Members,

Recalling the commitment at Doha to clarify and improve WTO disciplines on fishery subsidies.

Noting the current state of world fishery stocks and the desire of Members to address subsidies that have a harmful effect on them;

Conscious of the negative effects of overcapacity and overfishing on these fisheries resources;

Reaffirming that provisions for special and differential (S&D) treatment are an integral part of the WTO Agreements;

Determined to strengthen ASCM provisions with a view to making them more precise, effective and operational in relation to fisheries;

Considering the social and economic importance of the fisheries sector to developing country Members;

Hereby *agree* as follows:

Article 1

Definitions and coverage

1.1 This Annex provides for specific provisions regarding fisheries subsidies and it is an integral part of the Agreement on Subsidies and Countervailing Measures (ASCM).

1.2 A subsidy as used in this Annex is a subsidy within the meaning of paragraph 1 of Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM). A subsidy subject to this Annex must be specific, pursuant to Article 2 of the ASCM.

1.3 This Annex shall not apply to inland fisheries[1] or to aquaculture.[2]

1.4 This Annex covers any subsidy that confers a benefit to or on behalf of any company and/or person linked in fact or in law, directly or indirectly[3], to enterprises engaged in the harvesting of marine wild capture fisheries. Fisheries subsidies shall encompass any subsidy programme and/or the disbursement made under such programme.

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[1] "Inland fisheries" are fisheries which are carried out in freshwater or estuaries of a Member and whose target species are those that spend all of their life-cycle therein.

[2] "Aquaculture" is the farming of aquatic organisms, including fish, molluscs and crustaceans, provided that no capture fisheries is used to feed raised fish or is farmed.

[3] The term "directly or indirectly" is used in this Annex in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994.

Subsidi perikanan..., Maudy Kiranayanti, FHUI, 2009

1.5 Harvesting includes the on-vessel processing of fish and transport of fish from one vessel to another or from a vessel to shore, but it does not include inland or on-shore processing or other post-harvest handling or activity.

1.6 This Annex does not cover government-to-government payments to obtain access for a Member's distant water fishing fleet to fisheries resources within the territorial sea or exclusive economic zone of a developing country, or to quotas or other rights established by any regional fishery management organization (RFMO) or arrangement. The further transfer of such rights to the Member's fishing fleet is covered by this Annex but is not actionable under Article 2, provided that:

(a) a benefit is not conferred by the onward transfer of such rights to the Member's fishing fleet, in that the Member's fleet pays compensation comparable to the value of the access of the resource;

(b) the access arrangements provide for compliance with applicable fishery management plans and for a science-based assessment and monitoring of the status of the fishery resources covered by the access arrangements; and

(c) such payments are notified pursuant to Article 5 herein.

Article 2

Fishery Subsidies Actionable

No Member shall cause, through the use of any fishery subsidy included in paragraphs 1 and 2 of ASCM Article 1, adverse effects to the interests of other Members as defined in ASCM Article 5 or adverse effects to fishery resources as defined in paragraph 6.1 to this Annex, except as otherwise provided in this Annex.

Article 3

Exceptions to Actionable Subsidies

3.1 Notwithstanding Article 2, the following subsidies are not actionable:

(a) Provision of a social safety net for fishermen, including early retirement schemes, re-education, training or alternative employment assistance, unemployment relief, life insurance, support for the temporary suspension of fishing activities.

(b) Fisheries research, including data collection, surveys, data analysis, and stock monitoring, sampling and assessment;[4]

(c) Fisheries stock enhancement, including marine conservation and protection, marine environment restoration, protection and development of a Member's own archipelagic waters[5], artificial reefs, hatcheries for breeding and by-catch mitigation devices[6];

(d) Improving vessel and crew safety[7], provided that the improvement is undertaken to comply with international or domestic standards; and there is no increase in fishing

[4] This is limited to fisheries research that does not result in commercial sale of the fish harvested.

[5] Archipelago is as defined in Article 46 of UNCLOS 1982, and calculation of the archipelagic baselines is defined in Article 47 thereof.

[6] This provision is aimed at measures that enhance marine resources rather than capacity to harvest those resources.

[7] Programmes or activities aimed primarily at vessel modernisation or repair do not fall within this sub-paragraph. The construction of vessels is not permitted under this sub-paragraph.

capacity[8], such as the volume of fish hold or engine power of a vessel subject to such program.

(e) Construction and maintenance of general infrastructure for fishing activities, such as wharves and fishing ports and related facilities, roadways, water and sanitary waste systems, the provision of housing and other forms of community development infrastructure.[9]

(f) Short-term emergency relief, recovery adjustment programs and replacement of fishing capacity following natural or environmental disasters, provided that fishing fleet capacity is not restored beyond its pre-disaster state[10], except that special flexibility shall be given to developing countries pursuant to Article 4.

(g) Assistance and user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programs, and other expenses related to administration and operation of fishery management programs, including allocation and monitoring of licences, permits, quotas, vessel numbers and catch returns.

(h) Vessel decommissioning programmes, provided that the:

(i) vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;[11]

(ii) fish harvesting rights associated with such vessels, whether they are permits, licenses, fish quotas or any other form of harvesting rights, are permanently revoked and may not be reassigned; and

(iii) owners of such vessels, and the holders of such fish harvesting rights, are required to relinquish any claim associated with such vessels and harvesting rights that could qualify such owners and holders for any present or future harvesting rights in such fisheries;

(iv) there are in place fisheries management plan designed to prevent over-fishing in the targeted fishery, such as limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups, provided that special flexibility should be given to developing countries, including any technical assistance requested by any such developing country as provided in Article 4 below.

[8] Fishing capacity is understood here to mean the ability of a vessel or fleet of vessels to catch fish.
[9] General infrastructure for fishing communities shall also not be considered to be regionally specific under the ASCM.
[10] Restoration to pre-disaster state is not intended to restore a pre-disaster state of over-capacity.
[11] Vessels decommissioned for legitimate research and training purposes, with no commercial functions, need not comply with the conditions of this exception.

Article 4

Special and Differential Treatment of Developing Country Members

4.1 Notwithstanding the provisions of the ASCM and Articles 2 and 3, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities[12], defined herein as those which:

(a) Operate within its territorial waters and mostly close to shore;

(b) Use vessels of [proportional ratio between gross tonnage and engine power] and which utilize primarily manual gear; and

(c) Are operated by individual fishermen or family members for the purpose of subsistence or local trade.

Such subsidies are not actionable.

4.2 Notwithstanding the provisions of the ASCM and Articles 2 and 3, a developing country Member shall be allowed to grant or maintain subsidies to its small-scale fisheries for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel. For the purposes of this section, small-scale fisheries shall be defined as those that:

(a) Are below 20 meters dimension; and

(b) Operate within the Member's 12 nautical mile limit or the Member's own archipelagic waters.

Such subsidies are not actionable.

4.3 Notwithstanding the provisions of Articles 2 and 3, a developing country Member shall be allowed to grant or maintain subsidies for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel, provided that the purpose is to exploit:

(a) fisheries in the Member's own Exclusive Economic Zone; or

(b) rights held by the Member in high seas fishing quotas or any other rights established by a regional fisheries management organization (RFMO) or a regional fisheries management arrangement.

Such subsidies are not actionable.

4.4 Upon the request of developing country Members, and with reference to guidance provided by the UN [Fish Stocks Agreement], developed country Members shall provide technical assistance on mutually agreed terms and conditions to developing country Members to allow them to participate fully in any RFMO adjacent to their exclusive economic zone or archipelagic waters.

4.5 Fishing subsidies meet the definition of paragraph 4.2 contingent on a showing that:

(a) The Member has a fishery management plan in place that is effectively monitored and adequately enforced;

[12] Artisanal fisheries activities shall include on-board handling (including but not limited to provision of cool boxes, fish holds and other measures to encourage hygiene and sanitation and to preserve fish quality) and post-harvest handling.

(b) The fishery does not adversely affect resources governed by the fishery management plan; and

(c) The small-scale fishing activities will not adversely affect fishery resources of other Members or the resources governed by relevant RFMO's.

4.6 Fishing subsidies meet the definition of paragraph 4.3 contingent on a showing that the developing country Member has:

(a) underexploited resources in its EEZ; or

(b) a right to high seas fishing quotas or extra quota in a RFMO.

4.7 Upon the request of developing country Members, developed country Members shall provide technical assistance to developing country Members on mutually agreed terms and conditions to develop the capacity to initiate, implement and enforce compliance with a fishery management plan in keeping with the FAO Code of Conduct on Responsible Fisheries and adequate to provide the showing required by Sections 4.3, 4.4 and 4.5 herein.

Article 5

Notifications and Enquiry Points

5.1 A Member asserting that a subsidy covered by this Annex qualifies for an exception pursuant to Sections 3 and 4, with the exception of artisanal fisheries under Section 4.1, shall include in its annual notification, *mutatis mutandis,* under Article 25 of the ASCM, information fully describing the fisheries benefiting from the subsidy and describing how the subsidy conforms to the conditions set forth in the exception. Information shall include, where relevant, measures to address fishing capacity and effort, the biological status of managed stocks and other fishery resources.

5.2 The Committee on the ASCM will annually review such notifications and report to Members on the extent to which Members are availing themselves of such exceptions. Reports will be published annually in a form available to the public.

5.3 In reviewing notifications, the Committee is encouraged to consult with and seek information from fishery experts, as authorized by Article 24.5 of the ASCM.

5.4 Each Member shall maintain an enquiry point to answer all reasonable enquiries from other Members and interested parties in other Members concerning its fisheries management plan, including measures in place to address fishing capacity and fishing effort and the biological status of managed stocks. Special flexibility shall be given to developing countries with respect to instituting enquiry points, including flexibility to develop such enquiry points with the help of technical assistance. Upon the request of developing country Members, developed country Members shall provide technical assistance to develop the capacity to initiate and implement compliance with this Section.

Article 6

Adverse Effects

6.1 For purposes of ASCM Part III, no Member should cause, through the use of any fishery subsidy referred to in Article 2 of this Annex, adverse effects to a fishery resource,[13] i.e.:

(a) injury to the fishery resource of another Member;[14]

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994, as a result of an effect on a fishery resource;

(c) serious prejudice to a fishery resource of another Member.

6.2. Injury to a fishery resource in the sense of paragraph (a) of Article 6.1 of this Annex shall be based on positive evidence and involve an objective examination of the volume of the fishery activity and the effect of the fishery activity on the fishery resource.[15]

6.3. The examination of the injury from fishery activity shall include an evaluation of all relevant fishery resource factors, including:

(a) the total catch (in volume terms) by the Member of target species and by-catch, with breakdown by fishery, and the number of vessels used in those catching operations, with breakdown by operated location areas;

(b) the criteria and scientific information used to set the status of the fishery;

(c) whether the fishery in question is under management of a regional fisheries management organization or arrangement and which are the nature of the monitoring and the quantitative limits applicable to the Member;

(d) national fisheries management plans in place, with sufficient information to enable Members to evaluate and to understand their framework and operation; and

(e) government-to-government payment for access by foreign vessels to fishing resources of a developing country's maritime jurisdiction or to quotas or any other rights established by any regional fishery management organization or arrangement ("access rights"), with breakdown by recipient country, total amounts paid, amounts received on the onward transfer of the access rights, fisheries data (in accordance with items (a) and (b) of this paragraph) and other relevant information.

(f) information on the biological status of relevant marine ecosystems.

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[13] Nothing in the concept of adverse effects to a fishery resource shall prejudice the ability of a panel to find adverse effects as otherwise defined in Article 5 of the ASCM for products covered by Article 2 of this Annex. An adverse effect to the fishery resource is an alternative additional means of meeting the ASCM adverse effects standard.

[14] The term "injury to the fisheries resource" has the same meaning in ASCM Part III and ASCM Part V, except as specified by paragraph 6.8 of this Annex.

[15] This provison parallels ASCM Article 15.1.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.[16]

6.4 Where fishery activities of more than one country are simultaneously subject to a proceeding, the effects of such activities shall be cumulated only if they determine that the amount of subsidization established in relation to the imports from each country is more than de minimis as defined in paragraph 9 of ASCM Article 11 and the fishery activity of each country is not negligible.[17]

6.5 It must be demonstrated that the fishery activity is, through the effects of subsidies, causing injury within the meaning of this section. The demonstration of a causal relationship between the fishery activity and injury to the fishery resource shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized fishery activity which at the same time are injuring the fishery resource, and the injuries caused by these other factors must not be attributed to the subsidized fishery activity.[18]

6.6 The effect of the subsidized fishery activity for a particular product covered by this Annex shall be assessed in relation to any fisheries resource covered by this Annex.[19]

6.7 Serious prejudice to a fishery resource in the sense of paragraph (c) of Article 6.1 of this Annex shall be presumed to arise when:

(a) there is an increase in the subsidizing Member's capacity to produce the product due to the subsidy; or

(b) an increase in the subsidizing Member's relative share of production of the like product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.

6.8 For purposes of a countervailing duty proceeding under ASCM Part V, injury shall include the provisions of section 6.2 through 6.6 of this Annex, except that the fishery resource examined shall be exclusively within the Exclusive Economic Zone or archipelagic waters of the Member investigating injury to its fisheries resource. Injury for the purposes of a countervailing duty proceeding under ASCM Part V may also be determined according to the standards of Article 15 ASCM, even if it is a fishery subsidy covered by this Annex.[20]

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[16] This provision parallels ASCM Article 15.4, using the factors contained in Indoensia's July 2, 2007 Proposal.

[17] This provision parallels ASCM Article 15.3 on the issue of multiple countries being investigated in a countervailing duty proceeding.

[18] This provision parallels ASCM Article 15.5 on the need for proof of causation.

[19] This provision parallels ASCM Article 15.6 on "like product". However, for purposes of the adverse effects to fisheries resource test, the "like product" determination would not be the same as in a standard injury test that measures trade effects to a like product. For example, a fishing activity for bluefin tuna that "injures" the dolphin resource of another Member could be covered by these provisions, despite the fact that the bluefin tuna fishing might not be "injuring" the bluefin tuna catch.

[20] Nothing in the concept of adverse effects to fisheries resources or injury to a fishery resources shall prejudice the ability of a panel or investigating authority to find adverse effects or injury as otherwise defined in Article 5 and Part V of the ASCM. An adverse effect to fisheries resources or injury to a fisheries resource is an alternative additional means of meeting the traditional adverse effects or injury standard of Part III and Part V of the ASCM.

Article 7

Prevention of circumvention

Members shall not have recourse to rules of origin (preferential or non-preferential), the flag of a vessel and access rights, among others, as a means to undermine the objectives set out in the preamble and to circumvent their obligations under this Annex.

Article 8

Review

The provisions of this Annex shall be reviewed by the Committee after a period of 8 (eight) years from the date of its entry into force, with a view to determining whether any modification is necessary.

Article 9

Transitional provisions

9.1 Any fisheries subsidy which has been established within the territory of a Member before the date of the entry into force of this Annex shall be notified to the Committee in no later than 90 days after that date.

9.2 From the entry into force of this Annex, there shall be a period of three years for developed country Members and a period of five years for developing country Members to gradually phase out and eliminate fisheries subsidies that are inconsistent with the provisions of this Annex. The starting point of the reduction shall be the 2003-2005 average of the fisheries subsidies prohibited under Article 2. Members shall not be allowed to adopt new prohibited fisheries subsidies or to extend the scope of any existing prohibited fisheries subsidy.

9.3 Any least-developed country Member shall phase out its fisheries subsidies within an eight-year period, preferably in a progressive manner, from the date of entry into force of this Annex. If such least-developed country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the Member in question. If the Committee determines that the extension is justified, the Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the least-developed country Member shall phase out those fisheries subsidies within 3 (three) years from the end of the last authorized period.

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LAMPIRAN IV

PROPOSAL INDONESIA ke-III
FISHERIES SUBSIDIES* : *PROPOSED NEW DISCIPLINES
Nomor. TN/RL/GEN/150/Rev.2 tanggal 9 Oktober 2007

WORLD TRADE ORGANIZATION

TN/RL/GEN/150/Rev.2
9 October 2007

(07-4313)

Negotiating Group on Rules Original: English

FISHERIES SUBSIDIES: PROPOSED NEW DISCIPLINES

Revised Proposal from the Republic of Indonesia

Revision

The following communication, dated 4 October 2007, is being circulated at the request of the Delegation of the Republic of Indonesia.

INTRODUCTION

1. Following the discussion on Indonesia's 5 September 2007 Revised Proposal (TN/RL/Gen/150/Rev.1), Indonesia has undertaken to revise the text it submitted in September to reflect those discussions.

2. The delegation of Indonesia believes that its present revised text will provide a basis for further discussion and convergence of views around the important issues involved in this negotiation. The revisions focus primarily on three areas of the text. These are: prohibited subsidies, adverse effects, and special and differential treatment.

3. First, Indonesia believes that the keys to these negotiations are to put in place strong disciplines, and to make them practical and enforceable. These goals are the focus of our proposals. In terms of strong disciplines, there was much discussion in the last meeting about the mandate from the Hong Kong Ministerial meeting. As we indicated in the last meeting, we are very supportive of the mechanism of using a prohibition, provided that we all understand that it is still an incomplete solution to many of the issues that we are seeking to address. We introduce a proposed text on prohibition with this Revised Proposal. However, Members should also remind themselves about the fact that the Hong Kong mandate is completely silent on how - or even whether - new WTO rules should impose disciplines on fisheries subsidies falling outside an eventual prohibition. This curious omission indicates that there were serious issues which we had not begun to address by Hong Kong, but which need to be addressed. We believe that the overriding goal of strong disciplines for fishery subsidies requires disciplines both as to a prohibition, as well as to actionability.

4. In terms of the new Article 2 in our Revised Proposal which addresses a prohibition, we have been guided by several key principles. To be consistent with the structure and coverage of the ASCM, and to avoid definitional confusions between the ASCM and this eventual Fisheries Subsidies Annex, any prohibitions should be focused on subsidies deemed by definition to be harmful, with other subsidies being actionable and now also subjected to a strong adverse effects standard specific to fisheries. Members should be able to clearly delineate between prohibited subsidies which are deemed by their nature to cause harm to other Members, and actionable subsidies which need to be shown to cause adverse effects to other Members. To be clear, all fisheries subsidies other than those which are stated as prohibited would still be subjected to possible measures as actionable subsidies.

As we indicated in our last proposal, other than limited exceptions and S&D rules, all fishery subsidies would be captured.

5. In drafting our proposed article on prohibited subsidies, we have drawn from proposals made by other Members, including the EC, Norway, and Japan, and have sought to include each of the proposals made by those Members. We made some modifications to the scope of the prohibitions addressed in those earlier proposals. We have also added an important new class of prohibited subsidies addressed against overfishing, in terms of subsidies for fixed or variable operating costs of fishing and on-board processing. Six different types of fisheries subsidies are covered as prohibited subsidies. Thus, the resulting list of prohibited fisheries subsidies is broader and stronger than previously proposed by those Members.

6. In terms of the remaining subsidies which require strong disciplines, we have continued to work on the areas of actionable subsidies and the critical subject of the test for determining whether they are actionable, namely the adverse effects test. Members that do not had experience with actionable subsidies need to be aware that the system of actionable subsidies under the ASCM is in fact the principle means used under the ASCM to discipline subsidies to date. We have restructured some of our approach to actionable subsidies, which is now Article 3 of our Revised Proposal. We have added a section 3.2 listing several types of subsidy which are actionable. One of them is the topic of vessel decommissioning, which we moved from being exempted if meeting certain conditions, to actionable unless meeting certain conditions. We moved vessel decommissioning from the Article 4 exceptions to this new list of actionable subsidies, in order to make Article 4 of this proposal clearer as to its "green light" nature. We also added two subsidy types which other Members had proposed should be subject to being deemed to cause serious prejudice (see Art. 7.3 herein). There may be other subsidy types for which it would be useful to include in such a list. One could also take the view that such a list is unnecessary, since the definition of actionability covers these subsidies anyway. We invite Member comments and suggestions on these areas.

7. Second, we have also substantially restructured our text (formerly Article 6) on adverse effects, and in fact have split it into two Articles (now Articles 7 and 8), one article paralleling Articles 5, 6 and 7 of the ASCM relating broadly to actionable subsidies, and the other paralleling the articles in Part V of the ASCM relating to countervailing duty investigations. From comments by Members, we found that there was some confusion on the practical issues of applying the adverse effects test. Our suggestions go a long way to resolving some questions. There are still some conceptual areas on which Members need to focus, and we have noted areas that have thus far come to our attention by using brackets. For example, in Article 8.1, we have identified some of the areas where use of a test for injury to a fisheries resource is different than injury to a domestic industry, and the question of standing of recognized parties other than a domestic industry to bring a CVD application needs consideration. We invite Member feedback on these and other issues. We have added parallels from ASCM Article 15 to the practical steps for evaluating injury in Articles 8.2, 8.3 and 8.4. We have sought wherever possible to use concepts and practices in the ASCM for the new test of adverse effects to a fishery resource.

8. Third, relating to Special and Differential Treatment, we have noted that some Members commented about the conditions for these provisions in the S&D "Cascade" that we have employed. We made that conditionality clearer in this Revised Proposal, and also added some areas of coverage proposed by Brazil and Argentina in their recent paper.

9. In sum, this Revised Proposal reflects earlier responses, and represents many important areas of convergence of views, as well as addressing areas on which Members have needed to focus. The Revised Proposal is attached. We also attach a highlighted version for the convenience of Members, showing all changes from our 5 September 2007 Proposal. We welcome further comments and feedback from Members.

Attachment

ANNEX [VIII] TO THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Preamble

Members,

Recalling the commitment at Doha to clarify and improve WTO disciplines on fishery subsidies.

Noting the current state of world fishery stocks and the desire of Members to address subsidies that have a harmful effect on them;

Conscious of the negative effects of overcapacity and overfishing on these fisheries resources;

Reaffirming that provisions for special and differential (S&D) treatment are an integral part of the WTO Agreements;

Determined to strengthen ASCM provisions with a view to making them more precise, effective and operational in relation to fisheries;

Considering the social and economic importance of the fisheries sector to developing country Members;

Hereby *agree* as follows:

Article 1

Definitions and coverage

1.1 This Annex provides for specific provisions regarding fisheries subsidies and it is an integral part of the Agreement on Subsidies and Countervailing Measures (ASCM).

1.2 A subsidy as used in this Annex is a subsidy within the meaning of paragraph 1 of Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM). A subsidy subject to this Annex must be specific, pursuant to Article 2 of the ASCM.

1.3 This Annex shall not apply to inland fisheries[1] or to aquaculture.[2]

1.4 This Annex covers any subsidy that confers a benefit to or on behalf of any company and/or person linked in fact or in law, directly or indirectly[3], to enterprises engaged in the harvesting of marine wild capture fisheries. Fisheries subsidies shall encompass any subsidy programme and/or the disbursement made under such programme.

[1] "Inland fisheries" are fisheries which are carried out in freshwater or estuaries of a Member and whose target species are those that spend all of their life-cycle therein.

[2] "Aquaculture" is the farming of aquatic organisms, including fish, molluscs and crustaceans, provided that no capture fisheries is used to feed raised fish or is farmed.

[3] The term "directly or indirectly" is used in this Annex in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994.

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1.5 Harvesting includes the on-vessel processing of fish and transport of fish from one vessel to another or from a vessel to shore, but it does not include inland or on-shore processing or other post-harvest handling or activity.

1.6 This Annex does not cover government-to-government payments to obtain access for a Member's distant water fishing fleet to fisheries resources within the territorial sea or exclusive economic zone of a developing country, or to quotas or other rights established by any regional fishery management organization (RFMO) or arrangement. The further transfer of such rights to the Member's fishing fleet is covered by this Annex but is not actionable under Article 3, provided that:

(a) a benefit is not conferred by the onward transfer of such rights to the Member's fishing fleet, in that the Member's fleet pays compensation comparable to the value of the access of the resource;

(b) the access arrangements provide for compliance with applicable fishery management plans and for a science-based assessment and monitoring of the status of the fishery resources covered by the access arrangements; and

(c) such payments are notified pursuant to Article 6 herein.

Article 2

Prohibition of Fisheries Subsidies

2.1 Except as provided in this Annex, and without prejudice to Article 3 of the ASCM, the following subsidies, within the meaning of Article 1 of the ASCM and this Annex, shall be prohibited within the meaning of Article 3 of the ASCM:

(a) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of vessel construction of any fishing vessel[4];

(b) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of modernization, renovation, repair or upgrading of existing fishing vessels, including engine or gear acquisition, any technical or electronic equipment[5] onboard the vessel, and any other significant capital inputs to fishing;

(c) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of fixed or variable operational costs of fishing vessels and fishing activities, including on-board processing;

(d) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for shipbuilding yards contingent upon the construction of fishing vessels;

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[4] For the purpose of this Annex, fishing vessel means any vessel intended for use for the purpose of commercial exploitation of fishing resources, including fish processing vessels and vessels engaged in transshipment.

[5] This comprises, inter alia, engines, fishing gear, fish-processing machinery, fish-finding technology, refrigerators, machines for sorting or cleaning fish, or any other equipment onboard the fishing vessel. The prohibition does not cover the installation of equipment for safety or for control and enforcement purposes. Neither does the prohibition cover equipment fitted for the purpose of reducing environmentally harmful emissions.

(e) subsidies granted, in law or in fact, whether solely or as one of several other conditions, relating to illegal, unreported and unregulated fishing,[6] as well as to any fishing vessels flying "flags of convenience"; and

(f) subsidies granted, in law or in fact, whether solely or as one of several other conditions, upon the transfer of fishing vessels to foreign owners, including through the creation of joint ventures with those countries.

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

2.3 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member as defined in Article 2.1 of this Annex and without prejudice to Article 3 of the ASCM, such Member may seek remedies in accordance with Article 4 of the ASCM.

Article 3

Fishery Subsidies Actionable

3.1 No Member shall cause, through the use of any fishery subsidy included in paragraphs 1 and 2 of ASCM Article 1, adverse effects to the interests of other Members as defined in ASCM Article 5 or adverse effects to fishery resources as defined in Article 7.1 to this Annex, except as otherwise provided in this Annex.

3.2 Except as provided in this Annex, and without prejudice to Parts III and V of the ASCM and Articles 2 and 3.1 herein, the following subsidies, within the meaning of Article 1 of the ASCM and this Annex, shall be considered as actionable within the meaning of Article 5 of the ASCM:

(a) Vessel decommissioning programmes, unless:

(i) the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;[7] and

(ii) the fish harvesting rights associated with such vessels, whether they are permits, licenses, fish quotas or any other form of harvesting rights, are permanently revoked and may not be reassigned; and

(iii) the owners of such vessels, and the holders of such fish harvesting rights, are required to relinquish any claim associated with such vessels and harvesting rights that could qualify such owners and holders for any present or future harvesting rights in such fisheries; and

(iv) there are in place fisheries management plan designed to prevent over-fishing in the targeted fishery, such as limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups, provided that special flexibility should be given to developing countries, including any technical assistance requested by any such developing country as provided in Article 5 below.

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[6] The term "illegal, unreported and unregulated fishing" shall be interpreted in accordance with the definition set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of the United Nations Food and Agricultural Organization (FAO).

[7] Vessels decommissioned for legitimate research and training purposes, with no commercial functions, need not comply with the conditions of this exception.

(b) subsidies granted, in law or in fact, whether solely or as one of several other conditions, where there is an increase in the subsidizing Member's capacity to produce a fishery product due to the subsidy.

(c) subsidies granted, in law or in fact, whether solely or as one of several other conditions, where there is an increase in the subsidizing Member's relative share of production of a fishery product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.

3.3 The list of actionable subsidies in section 3.2 above is merely illustrative, and does not limit the general rule expressed in section 3.1 above.

3.4 Whenever a Member has reason to believe that an actionable subsidy being granted or maintained by another Member, results in any adverse effects to the interests of other Members as defined in ASCM Article 5 or adverse effects to fishery resources as defined in Article 7.1 to this Annex, except as otherwise provided in this Annex, such Member may seek remedies in accordance with Article 7 of the ASCM.

Article 4
Exceptions to Actionable Subsidies

4.1 Notwithstanding Articles 2 and 3 of this Annex, the following subsidies are not actionable:

(a) Provision of a social safety net for fishermen, including early retirement schemes, re-education, training or alternative employment assistance, unemployment relief, life insurance, support for the temporary suspension of fishing activities;

(b) Fisheries research, including data collection, surveys, data analysis, and stock monitoring, sampling and assessment;[8]

(c) Fisheries stock enhancement, including marine conservation and protection, marine environment restoration, protection and development of a Member's own archipelagic waters[9], artificial reefs, hatcheries for breeding and by-catch mitigation devices;[10]

(d) Improving vessel and crew safety[11], provided that the improvement is undertaken to comply with international or domestic standards; and there is no increase in fishing capacity[12], such as the volume of fish hold or engine power of a vessel subject to such programme;

(e) Construction and maintenance of general infrastructure for fishing activities, such as wharves and fishing ports and related facilities, roadways, water and sanitary waste systems, the provision of housing and other forms of community development infrastructure;[13]

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[8] This is limited to fisheries research that does not result in commercial sale of the fish harvested.

[9] Archipelago is as defined in Article 46 of UNCLOS 1982, and calculation of the archipelagic baselines is defined in Article 47 thereof.

[10] This provision is aimed at measures that enhance marine resources rather than capacity to harvest those resources.

[11] Programmes or activities aimed primarily at vessel modernisation or repair do not fall within this sub-paragraph. The construction of vessels is not permitted under this sub-paragraph.

[12] Fishing capacity is understood here to mean the ability of a vessel or fleet of vessels to catch fish.

[13] General infrastructure for fishing communities shall also not be considered to be regionally specific under the ASCM.

(f) Short-term emergency relief, recovery adjustment programmes and replacement of fishing capacity following natural or environmental disasters, provided that fishing fleet capacity is not restored beyond its pre-disaster state[14], except that special flexibility shall be given to developing countries pursuant to Article 5 of this Annex;

(g) Assistance and user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes, and other expenses related to administration and operation of fishery management programmes, including allocation and monitoring of licences, permits, quotas, vessel numbers and catch returns.

Article 5

Special and Differential Treatment of Developing Country Members

5.1 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities[15], defined herein as those which:

(a) Operate within its territorial waters and mostly close to shore;

(b) Use vessels of [proportional ratio between gross tonnage and engine power] and which utilize primarily manual gear; and

(c) Are operated by individual fishermen or family members for the purpose of subsistence or local trade.

Such subsidies are not actionable.

5.2 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, a developing country Member shall be allowed to grant or maintain subsidies to its small-scale fisheries for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel, or bait, or ice. For the purposes of this section, small-scale fisheries shall be defined as those that:

(a) Are below 20 meters dimension; and

(b) Operate within the Member's 12 nautical mile limit or the Member's own archipelagic waters.

Provided that they meet the contingencies of Article 5.5 of this Annex, such subsidies are not actionable.

5.3 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, a developing country Member shall be allowed to grant or maintain subsidies for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel, or bait, or ice, provided that the purpose is to exploit:

(a) fisheries in the Member's own Exclusive Economic Zone; or

[14] Restoration to pre-disaster state is not intended to restore a pre-disaster state of over-capacity.

[15] Artisanal fisheries activities shall include on-board handling (including but not limited to provision of cool boxes, fish holds and other measures to encourage hygiene and sanitation and to preserve fish quality) and post-harvest handling.

(b) rights held by the Member in high seas fishing quotas or any other rights established by a regional fisheries management organization (RFMO) or a regional fisheries management arrangement.

Provided that they meet the contingencies of Article 5.6, of this Annex such subsidies are not actionable.

5.4 Upon the request of developing country Members, and with reference to guidance provided by the UN Fish Stocks Agreement, developed country Members shall provide technical assistance on mutually agreed terms and conditions to developing country Members to allow them to participate fully in any RFMO adjacent to their exclusive economic zone or archipelagic waters.

5.5 Fishing subsidies meet the definition of Article 5.2 of this Annex contingent on a showing that:

(a) The Member has a fishery management plan in place that is effectively monitored and adequately enforced;

(b) The fishery does not adversely affect resources governed by the fishery management plan; and

(c) The small-scale fishing activities will not adversely affect fishery resources of other Members or the resources governed by relevant RFMO's.

5.6 Fishing subsidies meet the definition of Article 5.3 of this Annex contingent on a showing that the developing country Member has:

(a) underexploited resources in its EEZ; or

(b) a right to high seas fishing quotas or extra quota in a RFMO.

5.7 Upon the request of developing country Members, developed country Members shall provide technical assistance to developing country Members on mutually agreed terms and conditions to develop the capacity to initiate, implement and enforce compliance with a fishery management plan in keeping with the FAO Code of Conduct on Responsible Fisheries and adequate to provide the showing required by Articles 5.3, 5.4 and 5.5 of this Annex.

Article 6

Notifications and Enquiry Points

6.1 A Member asserting that a subsidy covered by this Annex qualifies for an exception pursuant to Articles 4 and 5 of this Annex , with the exception of artisanal fisheries under Article 5.1 of this Annex, shall include in its annual notification, *mutatis mutandis,* under Article 25 of the ASCM, information fully describing the fisheries benefiting from the subsidy and describing how the subsidy conforms to the conditions set forth in the exception. Information shall include, where relevant, measures to address fishing capacity and effort, the biological status of managed stocks and other fishery resources.

6.2 The Committee on the ASCM will annually review such notifications and report to Members on the extent to which Members are availing themselves of such exceptions. Reports will be published annually in a form available to the public.

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6.3 In reviewing notifications, the Committee is encouraged to consult with and seek information from fishery experts, as authorized by Article 24.5 of the ASCM.

6.4 Each Member shall maintain an enquiry point to answer all reasonable enquiries from other Members and interested parties in other Members concerning its fisheries management plan, including measures in place to address fishing capacity and fishing effort and the biological status of managed stocks. Special flexibility shall be given to developing countries with respect to instituting enquiry points, including flexibility to develop such enquiry points with the help of technical assistance. Upon the request of developing country Members, developed country Members shall provide technical assistance to develop the capacity to initiate and implement compliance with this Section.

Article 7

Actionable Subsidies: Adverse Effects

7.1 For purposes of ASCM Part III, no Member should cause, through the use of any fishery subsidy referred to in Article 3 of this Annex, adverse effects to the interests of other Members, which in addition to adverse effects as defined in Article 5 of the ASCM, shall also include adverse effects to a fishery resource[16], *i.e.:*

(a) injury to the fishery resource of another Member;[17]

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994, as a result of an effect on a fishery resource;

(c) serious prejudice to a fishery resource of another Member.

7.2. The examination of the adverse effects to a fishery resource from fishery activity shall include an evaluation of all relevant fishery resource factors, including:

(a) the total catch or production or trading (in volume terms) by the Member of target species, with breakdown by fishery, and the number of vessels used in those catching or production operations, with breakdown by operated location areas;[18]

(b) the criteria and scientific information used to set the status of the fishery;

(c) whether the fishery in question is under management of a regional fisheries management organization or arrangement and which are the nature of the monitoring and the quantitative limits applicable to the Member;

(d) national fisheries management plans in place, with sufficient information to enable Members to evaluate and to understand their framework and operation; and

[16] Nothing in the concept of adverse effects to a fishery resource shall prejudice the ability of a panel to find adverse effects as otherwise defined in Article 5 of the ASCM for products covered by Articles 2 and 3 of this Annex. An adverse effect to the fishery resource is an alternative additional means of meeting the ASCM adverse effects standard.

[17] The term "injury to the fisheries resource" has the same meaning in ASCM Part III and ASCM Part V, except as specified by paragraph 7.8 of this Annex.

[18] For evaluation of stocks involving multi-species, for example in tropical waters, Members shall use the available scientific data to identify trends.

(e) government-to-government payment for access by foreign vessels to fishing resources of a developing country's maritime jurisdiction or to quotas or any other rights established by any regional fishery management organization or arrangement ("access rights"), with breakdown by recipient country, total amounts paid, amounts received on the onward transfer of the access rights, fisheries data (in accordance with items (a) and (b) of this paragraph) and other relevant information.

(f) information on the biological status of relevant marine ecosystems.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.[19]

7.3 Without prejudice of Article 6 of the ASCM, serious prejudice to a fishery resource in the sense of paragraph (c) of Article 7.1 of this Annex shall be presumed to arise when:

(a) there is an increase in the subsidizing Member's capacity to produce a fishery product due to the subsidy; or

(b) an increase in the subsidizing Member's relative share of production of a fishery product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.

7.4 For purposes of assessment of adverse effects pursuant to Articles 7 and 8 of this Annex, the period of data collection normally should be at least three years, and should include the entirety of the period of data collection for the subsidy investigation.

Article 8

Countervailing Measures: Determination of Injury to a Fishery Resource

8.1. Members taking any countervailing duty measures under Part V of the ASCM shall do so only in accordance with the provisions thereof, except that where they avail themselves of the injury test in this Article of this Annex, they shall utilize any provisions specified in this Article of this Annex.[20] In particular, the following provisions shall apply to any investigations involving allegations of injury to a fishery resource:

(a) With reference to Article 11.1, 11.4 and 11.6 of the ASCM, Members shall grant recognized consumer, industry and advocacy groups standing to submit a written application, and the authorities may decide to initiate an investigation without having received a written application by or on behalf of a domestic industry without needing to show that special circumstances exist for taking such action, it being recognized that injury to that Member's fishery resource may or may not be drawn to the attention of the Member by a domestic industry;

(b) With reference to Article 11.2 of the ASCM, an application may refer the criteria in Article 11.2(iv) of the ASCM or the injury factors referred to in this Article of the Annex relating to injury to a fishery resource;

[19] This provision parallels ASCM Article 15.4, using the factors contained in Indonesia's 2 July 2007 Proposal.

[20] This provision parallels ASCM Article 10.

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(c) [Consider whether the definition of "interested parties" under Article 12.9 of the ASCM needs to broaden the parties included, and in particular to grant standing to recognized consumer, industry and advocacy groups as interested parties as well as applicants, with a possible amendment to Article 16 of the ASCM];

(d) With reference to calculation of the amount of a subsidy in terms of benefit to the recipient, in addition to the guidelines of Article 14 of the ASCM, Members may use a method consistent with the following:

….

(e) With reference to determination of the amount of any countervailing duty pursuant to Article 19.4 of the ASCM, subsidization per unit of the subsidized and exported product, the amount of the subsidy may include all subsidies found to exist in relation to the harvesting and production of such a product, including subsidies to any vessels used in such harvesting … [give any other necessary examples].

(f) …. [identify any other provisions that should be specific to a countervailing duty investigation involving allegations of injury to a fishery resource.]

8.2 A determination of injury to a fishery resource in the sense of paragraph (a) of Article 7.1 of this Annex in a countervailing duty investigation shall be based on positive evidence and involve an objective examination of the volume of the fishery activity and its effect on the Member's fishery stocks, and the effect of the fishery activity on the fishery resource.[21]

8.3 The examination of the injury to a fishery resource from fishery activity shall include an evaluation of the volume of the fishery activity, in particular whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or catch related to the product in the Member's waters. With regard to the effect on Member's fishery stocks, the investigatory authorities shall consider whether there has been a significant decrease in their fish stocks, or whether the effect of the fishery activity is to reduce stocks of migratory fisheries, reduce traditional hatching in the Member's fishing territories, or otherwise impair production or catch in the Member's waters. No one or several of these factors can necessarily give decisive guidance. [22]

8.4. The examination of the injury to a fishery resource from fishery activity shall include an evaluation of the effect of the fishery activity on all relevant fishery resource factors, including:

(a) the total catch (in volume terms) by the Member of target species and by-catch, with breakdown by fishery, and the number of vessels used in those catching operations, with breakdown by operated location areas;[23]

(b) the criteria and scientific information used to set the status of the fishery;

(c) whether the fishery in question is under management of a regional fisheries management organization or arrangement and which are the nature of the monitoring and the quantitative limits applicable to the Member;

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[21] This provision parallels ASCM Article 15.1.

[22] This provision parallels ASCM Article 15.2.

[23] For evaluation of stocks involving multi-species, for example in tropical waters, Members shall use the available scientific data to identify trends.

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(d) national fisheries management plans in place, with sufficient information to enable Members to evaluate and to understand their framework and operation; and

(e) government-to-government payment for access by foreign vessels to fishing resources of a developing country's maritime jurisdiction or to quotas or any other rights established by any regional fishery management organization or arrangement ("access rights"), with breakdown by recipient country, total amounts paid, amounts received on the onward transfer of the access rights, fisheries data (in accordance with items (a) and (b) of this paragraph) and other relevant information.

(f) information on the biological status of relevant marine ecosystems.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.[24]

8.5 Where fishery activities of more than one country are simultaneously subject to a proceeding, the effects of such activities shall be cumulated only if they determine that the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of ASCM Article 11 and the volume of imports from the fishery activity of each country is not negligible.[25]

8.6 It must be demonstrated that the fishery activity is, through the effects of subsidies, causing injury within the meaning of this section. The demonstration of a causal relationship between the fishery activity and injury to the fishery resource shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized fishery activity which at the same time are injuring the fishery resource, and the injuries caused by these other factors must not be attributed to the subsidized fishery activity.[26]

8.7 The effect of the subsidized fishery activity for a particular product covered by this Annex shall be assessed in relation to any fisheries resource covered by this Annex.[27]

8.8 For purposes of a countervailing duty proceeding under ASCM Part V, injury shall include the provisions of Articles 7 and 8 of this Annex, except that the fishery resource examined shall be exclusively within the Exclusive Economic Zone or archipelagic waters of the Member investigating injury to its fisheries resource. Injury for the purposes of a countervailing duty proceeding under ASCM Part V may also be determined according to the standards of Article 15 ASCM, even if it is a fishery subsidy covered by this Annex.[28]

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[24] This provision parallels ASCM Article 15.4, using the factors contained in Indonesia's 2 July 2007 Proposal.

[25] This provision parallels ASCM Article 15.3 on the issue of multiple countries being investigated in a countervailing duty proceeding.

[26] This provision parallels ASCM Article 15.5 on the need for proof of causation.

[27] This provision parallels ASCM Article 15.6 on "like product". However, for purposes of the adverse effects to fisheries resource test, the "like product" determination would not be the same as in a standard injury test that measures trade effects to a like product. For example, a fishing activity for bluefin tuna that "injures" the dolphin resource of another Member could be covered by these provisions, despite the fact that the bluefin tuna fishing might not be "injuring" the bluefin tuna catch.

[28] Nothing in the concept of adverse effects to fisheries resources or injury to a fishery resources shall prejudice the ability of a panel or investigating authority to find adverse effects or injury as otherwise defined in Article 5 and Part V of the ASCM. An adverse effect to a fisheries resource or injury to a fisheries resource is an alternative additional means of meeting the traditional adverse effects or injury standard of Part III and Part V of the ASCM.

Article 9

Prevention of circumvention

Members shall not have recourse to rules of origin (preferential or non-preferential), the flag of a vessel and access rights, among others, as a means to undermine the objectives set out in the preamble and to circumvent their obligations under this Annex.

Article 10

Review

The provisions of this Annex shall be reviewed by the Committee after a period of 8 (eight) years from the date of its entry into force, with a view to determining whether any modification is necessary.

Article 11

Transitional provisions

11.1 Any fisheries subsidy which has been established within the territory of a Member before the date of the entry into force of this Annex shall be notified to the Committee in no later than 90 days after that date.

11.2 From the entry into force of this Annex, there shall be a period of three years for developed country Members and a period of five years for developing country Members to gradually phase out and eliminate fisheries subsidies that are inconsistent with the provisions of this Annex. The starting point of the reduction shall be the 2003-2005 average of the fisheries subsidies prohibited under Article 2. Members shall not be allowed to adopt new prohibited fisheries subsidies or to extend the scope of any existing prohibited fisheries subsidy.

11.3 Any least-developed country Member shall phase out its fisheries subsidies within an eight-year period, preferably in a progressive manner, from the date of entry into force of this Annex. If such least-developed country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the Member in question. If the Committee determines that the extension is justified, the Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the least-developed country Member shall phase out those fisheries subsidies within 3 (three) years from the end of the last authorized period.

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Attachment

ANNEX [VIII] TO THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Preamble

Members,

Recalling the commitment at Doha to clarify and improve WTO disciplines on fishery subsidies.

Noting the current state of world fishery stocks and the desire of Members to address subsidies that have a harmful effect on them;

Conscious of the negative effects of overcapacity and overfishing on these fisheries resources;

Reaffirming that provisions for special and differential (S&D) treatment are an integral part of the WTO Agreements;

Determined to strengthen ASCM provisions with a view to making them more precise, effective and operational in relation to fisheries;

Considering the social and economic importance of the fisheries sector to developing country Members;

Hereby *agree* as follows:

Article 1

Definitions and coverage

1.1 This Annex provides for specific provisions regarding fisheries subsidies and it is an integral part of the Agreement on Subsidies and Countervailing Measures (ASCM).

1.2 A subsidy as used in this Annex is a subsidy within the meaning of paragraph 1 of Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM). A subsidy subject to this Annex must be specific, pursuant to Article 2 of the ASCM.

1.3 This Annex shall not apply to inland fisheries[1] or to aquaculture.[2]

1.4 This Annex covers any subsidy that confers a benefit to or on behalf of any company and/or person linked in fact or in law, directly or indirectly[3], to enterprises engaged in the harvesting of marine wild capture fisheries. Fisheries subsidies shall encompass any subsidy programme and/or the disbursement made under such programme.

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[1] "Inland fisheries" are fisheries which are carried out in freshwater or estuaries of a Member and whose target species are those that spend all of their life-cycle therein.

[2] "Aquaculture" is the farming of aquatic organisms, including fish, molluscs and crustaceans, provided that no capture fisheries is used to feed raised fish or is farmed.

[3] The term "directly or indirectly" is used in this Annex in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994.

1.5 Harvesting includes the on-vessel processing of fish and transport of fish from one vessel to another or from a vessel to shore, but it does not include inland or on-shore processing or other post-harvest handling or activity.

1.6 This Annex does not cover government-to-government payments to obtain access for a Member's distant water fishing fleet to fisheries resources within the territorial sea or exclusive economic zone of a developing country, or to quotas or other rights established by any regional fishery management organization (RFMO) or arrangement. The further transfer of such rights to the Member's fishing fleet is covered by this Annex but is not actionable under Article 3, provided that:

(a) a benefit is not conferred by the onward transfer of such rights to the Member's fishing fleet, in that the Member's fleet pays compensation comparable to the value of the access of the resource;

(b) the access arrangements provide for compliance with applicable fishery management plans and for a science-based assessment and monitoring of the status of the fishery resources covered by the access arrangements; and

(c) such payments are notified pursuant to Article 6 herein.

Article 2

Prohibition of Fisheries Subsidies

2.1 Except as provided in this Annex, and without prejudice to Article 3 of the ASCM, the following subsidies, within the meaning of Article 1 of the ASCM and this Annex, shall be prohibited within the meaning of Article 3 of the ASCM:

(a) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of vessel construction of any fishing vessel[4];

(b) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of modernization, renovation, repair or upgrading of existing fishing vessels, including engine or gear acquisition, any technical or electronic equipment[5] onboard the vessel, and any other significant capital inputs to fishing;

(c) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of fixed or variable operational costs of fishing vessels and fishing activities, including on-board processing;

(d) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for shipbuilding yards contingent upon the construction of fishing vessels;

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[4] For the purpose of this Annex, fishing vessel means any vessel intended for use for the purpose of commercial exploitation of fishing resources, including fish processing vessels and vessels engaged in transshipment.

[5] This comprises, inter alia, engines, fishing gear, fish-processing machinery, fish-finding technology, refrigerators, machines for sorting or cleaning fish, or any other equipment onboard the fishing vessel. The prohibition does not cover the installation of equipment for safety or for control and enforcement purposes. Neither does the prohibition cover equipment fitted for the purpose of reducing environmentally harmful emissions.

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(e) subsidies granted, in law or in fact, whether solely or as one of several other conditions, relating to illegal, unreported and unregulated fishing,[6] as well as to any fishing vessels flying "flags of convenience"; and

(f) subsidies granted, in law or in fact, whether solely or as one of several other conditions, upon the transfer of fishing vessels to foreign owners, including through the creation of joint ventures with those countries.

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

2.5 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member as defined in Article 2.1 of this Annex and without prejudice to Article 3 of the ASCM, such Member may seek remedies in accordance with Article 4 of the ASCM.

Article 3

Fishery Subsidies Actionable

3.1 No Member shall cause, through the use of any fishery subsidy included in paragraphs 1 and 2 of ASCM Article 1, adverse effects to the interests of other Members as defined in ASCM Article 5 or adverse effects to fishery resources as defined in Article 7.1 to this Annex, except as otherwise provided in this Annex.

3.2 Except as provided in this Annex, and without prejudice to Parts III and V of the ASCM and Articles 2 and 3.1 herein, the following subsidies, within the meaning of Article 1 of the ASCM and this Annex, shall be considered as actionable within the meaning of Article 5 of the ASCM:

(a) Vessel decommissioning programmes, unless:

(i) the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;[7] and

(ii) the fish harvesting rights associated with such vessels, whether they are permits, licenses, fish quotas or any other form of harvesting rights, are permanently revoked and may not be reassigned; and

(iii) the owners of such vessels, and the holders of such fish harvesting rights, are required to relinquish any claim associated with such vessels and harvesting rights that could qualify such owners and holders for any present or future harvesting rights in such fisheries; and

(iv) there are in place fisheries management plan designed to prevent over-fishing in the targeted fishery, such as limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups, provided that special flexibility should be given

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[6] The term "illegal, unreported and unregulated fishing" shall be interpreted in accordance with the definition set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of the United Nations Food and Agricultural Organization (FAO).

[7] Vessels decommissioned for legitimate research and training purposes, with no commercial functions, need not comply with the conditions of this exception.

to developing countries, including any technical assistance requested by any such developing country as provided in Article 5 below.

(b) subsidies granted, in law or in fact, whether solely or as one of several other conditions, where there is an increase in the subsidizing Member's capacity to produce a fishery product due to the subsidy.

(c) subsidies granted, in law or in fact, whether solely or as one of several other conditions, where there is an increase in the subsidizing Member's relative share of production of a fishery product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.

3.3 The list of actionable subsidies in section 3.2 above is merely illustrative, and does not limit the general rule expressed in section 3.1 above.

3.4 Whenever a Member has reason to believe that an actionable subsidy being granted or maintained by another Member, results in any adverse effects to the interests of other Members as defined in ASCM Article 5 or adverse effects to fishery resources as defined in Article 7.1 to this Annex, except as otherwise provided in this Annex, such Member may seek remedies in accordance with Article 7 of the ASCM.

Article 4

Exceptions to Actionable Subsidies

4.1 Notwithstanding Articles 2 and 3 of this Annex, the following subsidies are not actionable:

(a) Provision of a social safety net for fishermen, including early retirement schemes, re-education, training or alternative employment assistance, unemployment relief, life insurance, support for the temporary suspension of fishing activities;

(b) Fisheries research, including data collection, surveys, data analysis, and stock monitoring, sampling and assessment;[8]

(c) Fisheries stock enhancement, including marine conservation and protection, marine environment restoration, protection and development of a Member's own archipelagic waters[9], artificial reefs, hatcheries for breeding and by-catch mitigation devices;[10]

(d) Improving vessel and crew safety[11], provided that the improvement is undertaken to comply with international or domestic standards; and there is no increase in fishing capacity[12], such as the volume of fish hold or engine power of a vessel subject to such programme;

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[8] This is limited to fisheries research that does not result in commercial sale of the fish harvested.

[9] Archipelago is as defined in Article 46 of UNCLOS 1982, and calculation of the archipelagic baselines is defined in Article 47 thereof.

[10] This provision is aimed at measures that enhance marine resources rather than capacity to harvest those resources.

[11] Programmes or activities aimed primarily at vessel modernisation or repair do not fall within this sub-paragraph. The construction of vessels is not permitted under this sub-paragraph.

[12] Fishing capacity is understood here to mean the ability of a vessel or fleet of vessels to catch fish.

(e) Construction and maintenance of general infrastructure for fishing activities, such as wharves and fishing ports and related facilities, roadways, water and sanitary waste systems, the provision of housing and other forms of community development infrastructure;[13]

(f) Short-term emergency relief, recovery adjustment programmes and replacement of fishing capacity following natural or environmental disasters, provided that fishing fleet capacity is not restored beyond its pre-disaster state[14], except that special flexibility shall be given to developing countries pursuant to Article 5 of this Annex;

(g) Assistance and user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes, and other expenses related to administration and operation of fishery management programmes, including allocation and monitoring of licences, permits, quotas, vessel numbers and catch returns.

Article 5

Special and Differential Treatment of Developing Country Members

5.1 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities[15], defined herein as those which:

(a) Operate within its territorial waters and mostly close to shore;

(b) Use vessels of [proportional ratio between gross tonnage and engine power] and which utilize primarily manual gear; and

(c) Are operated by individual fishermen or family members for the purpose of subsistence or local trade.

Such subsidies are not actionable.

5.2 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, a developing country Member shall be allowed to grant or maintain subsidies to its small-scale fisheries for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel, or bait, or ice. For the purposes of this section, small-scale fisheries shall be defined as those that:

(a) Are below 20 meters dimension; and

(b) Operate within the Member's 12 nautical mile limit or the Member's own archipelagic waters.

Provided that they meet the contingencies of Article 5.5 of this Annex such subsidies are not actionable.

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[13] General infrastructure for fishing communities shall also not be considered to be regionally specific under the ASCM.

[14] Restoration to pre-disaster state is not intended to restore a pre-disaster state of over-capacity.

[15] Artisanal fisheries activities shall include on-board handling (including but not limited to provision of cool boxes, fish holds and other measures to encourage hygiene and sanitation and to preserve fish quality) and post-harvest handling.

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5.3 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, a developing country Member shall be allowed to grant or maintain subsidies for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel, or bait, or ice, provided that the purpose is to exploit:

(a) fisheries in the Member's own Exclusive Economic Zone; or

(b) rights held by the Member in high seas fishing quotas or any other rights established by a regional fisheries management organization (RFMO) or a regional fisheries management arrangement.

Provided that they meet the contingencies of Article 5.6, of this Annex such subsidies are not actionable.

5.4 Upon the request of developing country Members, and with reference to guidance provided by the UN Fish Stocks Agreement, developed country Members shall provide technical assistance on mutually agreed terms and conditions to developing country Members to allow them to participate fully in any RFMO adjacent to their exclusive economic zone or archipelagic waters.

5.5 Fishing subsidies meet the definition of Article 5.2 of this Annex contingent on a showing that:

(a) The Member has a fishery management plan in place that is effectively monitored and adequately enforced;

(b) The fishery does not adversely affect resources governed by the fishery management plan; and

(c) The small-scale fishing activities will not adversely affect fishery resources of other Members or the resources governed by relevant RFMO's.

5.6 Fishing subsidies meet the definition of Article 5.3 of this Annex contingent on a showing that the developing country Member has:

(a) underexploited resources in its EEZ; or

(b) a right to high seas fishing quotas or extra quota in a RFMO.

5.7 Upon the request of developing country Members, developed country Members shall provide technical assistance to developing country Members on mutually agreed terms and conditions to develop the capacity to initiate, implement and enforce compliance with a fishery management plan in keeping with the FAO Code of Conduct on Responsible Fisheries and adequate to provide the showing required by Articles 5.3, 5.4 and 5.5 of this Annex.

Article 6

Notifications and Enquiry Points

6.1 A Member asserting that a subsidy covered by this Annex qualifies for an exception pursuant to Articles 4 and 5 of this Annex, with the exception of artisanal fisheries under Article 5.1 of this Annex, shall include in its annual notification, *mutatis mutandis,* under Article 25 of the ASCM, information fully describing the fisheries benefiting from the subsidy and describing how the subsidy conforms to the conditions set forth in the exception. Information shall include, where relevant, measures to address fishing capacity and effort, the biological status of managed stocks and other fishery resources.

6.2 The Committee on the ASCM will annually review such notifications and report to Members on the extent to which Members are availing themselves of such exceptions. Reports will be published annually in a form available to the public.

6.3 In reviewing notifications, the Committee is encouraged to consult with and seek information from fishery experts, as authorized by Article 24.5 of the ASCM.

6.4 Each Member shall maintain an enquiry point to answer all reasonable enquiries from other Members and interested parties in other Members concerning its fisheries management plan, including measures in place to address fishing capacity and fishing effort and the biological status of managed stocks. Special flexibility shall be given to developing countries with respect to instituting enquiry points, including flexibility to develop such enquiry points with the help of technical assistance. Upon the request of developing country Members, developed country Members shall provide technical assistance to develop the capacity to initiate and implement compliance with this Section.

Article 7

Actionable Subsidies: Adverse Effects

7.1 For purposes of ASCM Part III, no Member should cause, through the use of any fishery subsidy referred to in Article 3 of this Annex, adverse effects to the interests of other Members, which in addition to adverse effects as defined in Article 5 of the ASCM, shall also include adverse effects to a fishery resource[16], *i.e.:*

(a) injury to the fishery resource of another Member;[17]

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994, as a result of an effect on a fishery resource;

(c) serious prejudice to a fishery resource of another Member.

7.2. The examination of the adverse effects to a fishery resource from fishery activity shall include an evaluation of all relevant fishery resource factors, including:

(a) the total catch or production or trading (in volume terms) by the Member of target species, with breakdown by fishery, and the number of vessels used in those catching or production operations, with breakdown by operated location areas;[18]

(b) the criteria and scientific information used to set the status of the fishery;

(c) whether the fishery in question is under management of a regional fisheries management organization or arrangement and which are the nature of the monitoring and the quantitative limits applicable to the Member;

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[16] Nothing in the concept of adverse effects to a fishery resource shall prejudice the ability of a panel to find adverse effects as otherwise defined in Article 5 of the ASCM for products covered by Articles 2 and 3 of this Annex. An adverse effect to the fishery resource is an alternative additional means of meeting the ASCM adverse effects standard.

[17] The term "injury to the fisheries resource" has the same meaning in ASCM Part III and ASCM Part V, except as specified by paragraph 7.8 of this Annex.

[18] For evaluation of stocks involving multi-species, for example in tropical waters, Members shall use the available scientific data to identify trends.

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(d) national fisheries management plans in place, with sufficient information to enable Members to evaluate and to understand their framework and operation; and

(e) government-to-government payment for access by foreign vessels to fishing resources of a developing country's maritime jurisdiction or to quotas or any other rights established by any regional fishery management organization or arrangement ("access rights"), with breakdown by recipient country, total amounts paid, amounts received on the onward transfer of the access rights, fisheries data (in accordance with items (a) and (b) of this paragraph) and other relevant information.

(f) information on the biological status of relevant marine ecosystems.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.[19]

7.3 Without prejudice of Article 6 of the ASCM, serious prejudice to a fishery resource in the sense of paragraph (c) of Article 7.1 of this Annex shall be presumed to arise when:

(a) there is an increase in the subsidizing Member's capacity to produce a fishery product due to the subsidy; or

(b) an increase in the subsidizing Member's relative share of production of a fishery product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.

7.4 For purposes of assessment of adverse effects pursuant to Articles 7 and 8 of this Annex, the period of data collection normally should be at least three years, and should include the entirety of the period of data collection for the subsidy investigation.

Article 8

Countervailing Measures: Determination of Injury to a Fishery Resource

8.1. Members taking any countervailing duty measures under Part V of the ASCM shall do so only in accordance with the provisions thereof, except that where they avail themselves of the injury test in this Article of this Annex, they shall utilize any provisions specified in this Article of this Annex.[20] In particular, the following provisions shall apply to any investigations involving allegations of injury to a fishery resource:

(a) With reference to Article 11.1, 11.4 and 11.6 of the ASCM, Members shall grant recognized consumer, industry and advocacy groups standing to submit a written application, and the authorities may decide to initiate an investigation without having received a written application by or on behalf of a domestic industry without needing to show that special circumstances exist for taking such action, it being recognized that injury to that Member's fishery resource may or may not be drawn to the attention of the Member by a domestic industry;

[19] This provision parallels ASCM Article 15.4, using the factors contained in Indonesia's July 2, 2007 Proposal.

[20] This provision parallels ASCM Article 10.

(b) With reference to Article 11.2 of the ASCM, an application may refer the criteria in Article 11.2(iv) of the ASCM or the injury factors referred to in this Article of the Annex relating to injury to a fishery resource;

(c) [Consider whether the definition of "interested parties" under Article 12.9 of the ASCM needs to broaden the parties included, and in particular to grant standing to recognized consumer, industry and advocacy groups as interested parties as well as applicants, with a possible amendment to Article 16 of the ASCM];

(d) With reference to calculation of the amount of a subsidy in terms of benefit to the recipient, in addition to the guidelines of Article 14 of the ASCM, Members may use a method consistent with the following:

….

(e) With reference to determination of the amount of any countervailing duty pursuant to Article 19.4 of the ASCM, subsidization per unit of the subsidized and exported product, the amount of the subsidy may include all subsidies found to exist in relation to the harvesting and production of such a product, including subsidies to any vessels used in such harvesting … [give any other necessary examples].

(f) …. [identify any other provisions that should be specific to a countervailing duty investigation involving allegations of injury to a fishery resource.]

8.2 A determination of injury to a fishery resource in the sense of paragraph (a) of Article 7.1 of this Annex in a countervailing duty investigation shall be based on positive evidence and involve an objective examination of the volume of the fishery activity and its effect on the Member's fishery stocks, and the effect of the fishery activity on the fishery resource.[21]

8.3 The examination of the injury to a fishery resource from fishery activity shall include an evaluation of the volume of the fishery activity, in particular whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or catch related to the product in the Member's waters. With regard to the effect on Member's fishery stocks, the investigatory authorities shall consider whether there has been a significant decrease in their fish stocks, or whether the effect of the fishery activity is to reduce stocks of migratory fisheries, reduce traditional hatching in the Member's fishing territories, or otherwise impair production or catch in the Member's waters. No one or several of these factors can necessarily give decisive guidance. [22]

8.4. The examination of the injury to a fishery resource from fishery activity shall include an evaluation of the effect of the fishery activity on all relevant fishery resource factors, including:

(a) the total catch (in volume terms) by the Member of target species and by-catch, with breakdown by fishery, and the number of vessels used in those catching operations, with breakdown by operated location areas;[23]

(b) the criteria and scientific information used to set the status of the fishery;

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[21] This provision parallels ASCM Article 15.1.
[22] This provision parallels ASCM Article 15.2.
[23] For evaluation of stocks involving multi-species, for example in tropical waters, Members shall use the available scientific data to identify trends.

(c) whether the fishery in question is under management of a regional fisheries management organization or arrangement and which are the nature of the monitoring and the quantitative limits applicable to the Member;

(d) national fisheries management plans in place, with sufficient information to enable Members to evaluate and to understand their framework and operation; and

(e) government-to-government payment for access by foreign vessels to fishing resources of a developing country's maritime jurisdiction or to quotas or any other rights established by any regional fishery management organization or arrangement ("access rights"), with breakdown by recipient country, total amounts paid, amounts received on the onward transfer of the access rights, fisheries data (in accordance with items (a) and (b) of this paragraph) and other relevant information.

(f) information on the biological status of relevant marine ecosystems.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.[24]

8.5 Where fishery activities of more than one country are simultaneously subject to a proceeding, the effects of such activities shall be cumulated only if they determine that the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of ASCM Article 11 and the volume of imports from the fishery activity of each country is not negligible.[25]

8.6 It must be demonstrated that the fishery activity is, through the effects of subsidies, causing injury within the meaning of this section. The demonstration of a causal relationship between the fishery activity and injury to the fishery resource shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized fishery activity which at the same time are injuring the fishery resource, and the injuries caused by these other factors must not be attributed to the subsidized fishery activity.[26]

8.7 The effect of the subsidized fishery activity for a particular product covered by this Annex shall be assessed in relation to any fisheries resource covered by this Annex.[27]

8.8 For purposes of a countervailing duty proceeding under ASCM Part V, injury shall include the provisions of Articles 7 and 8 of this Annex, except that the fishery resource examined shall be exclusively within the Exclusive Economic Zone or archipelagic waters of the Member investigating injury to its fisheries resource. Injury for the purposes of a countervailing duty proceeding under ASCM Part V may also be determined according to the standards of Article 15 ASCM, even if it is a fishery subsidy covered by this Annex.[28]

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[24] This provision parallels ASCM Article 15.4, using the factors contained in Indonesia's July 2, 2007 Proposal.

[25] This provision parallels ASCM Article 15.3 on the issue of multiple countries being investigated in a countervailing duty proceeding.

[26] This provision parallels ASCM Article 15.5 on the need for proof of causation.

[27] This provision parallels ASCM Article 15.6 on "like product". However, for purposes of the adverse effects to fisheries resource test, the "like product" determination would not be the same as in a standard injury test that measures trade effects to a like product. For example, a fishing activity for bluefin tuna that "injures" the dolphin resource of another Member could be covered by these provisions, despite the fact that the bluefin tuna fishing might not be "injuring" the bluefin tuna catch.

[28] Nothing in the concept of adverse effects to fisheries resources or injury to a fishery resources shall prejudice the ability of a panel or investigating authority to find adverse effects or injury as otherwise defined in

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Article 9

Prevention of circumvention

Members shall not have recourse to rules of origin (preferential or non-preferential), the flag of a vessel and access rights, among others, as a means to undermine the objectives set out in the preamble and to circumvent their obligations under this Annex.

Article 10

Review

The provisions of this Annex shall be reviewed by the Committee after a period of 8 (eight) years from the date of its entry into force, with a view to determining whether any modification is necessary.

Article 11

Transitional provisions

11.1 Any fisheries subsidy which has been established within the territory of a Member before the date of the entry into force of this Annex shall be notified to the Committee in no later than 90 days after that date.

11.2 From the entry into force of this Annex, there shall be a period of three years for developed country Members and a period of five years for developing country Members to gradually phase out and eliminate fisheries subsidies that are inconsistent with the provisions of this Annex. The starting point of the reduction shall be the 2003-2005 average of the fisheries subsidies prohibited under Article 2. Members shall not be allowed to adopt new prohibited fisheries subsidies or to extend the scope of any existing prohibited fisheries subsidy.

11.3 Any least-developed country Member shall phase out its fisheries subsidies within an eight-year period, preferably in a progressive manner, from the date of entry into force of this Annex. If such least-developed country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the Member in question. If the Committee determines that the extension is justified, the Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the least-developed country Member shall phase out those fisheries subsidies within 3 (three) years from the end of the last authorized period.

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Article 5 and Part V of the ASCM. An adverse effect to a fisheries resource or injury to a fisheries resource is an alternative additional means of meeting the traditional adverse effects or injury standard of Part III and Part V of the ASCM.

WORLD TRADE ORGANIZATION

TN/RL/W/213
30 November 2007

(07-5291)

Negotiating Group on Rules

DRAFT CONSOLIDATED CHAIR TEXTS OF THE AD AND SCM AGREEMENTS

The background

Six years ago, in Doha, Members agreed to negotiations aimed at clarifying and improving disciplines under the AD and SCM Agreements, while preserving the basic concepts, principles and effectiveness of those Agreements. They also agreed to negotiations to clarify and improve disciplines on fisheries subsidies. Four years later, at Hong Kong, Ministers gave more precision to that objective, directed the Negotiating Group on Rules to intensify its work, and mandated me, as Chairman, to prepare consolidated texts of the AD and SCM Agreements. At the time, Ministers expected the Round to be completed in 2006, and I myself had hoped to circulate consolidated texts in July of that year.

That did not happen but we nevertheless made good use of the extra time available to us. In fact, at all times, we were jointly able to keep the pace and direction of the negotiations. With that purpose in mind we concentrated on detailed and text-based proposals. All that collective effort was positive and indeed helped me in moving the process forward. I am particularly thankful for those Participants who were able to clearly identify their priorities and were capable of putting them in legal language in effective time. Likewise, I am thankful to those who, being in a defensive position, nevertheless helped the process by seriously engaging in the discussions.

A new challenge

However, we have now reached a point of diminishing returns in our Negotiating Group and more importantly, we now face the challenge of starting a new phase. The overall negotiating process demands us to enter this new realm. With the prospect of concluding the Doha Round soon, we are now required not only to identify clearly our interests and the language we prefer to foster those national objectives, but rather to find also the way to accommodate others' concerns and interests. It is time to start seeking balance and to help the rest of the multilateral negotiations move forward too. With this perspective in mind I decided not to seek the safety of "waiting and seeing", but rather to assume fully my responsibilities and encourage you to start soon this much needed new stage of negotiations. I am therefore pleased to present the Group with draft consolidated texts as requested by Ministers.

The architecture, aim and objectives of these texts

I am putting these draft legal texts before the Group with the objective of stimulating serious reflection by Participants on the broad parameters of possible outcomes to the negotiations with respect to the mandate in paragraph 28 of the Doha Declaration. There are no brackets and no blanks, not because I expect or ask Participants to agree to the texts at this stage, but indeed because I consider that they are bracketed in their entirety. I thus ask Participants to treat the texts as documents for intensive technical and detailed work in the Group. In order to ensure such a specific and focused discussion, these draft texts are presented in the form of proposed revisions to the existing Agreements on Anti-Dumping and Subsidies and Countervailing Measures, as manifested in specific legal language.

While these draft texts address all aspects of the Doha mandate in paragraph 28, i.e., anti-dumping, subsidies and countervailing measures and fisheries subsidies, they do not reflect every proposal put before the Group. This does not of course preclude that the issues contained in those proposals could be addressed in a subsequent revision; my purpose in circulating these draft texts is precisely to obtain further guidance from Participants. I also note that, since the beginning of these negotiations, there has been a broad acceptance that changes to the anti-dumping rules should, where relevant and appropriate, also be made to the rules regarding countervailing measures, and that is also my intention. I have not in these texts transposed the draft revisions in the anti-dumping rules into the countervail context because our discussions have focused on anti-dumping and because such a transposition will require further technical discussion.

In preparing these draft texts, I have maintained as a paramount principle the need to achieve in the negotiations a balance that takes into account the interests of all Participants. I have therefore attempted to develop texts that I believe could facilitate the negotiation of a balanced outcome. Thus, while all Participants will, I believe, find that a number of their demands have been taken into account in these texts, every Participant will also find things that they do not like, and even that they dislike intensely. That is the normal, and indeed inevitable, result of a negotiating process where the objectives of Participants vary widely and are in many cases mutually incompatible. I call upon Participants to assess these texts as a whole, and to carefully consider those elements that respond to their demands and interests, rather than concentrating on those elements that they do not like.

The process ahead

With respect to further process, I repeat that I do not request or invite Participants to agree to anything in these draft texts at this point. These texts are not the end of our negotiating process but only the first step in a new phase involving further intensive discussions within the Group. What I do expect of Participants is realistic and pragmatic engagement. While up to now we have focused on considering the specific demands of Participants through the examination of negotiating proposals, this new phase of our work must involve real negotiations where Participants will have to take into account the needs of their negotiating partners as they pursue their own objectives.

We will start these discussions in two weeks time, with a first look at the texts in each of the three areas of our work (anti-dumping, subsidies and countervailing measures, fisheries subsidies). At that meeting I need to hear your views as to whether these texts contain the elements necessary to work towards an appropriately balanced outcome, and if not, an explanation why not and, most importantly, where and how you believe such a balance might be found. We will meet again in the weeks of 21 January and 11 February 2008 for a more in-depth process in which we will identify specific problems and then seek to start resolving them. My intention is to circulate revised draft texts as soon thereafter as I have a sufficient basis to do so.

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

Members hereby *agree* as follows:

PART I

Article 1

Principles

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

Article 2

Determination of Dumping

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping ~~during the~~in an investigation ~~phase~~ initiated pursuant to Article 5 shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.4.3 When the authorities aggregate the results of multiple comparisons in order to establish the existence or extent of a margin of dumping, the provisions of this paragraph shall apply:

(i) when, in an investigation initiated pursuant to Article 5, the authorities aggregate the results of multiple comparisons of a weighted average normal value with a weighted average of prices of all comparable export transactions, they shall take into account the amount by which the export price exceeds the normal value for any of the comparisons.

(ii) when, in an investigation initiated pursuant to Article 5, the authorities aggregate the results of multiple comparisons of normal value and export prices on a transaction-to-transaction basis or of multiple comparisons of individual export transactions to a weighted average normal value, they may disregard the amount by which the export price exceeds the normal value for any of the comparisons.

(iii) when, in a review pursuant to Articles 9 or 11, the authorities aggregate the results of multiple comparisons, they may disregard the amount by which the export price exceeds the normal value for any of the comparisons.

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

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

2.6 Throughout this Agreement:

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(a) The term "product under consideration" shall be interpreted to mean the imported product subject to investigation or review. The product under consideration shall be limited to imported products that share the same basic physical characteristics. The existence of differences with respect to factors such as models, types, grades and quality shall not prevent imported products from being part of the same product under consideration if they share the same basic physical characteristics. Whether such differences are so significant as to preclude inclusion of imported products within a single product under consideration shall be determined on the basis of relevant factors, which may include similarity in use, interchangeability, competition in the same market and distribution through the same channels.

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

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

Article 3

Determination of Injury[10]

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

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

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

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

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

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imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

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

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuri~~es~~ous effects of ~~caused by~~ these other factors must not be attributed to the dumped imports.[12] The examination required by this paragraph may be based on a qualitative analysis of evidence concerning, *inter alia*, the nature, extent, geographic concentration, and timing of such injurious effects. While the authorities should seek to separate and distinguish the injurious effects of such other factors from the injurious effects of dumped imports, they need not quantify the injurious effects attributable to dumped imports and to other factors, nor weigh the injurious effects of dumped imports against those of other factors. ~~Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.~~

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

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[13] In making a determination regarding the existence of a threat of material injury, the authorities shall consider the state of the domestic industry during the period of investigation, including an examination of the impact of dumped imports upon it in accordance with paragraph 4, in order to establish a background for the evaluation of threat of material injury. In addition, the authorities should consider, *inter alia*, such factors as:

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

[12] Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

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

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

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

(iv) inventories of the product being investigated.

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

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

3.9 A determination of material retardation of the establishment of a domestic industry shall be based on facts and not merely on allegation, conjecture or remote possibility. An industry may be considered to be in establishment where a genuine and substantial commitment of resources has been made to domestic production of a like product not previously produced in the territory of the importing Member, but production has not yet begun or has not yet been achieved in commercial volumes.[14] In making a determination whether an industry is in establishment, and in examining the impact of dumped imports on the establishment of that industry, the authorities may take into account evidence concerning, *inter alia*, installed capacity, investments made and financing obtained, and feasibility studies, investment plans or market studies.[15]

Article 4

Definition of Domestic Industry

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

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[14] The authorities may however consider that an industry is in establishment notwithstanding the existence of established producers of the domestic like product, if those established producers are not able to satisfy domestic demand for the product in question to any substantial degree; provided that under no circumstances shall an industry be considered to be in establishment if the collective production capacity of established producers exceeds 10 per cent of domestic demand for the product in question.

[15] Members recognize that an examination of possible material retardation relates to the impact of dumped imports on the efforts of the industry to become established, and that this type of impact may not be reflected in actual or potential declines in performance. Nonetheless, the authorities shall evaluate, to the extent that data exists, available information with respect to all economic factors and indices relevant to an examination of material retardation of the establishment of the domestic industry in question.

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(i) when producers are related[16] to the exporters or importers or are themselves importers of the ~~allegedly dumped~~ product under consideration, the term "domestic industry" may be interpreted as referring to the rest of the producers[17,18];

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

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied[19] only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

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

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

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

[17] In determining whether to exclude a producer from the domestic industry in cases where that producer is itself an importer of the product under consideration, the authorities shall consider, *inter alia*, the extent of that producer's imports of that product relative to its total sales of the domestic like product in the market of the importing country and the range of the allegedly dumped goods imported by that producer relative to the range of its domestic production and sales of the like product. Evidence that the producer's imports of the allegedly dumped product are small relative to its total sales of the domestic like product in the market of the importing country or that the goods imported by that producer represent a limited number of models relative to the range of models of the domestic like product produced and sold domestically by the producer would normally favour a conclusion that the producer should not be excluded from the domestic industry.

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

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

Article 5

Initiation and Subsequent Investigation

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

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

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

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

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member[20];

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

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

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application[21] to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[22] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[23] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry. For the purpose of this paragraph, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like product, subject to the application of Article 4.1(i) and 4.1(ii).

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

5.6 If, in special circumstances,[24] the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.6*bis* An investigation under this Article shall be initiated and conducted, and a determination of the existence of dumping, injury and causal link shall be made, only with respect to a single product under consideration, the scope of which shall be determined in accordance with Article 2.6(a). If during the course of an investigation authorities find, in light of the evidence obtained, that the investigation includes imported products that are not properly included within the scope of the product under consideration, they shall amend the product scope of the investigation and shall only impose an anti-dumping duty on imports of any distinct product under consideration if they make determinations of the existence of dumping, injury and causal link with respect to that product.

5.7 The evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the

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

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

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

[24] Such special circumstances may exist, *inter alia*, where the domestic industry is still in establishment or where one or more new producers are still in a start-up situation.

investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

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

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

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

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

Article 6

Evidence

6.1*New* The authorities may request interested parties to supply such information as the authorities reasonably consider may be necessary for the conduct of the investigation, including information in the possession of parties that are affiliated to those interested parties.

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

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[25,26] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

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

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

6.1.1*bis* Within a reasonable period of time after the receipt of the response to a questionnaire, the authorities shall make a preliminary analysis of that response and shall notify the interested party concerned in writing of any requests for clarification or additional information.

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

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[27] ~~and to the authorities of the exporting Member~~ and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

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

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

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

6.4*bis* The authorities shall maintain a file containing all non-confidential documents submitted to or obtained by the authorities in an anti-dumping proceeding, including non-confidential summaries of confidential documents and any explanations provided pursuant to Article 6.5.1 as to why summarization is not possible, and shall allow any person to review and copy the documents in that file upon request. Access to this file shall be provided promptly, and in any case within two working days of a request. The non-confidential file shall be kept in an organized manner, and a complete index of all documents in the possession of the authorities, including confidential documents, shall be included therein. Each file shall include all public notices related to that proceeding issued pursuant to Article 12, as well as separate reports issued pursuant to footnote 60 to that Article. Each file shall be maintained for at least five years beyond the date that the proceeding is completed. The authorities shall provide for the copying of documents in the non-confidential file at the reasonable expense of

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

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the person so requesting, or shall allow, subject to reasonable safeguards, that person to remove the documents for copying elsewhere.[28]

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[29]

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

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[30]

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

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

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

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

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

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

6.8.1 Where an interested party substantiates that it does not control[31] an affiliated party and that, despite its best efforts, it has been unable to obtain requested information from that affiliated party, the authorities shall consider whether to maintain, modify or withdraw the request, taking into account the importance of the information to the investigation. In the event the authorities decide to maintain the request, whether in the same form or as modified, they shall take such reasonable steps as are available to them to support the interested party's efforts to obtain the information. Where despite the interested party's best efforts, necessary information in the possession of an affiliated party is not supplied, the authorities may base their determinations on the facts available. They shall not, however, deem the interested party to have been non-cooperative.

6.9 The authorities shall, before a final determination is made, ~~inform~~ provide all interested parties with a written report of the essential facts under consideration which they intend will form the basis for the decision whether to apply definitive measures. Interested parties shall have 20 days to respond to this report and the authorities shall address any responses in their final determination.[32] ~~Such disclosure should take place in sufficient time for the parties to defend their interests.~~

6.9*bis* The authorities shall, normally within seven days after giving public notice of a final determination under Article 12.2, disclose to each exporter or producer for whom an individual rate of duty has been determined the calculations used to determine the margin of dumping for that exporter or producer.[33] The authorities shall provide to the exporter or producer the calculations, either in electronic format (such as a computer programme or spreadsheet) or in another appropriate medium, a detailed explanation of the information used, the sources of that information and any adjustments made to the information prior to its use in the calculations. The disclosure and explanation shall be in sufficient detail to permit the interested party to reproduce the calculations without undue difficulty.

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

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

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of

[31] For purposes of this paragraph, one party shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction, or to exercise significant influence, over the latter. When considering whether control exists, the authorities may take into account, *inter alia*, direct or indirect shareholdings and any contractual, legal or family relationship between the parties.

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

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

dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

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

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

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

(ii) the government of the exporting Member; and

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

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

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

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

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

Article 7

Provisional Measures

7.1 Provisional measures may be applied only if:

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

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

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

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

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

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

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

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

Article 8

Price Undertakings

8.1 Proceedings may[34] be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. ~~It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.~~

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping or, if no affirmative preliminary determination is made, until the authorities have

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

made disclosure pursuant to paragraph 9 of Article 6. The authorities shall inform exporters of their right to offer undertakings and shall allow them an adequate opportunity to do so.

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

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

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

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of material violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available.[35] In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 9

Imposition and Collection of Anti-Dumping Duties

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member.~~ It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.~~ Each Member whose national legislation contains provisions on anti-dumping measures shall establish procedures in its laws or regulations[36] to enable its authorities,

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

[36] Each such Member shall publish those procedures and shall notify them to the Committee pursuant to Article 18.5.

in making such decisions in an investigation initiated pursuant to Article 5, to take due account of representations made by domestic interested parties[37] whose interests might be affected by the imposition of an anti-dumping duty.[38] The application of these procedures, and decisions made pursuant to them, shall not be subject to dispute settlement pursuant to the DSU, Article 17 of this Agreement or any other provision of the WTO Agreement.

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

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. In this regard, each Member shall establish procedures[39] to ensure a prompt refund, upon request, where the duty or security collected exceeds the actual margin of dumping.[40] In this respect, the following subparagraphs shall apply.

9.3.1*New* A determination of final liability for payment of anti-dumping duties, or of whether a duty in excess of the margin of dumping has been paid, may be made on the basis of (i) individual import transactions, (ii) all import transactions by an importer from an exporter or producer, or (iii) all import transactions from an exporter or producer. In determining the existence or amount of liability for any duty, or the entitlement to any refund, the authorities may disregard the amount by which the export price exceeds the normal value for any comparisons.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.[41] Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

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[37] For the purpose of this paragraph, the term "domestic interested parties" shall include industrial users of the imported product under consideration and of the domestic like product, suppliers of inputs to the domestic industry and, where the product is commonly sold at the retail level, representative consumer organizations.

[38] Decisions taken pursuant to these procedures are not subject to the judicial review requirements of Article 13.

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

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

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

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

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

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

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

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

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

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

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

9.5.1 A decision whether or not to initiate a review under this paragraph shall be taken within three months of receipt of a duly substantiated request, during

which period the authorities may take such steps as they deem appropriate to verify the accuracy and adequacy of the information contained in the request. The applicant and the domestic industry shall be advised of the initiation of any review and a public notice of the initiation shall also be made. The Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member, and shall in any event be concluded within nine months of receipt of a duly substantiated request.

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

Article 9bis

Circumvention

9*bis*.1 The authorities may extend the scope of application of an existing definitive anti-dumping duty to imports of a product that is not within the product under consideration from the country subject to that duty if the authorities determine that such imports take place in circumstances that constitute circumvention of the existing anti-dumping duty.[42]

9*bis*.2 Authorities may only find circumvention within the meaning of paragraph 1 if they demonstrate that:

(i) Subsequent to the initiation of the investigation that resulted in the imposition of the existing definitive anti-dumping duty, imports of the product under consideration from the country subject to that duty have been supplanted, in whole or in part[43]:

- by imports from the country subject to the anti-dumping duty of parts or unfinished forms of a product for assembly or completion into a product that is the same as the product under consideration;

- by imports of a product that is the same as the product under consideration and that has been assembled or completed in a third country from parts or unfinished forms of a product imported from the country subject to the existing anti-dumping duty; or

- by imports of a slightly modified product[44] from the country subject to the existing anti-dumping duty;

[42] Throughout this Article anti-dumping duty will be understood as duty or undertaking.

[43] Factors pertinent to a consideration of whether imports of the product under consideration have been supplanted include whether there has been a change in the pattern of trade of the exporters subject to the anti-dumping duty, the timing of such change, and any association or compensatory arrangement between the exporter and the importer or a third party. No one or several of these factors can necessarily give decisive guidance.

(ii) The principal cause of the change described in subparagraph 2(i) is the existence of the anti-dumping duty on the product under consideration from the country subject to the duty rather than economic or commercial factors unrelated to that duty;[45] and

(iii) The imports that have supplanted the imports of the product under consideration from the country subject to the existing anti-dumping duty undermine the remedial effect of that duty.[46]

9*bis*.3 With respect to imports referred to in 9*bis*.2 of parts or unfinished forms of a product and imports referred to in 9*bis*.2 of a product assembled or completed in a third country, the authorities shall only find circumvention if they establish that (i) the process of assembly or completion is minor or insignificant[47] and (ii) the cost of the parts or unfinished forms makes up a significant proportion of the total cost of the assembled or completed product. The authorities shall in no case find that circumvention exists unless they determine that the value of the parts or unfinished forms is 60 per cent of the total value of the parts or unfinished forms of the assembled or completed product or more, and that the value added to the parts or unfinished forms during the assembly or completion process is 25 per cent of the total cost of manufacture or less.

9*bis*.4 The authorities may extend the scope of application of an existing definitive anti-dumping duty to imports of parts or unfinished forms of the product under consideration assembled or completed in a third country only if they find that such imports are dumped pursuant to Article 2.

9*bis*.5 A determination of the existence of circumvention within the meaning of this Article shall be based on a formal review initiated pursuant to a duly substantiated request. Except in special circumstances, such a review shall not be initiated unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the request expressed by domestic producers of the like product that the request has been made by or on behalf of the domestic industry within the meaning of Article 5.4.

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

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[44] A slightly modified product is a product that is not within the product under consideration but that has the same general characteristics as the product under consideration. Factors pertinent to a consideration of whether a product is a slightly modified product include general physical characteristics, purchaser expectations, end uses, channels of trade, the interchangeability of the products, the processes, facilities and employees used in production of the products, differences in the costs of production, the manner in which the products are advertised and displayed, and the costs to transform the slightly modified product into the product under consideration. No one or several of these factors can necessarily give decisive guidance.

[45] Factors pertinent to a consideration of the possible role of economic or commercial factors unrelated to the duty include technological developments, changes in customers' preferences and changes in relative costs. No one or several of these factors can necessarily give decisive guidance.

[46] Factors pertinent to a consideration of whether the remedial effect of an existing anti-dumping duty is undermined include the evolution of the prices and quantities of the product assembled or completed in the importing country or in a third country or of the slightly modified product and whether those products are sold to the same customers and for the same uses as the product subject to the existing definitive anti-dumping duty. No one or several of these factors can necessarily give decisive guidance.

[47] Factors pertinent to a consideration of whether a process of completion or assembly is minor or insignificant include the level of investment, research and development related to the completion or assembly, the nature and cost of the production process and the extent of the facilities used for completion or assembly. No one or several of these factors can necessarily give decisive guidance.

9*bis*.7 If the authorities have determined in accordance with this Article that circumvention exists, they may apply the anti-dumping duty to the imported products found to be circumventing the existing definitive anti-dumping duty[48], including retroactively to imports entered after the date of the initiation of the review.

Article 10

Retroactivity

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

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

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

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

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

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

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

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty

[48] If a review under this Article has been initiated on a country-wide basis, the authorities shall exempt imports from particular exporters from the scope of any extended anti-dumping duty if they find that those imports take place in circumstances that do not constitute circumvention of an existing anti-dumping duty.

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to be applied, provided that the importers concerned have been given an opportunity to comment.

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

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

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

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

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

11.2 The authorities shall review the need for the continued imposition of the duty, or for a modification of the level of the duty[49], where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[50] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Interested parties may also request a modification in the level of a duty. If, as a result of the review under this paragraph, the authorities determine that there has been a change in circumstances of a lasting nature[51] since the original investigation or the last review under Article 11.2 or 11.3, such that the anti-dumping duty is no longer warranted or the level of the duty applicable to one or more exporters is no longer appropriate, the duty, it shall be terminated immediately or its level modified.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the effective date of the most recent review of the duty under this paragraph, or under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of

[49] Or in the case of a retrospective system, of the level of any security collected. Where the anti-dumping duty imposed takes the form of a prospective normal value, this requirement relates to the modification of the prospective normal value.

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

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

the duty would be likely to lead to continuation or recurrence of dumping and injury.[52] The duty may remain in force pending the outcome of such a review.

11.3.1 Except in special circumstances, a review under this paragraph shall be initiated upon a written application by or on behalf of the domestic industry. Such an application shall contain information reasonably available to the applicant and shall explain why, in the view of the applicant, dumping and injury are likely to continue or recur should the duty expire. The application shall in particular contain information on the development of the condition of the domestic industry since the imposition of the anti-dumping duty, the present condition of the domestic industry and the potential impact that any continuation or recurrence of dumping could have thereon if the duty were terminated. The authorities shall determine whether there is sufficient evidence[53] to warrant a review. In any case, a review shall not be initiated unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[54] by domestic producers of the like product, that the application has been made "by or on behalf" of the domestic industry within the meaning of Article 5.4.

11.3.2 If in special circumstances, authorities initiate a review under paragraph 3 in the absence of a written application by or on behalf of the domestic industry, they shall proceed only if they have sufficient evidence to warrant an examination as to whether dumping and injury are likely to continue or recur should the duty expire. The authorities shall set forth in the relevant public notices pursuant to Article 12 the special circumstances underlying the decision to initiate a review in the absence of a written application by or on behalf of the domestic industry.

11.3.3 A review under paragraph 3 shall be initiated not later than six months prior to the end of the five year period following the imposition of the duty or of the five year period following the most recent review of the anti-dumping duty. The review shall preferably be completed before the end of that five-year period and shall in no case be completed later than six months thereafter. Irrespective of whether a review under paragraph 3 is completed after the end of that five-year period, the result of the review shall be effective as of that date. In the event that the review results in the termination of the duty, the importing Member shall refund any monies collected in respect of imports occurring after the effective date of the termination and shall pay a reasonable amount of interest on such monies.

11.3.4 A determination whether the expiry of an anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury shall be based on

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

[53] The terms "sufficient evidence" and "positive evidence" as used in connection with the initiation and conduct of a review under paragraph 3 shall be interpreted in light of the prospective nature of the analysis required by such a review and of the possible effects of the existence of the anti-dumping duty on the state of the domestic industry and on the behaviour of exporters with respect to margins of dumping and volume of exports. In this regard, existing conditions will not necessarily be determinative in considering compliance with the "sufficient evidence" and "positive evidence" standards of sub-paragraphs 3.1, 3.2 and 3.4.

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

positive evidence and involve an objective examination of all relevant factors. The weight to be accorded to particular factors will depend upon the facts of each review, and no one or several factors can necessarily give decisive guidance.[55]

11.3.5 Any anti-dumping duty extended beyond the end of the initial five year period following a review in accordance with paragraph 3 shall be terminated on a date not later than ten years after the date of the imposition of the anti-dumping duty.

11.3.6 If during a period not longer than two years from the date of termination of an anti-dumping duty pursuant to sub-paragraph 3.5, the authorities initiate an investigation pursuant to Article 5 on the basis of an application containing sufficient evidence of dumping, injury and causal link pursuant to Article 5.3, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the date of termination of the anti-dumping duty.

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

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

Article 12

Public Notice and Explanation of Determinations

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

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[56], adequate information on the following:

(i) a description of the product under consideration, including its tariff classification for customs purposes, the name of the exporting country or countries, and the names of the known

[55] Thus, the authorities shall not rely on presumptions that assign decisive weight to particular factors. They may, however, draw reasonable inferences about the future from evidence on current facts if such inferences are supported by an analysis of the evidence as a whole.

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

exporters and foreign producers of the product~~product involved~~;

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

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

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

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

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

(vii) next steps in the process, related time frames, periods of data collection and a contact to whom ~~the address to which~~ representations by interested parties should be directed;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12.3 The provisions of this Article shall apply *mutatis mutandis* to proceedings conducted pursuant to Articles 9.1, 9.3 and 9.5, to decisions under Article 10 to apply duties retroactively and to the initiation and completion of reviews pursuant to Articles 9*bis* and 11 ~~and to decisions under Article 10 to apply duties retroactively~~.

Article 13

Judicial Review

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

Article 14

Anti-Dumping Action on Behalf of a Third Country

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

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

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

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14.4 Notwithstanding the provisions of Article VI:6(b) of GATT 1994, ~~T~~the decision whether or not to proceed with a case shall rest solely with the importing country; provided, that ~~If~~ the importing country ~~decides that it is prepared to take action, the initiation of the approach to~~ shall notify the Council for Trade in Goods of its decision to initiate such an investigation~~seeking its approval for such action shall rest with the importing country~~.

Article 15

Developing Country Members

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

PART II

Article 16

Committee on Anti-Dumping Practices

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

16.2 The Committee may set up subsidiary bodies as appropriate.

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

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

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

Article 17

Consultation and Dispute Settlement

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

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

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

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

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

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

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

17.6 In examining the matter referred to in paragraph 5:

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

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

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

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

PART III

Article 18

Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[57]

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

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

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

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

18.3*bis* Subject to subparagraph 3.1*bis*, the results of the DDA shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force of those results or, where an investigation or review is initiated by the authorities without those authorities having received an application, the investigation or review was initiated on or after the date of entry into force of those results.

18.3.1*bis* For the purpose of Article 11.3.5, anti-dumping measures in existence as of the date of entry into force of the results of the DDA shall be deemed to be imposed on that date.

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

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

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

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

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

ANNEX I

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

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

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

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

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

5. Sufficient advance notice shall~~should~~ be given to the firms in question before the visit is made. To afford the firms adequate opportunity to prepare for on-the-spot investigations, the investigating authorities shall provide each firm at least 21 days advance notice of the dates on which the authorities intend to conduct any on-the-spot investigation of the information provided by that firm.[58]

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

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

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

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

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

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

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

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

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

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties[59], which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, ~~should~~ shall be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language ~~should~~ shall not be considered to significantly impede the investigation.

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

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

6. If evidence or information is not accepted, the supplying party ~~should~~ shall be informed forthwith of the reasons therefor, and ~~should~~ shall have an opportunity to submit further evidence or information, or to provide further explanations, within a reasonable period, due account being taken of the time-limits of the investigation[60]. If the further evidence or information submitted, or the explanations provided, are considered by the authorities as not being satisfactory, the authorities shall

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

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

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

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they ~~should~~ shall do so with special circumspection. In such cases, the authorities ~~should~~ shall, where practicable, check the information from other independent sources at their disposal or reasonably available to them, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation[61]. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

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

ANNEX III

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

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

A. Objectives

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

B. Procedures for Review

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

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

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

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

5. The first cycle of reviews shall begin one year after the date of entry into force of the results of the Doha Development Agenda. During the ensuing five years, the Committee shall review the anti-dumping policies and practices of the 20 Members with the most anti-dumping measures in force as of the date of entry into force.[62]

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

7. The Committee shall agree on the order of, and schedule for, the conduct of these reviews, taking into account the resource constraints of the Secretariat and of developing country Members.[63]

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

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

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

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

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

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

C. Developing Country Members

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

D. Appraisal of the Mechanism

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

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Members hereby *agree* as follows:

PART I: GENERAL PROVISIONS

Article 1

Definition of a Subsidy

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

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

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

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

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

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

or

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

and

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

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

[2] A benefit is conferred when the terms of the financial contribution are more favourable than those otherwise commercially available to the recipient in the market, including, where applicable, as provided for in the guidelines in Article 14.1.

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

Article 2

Specificity

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

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

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

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

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

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

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

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

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

PART II: PROHIBITED SUBSIDIES

Article 3

Prohibition

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

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

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

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

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

Article 4

Remedies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[8] As established in Article 24.

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

[10] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited. <u>It is recognized that in a case of violation of the prohibition in Article 3.1(c) and Article I of Annex VIII, countermeasures may take the form of suspension of access of fishing or service vessels to port facilities for landing, transhipping or processing fish.</u>

[11] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited. <u>It is recognized that in a case of violation of</u>

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

PART III: ACTIONABLE SUBSIDIES

Article 5

Adverse Effects

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

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

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

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

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

Article 6

Serious Prejudice

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

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

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

(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and

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the prohibition in Article 3.1(c) and Article I of Annex VIII, countermeasures may take the form of suspension of access of fishing or service vessels to port facilities for landing, transhipping or processing fish.

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

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

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

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

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

which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

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

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

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

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

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

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

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

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

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

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

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

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6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

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

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

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

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

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

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

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

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

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

Article 7

Remedies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of Non-Actionable Subsidies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and provided that such assistance is limited exclusively to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 9

Consultations and Authorized Remedies

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

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

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

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

PART V: COUNTERVAILING MEASURES

Article 10

Application of Article VI of GATT 1994[36]

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

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

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

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

Article 11

Initiation and Subsequent Investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 12

Evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 13

Consultations

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

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

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

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

Article 14

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

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

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

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

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;[46]

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;[46]

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

14.2 For the purpose of Part V, where a subsidy is granted in respect of an input used to produce the product under consideration, and the producer of the product under consideration is unrelated to the producer of the input, no benefit from the subsidy in respect of the input shall be attributed to the product under consideration unless a determination has been made that the producer of the product under consideration obtained the input on terms more favourable than otherwise would have been commercially available to that producer in the market.[47]

[46] Notwithstanding the above, a loan or loan guarantee by a government shall be deemed to confer a benefit where the provider institution incurs long-term operating losses on its provision of such financing as a whole. The existence of such a benefit shall be rebuttable by a demonstration that the particular financing at issue does not confer a benefit pursuant to paragraph (b) or (c), as applicable.

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

14.3 For the purpose of Part V, the methods used by the investigating authority to attribute subsidy benefits to particular time periods shall be consistent with the following guidelines:[48]

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

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

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

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

(i) whether the subsidy is non-recurring (e.g., one-time, exceptional, requiring express government approval) or recurring[49]

(ii) the purpose of the subsidy[50]; and

(iii) the size of the subsidy.[51]

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

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

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

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

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

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

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

Article 15

Determination of Injury[52]

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products[53] and *(b)* the consequent impact of these imports on the domestic producers of such products.

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

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

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

15.5 It must be demonstrated that the subsidized imports are, through the effects[54] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship

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

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

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

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

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

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

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

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

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

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

(v) inventories of the product being investigated.

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

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

Article 16

Definition of Domestic Industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related[55] to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

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

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

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

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

Article 17

Provisional Measures

17.1 Provisional measures may be applied only if:

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

(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

Article 18

Undertakings

18.1 Proceedings may[56] be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider

[56] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.

acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 19

Imposition and Collection of Countervailing Duties

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties[57] whose interests might be adversely affected by the imposition of a countervailing duty.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of

[57] For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

19.4 No countervailing duty shall be levied[58] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

Article 20

Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

[58] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

Article 21

Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.[59] The duty may remain in force pending the outcome of such a review.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply *mutatis mutandis* to undertakings accepted under Article 18.

Article 22

Public Notice and Explanation of Determinations

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[60], adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

[59] When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[60] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested Members and interested parties should be directed; and

(vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination as set out in Article 15;

(v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

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22.7 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

Article 23

Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

PART VI: INSTITUTIONS

Article 24

Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

PART VII: NOTIFICATION AND SURVEILLANCE

Article 25

Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each second year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies[61], Members shall ensure that their notifications contain the following information:

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);

(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);

(iii) policy objective and/or purpose of a subsidy;

(iv) duration of a subsidy and/or any other time-limits attached to it;

(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

[61] The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

25.12 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 26

Surveillance

26.1 The Committee shall examine the new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every ~~third~~second year. ~~Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.~~

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies[62], and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either *(a)* on the basis of notification by the developing country Member having reached export competitiveness, or *(b)* on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

[62] For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

PART IX: TRANSITIONAL ARRANGEMENTS

Article 28

Existing Programmes

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and

(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

Article 29

Transformation into a Market Economy

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

(a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;

(b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

PART X: DISPUTE SETTLEMENT

Article 30

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

PART XI: FINAL PROVISIONS

Article 31

Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

Article 32

Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[63]

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes to this Agreement constitute an integral part thereof.

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[63] This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

ANNEX I

~~ILLUSTRATIVE LIST OF~~ CERTAIN EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available[64] on world markets[64] to their exporters.

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes[65] or social welfare charges paid or payable by industrial or commercial enterprises.[66]

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

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[64] The term "commercially available on world markets" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

[65] For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

[66] The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

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(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes[~~58~~65] in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes[~~58~~65] on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).[67] This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges[~~58~~65] in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by and/or acting under the authority of governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those available to the recipient 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. ~~at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.~~

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members)[68], or if in practice a Member applies the interest rates provisions of the relevant

[67] Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

[68] The parties to such undertaking in effect as of the date of entry into force of the results of the DDA shall notify that undertaking to the Committee not later than 30 days after that date. Upon request by a Member, the Committee shall examine the notified undertaking.

undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

Thereafter, any further successor undertaking shall be notified by the parties thereto to the Committee, and Members shall have a period of 30 days from the date of such notification to request examination by the Committee of the notified successor undertaking. Where no such request is made, the provisions of the second paragraph of item (k) shall apply to the notified successor undertaking as from the end of the 30-day period. Where such a request is made, the Committee shall examine the notified successor undertaking within 60 days following the receipt of the request, taking into account the need to maintain effective multilateral disciplines on export credit practices and to preserve a balance of rights and obligations among Members. The provisions of the second paragraph of item (k) shall not apply in respect of the notified successor undertaking until the requested examination has been completed.

ANNEX II

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS[69]

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating

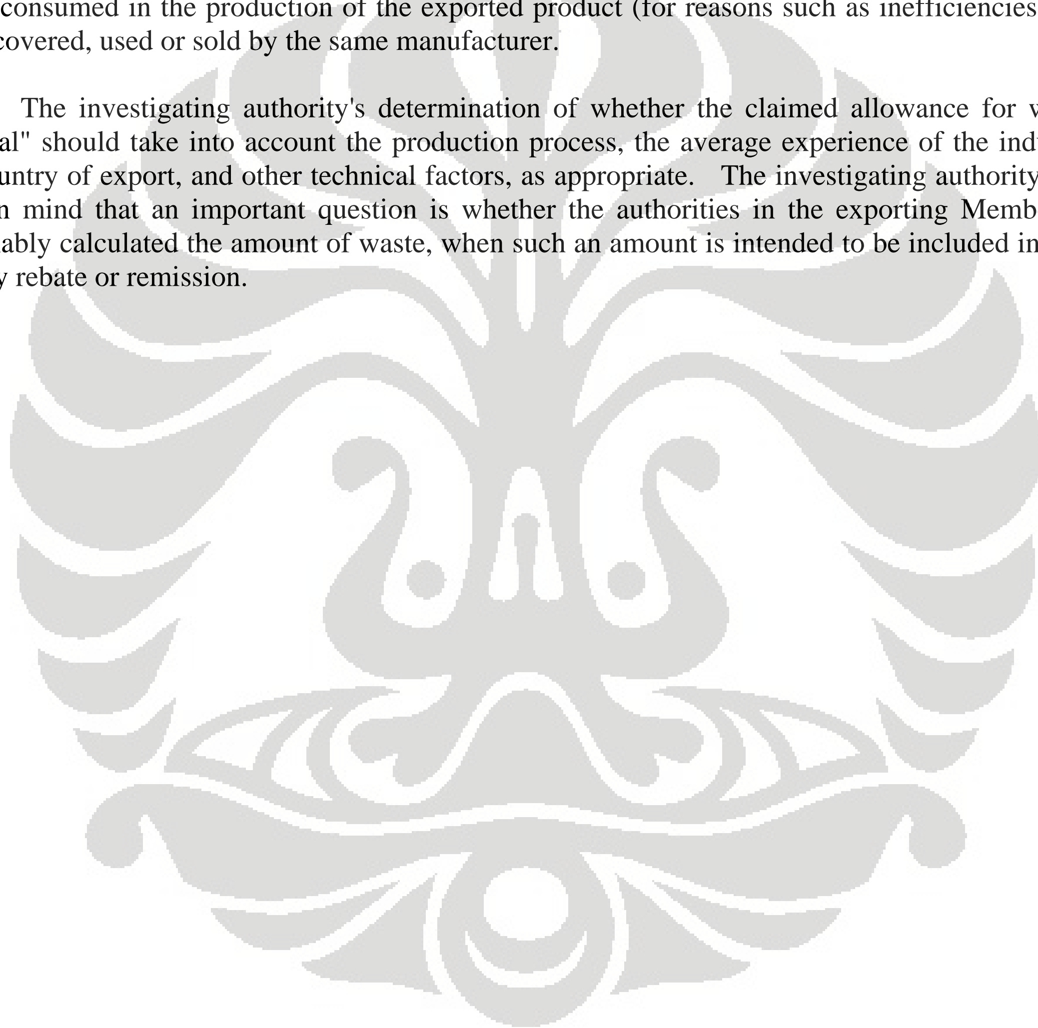
[69] Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.



ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 2.

4. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

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5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

ANNEX IV

CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION
(PARAGRAPH 1(A) OF ARTICLE 6)[70]

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's[71] sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.[72]

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.[73]

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

[70] An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

[71] The recipient firm is a firm in the territory of the subsidizing Member.

[72] In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned.

[73] Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.

ANNEX V

PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.[74] This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.[75]

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in

[74] In cases where the existence of serious prejudice has to be demonstrated.

[75] The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

ANNEX VI

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the government of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX VII

DEVELOPING COUNTRY MEMBERS REFERRED TO IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum[76]: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, Honduras, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

[76] ~~The inclusion~~In constant 1990 dollars for three consecutive years as calculated by the Secretariat on the basis of ~~developing country Members in the list in paragraph (b) is based on~~ the most recent data from the World Bank on GNP per capita, pursuant to paragraph 10.1 of the Ministerial Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17). A Member shall not leave Annex VII(b) so long as its GNP per capita in current dollars has not reached US$1,000 based upon the most recent data from the World Bank, and shall be reincluded in the list in Annex VII(b) when its GNP per capita falls back below US$1,000.

ANNEX VIII

FISHERIES SUBSIDIES

Article I

Prohibition of Certain Fisheries Subsidies

I.1 Except as provided for in Articles II and III, or in the exceptional case of natural disaster relief[77], the following subsidies within the meaning of paragraph 1 of Article 1, to the extent they are specific within the meaning of paragraph 2 of Article 1, shall be prohibited:

(a) Subsidies the benefits of which are conferred on the acquisition, construction, repair, renewal, renovation, modernization, or any other modification of fishing vessels[78] or service vessels[79], including subsidies to boat building or shipbuilding facilities for these purposes.

(b) Subsidies the benefits of which are conferred on transfer of fishing or service vessels to third countries, including through the creation of joint enterprises with third country partners.

(c) Subsidies the benefits of which are conferred on operating costs of fishing or service vessels (including licence fees or similar charges, fuel, ice, bait, personnel, social charges, insurance, gear, and at-sea support); or of landing, handling or in- or near-port processing activities for products of marine wild capture fishing; or subsidies to cover operating losses of such vessels or activities.

(d) Subsidies in respect of, or in the form of, port infrastructure or other physical port facilities exclusively or predominantly for activities related to marine wild capture fishing (for example, fish landing facilities, fish storage facilities, and in- or near-port fish processing facilities).

(e) Income support for natural or legal persons engaged in marine wild capture fishing.

(f) Price support for products of marine wild capture fishing.

(g) Subsidies arising from the further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fisheries within the jurisdiction of such other Member.[80]

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[77] Subsidies referred to in this provision shall not be prohibited when limited to the relief of a particular natural disaster, provided that the subsidies are directly related to the effects of that disaster, are limited to the affected geographic area, are time-limited, and in the case of reconstruction subsidies, only restore the affected area, the affected fishery, and/or the affected fleet to its pre-disaster state, up to a sustainable level of fishing capacity as established through a science-based assessment of the post-disaster status of the fishery. Any such subsidies are subject to the provisions of Article VI.

[78] For the purposes of this Agreement, the term "fishing vessels" refers to vessels used for marine wild capture fishing and/or on-board processing of the products thereof.

[79] For the purposes of this Agreement, the term "service vessels" refers to vessels used to tranship the products of marine wild capture fishing from fishing vessels to on-shore facilities; and vessels used for at-sea refuelling, provisioning and other servicing of fishing vessels.

[80] Government-to-government payments for access to marine fisheries shall not be deemed to be subsidies within the meaning of this Agreement.

(h) Subsidies the benefits of which are conferred on any vessel engaged in illegal, unreported or unregulated fishing.[81]

I.2 In addition to the prohibitions listed in paragraph 1, any subsidy referred to in paragraphs 1 and 2 of Article 1 the benefits of which are conferred on any fishing vessel or fishing activity affecting fish stocks that are in an unequivocally overfished condition shall be prohibited.

Article II

General Exceptions

Notwithstanding the provisions of Article I, and subject to the provision of Article V:

(a) For the purposes of Article I.1(a), subsidies exclusively for improving fishing or service vessel and crew safety shall not be prohibited, provided that:

(1) such subsidies do not involve new vessel construction or vessel acquisition;

(2) such subsidies do not give rise to any increase in marine wild capture fishing capacity of any fishing or service vessel, on the basis of gross tonnage, volume of fish hold, engine power, or on any other basis, and do not have the effect of maintaining in operation any such vessel that otherwise would be withdrawn; and

(3) the improvements are undertaken to comply with safety standards.

(b) For the purposes of Articles I.1(a) and I.1(c) the following subsidies shall not be prohibited:

subsidies exclusively for: (1) the adoption of gear for selective fishing techniques; (2) the adoption of other techniques aimed at reducing the environmental impact of marine wild capture fishing; (3) compliance with fisheries management regimes aimed at sustainable use and conservation (e.g., devices for Vessel Monitoring Systems); provided that the subsidies do not give rise to any increase in the marine wild capture fishing capacity of any fishing or service vessel, on the basis of gross tonnage, volume of fish hold, engine power, or on any other basis, and do not have the effect of maintaining in operation any such vessel that otherwise would be withdrawn.

(c) For the purposes of Article I.1(c), subsidies to cover personnel costs shall not be interpreted as including:

(1) subsidies exclusively for re-education, retraining or redeployment of fishworkers[82] into occupations unrelated to marine wild capture fishing or directly associated activities; and

[81] The terms "illegal fishing", "unreported fishing" and "unregulated fishing" shall have the same meaning as in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing of the United Nations Food and Agricultural Organization.

[82] For the purpose of this Agreement, the term "fishworker" shall refer to an individual employed in marine wild capture fishing and/or directly associated activities.

(2) subsidies exclusively for early retirement or permanent cessation of employment of fishworkers as a result of government policies to reduce marine wild capture fishing capacity or effort.

(d) Nothing in Article I shall prevent subsidies for vessel decommissioning or capacity reduction programmes, provided that:

(1) the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;

(2) the fish harvesting rights associated with such vessels, whether they are permits, licences, fish quotas or any other form of harvesting rights, are permanently revoked and may not be reassigned;

(3) the owners of such vessels, and the holders of such fish harvesting rights, are required to relinquish any claim associated with such vessels and harvesting rights that could qualify such owners and holders for any present or future harvesting rights in such fisheries; and

(4) the fisheries management system in place includes management control measures and enforcement mechanisms designed to prevent overfishing in the targeted fishery. Such fishery-specific measures may include limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups, such as individual transferable quotas.

(e) Nothing in Article I shall prevent governments from making user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes.

Article III

Special and Differential Treatment of Developing Country Members

III.1 The prohibition of Article 3.1(c) and Article I shall not apply to least-developed country ("LDC") Members.

III.2 For developing country Members other than LDC Members:

(a) Subsidies referred to in Article I.1 shall not be prohibited where they relate exclusively to marine wild capture fishing performed on an inshore basis (i.e., within the territorial waters of the Member) with non-mechanized net-retrieval, provided that (1) the activities are carried out on their own behalf by fishworkers, on an individual basis which may include family members, or organized in associations; (2) the catch is consumed principally by the fishworkers and their families and the activities do not go beyond a small profit trade; and (3) there is no major employer-employee relationship in the activities carried out. Fisheries management measures aimed at ensuring sustainability, such as the measures referred to in Article V, should be implemented in respect of the fisheries in question, adapted as necessary to the particular situation, including by making use of indigenous fisheries management institutions and measures.

(b) In addition, subject to the provisions of Article V:

(1) Subsidies referred to in Articles I.1(d), I.1(e) and I.1(f) shall not be prohibited.

(2) Subsidies referred to in Article I.1(a) and I.1(c) shall not be prohibited provided that they are used exclusively for marine wild capture fishing employing decked vessels not greater than 10 meters or 34 feet in length overall, or undecked vessels of any length.

(3) For fishing and service vessels of such Members other than the vessels referred to in paragraph (b)(2), subsidies referred to in Article I.1(a) shall not be prohibited provided that (i) the vessels are used exclusively for marine wild capture fishing activities of such Members in respect of particular, identified target stocks within their Exclusive Economic Zones ("EEZ"); (ii) those stocks have been subject to prior scientific status assessment conducted in accordance with relevant international standards, aimed at ensuring that the resulting capacity does not exceed a sustainable level; and (iii) that assessment has been subject to peer review in the relevant body of the United Nations Food and Agriculture Organization ("FAO")[83].

III.3 Subsidies referred to in Article I.1(g) shall not be prohibited where the fishery in question is within the EEZ of a developing country Member, provided that the agreement pursuant to which the rights have been acquired is made public, and contains provisions designed to prevent overfishing in the area covered by the agreement based on internationally-recognized best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at ensuring the sustainable use and conservation of marine species, such as, *inter alia*, the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* ("*Fish Stocks Agreement*"), the *Code of Conduct on Responsible Fisheries of the Food and Agriculture Organization* ("*Code of Conduct*"), the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* ("*Compliance Agreement*"), and technical guidelines and plans of action (including criteria and precautionary reference points) for the implementation of these instruments, or other related or successor instruments. These provisions shall include requirements and support for science-based stock assessment before fishing is undertaken pursuant to the agreement and for regular assessments thereafter, for management and control measures, for vessel registries, for reporting of effort, catches and discards to the national authorities of the host Member and to relevant international organizations, and for such other measures as may be appropriate.

III.4 Members shall give due regard to the needs of developing country Members in complying with the requirements of this Annex, including the conditions and criteria set forth in this Article and in Article V, and shall establish mechanisms for, and facilitate, the provision of technical assistance in this regard, bilaterally and/or through the appropriate international organizations.

[83] If the Member in question is not a member of the FAO, the peer review shall take place in another recognized and competent international organization.

Article IV

General Discipline on the Use of Subsidies

IV.1 No Member shall cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, depletion of or harm to, or creation of overcapacity in respect of, (a) straddling or highly migratory fish stocks whose range extends into the EEZ of another Member; or (b) stocks in which another Member has identifiable fishing interests, including through user-specific quota allocations to individuals and groups under limited access privileges and other exclusive quota programmes. The existence of such situations shall be determined taking into account available pertinent information, including from other relevant international organizations. Such information shall include the status of the subsidizing Member's implementation of internationally-recognized best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at the sustainable use and conservation of marine species, such as, *inter alia*, the *Fish Stocks Agreement*, the *Code of Conduct*, the *Compliance Agreement*, and technical guidelines and plans of action (including criteria and precautionary reference points) for the implementation of these instruments, or other related or successor instruments.

IV.2 Any subsidy referred to in this Annex shall be attributable to the Member conferring it, regardless of the flag(s) of the vessel(s) involved or the application of rules of origin to the fish involved.

Article V

Fisheries Management[84]

V.1 Any Member granting or maintaining any subsidy as referred to in Article II or Article III.2(b) shall operate a fisheries management system regulating marine wild capture fishing within its jurisdiction, designed to prevent overfishing. Such management system shall be based on internationally-recognized best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at ensuring the sustainable use and conservation of marine species, such as, *inter alia*, the *Fish Stocks Agreement*, the *Code of Conduct*, the *Compliance Agreement*, technical guidelines and plans of action (including criteria and precautionary reference points) for the implementation of these instruments, or other related or successor instruments. The system shall include regular science-based stock assessment, as well as capacity and effort management measures, including harvesting licences or fees; vessel registries; establishment and allocation of fishing rights, or allocation of exclusive quotas to vessels, individuals and/or groups, and related enforcement mechanisms; species-specific quotas, seasons and other stock management measures; vessel monitoring which could include electronic tracking and on-board observers; systems for reporting in a timely and reliable manner to the competent national authorities and relevant international organizations data on effort, catch and discards in sufficient detail to allow sound analysis; and research and other measures related to conservation and stock maintenance and replenishment. To this end, the Member shall adopt and implement pertinent domestic legislation and administrative or judicial enforcement mechanisms. It is desirable that such fisheries management systems be based on limited access privileges[85]. Information as to the nature and operation of these systems, including the results of the stock assessments performed, shall be notified to the relevant

[84] Developing country Members shall be free to implement and operate these management requirements on a regional rather than a national basis provided that all of the requirements are fulfilled in respect of and by each Member in the region.

[85] Limited access privileges could include, as appropriate to a given fishery, community-based rights systems, spatial or territorial rights systems, or individual quota systems, including individual transferable quotas.

body of the FAO, where it shall be subject to peer review prior to the granting of the subsidy[86]. References for such legislation and mechanism, including for any modifications thereto, shall be notified to the Committee on Subsidies and Countervailing Measures ("the Committee") pursuant to the provisions of Article VI.4.

V.2 Each Member shall maintain an enquiry point to answer all reasonable enquiries from other Members and from interested parties in other Members concerning its fisheries management system, including measures in place to address fishing capacity and fishing effort, and the biological status of the fisheries in question. Each Member shall notify to the Committee contact information for this enquiry point.

Article VI

Notifications and Surveillance

VI.1 Each Member shall notify to the Committee in advance of its implementation any measure for which that Member invokes the provisions of Article II or Article III.2; except that any subsidy for natural disaster relief[87] shall be notified to the Committee without delay[88]. In addition to the information notified pursuant to Article 25, any such notification shall contain sufficiently precise information to enable other Members to evaluate whether or not the conditions and criteria in the applicable provisions of Article II or Article III.2 are met.

VI.2 Each Member that is party to an agreement pursuant to which fishing rights are acquired by a Member government ("payer Member") from another Member government to fisheries within the jurisdiction of such other Member shall publish that agreement, and shall notify to the Committee the publication references for it.

VI.3 The terms on which a payer Member transfers fishing rights it has obtained pursuant to an agreement as referred to in paragraph 2 shall be notified to the Committee by the payer Member in respect of each such agreement.

VI.4 Each Member shall include in its notifications to the Committee the references for its applicable domestic legislation and for its notifications made to other organizations, as well as for the documents related to the reviews conducted by those organizations, as referred to in Article V.1.

VI.5 Other Members shall have the right to request information about the notified subsidies, including about individual cases of subsidization, about notified agreements pursuant to which fishing rights are acquired, and about the stock assessments and management systems notified to other organizations pursuant to Article V.1. Each Member so requested shall provide such information in accordance with the provisions of Article 25.9.

VI.6 Any Member shall be free to bring to the attention of the Committee information from pertinent outside sources (including intergovernmental organizations with fisheries management-related activities, regional fisheries management organizations and similar sources) as to any apparent illegal, unreported and unregulated fishing activities.

[86] If the Member in question is not a member of the FAO, the notification for peer review shall be to another relevant international organization. The specific information to be notified shall be determined by the relevant body of the FAO or such other organization.

[87] As provided for in Article I.1 and footnote 77.

[88] For the purposes of this provision, "without delay" shall mean not later than the date of entry into force of the programme, or in the case of an ad hoc subsidy, the date of commitment of the subsidy.

VI.7 Measures notified pursuant to this Article shall be subject to review by the Committee as provided for in Article 26.

Article VII

Transitional Provisions

VII.1 Any subsidy programme which has been established within the territory of any Member before the date of entry into force of the results of the DDA and which is inconsistent with Article 3.1(c) and Article I shall be notified to the Committee not later than 90 days, or in the case of a developing country Member 180 days, after the date of entry into force of the results of the DDA.

VII.2 Provided that a programme has been notified pursuant to paragraph 1, a Member shall have two years, or in the case of a developing country Member four years, from the date of entry into force of the results of the DDA to bring that programme into conformity with Article 3.1(c) and Article I, during which period the programme shall not be subject to those provisions.

VII.3 No Member shall extend the scope of any programme, nor shall a programme be renewed upon its expiry.

Article VIII

Dispute Settlement

VIII.1 Where a measure is the subject of dispute settlement claims pursuant to Article 3.1(c) and Article I, the relevant provisions of Article 4 and of this Article shall apply. Article 30 and the relevant provisions of this Article shall apply to disputes arising under other provisions of this Annex.

VIII.2 Where a subsidy that has not been notified as required by Article VI.1 is the subject of dispute settlement pursuant to the DSU and Article 4, such subsidy shall be presumed to be prohibited pursuant to Article 3.1(c) and Article I. It shall be for the subsidizing Member to demonstrate that the subsidy in question is not prohibited.

VIII.3 Where a further transfer of access rights as referred to in Article I.1(g) is the subject of a dispute arising under this Annex, and the terms of that transfer have not been notified as required by Article VI.3, the transfer shall be presumed to give rise to a subsidy. It shall be for the payer Member to demonstrate that no such subsidy has arisen.

VIII.4 Where a dispute arising under this Annex raises scientific or technical questions related to fisheries, the panel should seek advice from fisheries experts chosen by the panel in consultation with the parties. To this end, the panel may, when it deems it appropriate, establish an advisory technical fisheries expert group, or consult recognized and competent international organizations, at the request of either party to the dispute or on its own initiative.

VIII.5 Nothing in this Annex shall impair the rights of Members to resort to the good offices or dispute settlement mechanisms of other international organizations or under other international agreements.

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