USULAN PERUBAHAN ATAS THE ANTI DUMPING AGREEMENT: SUATU TINJAUAN TERHADAP KEPENTINGAN NEGARA BERKEMBANG DAN PERATURAN DOMESTIK

TESIS

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FAKULTAS HUKUM
PROGRAM PASCASARJANA
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TESIS

Diajukan sebagai salah satu syarat untuk memperoleh gelar Magister Hukum

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FAKULTAS HUKUM
PROGRAM PASCASARJANA
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JAKARTA
JANUARI 2009

HALAMAN PERNYATAAN ORISINALITAS

Tesis ini adalah hasil karya saya sendiri,
dan semua sumber baik yang dikutip maupun dirujuk
telah saya nyatakan dengan benar.

Nama	: Banny R. Ramadhani
NPM	: 0706175123
Tanda Tangan	:
Tanggal	: 05 Januari 2009

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HALAMAN PENGESAHAN

Tesis ini diajukan oleh :

Nama : Banny R. Ramadhani

NPM : 0706175123

Program Studi : Magister Ilmu Hukum

Judul Tesis : Usulan Perubahan atas the Anti Dumping Agreement: Suatu Tinjauan terhadap Kepentingan Negara Berkembang dan Peraturan Domestik

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.

DEWAN PENGUJI

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Penguji : Melda Kamil Ariadno SH., LL.M ( )

Ditetapkan di : Jakarta

Tanggal : 05 Januari 2009

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KATA PENGANTAR

Alhamdulillahirabbil'alamin, segala puji dan syukur penulis panjatkan kehadirat Allah SWT karena berkat rahmat dan hidayah-Nya penulisan tesis ini dapat terselesaikan. Penulisan tesis ini dilakukan dalam rangka memenuhi salah satu syarat untuk mencapai gelar Magister Hukum pada program pascasarjana Fakultas Hukum Universitas Indonesia.

Penulisan tesis ini bertujuan untuk menganalisa usulan perubahan atas the anti dumping agreement sebagaimana diajukan oleh ketua *NG on Rules* dalam *draft text*-nya. Penulisan ini khususnya ditujukan untuk melihat seberapa jauh usulan perubahan ketentuan anti dumping tersebut dapat merefleksikan kepentingan negara berkembang, termasuk Indoneisa. Kemudian, penulisan ini juga ditujukan untuk memberikan masukan mengenai perubahan seperti apakah yang tampaknya ideal bagi kepentingan negara berkembang. Hal ini dirasakan perlu oleh penulis agar negara berkembang suatu saat dapat mempunyai ketentuan anti dumping WTO yang memihak kepada kepentingan mereka.

Penulis juga menyadari bahwa masih banyak kekurangan di dalam penulisan tesis ini. Penulis akan sangat menghargai segala masukan dan kritikan sehubungan dengan penulisan tesis ini. Penulis juga menyadari bahwa tanpa bantuan dan bimbingan dari berbagai pihak, semenjak masa kuliah hingga penyusunan tesis ini, akan sulit bagi penulis untuk menyelesaikan penulisan tesis ini. Oleh karena itu, pada kesempatan ini dengan segala kerendahan hati penulis mengucapkan terimakasih sebesar-besarnya kepada:

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Semoga Tesis ini dapat bermanfaat baik bagi penulis sendiri maupun bagi semua pihak dan dapat memberikan sumbangan bagi perkembangan ilmu hukum.

Jakarta, Januari 2009

Penulis

Banny R. Ramadhani

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HALAMAN PERNYATAAN PERSETUJUAN PUBLIKASI
TUGAS AKHIR UNTUK KEPENTINGAN AKADEMIS

Sebagai sivitas akademik Universitas Indonesia, saya yang bertanda tangan di bawah ini:

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NPM : 0706175123

Program Studi : Magister Ilmu Hukum

Fakultas : Hukum

Jenis Karya : Tesis

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Dibuat di : Jakarta

Pada tanggal : 05 Januari 2009

Yang Menyatakan

(Banny R. Ramadhani)

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ABSTRAK

Nama : Banny R. Ramadhani
Program Studi : Magister Ilmu Hukum
Judul Tesis : Usulan Perubahan atas the Anti Dumping Agreement: Suatu Tinjauan terhadap Kepentingan Negara Berkembang dan Peraturan Domestik.

Tesis ini membahas mengenai perubahan atas *the Anti Dumping Agreement* yang diusulkan dalam *chairman's text* dilihat dari kepentingan negara berkembang dan peraturan domestik Indonesia. Penelitian ini adalah penelitian kualitatif dengan menggunakan kajian normatif. Hasil penelitian ini menunjukkan bahwa usulan perubahan tersebut tidak merepresentasikan kepentingan negara berkembang dan oleh karenanya perlu adanya perubahan yang dapat memfasilitasi kepentingan negara berkembang. Penelitian ini juga menyarankan agar negara berkembang dapat berperan aktif dalam perundingan masalah anti dumping, guna memiliki ketentuan anti dumping yang adil bagi mereka.

Kata Kunci :
Anti dumping, *chairman's text*, negara berkembang

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ABSTRACT

Name : Banny R. Ramadhani
Study Program : Law Magister
Title : Amendment of the Anti Dumping Agreement: A Review from Developing Countries' Interest and Domestic Regulation.

The focus of this study is to critize the amendment of WTO's anti dumping agreement, in the context of *chairman's text*, from a view of developing country members and Indonesia's domestic regulation. This research uses a qualitative approach with normative methodology. The outcome of this research shows that such proposed amendment does not represent the interest of developing country members. Thus, developing country members insist a better revision which reflecting their needs. This research also suggests developing country members to actively participate in the current anti dumping negotiation, in order to have a fair anti dumping agreement.

Key words:
Anti dumping, chairman's text, developing country

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DAFTAR ISI

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DAFTAR SINGKATAN

ADA	:	*Anti Dumping Agreement*
ASCM	:	*Agreement on Subsidies and Countervailing Measures*
DDA	:	*Doha Development Agenda*
GATT	:	*General Agreement on Tariffs and Trade*
HKI	:	Hak atas Kekayaan Intelektual
KADI	:	Komite Anti Dumping Indonesia
KTM	:	Konferensi Tingkat Menteri
LDC's	:	*Least Developed Countries*
MFN	:	*Most Favoured Nation*
NAMA	:	*Non-agricultural Market Access*
NG on Rules	:	*Negotiating Group on Rules*
S&D	:	*Special and Differential Treatment*
TNC	:	*Trade Negotiation Committee*
TPRM	:	*Trade Policy Review Mechanism*
WTO	:	*World Trade Organization*

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BAB 1
PENDAHULUAN

1.1 Latar Belakang Permasalahan

World Trade Organization (WTO) merupakan satu-satunya badan internasional yang secara khusus mengatur masalah perdagangan antar negara. Sistem perdagangan multilateral WTO diatur melalui persetujuan yang berisikan aturan-aturan dasar perdagangan internasional yang dihasilkan oleh para negara anggota[1] melalui proses negosiasi. Persetujuan tersebut merupakan perjanjian antar negara anggota yang mengikat pemerintah negara anggota untuk mematuhinya dalam pelaksanaan kebijakan perdagangan mereka.[2]

WTO berdiri secara resmi pada tanggal 1 Januari 1995 setelah berakhirnya *Uruguay Round* (Putaran Uruguay) yang telah berlangsung selama 8 tahun. WTO pada dasarnya bertujuan untuk mendorong perdagangan antar negara dan menghapus berbagai hambatan perdagangan dunia. WTO juga memiliki fungsi sebagai forum negosiasi dan penyelesaian sengketa diantara para anggotanya. Hingga kini, WTO telah memiliki anggota sebanyak 153 negara dan banyak negara lainnya yang kini sedang dalam proses aksesi masuk keanggotaan WTO.

Sistem perundingan atau negosiasi yang dianut dalam WTO adalah *single undertaking*. Dengan sistem ini maka negara peserta diwajibkan untuk menerima atau menolak hasil dari berbagai negosiasi sebagai satu paket (*single package*), bukan memilih salah satu atau beberapa diantaranya.[3] Oleh karena itu, guna menggambarkan sistem ini dikenal pula istilah *nothing is agreed until everything is*

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[1] Penyebutan istilah negara anggota atau negara anggota WTO digunakan oleh penulis guna mempermudah pemahaman mengenai anggota WTO. Anggota WTO sebenarnya tidak sebatas pada negara karena didalamnya juga terdapat *separate customs territory* seperti Hong Kong, China; Macau, China; dan *Chinese Taipei*. Dengan menggunakan istilah negara anggota atau negara anggota WTO, dianggap anggota-anggota WTO tersebut telah tercakup didalamnya dan penulis tidak mengesampingkan keberadaan mereka.

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

[3] "Deardrorff's Glossary of International Economics," <http://www-personal.umich.edu/~alandear/glossary/s.html>, diakses pada 9 September 2008.

agreed. Indonesia merupakan salah satu negara pendiri atau penandatangan *Agreement Establishing The World Trade Organization*. Kemudian, a*greement* tersebut telah diratifikasi pada tahun 1994 melalui Undang-Undang No.7 tahun 1994 tentang Pengesahan *Agreement Establishing The World Trade Organization* (Pembentukan Organisasi Perdagangan Dunia). Dengan demikian, Indonesia telah menerima keseluruhan hasil perundingan Putaran Uruguay sebagai satu paket dan terikat untuk mematuhi serta menjalankannya sesuai aturan yang telah disepakati dalam persetujuan tersebut.[4]

Dalam menjalankan sistem perdagangan multilateralnya, WTO memiliki beberapa prinsip atau aturan dasar yang menjiwai persetujuan-persetujuan yang ada di dalamnya. Prinsip-prinsip tersebut antara lain adalah: *Non-discrimination* dan *transparency*. Prinsip *Non-discrimination* terdiri atas dua prinsip yaitu *Most Favoured Nation* (MFN) dan *National Treatment*. Secara singkat, kedua prinsip ini pada dasarnya mengharuskan setiap negara anggota WTO untuk memberikan perlakuan yang sama atau tidak diskriminatif. Berdasarkan prinsip MFN, setiap negara anggota WTO dilarang untuk memberikan diskriminasi atau perlakuan berbeda diantara mitra dagangnya sebagai sesama negara anggota WTO. Sedangkan prinsip *National Treatment* mewajibkan setiap negara anggota WTO untuk memperlakukan produk negara anggota WTO lainnya sama seperti produk domestiknya. Jadi berdasarkan prinsip *National Treatment*, negara anggota WTO dilarang untuk memberikan diskriminasi atau perlakuan berbeda terhadap produk dari negara anggota WTO lainnya disaat produk tersebut telah memasuki teritori negara anggota WTO yang bersangkutan. Untuk prinsip berikutnya yaitu *transparency*, setiap negara anggota WTO diwajibkan untuk bersikap terbuka atau transparan terhadap berbagai kebijakan perdagangannya sehingga memudahkan pelaku usaha untuk melakukan kegiatan perdagangan.[5] Prinsip ini secara umum diimplementasikan melalui notifikasi kebijakan perdagangan dan juga *Trade Policy Review Mechanism* (TPRM)[6].

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[4] Kecuali *plurilateral agreement* sebagaimana tercantum dalam *annex* 4 Persetujuan WTO.

[5] Departemen Luar Negeri, *op. cit.*, hlm 4

[6] TPRM merupakan tinjauan secara periodik terhadap kebijakan perdagangan negara anggota WTO. Tinjauan ini berlaku terhadap semua negara anggota WTO tanpa terkecuali. Yang

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Selain kedua prinsip tersebut diatas, WTO juga memiliki prinsip universal lainnya yang dikenal dengan sebutan perlakuan khusus dan berbeda atau *special and differential treatment* (S&D). Keberadaan prinsip ini tidak terlepas dari beragamnya negara anggota WTO yang terdiri atas negara maju (*developed countries*), negara berkembang (*developing countries*) dan negara terbelakang (*least developed countries*/LDC's).[7] Kelompok-kelompok negara ini tentunya memiliki karakter tersendiri dalam berbagai hal misalnya: tingkat perekonomian, skala perdagangan, pembangunan, kekuatan atau pengaruh politik, dll. Prinsip ini intinya memberikan perlakuan yang bersifat *preferential* terhadap negara berkembang dan terbelakang.

Menyadari bahwa perlunya upaya positif yang dirancang untuk menjamin terintegrasinya negara berkembang dan juga negara terbelakang ke dalam sistem perdagangan multilateral, maka WTO menyediakan banyak ketentuan yang memberikan tingkat perlakuan khusus dan berbeda kepada negara berkembang. Ketentuan-ketentuan ini diatur guna mencoba untuk mempertimbangkan kebutuhan khusus dari negara berkembang. Dalam banyak bidang, ketentuan-ketentuan ini mengatur beban kewajiban yang lebih sedikit, atau pembedaan keberlakuan aturan terhadap negara berkembang dan juga pemberian bantuan teknis.[8]

Aturan-aturan yang yang telah disepakati dalam Persetujuan WTO meliputi berbagai hal atau bidang. Salah satu yang tercakup di dalamnya adalah aturan atau ketentuan mengenai anti dumping. Anti dumping dalam WTO diatur melalui *Article VI of GATT 1994* dan *Agreement on Implementation of Article VI of GATT 1994* atau yang lebih dikenal dengan *the Anti Dumping Agreement* (ADA). Ketentuan-ketentuan inilah yang menjadi acuan atau dasar bagi setiap anggota

membedakannya hanyalah periode dilakukannya tinjauan tersebut yang didasarkan pada besarnya *share* dari negara anggota WTO terhadap perdagangan internasional saat ini. TPRM ini diatur dalam *annex* 3 Persetujuan WTO.

[7] Penyebutan istilah negara berkembang dan negara terbelakang kadangkala memang dipisah namun seringnya penyebutan kedua istilah tersebut digabungkan hanya menjadi negara berkembang saja. Jadi, istilah negara berkembang pada hakikatnya telah mencakup juga negara terbelakang kecuali memang disengaja untuk dipisah guna menerangkan atau menjelaskan sesuatu.

[8] Peter Van Den Bossche, *The Law and Policy of the World Trade Organization (Text, Cases and Material)*, (New York: Cambridge University Press, 2005), hlm. 43.

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WTO untuk mengimplementasikan permasalahan anti dumping baik prosedural maupun substantif dalam peraturan domestiknya.

Permasalahan anti dumping tidak terlepas dari apa yang dipahami sebagai dumping. Dumping yang dalam praktik bisnis atau perdagangan merupakan suatu yang wajar dalam rangka *pricing policy*, pada kenyataannya dapat menimbulkan kerugian bagi usaha atau industri barang sejenis di negara lain. Oleh karenanya, WTO mengatur mengenai tindakan yang dapat diambil terhadap suatu negara yang menerapkan dumping dan menimbulkan kerugian terhadap usaha atau industri di negara lainnya atau negara pengimpor.[9] Tindakan inilah yang dikenal sebagai tindakan anti dumping.

Suatu negara, berdasarkan ketentuan WTO, pada dasarnya tidak diwajibkan untuk memiliki peraturan mengenai anti dumping dalam peraturan domestiknya.[10] Namun, pasal 1 ADA menyatakan bahwa tindakan anti dumping hanya dapat dilakukan berdasarkan keadaan sebagaimana diatur dalam *Article VI of GATT 1994* dan harus sesuai dengan prosedur penyelidikan yang dilakukan menurut ketentuan *agreement* ini. Oleh sebab itu, maka bagi negara anggota WTO yang menginginkan untuk dapat menerapkan ketentuan atau aturan mengenai anti dumping ini, harus memiliki peraturan domestik yang tidak bertentangan dengan ketentuan WTO yang ada.

Di Indonesia, ketentuan mengenai anti dumping diatur dalam Undang-Undang No. 17 tahun 2006 tentang Perubahan atas Undang-Undang No.10 tahun 1995 tentang Kepabeanan. Kemudian, lebih rinci diatur dalam Peraturan Pemerintah No.34 tahun 1996 tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan, dan beberapa peraturan teknis lainnya. Dengan diaturnya ketentuan mengenai anti dumping dalam peraturan domestik Indonesia tersebut, maka berdasarkan ketentuan dalam ADA, Indonesia harus tunduk atau menyesuaikan ketentuan domestiknya baik substantif maupun prosedural dengan ketentuan yang diatur dalam WTO.[11]

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[9] H.S. Kertadjoemena, *GATT-WTO dan Hasil Uruguay Round*, (Jakarta: UI Press, 1997), hlm. 156.

[10] Peter Van Den Bossche, *op cit.*, hal. 516.

[11] Pasal 1 ADA

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Sebagaimana disebutkan sebelumnya, aturan-aturan yang ada didalam WTO merupakan hasil negosiasi dari serangkaian proses perundingan atau dikenal juga dengan putaran perundingan. Sejak awal terbentuknya WTO hingga sekarang telah diselenggarakan sebanyak enam kali Konferensi Tingkat Menteri (KTM) yang merupakan forum pengambil kebijakan tertinggi dalam WTO. KTM WTO diselenggarakan minimal satu kali setiap dua tahun. KTM I diselenggarakan di Singapura tahun 1996, KTM II di Jenewa tahun 1998, KTM III di Seattle tahun 1999, KTM IV di Doha tahun 2001, KTM V di Cancun tahun 2003 dan KTM VI atau yang terakhir diselenggarakan di Hong Kong tahun 2005.

Pada KTM IV di Doha, dideklarasikan suatu agenda baru perundingan yang dikenal dengan "Agenda Pembangunan Doha" (*Doha Development Agenda/DDA*). Mulai dari KTM IV inilah dikenal adanya putaran perundingan baru yaitu Putaran Doha (*the Doha Round*) yang masih terus berjalan hingga kini guna mensukseskan agenda pembangunan yang telah dicanangkan. Deklarasi Doha ini mencanangkan segera dimulainya perundingan lebih lanjut mengenai beberapa bidang yang lebih spesifik, yaitu: jasa, pertanian, tarif produk industri, lingkungan hidup, masalah implementasi, Hak atas Kekayaan Intelektual (HKI), dan penyempurnaan prosedur penyelesaian sengketa dan aturan-aturan WTO (*WTO on Rules*)[12].

Khusus mengenai aturan-aturan WTO (*WTO on Rules*), agenda ini dimaksudkan untuk lebih memperjelas dan meningkatkan disiplin aturan WTO dimana disepakati untuk mengklarifikasi lebih lanjut dan memperbaiki beberapa pasal/aturan yang terkait dengan ADA dan *the Agreement on Subsidy and Countervailing Measures* (ASCM). Untuk melancarkan perundingan dalam hal *WTO on Rules* ini maka dibentuk suatu badan atau organ yang secara khusus menangani hal ini yaitu *Negotiating Group on Rules* (*NG on Rules*) yang dipimpin oleh seorang ketua (*chairman*).

[12] Yang tercakup dalam isu *rules* adalah masalah anti dumping, subsidi dan *regional trade agreements*.

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Saat ini, setelah melalui proses panjang perundingan, ketua *NG on Rules* telah mengeluarkan suatu dokumen yaitu *Draft Consolidated Chair Text* atau lebih dikenal dengan *chairman's text*.[13] Dokumen ini merupakan *draft* amandemen atau revisi atas ADA (dan juga ASCM) yang disusun berdasarkan masukan-masukan, tanggapan-tanggapan, atau kritikan-kritikan terhadap ADA (dan ASCM) yang berlaku saat ini. Masukan, tanggapan ataupun kritik tersebut umumnya diberikan (*submitted*) oleh negara-negara anggota WTO berupa dokumen resmi yang kemudian ditanggapi oleh negara anggota lainnya.

Berbagai macam usulan perubahan ADA (dan ASCM) dicoba untuk dapat difasilitasi melalui *draft* ini. Namun tentunya tidak mudah untuk dapat memfasilitasi kepentingan 153 negara anggota WTO dalam suatu dokumen yang dapat disepakati bersama. Negara-negara anggota WTO, tidak terlepas Indonesia, telah memberikan berbagai macam komentar terhadap *draft* perubahan ini baik disatu sisi mendukung terhadap usulan perubahan maupun juga menolak usulan disisi lain. Bagi Indonesia khususnya, dan negara berkembang pada umumnya, komentar terhadap dokumen ini merupakan cara dan harapan untuk dapat merubah ketentuan, khususnya ADA, yang selama ini dirasakan *ambigous* dan tidak *precise* sehingga kerap merugikan kepentingan nasional. Hal ini merupakan upaya guna di hari esok WTO dapat memiliki ADA yang baru yang bisa melindungi dan memfasilitasi kepentingan negara berkembang pada umumnya, termasuk Indonesia.

Oleh karenanya, berdasarkan hal tersebut, maka penelitian ini ditujukan untuk mencoba membandingkan usulan perubahan ketentuan dalam *chairman's text* tersebut dengan ketentuan ADA dan juga peraturan domestik Indonesia. Kemudian, menilai sejauh mana *draft* ini dapat merepresentasikan kepentingan negara berkembang pada umumnya dan Indonesia pada khususnya. Sedangkan yang terakhir, melihat bagaimanakah perubahan yang ideal bagi kepentingan negara berkembang, termasuk Indonesia, atas ketentuan anti dumping WTO.

[13] *Draft* ini dimuat dalam dokumen WTO bernomor TN/RL/W/213 tertanggal 30 Nopember 2007.

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2.1 Perumusan Masalah

Berdasarkan latar belakang diatas maka untuk lebih memfokuskan penelitian ini, disusun perumusan masalah sebagai berikut:

a. Bagaimanakah ketentuan dalam *chairman's text* tersebut dibandingkan dengan ketentuan dalam ADA yang berlaku saat ini dan peraturan domestik Indonesia?
b. Apakah ketentuan dalam *chairman's text* tersebut secara umum telah merepresentasikan kepentingan negara berkembang pada umumnya dan Indonesia pada khususnya?
c. Bagaimanakah seyogyanya perubahan atas ketentuan anti dumping yang ideal bagi kepentingan negara berkembang, termasuk Indonesia?

3.1 Kerangka Teori

Perdagangan internasional merupakan perdagangan lintas batas, dimana melibatkan lebih dari satu negara didalamnya. Dalam sistem perdagangan multilataral WTO, negara-negara yang terlibat didalamnya sangat banyak dan dapat dikelompokan sebagai negara maju dan negara berkembang (termasuk negara terbelakang). Walaupun WTO tidak memberikan parameter khusus untuk membedakan hal ini, namun faktanya kedua kelompok negara ini memiliki perbedaan karakteristik yang dapat dilihat dalam berbagai aspek khususnya ekonomi.[14] Persetujuan-persetujuan yang ada dalam WTO juga, dalam hal tertentu, secara eksplisit menyebutkan atau membedakan dua kelompok negara ini.

Adanya pembedaan atau pembagian kelompok negara ini memperlihatkan atau mempertegas adanya perbedaan kedudukan diantara negara anggota WTO. Dengan kata lain, terdapat ketidaksetaraan (*inequality*) diantara negara-negara tersebut. Ketidaksetaraan inilah yang kemudian menimbulkan pertanyaan mengenai keadilan khususnya *distributive justice*.

[14] Kecuali untuk negara terbelakang, parameter yang digunakan adalah sebagaimana yang dipakai oleh UNCTAD. Negara-negara yang masuk dalam kategori terbelakang berdasarkan penilaian UNCTAD, oleh WTO juga dikategorikan demikian. Tentunya bila negara tersebut adalah negara anggota WTO.

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Distributive justice pada dasarnya merupakan prinsip yang di-*design* sebagai panduan untuk alokasi manfaat dan beban dari aktivitas ekonomi.[15] Prinsip ini kemudian dikembangkan oleh John Rawls yang dikenal dengan *Justice as Fairness*-nya melalui "*different principle*". Konsep dari prinsip ini adalah:

> *The difference principle allows allocation that does not conform to strict equality so long as the inequality has the effect that the least advantaged in society are materially better off than they would be under strict equality*.[16]

Berdasarkan prinsip ini maka alokasi tersebut dapat atau boleh diberikan tidak sesuai dengan *strict equality* sepanjang ketidaksetaraan tersebut memberikan dampak yang lebih baik kepada masyarakat yang kurang beruntung (*least advantage*) dibandingkan dengan diberikan secara *strict equality*.

Konsep umum *Justice as Fairness* yang diangkat oleh John Rawls adalah bahwa seluruh barang sosial primer –seperti kebebasan dan kesempatan, pendapatan dan kesejahteraan, dan dasar-dasar *self-respect*– harus didistribusikan secara merata kecuali ketidakmerataan distribusi tersebut diberikan untuk keuntungan mereka yang paling tidak beruntung.[17] Kemudian, dua prinsip dapat ditarik dari konsep ini yaitu: prinsip kebebasan berdasarkan persamaan (*equal liberty*) dan prinsip perbedaan (*difference*).[18]

Teori keadilan yang diusung oleh John Rawls, sebagaimana diakuinya, diperuntukkan sebatas pada masyarakat domestik. Dia mengatakan:[19]

> *I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies.*

Namun dalam perkembangannya, Frank J. Garcia mengkritik dan mengembangkan teori tersebut sehingga relevan untuk diterapkan pada lingkungan internasional. Apa yang menjadi syarat dibutuhkannya keadilan, menurut John Rawls, yaitu

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[15] "Distributive Justice", <http://plato.stanford.edu/entries/justice-distributive/>, 5 Maret 2007.

[16] *Ibid*.

[17] Frank J. Garcia (1), "Trade And Inequality: Economic Justice And The Developing World", *Michigan Journal of International Law*, (2000).

[18] Frank J. Garcia (2), "The Law of Peoples: By John Rawls" *Houston Journal of International Law*, (2001) dalam Nandang Sutrisno, "Eksistensi Ketentuan Khusus WTO," <http://nandang.staff.uii.ac.id/2008/08/28/artikel/>, 28 Agusteus 2008.

[19] John Rawls, *A Theory of Justice* (Harvard: Harvard Univ. Press, 1972) dalam Frank J. Garcia (1)," *op cit.*

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adanya mekanisme untuk mengalokasikan keuntungan yang timbul akibat kerjasama sosial, dapat dilihat pada keberadaan WTO. Instutusi WTO, dengan aturannya, telah meningkatkan keuntungan dari kerjasama sosial. Oleh karenanya, teori keadilan juga berlaku berada disana.

Menurut Frank J. Garcia, ketidaksetaraan dilingkungan internasional dalam bidang sosial dan ekonomi adalah atau dianggap adil hanya jika dapat menghasilkan keuntungan untuk semua negara khususnya negara yang kurang beruntung, dalam hal ini negara berkembang.[20] Selanjutnya, dia menambahkan bahwa perlu adanya suatu kerangka normatif yang didasari atas kewajiban moral yang mendasari hubungan antara negara maju dan negara berkembang yang tidak setara. Untuk hal ini, dia menyatakan:

> *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.*

Dari pernyataan tersebut, maka penerapan prinsip S&D merupakan jalan keluar untuk menjembatani ketidaksetaraan yang ada diantara negara maju dan negara berkembang. Prinsip ini bukan sekedar akomodasi politik namun merefleksikan kewajiban moral akibat adanya ketidaksetaraan. Dengan prinsip ini diharapkan negara berkembang bisa mendapatkan manfaat sehingga dapat memainkan perannya dengan maksimal.

Prinsip S&D ini merupakan prinsip universal yang telah dianut oleh WTO. Ketentuan-ketentuan S&D tersebar di berbagai persetujuan WTO. Selain menjiwai persetujuan-persetujuan yang ada, prinsip ini juga menjiwai perundingan yang dilakukan dalam forum WTO. Keefektifan ketentuan S&D sangat menentukan bagi negara berkembang guna menjembatani *gap* yang ada karena ketidaksetaraan. Dengan ketentuan S&D yang efektif, salah satunya, maka dapat dikatakan kepentingan negara berkembang telah terakomodir.

[20] Frank J. Garcia (1), *op cit*.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

4.1 Kerangka Konsepsional

Berikut ini akan diuraikan istilah-istilah yang akan dipergunakan dalam penelitian ini dengan tujuan menghindarkan perbedaan pengertian dan memperoleh pemahaman yang sama. Istilah-istilah tersebut tersebut :

Dumping adalah penjualan suatu komoditi disuatu pasar luar negeri pada tingkat harga yang lebih rendah dari nilai yang wajar, biasanya dianggap sebagai tingkat harga yang lebih rendah dari tingkat harga di pasar domestiknya atau di negara ketiga.[21]

Anti Dumping adalah suatu referensi dalam sistem perundang-undangan untuk mencegah dumping yang didefinisikan sebagai kebalikan dari dumping.[22]

Bea masuk anti dumping adalah pungutan negara yang dikenakan terhadap barang dumping yang menyebabkan kerugian.[23]

Draft Consolidated Chair Text of the Anti Dumping and SCM Agreements adalah dokumen No. TN/RL/W/213 tertanggal 30 Nopember 2007 yang merupakan usulan perubahan atas ketentuan anti dumping, dan subsidi yang disusun oleh ketua *NG on Rules*. *Draft* ini kemudian dikenal dengan istilah *chairman's text*.[24]

Special and Differential Treatment adalah ketentuan-ketentuan yang memberikan hak khusus kepada negara berkembang dan memperkenankan negara maju memberikan perlakuan lebih kepada negara berkembang dari negara anggota WTO lainnya.[25]

WTO adalah Organisasi Perdagangan Dunia sebagai pengganti Sekretariat GATT yang selanjutnya akan mengadministrasikan dan mengawasi pelaksanaan persetujuan perdagangan serta menyelesaikan sengketa dagang diantara negara anggota. [26]

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[21] Departemen Perindustrian dan Perdagangan, *Kamus Lengkap Perdagangan Internasional*, (Jakarta: Direktorat Jenderal Perdagangan Internasional, 98), hlm .123.

[22] *Ibid*., hlm. 22.

[23] Pasal 1 angka 15 PP No. 34 tahun 1996 tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan.

[24] Lihat *Draft Consolidated Chair Text of the Anti Dumping and SCM Agreements*, dokumen No. TN/RL/W/213 tertanggal 30 Nopember 2007. Dapat diakses melalui <http://docsonline.wto.org>

[25] Joseph E. Stiglitz dan Andrew Charlton, *Fair Trade for All : How Trade Can Promote Development*, (Oxford : Oxford University Press, 2005), hlm. 88.

[26] *Ibid.*

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

5.1 Metodologi Penelitian

Penelitian hukum pada dasarnya adalah kegiatan pemecahan masalah. Dalam melakukan penelitian ini, penulis melakukan identifikasi dan kualifikasi fakta-fakta kemudian mencari norma hukum yang berlaku guna pemecahan masalah. Berdasarkan fakta-fakta yang ada kemudian norma hukum yang berlaku maka diambil kesimpulan.[27] Penelitian ini menggunakan kajian normatif untuk memahami penerapan norma-norma terhadap fakta-fakta.

Penelitian hukum normatif akan menghasilkan kajian yang bersifat preskriptif – kritis.[28] Melalui kajian ini, penulis akan berusaha mencari jalan keluar untuk mengatasi masalah yang ada pada penelitian ini. Penelitian ini mempergunakan pendekatan kualitatif dan data yang digunakan merupakan data sekunder yang diambil melalui sumber-sumber seperti Undang-Undang, buku, kamus, internet, dll.

Bahan hukum yang digunakan penulis untuk memperoleh data adalah melalui :

1. Bahan Hukum Primer, yaitu bahan-bahan hukum yang mengikat misalnya peraturan perundang-undangan.[29] Perundang-undangan yang terkait dalam hal ini antara lain adalah Undang–Undang nomor 7 tahun 1994 tentang Pengesahan *Agreement Establishing The World Trade Organization* (Persetujuan Pembentukan Organisasi Perdagangan Dunia), Undang–Undang Nomor 24 Tahun 2000 tentang Perjanjian Internasional, 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, *General Agreement on Tariffs and Trade* 1994, dan *Agreement on Implementation of Article VI of GATT 1994*.

[27] Agus Brotosusilo, et al., *Penulisan Hukum: Buku Pegangan Dosen*. (Jakarta: Konsorsium Ilmu Hukum, Departemen Pendidikan dan Kebudayaan, 1994), hlm. 8.

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

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

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2. Bahan Hukum Sekunder, yaitu bahan-bahan hukum yang berisi penjelasan terhadap bahan-bahan hukum primer, seperti buku, hasil-hasil penelitian, artikel, jurnal yang berkaitan dengan topik penelitian. Pada penelitian ini, penulis menggunakan bahan hukum sekunder antara lain buku-buku mengenai WTO, perdagangan internasional dan anti dumping; artikel dan jurnal internasional tentang WTO dan anti dumping; dan lain-lain.
3. Bahan Hukum Tertier, yaitu bahan-bahan hukum yang berisi penjelasan terhadap bahan hukum primer dan bahan hukum sekunder. Misalnya kamus dan ensiklopedi hukum.[30] Sebagai bahan hukum tertier, penulis menggunakan antara lain *Black's Law Dictionary,* dan Kamus Lengkap Perdagangan Internasional.

6.1 Tujuan Penelitian

Tujuan dilakukannya penelitian ini adalah:

1. Untuk membandingkan ketentuan dalam *chairman's text* dengan ADA yang berlaku saat ini dan peraturan domestik Indonesia.
2. Untuk mengetahui sejauhmana ketentuan dalam *chairman's text* tersebut telah merepresentasikan kepentingan negara berkembang pada umumnya dan Indonesia khususnya.
3. Untuk mengetahui perubahan atas ketentuan anti dumping yang ideal bagi kepentingan negara berkembang, termasuk Indonesia.

7.1 Sistematika Penelitian

Dalam penelitian ini, penulis membagi ke dalam lima bab yang terdiri dari:

1. Bab 1, yang merupakan pendahuluan, menguraikan latar belakang permasalahan, perumusan masalah, metodologi yang dipergunakan, kerangka teori dan konsep yang digunakan, tujuan penelitian dan sistematika penelitian.

[30] *Ibid* hlm. 56.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

2. Bab 2, akan membahas mengenai anti dumping secara umum. Diawali dengan pengertian, sejarah, pengaturan mengenai anti dumping dalam kerangka WTO, tindakan anti dumping (*anti dumping measures*), dan terakhir pengaturan mengenai anti dumping di Indonesia.
3. Bab 3, akan membahas secara umum mengenai perubahan atas ADA dalam konteks *chairman's text*. Diawali dengan proses perubahan dan kemudian mengenai beberapa ketentuan penting yang ada di dalam *chairman's text* tersebut.
4. Bab 4, akan membuat perbandingan beberapa ketentuan penting dalam *chairman's text* tersebut dengan ADA dan peraturan domestik Indonesia. Kemudian, menilai ketentuan dalam *chairman's text* tersebut dari sudut kepentingan negara berkembang pada umumnya dan Indonesia pada khususnya dan terakhir, melihat perubahan atas ketentuan anti dumping yang ideal bagi kepentingan negara berkembang, termasuk Indonesia.
5. Bab 5, merupakan penutup yang berisikan kesimpulan dan saran atas penelitian ini.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

BAB 2
TINJAUAN UMUM MENGENAI ANTI DUMPING

2.1 Pengertian

Guna memahami apa yang dimaksud dengan anti dumping, terlebih dahulu harus dipahami mengenai pengertian dumping. Beberapa sumber memberikan definisi mengenai dumping sebagai berikut:

a. "*The act of selling a large quantity of goods at less than fair value; also, selling goods abroad at less than the market price at home.*"[31]

b. "*Exporting at prices below those charged on the domestic market (or, if none, on a third-country market) or at prices insufficient to cover the cost of the goods sold.*"[32]

c. "*A situation of international price discrimination involving the price and cost of a production in the exporting country in relation to its price in the importing country*."[33]

d. "*In general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. Thus, in the simplest of cases, one identifies dumping simply by comparing prices in two markets.*" [34]

e. "Penjualan suatu komoditi di suatu pasar luar negeri pada tingkat harga yang lebih rendah dari nilai yang wajar, biasanya dianggap sebagai tingkat harga yang lebih rendah dari tingkat harga domestiknya atau di negara ketiga."[35]

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[31] Lihat Henry Campbell Black, *Black's Law Dictionary*, 8th Ed, (Thompson West, 2004), hlm 540.

[32] John H. Jackson; William J. Davey: dan Alan O. Sykes, *Legal Problem of International Economic Relations (Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations)*, (St. Paul, Minn : West Group, 2002), hlm. 681.

[33] Peter Van Den Bossche, *op. cit.*, hlm 516.

[34] "Technical Information on Anti Dumping," <http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm>. Diakses tanggal 15 Oktober 2008

[35] Departemen Perindustrian dan Perdagangan, *op. cit.*, hlm 123.

Berdasarkan definisi-definisi diatas, maka dapat disimpulkan bahwa dumping merupakan istilah yang digunakan terhadap tindakan atau praktik perdagangan dengan menjual barang ke negara lain atau pasar luar negeri dengan harga yang lebih rendah dari harga jual di pasar domestik. Disini terlihat bahwa dumping pada prinsipnya merupakan suatu praktik diskriminasi harga. Diskriminasi ini diberlakukan terhadap barang yang dijual ke pasar luar negeri dengan barang yang dijual di pasar domestik. Definisi dumping juga, oleh sebab itu, hanya dikenal dalam kerangka perdagangan internasional karena adanya unsur penjualan di pasar luar negeri.

Dumping dalam praktik bisnis atau perdagangan internasional dianggap merupakan suatu tindakan yang wajar dalam rangka *pricing policy*.[36] Perusahaan sebagai suatu entitas tersendiri berhak untuk menentukan kebijakan ataupun strateginya guna mencapai tujuan perusahaan yang telah ditentukan. Penentuan harga jual suatu produk atau komoditi merupakan salah satu bentuk dari kebijakan perusahaan untuk mencapai tujuannya tersebut. Oleh karena itu, dumping pada hakikatnya merupakan suatu praktik yang diperbolehkan atau tidak dilarang dalam suatu perdagangan. Namun demikian, walaupun dumping merupakan suatu tindakan wajar yang dilakukan dalam perdagangan, ternyata dibalik itu terdapat alasan atau motivasi yang pada kenyataannya dapat menimbulkan kerugian bagi berbagai pihak.

Alasan atau motivasi dilakukannya suatu praktik dumping sangat bervariasi, antara lain: untuk mematikan pesaing sehingga dapat memonopoli pasar; ekspansi untuk memperbesar pangsa pasar; menambah cadangan devisa; sudah jenuhnya pasar di dalam negeri; sekedar menghabiskan stok barang karena *over-production*; atau bahkan karena ketidaksengajaan atau ketidaktahuan. Robert Willig mengklasifikasikan dumping dalam beberapa tipe, yaitu:[37]

[36] H.S Kertadjoemena, *op. cit.*, hlm 169.

[37] Robert Willig, "The Economic Effects of Anti Dumping Policy" dalam "Competition Policy and Anti Dumping", (OECD, 1995), dikutip dalam Edwin Vermulst (1), *The WTO Anti-Dumping Agreement (A Commentary),* (New York: Oxford University Press, 2005), hlm.3.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

1. *Predatory Dumping*;

   Praktik dumping yang ditujukan untuk mematikan pesaing sehingga dapat memonopoli pasar.

2. *Cyclical Dumping*;

   Menjual dengan harga rendah dikarena kelebihan kapasitas (*over-capacity*) akibat kecenderungan penurunan permintaan.

3. *Market Expansion Dumping*;

   Menjual harga lebih murah untuk ekspor guna menggapai atau merebut pangsa pasar yang lebih besar.

4. *State-Trading Dumping*;

   Menjual harga lebih murah untuk mendapatkan *hard currency*.

5. *Strategic Dumping*.

   Dumping dengan memperoleh keuntungan dari strategi secara menyeluruh termasuk ekspor dengan harga rendah dan menjaga tertutupnya pasar domestik guna menuai hasil dari monopoli dan oligopoli.

Membanjirnya produk impor dengan harga yang murah tentunya akan mengakibatkan daya saing atau *competitiveness* dari barang sejenis produksi domestik menjadi menurun atau dengan kata lain kalah bersaing. Kalah bersaingnya barang produksi domestik dapat mengakibatkan matinya pasar barang tersebut di dalam negeri yang kemudian diikuti oleh gulung tikarnya para produsen barang tersebut. Lebih lanjut, pemutusan hubungan kerja dalam jumlah besar tampaknya tidak dapat dihindarkan sehingga akan menambah angka pengangguran, mengurangi daya beli masyarakat, mengurangi pendapatan nasional, dan pastinya dapat menimbulkan gejolak sosial.

Dikarenakan praktik dumping berpotensi mengakibatkan kerugian terhadap industri domestik suatu negara, maka praktik dumping banyak ditentang oleh berbagai pihak. Sikap yang menentang adanya praktik dumping melalui kebijakan-kebijakan perdagangan itulah yang disebut dengan anti dumping.[38] Anti dumping diwujudkan atau diterapkan melalui suatu tindakan yang ditujukan untuk

[38] Lihat Sukarni, S.H., M.Hum., *Regulasi Antidumping di Bawah Bayang-bayang Pasar Bebas*, (Jakarta: Sinar Grafika, 2002), hlm 28.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

menetralkan (*counteract*) kerugian yang dialami akibat masuknya produk dumping. Tindakan ini dikenal dengan istilah tindakan anti dumping (*anti dumping measure*). Tindakan anti dumping umumnya berupa pengenaan atau pembebanan bea masuk anti dumping terhadap produk yang dijual secara dumping. Namun demikian, tidak tertutup kemungkinan adanya bentuk lain tindakan anti dumping selain dari pembebanan bea masuk anti dumping tersebut.

2.2 Sejarah dalam Kerangka Multilateral

2.2.1 *General Agreement on Tariffs and Trade* (GATT)

Pengaturan mengenai dumping atau anti dumping telah mendapatkan perhatian serius semenjak permulaan dibentuknya GATT[39]. Namun demikian, masuknya masalah anti dumping dalam negosiasi GATT bukan berarti tidak menimbulkan polemik diantara negara-negara peserta. Beberapa diantara mereka menentang pengaturan mengenai pengenaan atau pembebanan bea masuk anti dumping dimasukkan dalam negosiasi. Hal ini dikarenakan bahwa pembebanan bea masuk anti dumping merupakan suatu tindakan yang menghambat perdagangan bebas dan oleh karenanya GATT harus melarang tindakan tersebut.[40]

GATT menganggap bahwa ekspor yang disertai dengan praktik dumping dan terbukti mengakibatkan kerugian bagi usaha atau industri barang sejenis di negara pengimpor merupakan praktik perdagangan yang tidak jujur (*unfair trade practices*).[41] Oleh karenanya, GATT mengizinkan negara yang dirugikan karena adanya praktik dumping untuk mengambil suatu tindakan guna melawan praktik

[39] GATT merupakan kesepakatan multilateral di bidang perdagangan yang ditandatangani oleh 23 negara pada 30 Oktober 1947. Kesepakatan ini awalnya ditujukan untuk membentuk *International Trade Organization* (ITO), suatu badan khusus PBB yang merupakan bagian dari sistem *Bretton Woods* selain IMF dan *World Bank*. Piagam ITO kemudian ditandatangani di Havana pada bulan Maret 1948 namun proses ratifikasi oleh negara-negara peserta ternyata mengalami banyak tentangan. Tentangan terbesar datang dari kongres Amerika Serikat, yang walaupun pemerintahnya merupakan pencetus namun akhirnya tidak meratifikasi Havana Charter ini. Oleh karena itu praktis ITO secara efektif tidak dapat dijalankan. Meskipun demikian GATT sebagai suatu kesepakatan tetap merupakan instrumen multilateral yang mengatur perdagangan internasional. Negara penandatangan GATT dikenal dengan istilah *contracting parties* bukan *member*.

[40] Lihat Peter Van Den Bossche, *op. cit.*, hlm 515. Lihat juga Bruce A. Bloningen dan Thomas J. Prusa, "Anti Dumping," <http://www.nber.org/papers/w8398.pdf?new_window=1>. Diakses tanggal 15 Oktober 2008.

[41] Lihat H.S Kertadjoemena, *op. cit.*, hlm 169.

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curang tersebut. Tindakan ini merupakan suatu respon atau tanggapan terhadap barang dumping yang mengakibatkan kerugian itu. Tindakan ini berupa pembebanan bea masuk anti dumping.

GATT mengatur perihal anti dumping dalam Pasal VI GATT.[42] Pasal ini mengatur prasyarat yang harus dipenuhi sebelum suatu negara berhak membebankan bea masuk anti dumping. Yang terpenting dari prasyarat ini adalah bahwa tindakan pembebanan bea masuk anti dumping tersebut baru dapat dilakukan setelah dibuktikan dengan jelas adanya kerugian atau *injury* yang dihasilkan dari barang dumping tersebut. Oleh karenanya, tidak ada pembebanan bea masuk anti dumping untuk barang yang tidak mengakibatkan kerugian.[43]

Pasal VI GATT ini, dalam perkembangan perundingan, ternyata dirasakan tidak cukup atau tidak mampu untuk mengatur masalah anti dumping. Ketentuan pasal ini bersifat sumir atau tidak jelas sehingga diartikan dan diterapkan secara tidak konsisten.[44] Banyak negara peserta GATT (*contracting parties*) mulai merasa bahwa negara anggota lainnya menerapkan ketentuan anti-dumping sebagai suatu cara yang efektif dalam meningkatkan hambatan baru perdagangan.[45] Oleh karenanya, ketentuan pasal VI ini perlu kiranya dipertegas serta diperluas lagi.[46]

2.2.2 Putaran Kenedy (*The Kennedy Round*)

Pengaturan lebih lanjut mengenai ketentuan anti dumping akhirnya disepakati pada Putaran Kennedy[47] tahun 1967. Pada putaran ini dihasilkan kesepakatan yang dinamai dengan *Agreement on Implementation of Article VI of*

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[42] Lihat pasal VI GATT 1947.

[43] Clive Stanbrook dan Philip Bentley, *Dumping and Subsidies (The Law and Procedures Governing the Imposition of Anti dumping and Countervailing Duties in European Community)*, Ed.3, (London: Kluwer Law International Ltd, 2005), hlm. 2.

[44] M. Trebilcock dan R. Howse, *The Regulation of International Trade*, (Routledge, 1999) hlm. 167 dalam Peter Van Den Bossche, *op. cit.*, hlm 515.

[45] John H. Jackson, *The World Trading System: Law and Policy of International Economic Relation*, Ed.2, (MIT,1997), hlm 256 dalam Peter Van Den Bossche, *op. cit.*, hlm 515.

[46] Lihat H.S Kertadjoemena, *op. cit.*, hlm 169.

[47] Terdapat beberapa putaran besar dalam negosiasi perdagangan multilateral GATT yaitu setelah Konferensi Jenewa tahun 1947: Putaran Annecy tahun 1949, Putaran Torquay tahun 1950, Putaran Jenewa tahun 1956, Putaran Dillon tahun 1960-1961, Putaran Kennedy tahun 1964-1967, Putaran Tokyo tahun 1973-1979, dan Putaran Uruguay tahun 1986-1994. Clive Stanbrook dan Philip Bentley, *op. cit.*, hlm. 3.

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the General Agreement on Tariffs and Trade atau yang kemudian dikenal dengan *The Kennedy Round Anti Dumping Code*. Persetujuan ini mencoba untuk mengklarifikasi ketidakjelasan (*ambiguities*) ketentuan dari pasal VI GATT dan juga mencoba menghilangkan inkonsistensi peraturan anti dumping domestik para *contracting parties*.[48]

Selain itu, persetujuan baru yang terdiri dari 11 halaman dan 4613 kata[49] ini mencoba melengkapi ketentuan pasal VI GATT dengan menetapkan persyaratan prosedural yang tepat untuk melakukan investigasi anti dumping.[50] Namun demikian, hal terpenting dari persetujuan ini adalah pengaturan adanya keharusan bagi negara penandatangan (*signatory parties*) untuk merubah ketentuan anti dumping mereka agar sesuai (*conform*) dengan ketentuan persetujuan ini.[51] Persetujuan ini kemudian ditandatangani oleh 17 *signatory parties*.

2.2.3 Putaran Tokyo (*The Tokyo Round*)

Pada putaran berikutnya yaitu putaran Tokyo, pengaturan mengenai anti dumping kembali mengalami perubahan. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* disepakati pada tahun 1979 yang kemudian dikenal dengan *The Tokyo Round Anti Dumping Code*. Persetujuan ini menggantikan persetujuan sebelumnya yaitu *The Kennedy Round Anti Dumping Code*.

Sebagaimana persetujuan sebelumnya, persetujuan ini berisikan aturan dan prosedur tentang pelaksanaan investigasi anti dumping yang mana kini lebih diperluas dan juga diperkeras.[52] Persetujuan anti dumping baru ini kini terdiri atas 17 halaman dan 6712 kata.[53] Namun demikian, ada kekurangan yang dirasakan dalam persetujuan baru ini, yaitu *contracting parties* tidak diharuskan untuk

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[48] Raj Bhala, *International Trade Law: Theory and Practice*, Ed.2, Vol.1, (Denvers: Lexis Publishing, 2000), hlm 825.

[49] James R. Durling dan Matthew R. Nicely, *Understanding the WTO Anti-Dumping Agreement: Negotiating History and Subsequent Interpretation*, (London, Cameron May, 2002), hlm. 3. Bandingkan dengan Raj Bhala, *Ibid.*, hlm. 825 yang menyebutkan terdiri atas 14 halaman.

[50] Raj Bhala, *Ibid.*

[51] Clive Stanbrook dan Philip Bentley, *op. cit.*, hlm 3.

[52] *Ibid*., hlm 4. Lihat juga Raj Bhala, *op. cit.*, hlm 826.

[53] James R. Durling dan Matthew R. Nicely, *op. cit.*, hlm 3.

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mengadopsinya sehingga tidak semua *contracting parties* menerapkan atau melaksanakan persetujuan ini.[54]

2.2.4 Putaran Uruguay (*The Uruguay Round*)

Sementara itu perkembangan ekonomi dunia pada awal 1980-an yang diliputi oleh permasalahan-permasalahan yang semakin kompleks telah menimbulkan persaingan yang ketat di bidang perdagangan internasional. Beberapa praktik perdagangan yang tidak jujur, termasuk praktik dumping, semakin banyak digunakan sebagai langkah menghadapi persaingan ketat tersebut. Hal dirasakan kurang dapat diantisipasi oleh ketentuan-ketentuan dalam *The Anti Dumping Code*.[55]

Penggunaan ketentuan *The Anti Dumping Code* tersebut lebih banyak dimanfaatkan sebagai pengesahan tindakan anti dumping yang sesungguhnya dipakai sebagai alat proteksi terselubung untuk kepentingan perlindungan industri dalam negeri terutama di negara maju.[56] Keadaan ini dianggap menghambat kelancaran arus perdagangan. Oleh karena itu selain perlu ada perbaikan dan perluasan mengenai aturan-aturan main dalam *The Anti Dumping Code*, juga perlunya suatu peningkatan disiplin terhadap aturan tersebut.[57]

Dalam Deklarasi Punta del Este,[58] tidak secara eksplisit menyebutkan mandatnya mengenai perundingan masalah anti dumping. Perundingan masalah ini tercermin dari mandat yang diberikan untuk perundingan *MTN agreement and arrangements* yang dihasilkan dalam Putaran Tokyo. Mandat tersebut berbunyi sebagai berikut:[59] *Negotiation shall aim to improve, clarify, or expand, as*

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[54] Terdapat 25 *contracting parties* yang menandatangani persetujuan ini. Mereka adalah Amerika Serikat, Australia, Austria, Brazil, Cekoslowakia, European Community (EC), Finlandia, Hong Kong, Hungaria, India, Jepang, Kanada, Korea, Meksiko, Mesir, Norwegia, Pakistan, Polandia, Rumania, Selandia Baru, Singapura, Spanyol, Swedia, Swiss, dan Yugoslavia. Raj Bhala, *op. cit.*, hlm 826-827.

[55] Lihat H.S Kertadjoemena, *op. cit.*, hlm 170-172.

[56] Secara dominan negara maju merupakan pengguna tindakan anti dumping sedangkan negara berkembang merupakan target dari tindakan anti dumping tersebut. Semenjak bulan Juli 1980 sampai bulan Juni 1988, terdapat hampir sekitar 1200 inisasi aksi anti dumping. Hal ini telah meningkatkan ketegangan antara Utara-Selatan. Lihat Peter Van Den Bossche, *op. cit.*, hlm 515.

[57] H.S Kertadjoemena, *op. cit.*, hlm 170-172.

[58] Deklarasi ini merupakan awal atau dasar dimulainya perundingan Putaran Uruguay. Deklarasi ini dikeluarkan pada bulan September 1986.

[59] H.S Kertadjoemena *op. cit.*, hlm 171.

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appropriate, agreement and arrangements negotiated in the Tokyo Round of multilateral negotiation.

Kemudian, dalam perkembangan perundingan khususnya sidang *Mid-Term Review* di Montreal tahun 1988, dilakukanlah pertukaran pandangan dalam rangka identifikasi permasalahan baik yang terkait langsung dengan aturan *The Anti Dumping Code* maupun berbagai faktor di luar ketentuan *The Anti Dumping Code* yang dapat mempengaruhi pelaksanaan *The Anti Dumping Code*.[60] Dalam pertukaran pandangan tersebut akhirnya teridentifikasilah berbagai macam permasalahan yang kini dihadapi oleh ketentuan anti dumping yang ada.[61]

Luasnya permasalahan yang teridentifikasi dalam sidang tersebut mencerminkan luasnya aspek yang kontroversial sehingga membuat perundingan anti dumping menjadi salah satu substansi yang paling sulit dilakukan di bidang *rules*.[62] Di sisi lain, luas atau banyaknya permasalahan yang teridentifikasi menggambarkan betapa besarnya perhatian negara-negara peserta akan permasalahan anti dumping dan juga besarnya kepentingan negara-negara tersebut akan masalah anti dumping.

Perbedaan pandangan dan kepentingan yang besar diantara para negara peserta menjadikan perundingan masalah anti dumping sulit untuk mencapai kata sepakat. Suatu langkah akhirnya diambil oleh Ketua Kelompok Perunding untuk menyusun draft teks tersendiri yang akhirnya dimasukkan dalam *Draft Final Act* untuk keseluruhan substansi perundingan Putaran Uruguay. *Draft* yang baru ini mencoba untuk memperbaiki berbagai kesulitan mengenai interpretasi ketentuan dan penerapan *The Anti Dumping Code* yang dialami oleh berbagai negara, baik yang menyangkut pengalaman negara yang mempergunakan aturan anti dumping maupun negara yang ekspornya terkena tindakan anti dumping.[63]

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[60] *Ibid*., hlm 172-173.

[61] Masalah-masalah yang teridentifikasi antara lain: relevansi dari pengertian dumping dengan kenyataan banyaknya eksporir yang menghadapi ancaman tindakan anti dumping, perbaikan ketentuan besarnya bea masuk anti dumping, perbaikan ketentuan mengenai masa berlakunya suatu tindakan anti dumping, dll. Detailnya dapat dilihat di H.S Kertadjoemena, *Ibid.,*

[62] *Ibid.,* hlm 173.

[63] *Ibid.,* hlm 173-177.

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Draft baru ini, selain mempertegas ketentuan yang sudah ada, juga mencoba mengatur ketentuan-ketentuan tertentu dalam suatu rumusan yang baru. Kemudian, ketentuan-ketentuan yang sebelumnya tidak dikenal dalam *The Anti Dumping Code* dicoba untuk diperkenalkan dalam draft ini.[64] *Draft* teks ini juga menghendaki adanya notifikasi secepatnya terhadap semua tindakan anti dumping baik yang bersifat sementara (*preliminary*) ataupun yang sudah final kepada *Committee on Anti Dumping Practices*.[65]

Draft Final Act untuk keseluruhan substansi perundingan Putaran Uruguay telah dikeluarkan pada bulan Desember 1991. Namun demikian, menjelang akhir tahun 1993 ternyata Amerika Serikat kembali mengajukan usulan perubahan substansi atas draft perjanjian anti dumping.[66] Negara berkembang pada umumya dan beberapa negara maju seperti Jepang dan Norwegia menolak pembahasan mengenai usulan Amerika Serikat ini. Namun atas tekanan pihak Amerika Serikat, akhirnya beberapa hal dari usulan tersebut kemudian diajukan ke sidang *Head of Delegation* untuk mendapat keputusan.[67]

Pada sidang *Trade Negotiation Committee* tanggal 15 Desember 1993, sebagai sidang terakhir dari proses negosiasi, teks perjanjiaan bidang anti dumping ini kemudian dimasukkan ke dalam *Final Act*. Isi perjanjian tersebut secara substantif tidak banyak berbeda dengan yang telah terurai dalam *Draft Final Act*, kecuali perubahan yang disepakati dalam sidang *Head of Delegation* untuk mengakomodasi kehendak Amerika Serikat.[68]

Dari beberapa penjelasan diatas, maka kemudian dapat dikatakan bahwa masalah anti dumping dalam Putaran Uruguay merupakan isu yang paling kontroversial dalam agenda perundingan. Posisi yang diambil oleh para peserta

[64] Untuk detail ketentuan dengan rumusan baru dan juga ketentuan-ketentuan baru yang diatur dalam draft ini, lihat H.S Kertadjoemena, *Ibid.*, hlm 178-179.

[65] H.S Kertadjoemena, *Ibid.*, hlm 179.

[66] *Ibid.*, Usulan Amerika Serikat ini meliputi 11 hal antara lain: *standard or review, anti circumvention, sunset, standing, cummulation, start up, below cost sales test, termination of investigations, price averaging, dan profit for constructed value.*

[67] *Ibid.*, hlm. 180.

[68] Untuk jelasnya lihat H.S Kertadjoemena, *Ibid.*, hlm 179-180.

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sangat beragam.[69] Perang kepentingan antar negara anggota membuat perjanjian di bidang anti dumping harus diakhiri dengan tindakan kompromis. Perjanjian baru mengenai anti dumping hasil dari Putaran Uruguay[70] ini dapat dikatakan mewakili atau menggambarkan kompromi dari berbagai sudut pandang.

Walaupun perjanjian baru ini mengatur secara lebih detail permasalahan anti dumping dibandingkan dengan perjanjian sebelumnya,[71] namun yang lebih dirasakan adalah besarnya tekanan kepentingan dari para negara peserta khususnya negara maju terutama Amerika Serikat agar perjanjian baru ini dapat memfasilitasi keinginan mereka. Kepentingan para negara peserta yang bertentangan, bahkan kadang berlawanan, akhirnya tergambarkan pada bahasa dari ketentuan dalam perjanjian tersebut yang dirasakan sangat ambigu dan tidak *precise*.[72]

2.3 Anti Dumping dalam Kerangka WTO

2.3.1 Perlakuan WTO terhadap Dumping

Pengaturan mengenai anti dumping dalam WTO diatur melalui Pasal VI GATT 1994 dan juga *Agreement on Implementation of Article VI of GATT 1994* atau yang lebih dikenal dengan *the Anti Dumping Agreement* (ADA). Keduanya secara bersama-sama berlaku sebagai aturan mengenai anti dumping dalam kerangka WTO. Sebagai organisasi perdagangan internasional, WTO pada

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[69] Beberapa peserta menginginkan untuk mempermudah pembebanan tindakan anti dumping (Amerika Serikat dan Masyarakat Eropa/EC), sementara yang lainnya menginginkan penerapan disiplin yang lebih keras (Jepang, Korea, Hong Kong, dan Cina). Lihat Peter Van Den Bossche, *op. cit.*, hlm 515. Dapat disebutkan pula bahwa kepentingan para negara peserta terbagi atas tiga kelompok utama. Kelompok pertama, bermaksud memperluas *The Anti Dumping Code* agar mencakup materi-materi aktual yang telah diatur dalam perundang-undangan mereka. Misalnya ketentuan mengenai *anti circumvention* yang telah diterapkan oleh Amerika Serikat dan EC sebelumnya. Kelompok kedua, mencoba untuk membatasi beberapa ketentuan anti dumping dan kelompok ketiga, mencoba untuk menjembatani kepentingan kedua kelompok lainnya. Lihat Edwin Vermulst (2), *The Uruguay Round Agreement on Antidumping and Its Likely Impact on European Community and United States Antidumping Law and Practice*, Januari, 1992 hlm. 1-2 dalam Sukarni, S.H., M.Hum., *op. cit.*, hlm 31.

[70] Putaran Uruguay, tidak seperti sebelumnya, merupakan satu paket dimana para negara peserta harus menerima keseluruhan isi hasil perundingan tersebut. Untuk alasan ini, maka perjanjian pendukung (*supporting aggrements*) terutama anti dumping dan subsidi, digunakan istilah "*agreements*" bukan lagi "*Codes*". Clive Stanbrook dan Philip Bentley, *op. cit.*, hlm 4.

[71] Perjanjian anti dumping ini kini telah terdiri atas 26 halaman dan 11.746 kata. Lihat James R. Durling dan Matthew R. Nicely, *op. cit.*, hlm 3.

[72] Lihat Peter Van Den Bossche, *op. cit.*, hlm 515. Lihat juga Clive Stanbrook dan Philip Bentley, *Ibid.*,

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hakikatnya tidak melarang keberadaan dumping.[73] Dumping diyakini sebagai suatu kebijakan yang ditentukan oleh suatu perusahaan, dan oleh karenanya tidak diatur dalam aturan WTO.[74] Aturan WTO, secara umum, hanya membebankan kewajiban kepada negara anggota WTO dan juga mengatur langkah atau tindakan yang dapat diambil oleh mereka sebagai negara anggota. Aturan WTO tidak secara langsung mengatur tindakan atau perilaku dari suatu perusahaan. Oleh sebab itu, WTO tidak melarang praktik dumping.[75]

Namun demikian, dikarenakan praktik dumping pada kenyataanya dapat mengakibatkan kerugian terhadap industri domestik negara pengimpor, maka ketentuan Pasal VI GATT 1994 menyatakan bahwa terhadap praktik dumping tersebut dapat dipersalahkan.[76] Hanya terhadap praktik dumping yang menyebabkan kerugian inilah suatu negara dibenarkan untuk melakukan tindakan anti dumping. Oleh karena itu, Pasal VI GATT 1994 dan ADA mengatur suatu kerangka aturan substantif dan prosedural untuk menentukan bagaimana negara anggota WTO dapat menetralkan (*counteract*) atau *remedy* terhadap dumping melalui tindakan anti dumping.[77]

Suatu negara, berdasarkan ketentuan WTO, pada dasarnya tidak diwajibkan untuk memiliki aturan mengenai anti dumping dalam peraturan domestiknya.[78] Begitupula terhadap adanya sistem untuk melakukan penyelidikan dumping dan juga pembebanan tindakan anti dumping. Keberadaan ADA yang menjadi satu paket dengan ketentuan Pasal VI GATT tidak membuat setiap negara anggota WTO secara serta merta atau otomatis terikat kepadanya sehingga wajib untuk mengadopsi ketentuan tersebut dalam peraturan domestiknya.[79]

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[73] Bahkan dapat dikatakan bahwa WTO tidak melarang *injurious dumping* atau praktik dumping yang dapat mengakibatkan kerugian (*injury*) bagi industri negara pengimpor. WTO, dalam hal ini, membolehkan negara yang industrinya terkena kerugian akibat dumping untuk melakukan suatu tindakan anti dumping. Lihat Edwin Vermulst (1), *op. cit.*, hlm 2 dan lihat juga Raj Bhala, *op. cit.*, hlm 821.

[74] Lihat Peter Van Den Bossche, *op. cit.*, hlm 514-516.

[75] *Ibid*., hlm 516. Lihat juga Edwin Vermulst (1), *op. cit.*, hlm 2.

[76] Lihat Pasal VI GATT 1994

[77] Peter Van Den Bossche, *op. cit.*, hlm 516.

[78] *Ibid.*

[79] Lihat Edwin Vermulst, *op. cit.*, hlm 4.

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Pasal 1 ADA menyatakan bahwa tindakan anti dumping hanya dapat dilakukan berdasarkan keadaan sebagaimana diatur dalam Pasal VI GATT 1994 dan harus sesuai dengan prosedur penyelidikan yang dilakukan menurut ketentuan *Agreement* ini.[80] Oleh sebab itu, bila negara anggota WTO menginginkan untuk dapat menerapkan ketentuan atau aturan mengenai anti dumping, negara tersebut harus memiliki peraturan domestik yang tidak bertentangan dengan ketentuan WTO yang ada. Ketentuan-ketentuan inilah yang menjadi acuan atau dasar bagi setiap anggota WTO untuk mengimplementasikan permasalahan anti dumping baik prosedural maupun substantif dalam peraturan domestiknya.

Kemudian, dalam hal pembebanan tindakan anti dumping terhadap negara berkembang, pasal 15 ADA menyatakan bahwa negara maju harus memberikan suatu perhatian khusus atas situasi atau keadaan dari negara berkembang tersebut. Bila pembebanan bea masuk anti dumping dirasakan dapat membawa dampak bagi *essential interests* dari negara berkembang, maka negara maju juga harus mempertimbangkan kemungkinan adanya *constructive remedies* sebelum membebankan bea masuk anti dumping.[81] Ketentuan inilah yang merupakan bagian dari S&D yang secara khusus diatur dalam ADA.

2.3.2 *Dumping*, Kerugian (*Injury*), dan Hubungan Kausalitas (*Causal link*)

2.3.2.1 *Dumping*

Dari beberapa pengertian mengenai dumping sebagaimana telah disebutkan sebelumnya, tampaknya tidak sulit untuk memahami atau mencari tahu seberapa besar dumping yang telah terjadi. Hal ini cukup dengan membandingkan harga jual produk tersebut di pasar domestik (negara pengekspor) dan di negara pengimpor.

[80] Pasal 1 ADA lengkapnya menyebutkan bahwa:
An anti dumping measure shall be applied only under circumstances provided for in article VI of GATT 1994 and pursuant to investigation initiated 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 regulation.

[81] Lengkapnya pasal 15 ADA menyatakan:
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.

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Namun demikian, perhitungan sederhana ini jarang atau bahkan hampir tidak mungkin ditemukan dalam perhitungan dumping sebenarnya.

Dalam hampir semua kasus, perhitungan atas dumping memerlukan serangkaian langkah analitis yang kompleks. Langkah ini diperlukan guna menentukan harga yang wajar di pasar negara pengekspor (dikenal dengan "*normal value*") dan juga harga wajar di negara pengimpor (dikenal dengan "*export price*") sehingga dapat dilakukan perbandingan yang wajar pula.[82] Pengertian dumping dalam aturan WTO dapat dilihat dalam Pasal VI GATT 1994 dan Pasal 2.1 ADA.[83] Dumping diartikan sebagai *the introduction of a product into the commerce of another country at less than its normal value*. Dengan kata lain dapat disebutkan bahwa dumping terjadi ketika atau pada saat *normal value* dari suatu produk melebihi *export price*-nya.[84] Selisih dari *normal value* dan *export price* inilah yang dikenal dengan istilah *dumping margin*.[85]

Perhitungan *dumping margin* secara umum dapat dilakukan melalui dua metode, yaitu:[86]

- Perbandingan antara rata-rata tertimbang (*weighted average*) dari *normal value* dan *export price* atau yang dikenal dengan *weighted average to weighted average method*; dan
- Perbandingan antara *transcaction to transaction* dari *normal value* dan *export price* atau yang dikenal dengan *transaction to transaction method*.

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[82] "Technical Information on Anti Dumping," *op. cit.*, Perbandingan wajar antara *normal value* dan *export price* harus dilakukan pada tingkat perdagangan yang sama (*the same level of trade*), umumnya pada *ex-factory level* dan terhadap penjualan yang sedekat mungkin dilakukan pada saat yang sama. Dikarenakan *normal value* dan *export price* pada dasarnya merupakan harga kotor (*gross price*) yang ditemukan di pasar, seperti tercantum dalam *invoice* dan dokumen perdagangan lainnya, maka kemudian perlu dilakukan penyesuaian harga. Biaya-biaya yang terkandung dalam harga tersebut seperti biaya pengiriman dll. akan dikurangkan. Pada praktiknya, umumnya segala biaya atau pengeluaran yang terkandung dalam harga akan dikurangkan sampai menemukan harga pada saat produk tersebut pertama kali keluar dari pabrik atau yang dikenal dengan *ex-factory price*. Lihat Pasal 2.4 ADA dan Edwin Vermulst (1), *op. cit.*, hlm 46.

[83] Lihat dan bandingkan Pasal VI GATT 1994 dan Pasal 2.1 ADA.

[84] Peter Van Den Bossche, *op. cit.*, hlm 518.

[85] *Dumping margin* begitu penting untuk dipahami karena besarnya bea masuk anti dumping yang dapat dibebankan kepada produk dumping adalah maksimal sebesar *dumping margin*. *Dumping margin* biasanya ditentukan dalam bentuk prosentase (%).

[86] Pasal 2.4.2 ADA.

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Namun demikian, untuk keadaan tertentu, metode perhitungan *dumping margin* dapat dilakukan dengan membandingkan *weighted average* dari *normal value* dengan transaksi ekspor secara individual (*targeted dumping*). Metode ini dengan kata lain menggabungkan dua metode yang yang telah disebutkan sebelumnya.[87]

2.3.2.2 *Injury*

Injury atau kerugian terhadap industri domestik merupakan salah satu unsur atau prasyarat yang harus dipenuhi untuk dapat membebankan tindakan anti dumping selain dumping dan hubungan kausalitas antara keduanya. *Injury* dalam ADA didefinisikan sebagai tiga hal, yaitu: kerugian material (*material injury*) terhadap industri domestik; ancaman kerugian material (*threat of material injury*) terhadap industri domestik; dan hambatan material (*material retardation*) terhadap pendirian industri domestik.[88]

Penentuan adanya kerugian bagi domestik industri harus didasarkan pada adanya bukti positif (*positive evidence*) dan melibatkan pemeriksaan yang obyektif (*objective examination*) atas dua hal, yaitu:[89]

- Besarnya volume impor produk dumping dan pengaruhnya terhadap harga produk sejenis di pasar domestik; dan
- Dampak dari impor ini terhadap produsen domestik produk tersebut.

Sedangkan khusus terhadap *threat of material injury*, ADA memberikan pengaturan lebih lanjut pada pasal 3.7 dimana terdapat beberapa syarat ekstra yang harus dipenuhi.[90]

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[87] *Ibid*.

[88] *Footnote* 9 ADA. ADA memberikan petunjuk dan pengaturan lebih lanjut atas *material injury* dan *threat of material injury* tetapi tidak untuk *material retardation*. *Material retardation,* faktanya sangat jarang ditemukan dalam sejarah anti dumping. Lihat Peter Van Den Bossche, *op. cit.*, hlm 528 dan 533. Lihat pula Edwin Vermulst (1), *op. cit.*, hlm.46.

[89] Lihat Pasal 3.1 sampai 3.4 ADA

[90] Syarat-syarat tersebut adalah penentuan adanya ancaman kerugian harus didasarkan pada fakta bukan sebatas dugaan; perubahan keadaan yang akan membawa pada kerugian yang aktual harus secara jelas dapat diramalkan atau perkirakan dan segera terjadi; harus mempertimbangkan faktor-faktor spesifik tertentu; dan adanya kesimpulan perlu dilakukan tindakan protektif agar kerugian material tidak benar-benar terjadi. Lihat Edwin Vermulst (1), *op. cit.*, hlm 94-96.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

2.3.2.3 *Causal Link*

Suatu tindakan anti dumping, sekali lagi, hanya dapat dikenakan terhadap produk dumping yang mengakibatkan kerugian. Namun demikian, perlu pembuktian lebih lanjut apakah *injury* yang diderita oleh industri domestik tersebut benar-benar diakibatkan oleh produk dumping yang bersangkutan. Oleh karena itu, hubungan kausalitas atau *causal link* antara produk dumping dan *injury* yang terjadi menjadi sesuatu yang sangat penting dan tidak terpisahkan.

Pasal 3.5 ADA mengatur secara spesifik mengenai *causal link* ini. Pasal ini menyebutkan bahwa adanya *causal link* antara dumping dan *injury* harus dapat digambarkan atau didemonstrasikan. Demonstrasi *causal link* ini harus didasarkan pada pemeriksaan atau pengujian terhadap semua bukti yang relevan. Pemeriksaan atau pengujian juga harus dilakukan terhadap faktor-faktor lain, selain produk dumping, yang diketahui pada saat yang bersamaan mengakibatkan *injury* terhadap industri domestik. *Injury* yang dihasilkan oleh faktor-faktor ini tidak boleh dimasukkan atau diperhitungkan sebagai akibat dari produk dumping tersebut. [91] Faktor-faktor tersebut antara lain misalnya: volume dan harga impor produk yang tidak dijual dengan harga dumping, penyusutan permintaan atau perubahan pola konsumsi, dan perkembangan teknologi dan kinerja ekspor serta produktivitas industri domestik.

Sebagai catatan, ADA tidak pernah mensyaratkan impor produk dumping sebagai penyebab utama dari *injury* terhadap industri domestik. ADA hanya mensyaratkan bahwa impor produk dumping merupakan atau sebagai penyebab terjadinya *injury* dan penyebab lain dari *injury* tersebut tidak dapat diperhitungkan.[92]

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[91] Persyaratan seperti ini dikenal dengan istilah *non-attribution requirement*. Lihat Peter Van Den Bossche, *op. cit.*, hlm 533.

[92] Impor produk dumping sebagai penyebab utama *injury* merupakan pesyaratan yang dianut dalam *The Kennedy Round Anti Dumping Code*. Persyaratan ini kemudian ditarik atau tidak diberlakukan kembali pada *The Tokyo Round Anti Dumping Code*. Lihat Peter Van Den Bossche, *Ibid.*,

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

2.3.3 Penyelidikan Anti Dumping (*Anti Dumping Investigation*)

Penyelidikan anti dumping dilakukan oleh suatu badan atau institusi yang memang diberikan kewenangan untuk melakukan penyelidikan tersebut. Penyelidikan anti dumping umumnya diawali dengan adanya permohonan atau aplikasi tertulis yang diajukan oleh atau atas nama industri domestik[93]. Namun demikian, untuk keadaan tertentu penyelidikan dapat dilakukan sebagai inisiatif dari *authorities*. [94]

Permohonan tertulis tersebut harus berisikan bukti adanya *dumping*, *injury* dan *causal link*.[95] Kemudian, *authorities* harus menguji keakuratan dan kelengkapan dari bukti yang ditunjukkan dalam permohonan guna menentukan apakah sudah cukup bukti untuk memulai dilakukannya penyelidikan anti dumping.[96] Permohonan penyelidikan anti dumping harus ditolak dan penyelidikan harus segera mungkin dihentikan bila ternyata *authorities* merasa tidak cukup bukti atas *dumping* dan *injury*.[97] Bila *authorities* telah merasa puas akan permohonan dan cukup untuk memulai penyelidikan anti dumping, maka negara asal produk dumping tersebut dan juga pihak-pihak lain yang berkepentingan harus diberitahukan. Kemudian *authorities* juga wajib untuk memberikan *public notice* akan hal tersebut.[98]

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[93] Dimulainya penyelidikan anti dumping harus didasari pada tingkat dukungan dari para produsen domestik dan juga produsen-produsen yang menentang pengajuan permohonan dimana permohonan tersebut telah dibuat oleh atau atas nama domestik industri. Yang dimaksud dengan oleh atau atas nama industri domestik adalah bila permohonan tersebut didukung oleh para produsen domestik yang menghasilkan output produksi secara kumulatif lebih dari 50% dari total produksi produk sejenis baik yang mendukung atau menentang permohonan penyelidikan tersebut. Namun demikian, penyelidikan anti dumping tidak akan dimulai bila para produsen domestik yang mendukung permohonan penyelidikan hanya mewakili kurang dari 25% dari total produksi produk sejenis tersebut yang diproduksi oleh industri domestik. Lihat Pasal 5.4 ADA.

[94] *Authorities* hanya dapat melakukan penyelidikan semacam ini bila dirasakan telah ada bukti yang cukup akan keberadaaan *dumping*, *injury* dan *causal link*. Lihat Pasal 5.6 ADA.

[95] Pasal 5.1 ADA. Permohonan tersebut juga harus, jika memang tersedia, berisikan informasi-informasi penting yang diperlukan yaitu antara lain: identitas pemohon dan penjelasan besarnya volume dan nilai produksi domestik dari pemohon; deskripsi lengkap produk yang dituduh dumping beserta nama negara dan eksportir atau produsennya dan juga nama-nama importirnya; informasi mengenai harga jual produk tersebut di negara asal; dan perubahan harga beserta dampak dan konsekuensi dari dampak tersebut terhadap industri domestik yang ditunjukkan melalui faktor-faktor yang relevan. Lihat pasal 5.2 ADA.

[96] Pasal 5.3 ADA

[97] Pasal 5.8 ADA. Lihat juga Edwin Vermulst (1), *op. cit.*, hlm 117.

[98] Pasal 12.1 ADA

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

Dalam melakukan penyelidikan, *authorities* memerlukan atau menggunakan data dalam kurun waktu tertentu guna dijadikan dasar atau acuan dalam menentukan eksistensi baik *dumping* maupun *injury*. Kurun waktu inilah yang dikenal dengan periode penyelidikan atau *period of investigation*. Pemilihan kurun waktu yang diperlukan untuk penyelidikan eksistensi *dumping* dan *injury* merupakan elemen yang krusial, namun sayangnya ADA tidak mengatur mengenai aspek penting ini. Untuk itu, *The Committee on Anti Dumping Practices* mengadopsi suatu rekomendasi yang dinamakan *Recommendation Concerning the Periods of Data Collection for Anti Dumping Investigations.*[99]

Berdasarkan rekomendasi ini maka periode pengumpulan data untuk penyelidikan dumping ditentukan normalnya tidak lebih dari 12 bulan dan tidak kurang dari 6 bulan dan berakhirnya sedekat mungkin dengan tanggal dimulainya penyelidikan anti dumping. Kemudian untuk penyelidikan *injury*, periode pengumpulan data ditentukan normalnya setidaknya 3 tahun kecuali pihak atau sumber darimana data tersebut dikumpulkan hanya memiliki data untuk waktu yang lebih pendek. Namun demikian, untuk keadaan tersebut harus setidaknya mencakup keseluruhan periode pengumpulan data untuk penyelidikan dumping.

Dalam melakukan penyelidikan anti dumping, *authorities* memeriksa dan meneliti semua data pendukung guna mencari eksistensi dari *dumping*, *injury* dan *causal link*. Bila ternyata pada saat penyelidikan, *authorities* melihat adanya indikasi ketiga unsur tersebut maka ia dapat mengeluarkan keputusan sementara atau *preliminary determination*. Keputusan ini digunakan untuk mengambil suatu tindakan sementara atau *provisional anti dumping measures* guna mencegah kerugian lebih lanjut hingga nanti tercapai keputusan final atau *final determination* terhadap eksistensi ketiga unsur tersebut.

Penyelidikan anti dumping harus segera diakhiri bila *authorities* menemukan terdapat *de minimis dumping margin* atau *negligible import volume*. Yang dimaksud dengan *de minimis dumping* margin adalah *dumping margin* yang besarnya kurang dari dua persen, dilihat dari *export price*. Sedangkan *negligible*

[99] G/ADP/6, diadopsi oleh *The Committee on Anti Dumping Practices* pada 5 Mei 2000. Lihat Peter Van Den Bossche, *op. cit.*, hlm 538.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

import volume maksudnya adalah volume impor barang dumping dari suatu negara kurang dari tiga persen dari total impor, kecuali negara-negara dengan volume impor kurang dari tiga persen tersebut secara kolektif berjumlah lebih dari tujuh persen dari total impor.[100]

Penyelidikan anti dumping, berdasarkan pasal 5.10 ADA, harus berakhir dalam waktu 1 tahun setelah dimulainya penyelidikan dan untuk keadaan tertentu tidak boleh lebih dari 18 bulan setelah penyelidikan dimulai. Jadi pada dasarnya, setelah paling lama 18 bulan, seharusnya telah ada kepastian apakah terhadap produk yang dituduh dumping tersebut akan dikenakan tindakan anti dumping atau tidak. Namun tidak demikian pada praktik kesehariannya, masa waktu 18 bulan ini seringkali terlewatkan dan belum ada keputusan apakah akan membebankan tindakan anti dumping atau tidak terhadap produk yang dituduh dumping tersebut.

2.3.4 Tindakan Anti Dumping (*Anti Dumping Measures*)

Sebagaimana telah dijelaskan sebelumnya, WTO membolehkan suatu negara untuk melakukan tindakan anti dumping terhadap praktik dumping yang dapat mengakibatkan kerugian terhadap industri domestiknya. Namun demikian, WTO membatasi tindakan yang dibolehkan sebagai respon atau tanggapan atas *injurious dumping* tersebut. Tidak semua bentuk tindakan anti dumping diakui atau diperbolehkan oleh aturan WTO. Tindakan anti dumping yang dikenal dalam aturan WTO adalah:[101] *provisional measures, price undertakings*, dan *definitive anti dumping duties*.

2.3.4.1 *Provisional Measures*

Provisional anti dumping measures (tindakan sementara) adalah tindakan pengamanan sementara yang dilakukan guna menghindari kerugian lebih lanjut akibat produk dumping. Pengaturan mengenai pembebanan tindakan sementara ini diatur dalam pasal 7 ADA. Untuk dapat menerapkan tindakan sementara ini, sebelumnya telah harus ada penyelidikan dimana sementara hasil penyelidikan

[100] Pasal 5.8 ADA
[101] Lihat Peter Van Den Bossche, *op. cit.*, hlm 517-518 dan 541-549.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

tersebut mengindikasikan adanya eksistensi dari *dumping*, *injury*, dan *causal link*.[102] Kemudian, berdasarkan indikasi tersebut maka *authorities* memutuskan bahwa perlu untuk mengenakan tindakan sementara guna mencegah atau menghindari terjadinya kerugian lebih lanjut.[103]

Penerapan tindakan sementara ini dapat berupa pembebanan bea masuk anti dumping sementara (*provisional duty*) atau lebih disarankan berupa suatu jaminan. Jaminan ini dapat berbentuk *cash deposit* ataupun obligasi (*bond*) yang besarnya sebanding dengan *provisional duty*.[104] Pembebanan tindakan sementara ini tidak dapat dilakukan sebelum 60 hari sejak dimulainya penyelidikan.[105] Kemudian, lama penerapan tindakan sementara ini tidak boleh lebih dari 4 bulan kecuali untuk keadaan tertentu dapat diberlakukan hingga 6 bulan dan 9 bulan.[106] Bila keputusan final dari penyelidikan menunjukkan bahwa *provisional anti dumping duty* yang dibebankan ternyata lebih besar dari *definitive anti dumping duties* maka selisih bea tersebut harus dikembalikan. Begitu pula untuk *cash deposit* dan *obligasi*, bila keputusan final hasilnya adalah negatif, maka *cash deposit* harus dikembalikan.

2.3.4.2 *Price Undertakings*

Tindakan anti dumping lain yang dikenal dalam aturan WTO adalah *price undertakings*. Tindakan ini diatur dalam pasal 8 ADA. *Price undertakings* merupakan suatu kesepakatan sukarela untuk merevisi harga ekspor atau menghentikan ekspor produk dumping sehingga *authorities* merasa kerugian yang diakibatkan oleh produk dumping (*injurious effect*) telah dihapuskan.[107] Sama halnya dengan *provisional measure*, *price undertakings* hanya dapat dilakukan setelah hasil penyelidikan sementara mengindikasikan eksistensi *dumping*, *injury*, dan *causal link*.[108]

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[102] Pasal 7.1 (ii) ADA
[103] Pasal 7.1 (iii) ADA
[104] Pasal 7.2 ADA
[105] Pasal 7.3 ADA
[106] Pasal 7.4 ADA
[107] Pasal 8.1 ADA
[108] Pasal 8.2 ADA

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

Price undertakings dapat diajukan baik oleh pihak eksportir maupun oleh *authorities*. Namun demikian, tidak ada kewajiban atau paksaan bagi kedua belah pihak untuk sepakat mengambil tindakan anti dumping ini. Dengan adanya kesepakatan ini, proses penyelidikan akan tetap berjalan, namun demikian dapat pula untuk ditunda atau dihentikan jika kedua belah pihak sepakat menginginkannya. Bila pada hasil penyelidikan final (*final determination*) tidak terbukti eksistensi dari ketiga unsur baik *dumping*, *injury*, dan *causal link*, maka *price undertakings* secara otomatis tidak berlaku lagi atau berakhir.[109]

2.3.4.3 *Definitive Anti Dumping Duties*

Terakhir, tindakan anti dumping yang diperkenankan oleh aturan WTO adalah pembebanan bea masuk anti dumping (*definitive anti dumping duties*). Pembebanan dan pengumpulan bea masuk anti dumping diatur dalam pasal 9 ADA. Pasal ini menetapkan suatu prinsip umum dimana pembebanan bea masuk anti dumping dan juga besarannya, walaupun semua persyaratan telah dipenuhi, merupakan suatu hal yang bersifat *optional*.[110] Pembebanan bea masuk anti dumping diserahkan kepada otoritas yang berwenang apakah memang diperlukan untuk membebankan bea masuk anti dumping.[111] Terbuka kemungkinan bila ternyata otoritas yang berwenang memutuskan untuk tidak membebankan bea masuk anti dumping walaupun telah terbukti adanya dumping dan mengakibatkan kerugian.

Pasal ini kemudian juga mengatur mengenai pembebanan bea masuk anti dumping yang lebih kecil dari *dumping margin* yang dikenal dengan istilah *lesser duty rule*[112]. Aturan ini menyebutkan bahwa pembebanan bea masuk anti dumping yang lebih kecil dari *margin dumping* merupakan suatu yang *desirable*. Hal ini

[109] Terdapat pengecualian untuk hal ini, lihat pasal 8.4 ADA

[110] Pasal 9.1 ADA

[111] Oleh karena itu, banyak negara anggota WTO yang menerapkan *public interest test* sebelum membebankan bea masuk anti dumping terhadap suatu produk dumping. Jadi walaupun telah dibuktikan adanya dumping dan juga kerugian yang diakibatkan oleh produk dumping tersebut, keputusan untuk membebankan bea masuk anti dumping tergantung dari hasil *public interest test* negara pengimpor. Pada kenyataannya, memang di hampir semua kasus hasil dari *public interest test* mendukung pembebanan bea masuk anti dumping. Lihat Edwin Vermulst (1), *op. cit.*, hlm 171.

[112] Ketentuan ini juga berlaku untuk tindakan anti dumping yang berupa pembebanan bea masuk sementara atau *provisional duty*.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

dapat dilakukan bila pembebanan bea masuk tersebut dirasakan sudah cukup untuk menghilangkan kerugian dari industri domestik.

Bea masuk anti dumping dibebankan kepada setiap produk yang telah terbukti dumping dan mengakibatkan kerugian (*non-discriminatory basis*).[113] Bea masuk anti dumping umumnya dikenakan secara individual dan dengan besaran atau nilai yang berbeda tergantung *dumping margin* yang ditemukan pada produk dumping tiap-tiap eksportir.[114] Namun dalam keadaan tertentu dimana sulit untuk dapat menerapkan hal tersebut, seperti karena sangat banyaknya eksportir yang juga berasal dari berbagai macam negara maka pengenaan bea masuk seperti diatas dimungkinkan untuk tidak diberlakukan.[115]

Bea masuk anti dumping ini pada dasarnya hanya dapat dikenakan setelah hasil penyelidikan dumping baik *preliminary determination* maupun *final determination* menunjukkan eksistensi *dumping*, *injury* dan *causal link*. Oleh karenanya itu penerapan bea masuk anti dumping secara *retroactive* atau berlaku surut secara prinsip dilarang.[116] Namun demikian, dalam keadaan tertentu penerapan secara *retroactive* atas bea masuk anti dumping diperbolehkan oleh aturan WTO. Pengaturan mengenai hal ini diatur dalam pasal 10 ADA.

Pembebanan bea masuk anti dumping (*definitive duties*), menurut pasal 11.1 ADA, tetap diberlakukan selama masih diperlukan untuk menetralkan *injury* akibat produk dumping. *Authorities* harus melakukan peninjauan (*review*) terhadap perlu tidaknya dilanjutkan pembebanan bea masuk anti dumping. *Review* ini dapat diajukan baik berdasarkan inisiatif sendiri ataupun permintaan dari pihak-pihak yang berkepentingan. Bila hasil *review* menunjukkan bahwa keberadaan bea masuk anti dumping tidak lagi diperlukan, maka sesegera mungkin bea masuk tersebut harus dicabut.[117]

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[113] Pasal 9.2 ADA. Pengecualiannya adalah bila sebelumnya telah ada *price undertakings*.

[114] *Ibid.*, Lihat juga pasal 6 ADA. Perlu disampaikan juga bahwa bea masuk anti dumping dikenakan sebagai tambahan atas bea masuk yang telah dikenakan sebelumnya terhadap produk impor tersebut.

[115] Pasal 9.2 ADA.

[116] Peter Van Den Bossche, *op. cit.*, hlm 544.

[117] Pasal 11.2 ADA.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

Kemudian, berdasarkan pasal 11.3 ADA maka setiap bea masuk anti dumping harus dicabut tidak lebih dari lima tahun sejak diberlakukan. Pengecualian dari ketentuan ini adalah bila ternyata *authorities* berpendapat bahwa berakhirnya atau dicabutnya pemberlakukan bea masuk anti dumping sepertinya tidak menghilangkan adanya dumping dan *injury*. Keputusan *authorities* dalam hal ini juga harus didasarkan pada hasil suatu *review* yang telah dilakukan sebelumnya. Peninjauan atas tindakan anti dumping dalam masa keberlakuan lima tahun ini dikenal dengan istilah "*sunset review*".[118]

2.4 Anti Dumping dalam Peraturan Domestik Indonesia

Setelah ditandatanganinya *Marrakesh Agreement Establishing The World Trade Organization* (Persetujuan WTO), Indonesia secara resmi meratifikasi Persetujuan tersebut ke dalam peraturan domestiknya melalui Undang-Undang No. 7 tahun 1994 tentang Pengesahan *Agreement Establishing The World Trade Organization* (Persetujuan Pembentukan Organisasi Perdagangan Dunia). Persetujuan WTO ini berisikan berbagai macam persetujuan hasil negosiasi selama ini termasuk didalamnya persetujuan mengenai anti dumping.

Sebagaimana telah dijelaskan sebelumnya, suatu negara pada dasarnya tidak secara otomatis tunduk terhadap aturan anti dumping WTO. Namun demikian, terhadap negara yang ingin dapat menerapkan tindakan anti dumping maka negara tersebut harus menyesuaikan aturan domestiknya agar sesuai dengan ketentuan WTO. Indonesia, sebagai konsekuensi agar dapat menerapkan tindakan anti dumping, kemudian harus memasukkan atau mengatur masalah anti dumping ini kedalam peraturan domestiknya. Pengaturan mengenai anti dumping dalam peraturan domestik Indonesia dapat ditemukan pada Undang-Undang No.10 Tahun 1995 tentang Kepabeanan yang kemudian dirubah menjadi Undang-Undang No.17 tahun 2006.

[118] Keputusan *review* ini normalnya harus diputuskan dalam waktu 12 bulan sejak dimulainya *review*. Lihat pasal 11.3 dan 11.4 ADA.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

Dalam Undang-Undang ini, pengaturan mengenai anti dumping diatur dalam Bab IV bagian pertama dan bagian kelima, tepatnya pasal 18, pasal 19 dan pasal 23C. Undang-undang ini tidak mengatur secara rinci mengenai anti dumping dimana di dalamnya hanya mengatur mengenai syarat, besaran bea masuk anti dumping dan pihak yang berwenang menetapkannya. Kemudian, Undang-Undang ini memandatkan adanya pengaturan lebih lanjut mengenai anti dumping yang akan diatur dalam Peraturan Pemerintah.

Peraturan Pemerintah yang kemudian mengatur lebih lanjut masalah anti dumping adalah Peraturan Pemerintah No. 34 Tahun 1996 tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan. Peraturan pemerintah inilah yang secara lebih detail mengatur mengenai persyaratan dan tata cara pengenaan bea masuk anti dumping. Lebih lanjut, untuk menangani permasalahan yang berkaitan dengan upaya penanggulangan importasi produk dumping maka Menteri Perindustrian dan Perdagangan berdasarkan Peraturan Pemerintah ini membentuk Komite Anti Dumping Indonesia (KADI).

KADI dibentuk berdasarkan Keputusan Menteri Perindustrian dan Perdagangan No.136/MPP/KEP/6/1996 tentang Pembentukan Komite Anti Dumping Indonesia. KADI memiliki tugas yaitu: melakukan penyelidikan terhadap barang dumping (juga barang mengandung subsidi); mengumpulkan, meneliti, dan mengolah bukti dan informasi; mengusulkan pengenaan bea masuk anti dumping (dan bea masuk imbalan), serta melaksanakan tugas lain yang ditetapkan oleh Menteri perindustrian dan Perdagangan.[119]

Selain peraturan-peraturan diatas, pengaturan mengenai masalah anti dumping kemudian juga dapat ditemukan pada peraturan-peraturan pelaksana lainnya khususnya pada tingkat keputusan menteri untuk pembebanan tindakan anti dumping. Peraturan-peraturan tersebut tidak terlepas dari kewajiban untuk *conform* atau sesuai dengan ketentuan anti dumping WTO sebagai konsekuensi dari 'pilihan' Indonesia untuk dapat menerapkan tindakan anti dumping.

[119] PP No. 34/1996 pasal 7.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

BAB 3

PERUBAHAN ATAS *THE ANTI DUMPING AGREEMENT* (*CHAIRMAN'S TEXT*)

3.1. Proses Perubahan

3.1.1 Deklarasi Doha

Sejak terbentuknya WTO tahun 1995 telah diselenggarakan enam kali Konferensi Tingkat Menteri (KTM) sebagai forum pengambil kebijakan tertinggi di WTO. KTM pertama dilangsungkan di Singapura tahun 1997; KTM kedua di Jenewa, Swiss tahun 1998; KTM ketiga di Seattle, Amerika Serikat tahun 1999; KTM keempat di Doha, Qatar tahun 2001; KTM kelima di Cancun, Meksiko tahun 2003; dan KTM keenam diselenggarakan di Hong Kong tahun 2005.

Pada KTM keempat di Doha, Qatar tahun 2001 dihasilkan suatu dokumen utama yang disepakati oleh para menteri negara anggota WTO yaitu Deklarasi Menteri (*Ministerial Declaration*) atau yang dikenal dengan Deklarasi Doha[120]. Dokumen ini merupakan awal atau tanda diluncurkan suatu putaran perundingan baru yang dikenal dengan Putaran Doha (*The Doha Round*). Deklarasi ini menghasilkan suatu Program Kerja (*Work Programme*) untuk membahas isu-isu yang akan menjadi agenda dalam putaran perundingan ini.

Deklarasi Doha mencanangkan segera dimulainya perundingan lebih lanjut mengenai beberapa bidang spesifik yaitu: perdagangan jasa, produk pertanian, tarif industri (akses pasar untuk produk non-pertanian), lingkungan, isu-isu implementasi, Hak atas Kekayaan Intelektual (HKI), penyelesaian sengketa, dan aturan-aturan WTO (WTO *rules*). Kemudian, deklarasi ini memberikan mandat yang ditujukan untuk tercapainya konsensus mengenai *Singapore issues*[121] dan juga

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[120] Keputusan ini diadopsi pada tanggal 14 Nopember 2001. Untuk lengkapnya dapat dilihat pada WT/MIN(01)/DEC/1 tanggal 20 Nopember 2001. Dapat diakses melalui <http://docsonline.wto.org>

[121] Yang dikenal dengan *Singapore Issues* adalah: perdagangan dan investasi (*trade and investment*), perdagangan dan kebijakan kompetisi (*trade and competition policy*), transparansi dalam pengadaan pemerintah (*transparency in government procurement*), dan fasilitasi perdagangan (*trade facilitation*).

mandat untuk mengadakan pembicaraan persiapan mengenai empat bidang lain yaitu: *electronic commerce*, *small economies*, hubungan antara perdagangan dengan hutang dan keuangan, dan kaitan antara perdagangan dengan alih teknologi.

Secara khusus, para menteri dalam deklarasinya ini juga mengeluarkan atau mengadopsi suatu keputusan yang dinamakan *Decision on Implementation-Related Issues and Concerns*[122]. Keputusan ini merupakan dokumen tersendiri yang memuat prinsip-prinsip dan panduan mengenai berbagai isu yang terkait dengan masalah komitmen di berbagai bidang.[123] Dokumen ini dapat dikatakan sebagai tindak lanjut dari masalah-masalah yang dihadapi oleh negara anggota WTO khususnya negara berkembang dalam mengimplementasikan ketentuan WTO yang ada. Bidang-bidang atau isu yang masuk di dalam *Decision on Implementation-Related Issues and Concerns* ini antara lain: pertanian, tekstil, anti dumping, subsidi, *sanitary and phytosanitary measures*, HKI, hambatan teknis perdagangan, dan perlakuan khusus dan berbeda (*special and differential treatment*).

Kemudian, deklarasi ini memutuskan pembentukan secara resmi suatu komite yang bertugas sebagai badan pengawas jalannya perundingan secara keseluruhan. Komite ini bernama *Trade Negotiation Committee* (TNC). Komite ini harus menetapkan mekanisme perundingan yang cocok atau tepat dan juga mengawasi perkembangan (*progress*) dari perundingan.[124] Pada tanggal 1 Pebruari 2002, TNC telah menyetujui suatu struktur perundingan untuk isu-isu terkait dimana untuk isu *rules* (anti dumping, *subsidies and countervailing measures*, dan *regional trade agreements*) perundingan akan dilakukan dalam *Negotiating Group on Rules* (*NG on Rules*) yang merupakan struktur baru yang secara khusus dibentuk.[125]

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[122] WT/MIN(01)/17 tanggal 20 Nopember 2001. Dapat diakses melalui <http://docsonline.wto.org>

[123] Departemen Luar Negeri, *op. cit.*, hlm 71.

[124] Paragraf 46 Deklarasi Doha.

[125] Lihat TN/C/1 tanggal 4 Pebruari 2002. Dapat diakses melalui <http://docsonline.wto.org>

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Perlu diketahui, keputusan-keputusan yang telah dihasilkan dalam KTM IV di Doha ini, sebagai satu paket, kemudian dikenal dengan sebutan "Agenda Pembangunan Doha" (*Doha Development Agenda*/DDA). Penyebutan kata Pembangunan atau *Development* disini disebabkan karena didalamnya termuat isu-isu pembangunan yang menjadi kepentingan negara berkembang termasuk di dalamnya negara terbelakang. Isu-isu pembangunan ini antara lain adalah: kerangka kerja bantuan teknik WTO, Program Kerja bagi negara terbelakang, dan Program Kerja untuk mengintegrasikan secara penuh negara-negara kecil dalam WTO.

Sebagaimana disebutkan sebelumnya, deklarasi Doha mencanangkan dimulainya suatu perundingan baru mengenai berbagai macam isu perdagangan. Salah satu isu yang disepakati menjadi bagian dari agenda perundingan putaran Doha ini adalah masalah anti dumping. Hal ini dapat dilihat pada *paragraph* 28 deklarasi Doha yang menyebutkan:

> *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 Agreements on 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.*

Berdasarkan *paragraph* tersebut maka dengan demikian dapat dikatakan bahwa diluncurkannya perundingan mengenai *rules*, termasuk di dalamnya masalah anti dumping, ditujukan untuk lebih memperjelas dan meningkatkan atau memperbaiki aturan mengenai anti dumping (dan juga subsidi). Selain itu, dipertegas disini bahwa perundingan mengenai masalah anti dumping harus dilakukan dengan tetap mempertimbangkan kepentingan atau kebutuhan dari negara berkembang dan terbelakang.

3.1.2 KTM V di Cancun dan *July Package* 2004

Sejak dicanangkannya DDA, perundingan Putaran Doha telah mengalami banyak pasang surut yang ditandai dengan beberapa kali kemacetan sebagai akibat timbulnya perbedaan yang tajam diantara negara anggota WTO khususnya untuk isu pertanian, NAMA, dan jasa. Selain itu, perundingan untuk membahas

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penekanan aspek pembangunan sebagaimana dimandatkan dalam DDA juga berjalan sangat lamban dan sering mengalami kebuntuan. Kebuntuan ini disebabkan karena besarnya kepentingan negara-negara anggota WTO terhadap isu-isu pertanian, NAMA, jasa dan pembangunan tersebut. Isu-isu ini diyakini memiliki kandungan kepentingan ekonomi, sosial dan politik yang sangat tinggi sehingga sulit bagi negara-negara anggota WTO untuk merubah pandangan atau posisinya sehingga berujung pada macetnya perundingan Putaran Doha.[126]

KTM kelima yang diselenggarakan di Cancun, Meksiko tahun 2003 merupakan contoh kegagalan yang dialami para negara anggota WTO untuk menindaklanjuti mandat yang diberikan pada KTM sebelumnya di Doha, Qatar. KTM ini awalnya bertujuan untuk mengadakan peninjauan terhadap implementasi dari kesepakatan-kesepakatan yang telah dicapai pada KTM Doha termasuk pembuatan kerangka perundingan yang lebih riil dan juga kemungkinan diluncurkannya perundingan atas *Singapore issues*. Pada perkembangan berikutnya, ternyata perundingan mengalami kebuntuan dimana para negara anggota WTO gagal untuk menyepakati secara konsensus terutama terhadap *draft* teks isu pertanian, NAMA, dan *Singapore issues*. Oleh karena itu, KTM kelima di Cancun ini pada akhirnya tidak dapat menghasilkan suatu *Ministerial Declaration* yang rinci dan substantif seperti halnya pada KTM keempat di Doha. KTM ini hanya menghasilkan suatu "*Ministerial Statement*"[127] yang sangat singkat dan tidak substantif.[128]

Berangkat dari kegagalan KTM di Cancun, maka perhatian untuk mengembalikan momentum perundingan Putaran Doha semakin lama semakin membesar. Para negara anggota WTO mengupayakan agar arah dan pembentukan kerangka untuk perundingan lebih lanjut khususnya isu-isu tertentu dapat segera disepakati. Setelah melalui perundingan yang intensif sejak awal Januari 2004, maka pada tanggal 1 Agustus 2004 disepakati suatu keputusan yang dikeluarkan oleh *General Council* WTO tentang Program Kerja Doha. Keputusan ini

[126] Departemen Luar Negeri, *op. cit.*, hlm 76.

[127] WT/MIN(03)/20 tanggal 23 September 2003. Dapat diakses melalui <http://docsonline.wto.org>

[128] Lihat Departemen Luar Negeri, *op. cit.*, hlm 78-79.

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menyepakati kerangka kerja perundingan lebih lanjut untuk Putaran Doha bagi lima isu utama yaitu pertanian, NAMA, jasa, isu-isu implementasi dan pembangunan, serta *trade facilitation*. Perundingan isu-isu lain dalam DDA seperti HKI, penyelesaian sengketa, lingkungan, termasuk *rules* tetap berjalan sesuai mandat dari Deklarasi Doha. Keputusan *General Council* WTO perihal Program Kerja Doha ini kemudian dikenal atau lebih sering disebut sebagai Paket Juli (*July Package*).[129]

3.1.3 KTM VI di Hong Kong

Pada KTM keenam di Hong Kong tahun 2005, para menteri negara WTO kembali mengeluarkan suatu *Ministerial Declaration*[130]. Deklarasi ini merupakan momentum penggerak jalannya proses perundingan Putaran Doha. Suatu Program Kerja kembali dihasilkan yang berisikan arahan dan *timeline* bagi tiap isu yang dirundingkan.[131] Untuk masalah anti dumping, Deklarasi ini menyepakati untuk meneruskan perundingan guna menyempurnakan peraturan mengenai anti dumping yang ada. Hal ini dapat dilihat pada *paragraph* 28 *Hong Kong Ministerial Declaration* yang menyebutkan: *We recall the mandates in paragraphs 28 (and 29) of the Doha Ministerial Declaration and reaffirm our commitment to the negotiations on rules, as we set forth in Annex D to this document.*

Dalam *Annex D Ministerial Declaration* ini diakui pentingnya pencapaian hasil substantif dari semua aspek yang menjadi mandat untuk isu *rules* dalam bentuk suatu perubahan atau amandemen atas ADA (dan juga *Subsidies and Countervailing Measures* Agreement/ASCM). Pencapaian ini diakui penting bagi perkembangan sistem perdagangan multilateral WTO yang *rule-based* dan juga keseimbangan atas hasil DDA.[132] Kemudian, ditekankan pula bahwa perundingan masalah anti dumping memang ditujukan untuk mencapai perbaikan atau perkembangan lebih lanjut khususnya dalam hal transparansi, *predictability* dan

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[129] *Ibid.*, hlm 81-86.

[130] WT/MIN(05)/DEC tanggal 22 December 2005. Dapat diakses melalui <http://docsonline.wto.org>

[131] Departemen Luar Negeri, *op. cit.*, hlm 86.

[132] *Paragraph 1 Annex D Hong Kong Ministerial Declaration.*

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kejelasan aturan. Perbaikan ini dilakukan agar bermanfaat bagi semua negara anggota WTO khususnya negara berkembang dan terbelakang.[133]

Para menteri, pada *annex* ini, mengharuskan dalam perundingan masalah anti dumping untuk lebih memperjelas dan memperbaiki atau mengembangkan aturan anti dumping dalam hal penentuan *dumping*, *injury* dan *causation* serta pelaksanaan tindakan anti dumping. Perbaikan dan penjelasan aturan anti dumping ini juga ditujukan terhadap prosedur penyelidikan anti dumping baik inisiasi, pelaksanaan dan penyelesaian. Demikian pula terhadap masalah tingkat, cakupan dan jangka waktu penerapan tindakan anti dumping. *Annex* ini kemudian juga mencatat banyaknya proposal-proposal mengenai isu-isu dalam hal anti dumping yang kiranya sedang dibahas oleh *NG on Rules*. Proposal-proposal yang telah bersifat rinci atau detail ini antara lain membahas mengenai penentuan *injury* atau *causation*, *lesser duty rule*, *sunset review*, *circumvention*, penyelesaian sengketa, definisi impor produk dumping, inisiasi dan penyelesaian penyelidikan dumping, dll. Pembahasan mengenai proposal-proposal ini termasuk proposal yang akan diajukan di kemudian hari akan tetap terus dilakukan setelah berakhirnya KTM Hong Kong.[134]

Lebih lanjut, para menteri negara anggota WTO meminta *NG on Rules* untuk mengintensifkan dan mempercepat proses perundingan atas semua hal yang telah dimandatkan berdasarkan proposal yang telah atau akan diajukan. Selain itu, para menteri juga meminta agar *NG on Rules* dapat menyelesaikan proses analisa atas proposal tersebut sesegera mungkin. Terakhir, suatu mandat penting diberikan oleh para menteri negara anggota WTO, dalam *paragraph* 11, kepada ketua (*chairman*) *NG on Rules* yaitu ia harus mempersiapkan suatu *draft* konsolidasi atas ADA. *Draft* ini merupakan dokumen yang kemudian akan menjadi dasar atau acuan untuk perundingan tahap akhir atas isu anti dumping. *Draft* inilah yang umumnya dikenal kemudian dengan istilah *chairman's text*.

[133] *Paragraph 2 Annex D Hong Kong Ministerial Declaration.*
[134] *Paragraph 6 Annex D Hong Kong Ministerial Declaration.*

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3.1.4 *Chairman's Text*

Menindaklanjuti Program Kerja Doha yang telah dicanangkan dalam Deklarasi Doha, dan telah kemudian lebih diperinci dalam Hong Kong *Ministerial Declaration*, pada tanggal 30 November 2007 ketua *NG on Rules* akhirnya mengeluarkan suatu dokumen yaitu *Draft Consolidated Chair Texts of the AD and SCM Agreements*.[135] Dokumen *chairman's text* ini terdiri atas *draft* perubahan terhadap ADA dan juga ASCM. Khusus untuk ADA, *draft* ini ternyata tidak menambah jumlah pasal yang ada yaitu tetap 18 pasal ditambah dengan adanya tiga buah *annex*. Walaupun tidak menambah jumlah pasal, *draft* ini memperlihatkan banyaknya ketentuan dalam ADA yang direncanakan atau diusulkan untuk dilakukan perubahan.

Disusunnya *draft* perubahan atas ADA ini menandakan suatu babak baru dalam proses perundingan masalah anti dumping guna memenuhi mandat yang telah diberikan dalam Putaran Doha. *Draft* ini akan menjadi acuan jalannya perundingan atas isu anti dumping hingga pada akhirnya dapat menjadi suatu *agreement* baru yang mengatur masalah anti dumping sebagai bagian atau hasil dari Putaran Doha.

Dalam pengantarnya, ketua *NG on Rules* menyatakan bahwa *draft* ini sesungguhnya dibuat diatas suatu prinsip yaitu kebutuhan untuk mencapai suatu keseimbangan dalam perundingan. Keseimbangan disini maksudnya adalah keseimbangan yang mempertimbangkan kepentingan semua peserta perundingan atas isu anti dumping (dan juga subsidi). Oleh karenanya, beliau berupaya untuk menghasilkan suatu *draft* yang dapat memfasilitasi perundingan untuk hasil yang seimbang (*balanced outcome*).

Ketua *NG on Rules* mengakui bahwa meskipun *draft* yang ia buat ini ditujukan terhadap segala aspek sebagaimana dimandatkan dalam Putaran Doha, *draft* ini tidak mencerminkan atau mewakili semua proposal yang telah diajukan oleh peserta atau negara anggota WTO kepada *NG on Rules*. Namun demikian, ia kemudian menyatakan bahwa hal ini tidaklah menjadi suatu rintangan. Isu-isu yang

[135] TN/RL/W/213 tanggal 30 Nopember 2007. Dapat diakses melalui <http://docsonline.wto.org>

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diangkat atau diajukan dalam proposal-proposal tersebut dapat saja ditujukan atau dipertimbangkan pada revisi atau perubahan yang akan datang. Selanjutnya, ketua *NG on Rules* menyatakan bahwa tujuan ia mengedarkan *draft* perubahan ini adalah untuk mendapatkan petunjuk lebih lanjut dari para negara peserta.

Kemudian, ketua *NG on Rules* meyakini atas *draft* ini 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* ini. Hal ini diyakini sebagai suatu yang wajar atau normal dalam suatu perundingan yang melibatkan banyak peserta. Banyaknya peserta ini tentunya juga diikuti dengan tujuan atau kepentingan mereka yang beragam dan bahkan sering bertentangan.

Dalam bagian akhir pengantarnya, ketua *NG on Rules* tidak lupa menekankan kembali bahwa *draft* yang ia buat ini bukanlah akhir dari proses perundingan namun merupakan langkah awal dari babak baru yang memerlukan diskusi lebih lanjut secara intensif. Ia juga mengharapkan para peserta untuk mempertimbangkan kebutuhan atau kepentingan dari peserta lain dalam perundingan ini sebagaimana mereka memperjuangkan kebutuhan mereka.

3.2. Beberapa Isu Penting dalam *Chairman's Text*

Berbagai macam ketentuan di bidang anti dumping, dalam *chairman's text*, diusulkan atau direncanakan untuk mengalami perubahan. Perubahan-perubahan dimaksud baik berupa penambahan, pengurangan, maupun modifikasi dari ketentuan yang sudah ada. Hal ini dilakukan untuk menyempurnakan ketentuan anti dumping yang ada guna mencapai hasil yang lebih baik dan tentunya mengedepankan kepentingan negara berkembang. Karena banyaknya usulan perubahan ketentuan dalam *draft* tersebut, maka dalam penelitian ini, penulis hanya membatasi pembahasan pada beberapa ketentuan saja. Ketentuan-ketentuan yang diangkat dalam penelitian ini, tanpa mengesampingkan ketentuan yang lain, dinilai

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memiliki kedudukan yang sangat penting dalam perundingan anti dumping yang sedang berjalan.[136]

3.2.1 *Zeroing*

Zeroing merupakan istilah yang dikenal dalam hal perhitungan *dumping margin*. *Dumping margin* merupakan selisih dari *normal value* dan *export price* yang kemudian biasanya dinilai dengan prosentase. Hasil perhitungan dari *normal value* dan *export price* tersebut dapat menunjukkan suatu nilai atau angka baik positif maupun negatif. Nilai positif dihasilkan bilamana *normal value* lebih besar dari *export price* dan begitu pula sebaliknya dimana hasil negatif ditemukan bila ternyata *normal value* lebih kecil dari *export price*.

Perhitungan yang menunjukkan hasil negatif kemudian di-nol-kan sehingga tidak diperhitungkan lebih lanjut dalam perhitungan *dumping margin*. Perhitungan *dumping margin* hanya dilakukan sebatas pada hasil yang menunjukkan nilai positif saja. Praktik perhitungan seperti inilah yang kemudian dinamakan dengan *zeroing*. Melalui praktik perhitungan semacam ini maka akan ditemukan atau dihasilkan nilai *dumping margin* yang lebih besar. Karena bea masuk anti dumping dibebankan maksimal sebesar *dumping margin*, maka konsekuensi dari nilai *dumping margin* yang lebih besar tentunya adalah potensi dibebankannya bea masuk anti dumping yang lebih besar pula.

[136] Ketentuan-ketentuan ini menyangkut isu-isu atau masalah-masalah yang dirasakan sangat penting dalam perundingan anti dumping pada Putaran Doha. Isu-isu atau masalah-masalah ini dalam perundingan anti dumping termasuk atau dapat dikategorikan sebagai *contentious issues*. Maksudnya adalah isu-isu atau masalah-masalah ini merupakan isu atau masalah yang mendapatkan perhatian luar biasa dari negara anggota WTO. Pengaturan dan juga penerapan ketentuan mengenai isu atau masalah tersebut selama ini menjadi sorotan dengan berbagai alasan yang melatarbelakanginya. Oleh sebab itu, *contentious issues* ini dapat dikatakan sebagai isu-isu atau masalah-masalah yang bersifat kontroversial. Pembahasan mengenai *contentious issues* ini bahkan dibedakan atau diprioritaskan dalam perundingan anti dumping yang sedang berjalan. Inilah yang menjadi alasan bagi penulis untuk membatasi isu atau masalah yang diangkat dalam penelitian ini. Khusus untuk isu S&D, walaupun tidak termasuk *contentious issues*, namun merupakan isu yang tidak kalah penting bahkan dapat dikatakan sangat penting. Hal ini dikarenakan S&D merupakan hak ekslusif negara berkembang yang harus dapat diberdayakan. Namun demikian, formulasi S&D yang ada saat ini dirasakan tidak memadai sehingga ketentuan mengenai S&D ini tidak dapat diimplementasikan dengan baik. Oleh karenanya, perlu kiranya suatu penyempurnaan terhadap ketentuan S&D yang ada agar kepentingan negara berkembang perihal S&D ini dapat terjamin.

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Kemudian, sebagaimana telah disebutkan sebelumnya, ada tiga metode yang bisa digunakan untuk mencari atau menghitung besarnya *dumping margin*. Ketiga metode perhitungan yang dimaksud itu adalah: *weighted average to weighted average method*, *transaction to transaction method*, dan perbandingan antara *weighted average* dari *normal value* dengan transaksi ekspor secara individual. Terhadap ketiga metode perhitungan diatas, perhitungan dengan cara *zeroing* dapat saja dipraktikkan disana.

Lebih lanjut, isu *zeroing* secara tidak langsung ternyata berkaitan dengan proses pelaksanaan penyelidikan anti dumping dan juga *review* atas pemberlakuan tindakan anti dumping. Penyelidikan anti dumping yang dilakukan oleh *authorities* yang kemudian menunjukkan hasil positif atas eksistensi dumping, *injury* dan *causal link* dapat ditindaklanjuti dengan pembebanan bea masuk anti dumping. Namun demikian, setelah dibebankannya bea masuk anti dumping, pihak-pihak yang berkepentingan dapat meminta kepada, ataupun dengan inisiatif sendiri, *authorities* untuk melakukan *review* atas bea masuk yang telah dibebankan tersebut. *Review* ini guna menilai apakah masih diperlukan pembebanan bea masuk anti dumping untuk menetralkan *injury* yang diakibatkan produk dumping yang bersangkutan. Disinilah kemudian isu *zeroing* juga menjadi sorotan, yaitu pemberlakuannya dalam penyelidikan anti dumping dan juga dalam *review* atas bea masuk anti dumping yang telah dibebankan.

Pengaturan yang berkaitan dengan *zeroing*, dalam *chairman's text*, dapat dilihat dalam beberapa pasal. Pasal-pasal dimaksud antara lain adalah pasal 2.4.2 dan 2.4.3. Untuk dapat melihat adanya pengaturan mengenai *zeroing*, maka Pasal 2.4.2 dan pasal 2.4.3 harus secara seksama dibaca bersama. Berdasarkan ketentuan pasal-pasal ini maka praktik perhitungan dengan *zeroing* diperbolehkan untuk saat tertentu dan juga dengan menggunakan perhitungan tertentu.[137]

[137] Lihat pasal 2.4.2 dan 2.4.3 *chairman's text*.

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3.2.2 *Sunset Review*

Pembebanan bea masuk anti dumping terhadap suatu produk impor memiliki jangka waktu atau durasi dan oleh karenanya perlu suatu *review* atau tinjauan atas pemberlakuan bea masuk tersebut. *Sunset review* adalah istilah yang digunakan dalam hal tinjauan atas bea masuk anti dumping yang telah dibebankan. Tinjauan tersebut dalam hal ini adalah tinjauan yang dilakukan menjelang berakhirnya masa berlaku bea masuk anti dumping yaitu lima tahun. Tinjauan ini diperlukan guna menilai apakah masih diperlukan atau tidak pembebanan lebih lanjut bea masuk anti dumping atas produk impor dimaksud. Bila ternyata berdasarkan hasil tinjauan dinyatakan masih perlu untuk membebankan bea masuk anti dumping, maka bea masuk anti dumping tersebut dapat tetap diberlakukan.

Dalam *draft* yang dikeluarkan oleh ketua *NG on Rules* ini, pengaturan mengenai *sunset review* dapat dilihat pada pasal 11.3 termasuk didalamnya pasal 11.3.1 sampai dengan pasal 11.3.6 dan juga pasal 11.4. Bea masuk anti dumping, berdasarkan *draft* ini, berlaku atau berakhir paling lama lima tahun sejak dikenakan kecuali *authorities* menentukan bahwa diakhirinya pembebanan bea masuk anti dumping cenderung membuat dumping dan *injury* akan berulang atau terjadi lagi.[138] Keputusan yang diambil oleh *authorities* ini harus didasarkan pada hasil *review* yang telah dilakukan semenjak minimal enam bulan sebelum berakhirnya jangka waktu lima tahun tersebut.[139] Keputusan ini normalnya harus diambil dalam jangka waktu 12 bulan sejak dimulainya *review*.[140]

Draft ini juga menetapkan adanya suatu *automatic termination* atas bea masuk anti dumping yang telah dibebankan yaitu sepuluh tahun sejak dibebankannya bea masuk anti dumping.[141] Dengan peraturan ini maka batas maksimal pembebanan bea masuk anti dumping adalah selama sepuluh tahun tanpa dapat diperpanjang kembali. Kemudian, bila dalam jangka waktu tidak lebih dari dua tahun semenjak berakhirnya pembebanan bea masuk anti dumping yaitu sepuluh tahun tersebut *authorities* melakukan inisiasi penyelidikan anti dumping,

[138] Pasal 11.3 *chairman's text*.
[139] Pasal 11.3.3 *chairman's text.*
[140] Pasal 11.4 *chairman's text.*
[141] Pasal 11.3.5 *chairman's text.*

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maka *authorities* dapat mengambil *expeditious action* yang kemudian dapat berbentuk penerapan tindakan sementara atau *provisional measures*.[142]

3.2.3 *Lesser Duty Rule*

Lesser duty rule merupakan istilah atau konsep yang dikenal dalam hal pembebanan bea masuk anti dumping. Oleh karenanya, seperti halnya *zeroing*, istilah ini juga tidak terlepas atau berkaitan erat dengan perhitungan *dumping margin*. Sebagaimana diketahui, besarnya bea masuk anti dumping yang ditetapkan, untuk kemudian dibebankan kepada produk impor, adalah maksimal sebesar *dumping margin* yang ditemukan. Namun demikian, sangat disarankan bila ternyata *injury* yang dihasilkan oleh produk dumping tersebut tidak sebesar *dumping margin*, bea masuk anti dumping tidak perlu dibebankan secara maksimal sebesar *dumping margin* tersebut.

Konsep seperti inilah yang disebut dengan *lesser duty rule* dimana pembebanan bea masuk yang lebih rendah dari *dumping margin* dirasakan sudah cukup untuk menetralkan atau menghilangkan *injury* yang diderita oleh industri domestik. Kemudian, sebagaimana telah dijelaskan sebelumnya, bea masuk anti dumping dapat dibebankan sebagai suatu tindakan sementara (*provisional measure*) ataupun sebagai *definitive duties*. Oleh karena itu, konsep *lesser duty* ini berlaku terhadap keduanya baik sebagai tindakan sementara maupun *definitive duties*.

Pengaturan mengenai *lesser duty rule*, dalam *chaiman's text*, dapat ditemukan pada pasal 9.1. Pasal ini menyebutkan bahwa keputusan untuk membebankan bea masuk anti dumping diserahkan kepada otoritas yang berwenang menentukannya. Hal yang sama juga berlaku terhadap besaran bea masuk yang akan dibebankan, apakah sebesar *dumping margin* atau lebih kecil dari *dumping margin*. Kemudian, pasal ini juga menambahkan bahwa perlu adanya pembentukan prosedur dalam aturan domestik negara anggota WTO perihal pembebanan bea masuk anti dumping sebagaimana disebutkan diatas khususnya untuk memperhatikan kepentingan pihak-pihak yang terkait atas pembebanan bea masuk anti dumping tersebut.

[142] Pasal 11.3.6 *chairman's text*.

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3.2.4 *Circumvention/anti circumvention*

Circumvention ataupun sebaliknya *anti circumvention* merupakan isu yang telah lama menjadi perhatian dalam perundingan masalah anti dumping. *Circumvention* dapat dikatakan merupakan suatu tindakan penghindaran dari pengenaan bea masuk anti dumping yang telah dibebankan terhadap suatu produk dumping. Tindakan ini merupakan strategi dagang dalam hal mengekspor suatu *complex manufactured products* disaat negara pengimpor memberlakukan (atau kemungkinan akan memberlakukan) bea masuk anti dumping sebagai tindakan perlindungan terhadap industri domestiknya.[143] Strategi ini pada dasarnya dilakukan dengan cara menyembunyikan asal atau *origin* dari produk dumping guna membingungkan otoritas pabean dari negara pengimpor, begitu pula dengan pelaku perdagangan dan juga konsumen.[144]

Strategi *circumvention* dilakukan dengan cara merubah produk yang dibebankan bea masuk anti dumping tersebut, atau dengan memindahkan baik keseluruhan atau sebagian pembuatan dan/atau perakitan dari produk tersebut dari negara asal yang dibebankan bea masuk anti dumping ke negara lain. Lebih spesifik, ada empat tipe atau cara berbeda dari strategi *circumvention* atas bea masuk anti dumping, yaitu:[145]

1. Mengekspor komponen atau bagian lepas dari produk dumping tersebut ke negara ketiga untuk kemudian dirakit disana. Tipe ini dikenal dengan *third country circumvention*.
2. Mengekspor komponen atau bagian lepas dari produk dumping tersebut langsung ke negara pengimpor yang membebankan bea masuk anti dumping, dan kemudian dirakit di negara tersebut. Tipe ini dikenal dengan *importing-country circumvention*.

[143] Lucia Ostoni, "Anti-dumping circumvention in the EU and the US: is there a future for multilateral provisions under the WTO?," <http://law.fordham.edu/publications/articles/600flspub8893.pdf>, diakses tanggal 13 Nopember 2008.
[144] *Ibid*.
[145] *Ibid*.

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3. Memindahkan baik sebagian atau keseluruhan proses produksi dari produk dumping tersebut dari negara asal pembuat (atau pengekspor) ke negara pengimpor atau negara ketiga. Tipe ini lebih kompleks karena operasional produksi atau pabrikasi dipindahkan.
4. Melakukan perubahan kecil atau *minor* terhadap produk dumping. Perubahan ini dapat dilakukan dengan cara misalnya merubah sedikit aspek sehingga memiliki tampilan berbeda yang ditawarkan kepada konsumen. Tipe ini dikenal dengan *minor alteration circumvention*.

Tindakan-tindakan sebagaimana disebutkan diatas, diyakini dapat merusak efektivitas dari *trade remedies*. Bea masuk anti dumping merupakan suatu tindakan yang dilakukan guna menetralkan *injury* yang diakibatkan oleh produk dumping. Penghindaran pembayaran bea masuk anti dumping dengan cara-cara tersebut pastinya membuat tindakan anti dumping menjadi sia-sia atau tidak berarti. Oleh karenanya, tindakan *anti circumvention* dianggap merupakan suatu hal yang penting dalam menghadapi praktik penghindaran pembayaran bea masuk anti dumping dan memastikan efektifitas bea masuk tersebut untuk menetralkan *injury* yang terjadi.

Dalam *chairman's text* ini, masalah *circumvention* atau *anti circumvention* diatur melalui pasal 9.*bis*. Pasal ini menyebutkan bahwa *authorities* dapat memperluas cakupan dari penerapan bea masuk anti dumping, tidak hanya sebatas pada produk dumping yang telah terbukti mengakibatkan *injury*, namun juga terhadap produk impor lainnya. Hal ini dapat dilakukan bila *authorities* menetapkan bahwa impor produk tersebut merupakan *circumvention* atas bea masuk anti dumping yang telah dibebankan. Kemudian, pasal ini juga mengatur lebih lanjut mengenai hal-hal lain seputar *circumvention* seperti: tipe-tipe *circumvention*, pembuktian, prosedur tinjauan, dan berlakunya bea masuk anti dumping terhadap produk yang terbukti diimpor sehubungan dengan tindakan *circumvention*.

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3.2.5 *Special and Differential Treatment*

Special and Differential Treatment (S&D) merupakan prinsip universal yang diakui dalam sistem perdagangan multilateral WTO. Walaupun tidak ada definisi secara eksplisit mengenai prinsip ini, namun prinsip S&D dipahami sebagai perlakuan khusus dan berbeda yang diberikan kepada, atau dimiliki oleh, negara berkembang (termasuk negara terbelakang) secara ekslusif. Karena prinsip ini ditujukan untuk kepentingan negara berkembang dan terbelakang, maka oleh karenanya perlakuan khusus dan berbeda bukan merupakan hak bagi negara maju untuk mendapatkannya. Bahkan dalam beberapa hal, negara maju wajib menerapkan perlakuan tersebut terhadap negara berkembang dan terbelakang.

Dari sifatnya yang universal, maka prinsip ini menjiwai semua persetujuan yang ada di dalam persetujuan WTO. Selain itu, masing-masing persetujuan yang ada di dalam persetujuan WTO juga memiliki ketentuan sendiri yang menyangkut perlakuan khusus dan berbeda ini, termasuk juga ADA. Kemudian, selain menjiwai isi semua persetujuan dalam persetujuan WTO, prinsip ini juga menjiwai jalannya perundingan-perundingan yang sedang berlangsung di WTO.

Dalam Deklarasi Doha, sebagai awal diluncurkannya putaran perundingan baru yaitu Putaran Doha, masalah S&D ditempatkan pada posisi yang sangat penting. Deklarasi Doha memandang masalah S&D ini dengan menegaskan: (1) bahwa S&D merupakan bagian integral dari persetujuan-persetujuan WTO; (2) bahwa semua perundingan dan aspek-aspek dalam Program Kerja Doha harus mempertimbangkan prinsip S&D tersebut; dan (3) bahwa semua ketentuan mengenai S&D harus ditinjau kembali untuk membuatnya lebih *precise*, efektif dan operasional.[146] Bahkan, Deklarasi Doha menetapkan suatu Program Kerja dalam hal S&D yang ditempatkan pada *Decision on Implementation-Related Issues and Concerns*.[147] Pengakuan akan pentingnya S&D ini selanjutnya juga kembali

[146] Departemen Luar Negeri, *op. cit.*, hlm 75.

[147] *Decision on Implementation-Related Issues and Concerns* sebagaimana telah dijelaskan sebelumnya merupakan suatu keputusan yang dikeluarkan pada KTM IV di Doha, Qatar. Negara anggota WTO, khususnya negara berkembang dan terbelakang kerap menghadapi masalah dalam hal implementasi atau pelaksanaan berbagai ketentuan yang ada dalam persetujuan WTO. Keputusan ini dikeluarkan sebagai tindak lanjut atas tingginya perhatian terhadap implementasi berbagai ketentuan yang ada dalam persetujuan WTO tersebut. Ditetapkannya atau dimasukkannya suatu program kerja

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ditegaskan oleh negara-negara anggota WTO dalam *July Package* dan juga *Hong Kong Ministerial Declaration*.

Oleh karena itu, maka dapat dikatakan bahwa sesungguhnya S&D memiliki kedudukan yang utama dan sangat penting baik dalam persetujuan WTO maupun dalam proses jalannya perundingan. Gambaran diatas menunjukkan dan mempertegas kembali bahwa S&D merupakan suatu hal yang bersifat sangat prinsipil dan oleh karenanya wajib untuk dikedepankan.

Dalam *chairman's text*, pengaturan mengenai S&D terhadap anti dumping diatur dalam pasal 15. Pasal tersebut menyebutkan bahwa:

> *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.*

Dari ketentuan pasal tersebut, dapat dikatakan negara maju harus secara khusus memperhatikan (*special regard*) keadaan dari negara berkembang bila ingin membebankan tindakan anti dumping terhadap produk impor asal negara tersebut. Kemudian, negara maju juga harus meneliti atau mempertimbangkan kemungkinan adanya *constructive remedies* sebelum membebankan bea masuk anti dumping. Hal ini bilamana pembebanan bea masuk anti dumping tersebut dirasakan dapat memberikan efek atau dampak kepada *essential interests* dari negara berkembang.

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mengenai S&D di dalam keputusan ini menunjukkan bahwa implementasi dari prinsip ini ternyata pada praktiknya mengalami berbagai permasalahan. Oleh karenanya, perlu adanya suatu program kerja atas masalah ini agar kedepannya tidak lagi mengalami permasalahan dalam hal implementasinya.

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BAB 4
PEMBAHASAN

Dengan dikeluarkannya dokumen TN/RL/W/213 tanggal 30 Nopember 2007 berjudul *Draft Consolidated Chair Texts of the AD and SCM Agreements* menandakan babak baru perundingan atas masalah anti dumping dan subsidi. *Draft* ini bukanlah akhir dari proses perundingan namun merupakan suatu langkah awal tahap lanjutan dari proses perundingan yang memerlukan diskusi lebih lanjut secara intensif. *Draft* yang kemudian dikenal dengan istilah *chairman's text* inilah yang akan menjadi acuan bagi negara anggota WTO dalam melakukan perundingan selanjutnya untuk masalah anti dumping dan subsidi dalam Putaran Doha.

Chairman's text ini berisikan perubahan atas ketentuan-ketentuan mengenai anti dumping sebagaimana diatur dalam ADA dan juga subsidi sebagaimana diatur dalam ASCM. Khusus mengenai masalah anti dumping, sebagaimana menjadi topik pembahasan penulis dalam penelitian ini, *draft* ini terdiri atas 18 pasal ditambah dengan adanya tiga buah *annex*. Jumlah ini sedikit berbeda dari ADA yang berlaku saat ini dimana terdiri atas 18 pasal dan hanya dua buah *annex*.

Indonesia, sebagai negara berkembang, dimana telah memiliki ketentuan anti dumping dalam peraturan domestiknya, tentunya berkepentingan atas dikeluarkannya dokumen *chairman's text* ini. Dengan adanya usulan perubahan atas ketentuan anti dumping, maka perlu kiranya diketahui atau diperbandingkan usulan perubahan tersebut dengan ADA yang berlaku saat ini dan juga terhadap peraturan domestik Indonesia. Kemudian, yang terpenting dari usulan perubahan ketentuan anti dumping ini bagi Indonesia dan negara berkembang pada umumnya, adalah mengenai substansi perubahannya. Perubahan yang diajukan dalam usulan ini semestinya harus dapat memfasilitasi kepentingan Indonesia dan negara berkembang pada umumnya, sebagaimana dimandatkan dalam Deklarasi Doha. Oleh karena itu, perlu diketahui dan diperjuangkan perubahan yang ideal dari ketentuan anti dumping agar kiranya dapat memfasilitasi kepentingan Indonesia dan negara berkembang pada umumnya.

Berdasarkan hal tersebut, maka dalam penelitian ini penulis akan membagi pembahasan ke dalam tiga bagian yaitu: membandingkan ketentuan yang diusulkan dalam *chairman's text* dengan ketentuan ADA dan juga peraturan domestik Indonesia; menilai sejauhmana ketentuan dalam *chairman's text* tersebut merefleksikan kepentingan negara berkembang pada umumnya dan Indonesia pada khususnya; dan melihat perubahan yang ideal bagi kepentingan negara berkembang, termasuk Indonesia, atas ketentuan anti dumping tersebut.

4.1 Perbandingan Ketentuan dalam *Chaiman's Text* dengan *the Anti Dumping Agreement* (ADA) dan Peraturan Domestik

Sebagai negara penandatangan *Agreement Establishing the World Trade Organization*, dan kemudian telah meratifikasinya melalui Undang-Undang No.7 tahun 1994, Indonesia telah menerima keseluruhan hasil perundingan Putaran Uruguay sebagai satu paket dan terikat untuk mematuhi serta menjalankannya sesuai aturan yang telah disepakati dalam persetujuan tersebut. Aturan-aturan yang yang telah disepakati dalam Persetujuan WTO itu meliputi berbagai hal termasuk di dalamnya adalah aturan mengenai anti dumping.

Kemudian, guna dapat mengenakan suatu tindakan anti dumping, sebagaimana ditentukan dalam pasal 1 ADA, Indonesia selanjutnya mengatur mengenai aturan anti dumping di dalam peraturan domestiknya. Ketentuan mengenai anti dumping di Indonesia diatur, khususnya, dalam Undang-Undang No. 17 tahun 2006 tentang Perubahan atas Undang-Undang No.10 tahun 1995 tentang Kepabeanan dan juga Peraturan Pemerintah No.34 tahun 1996 tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan. Dengan adanya usulan perubahan atas ketentuan ADA yang berlaku saat ini, melalui *chairman's text*, maka perlu kiranya dilihat sejauhmana usulan perubahan tersebut memiliki perbedaan dengan ketentuan yang ada baik terhadap ADA maupun dengan peraturan domestik Indonesia.

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Oleh karena itu, sebagaimana telah disebutkan sebelumnya pada bab 3, ketentuan perubahan atas ADA yang akan dibicarakan pada penelitian ini hanya dibatasi pada lima masalah utama yaitu: *zeroing*, *sunset review*, *lesser duty rule*, *circumvention/anti circumvention*, dan terakhir *special and differential treatment* (S&D). Untuk lebih lengkapnya, maka pembahasan akan difokuskan pada tiap-tiap masalah atau isu utama tersebut.

4.1.1 *Zeroing*

Draft chairman's text mengatur seputar masalah *zeroing* antara lain pada pasal 2.4.2 dan 2.4.3. Untuk dapat menghitung *dumping margin*, maka diperlukan perbandingan yang wajar (*fair comparison*) antara *normal value* dan *export price*.[148] Pasal 2.4.2 *draft* ini menentukan guna mendapatkan perbandingan yang wajar, perhitungan *dumping margin* dalam tahap penyelidikan anti dumping dapat dilakukan dengan tiga metode yaitu: *weighted average to weighted average method*, *transaction to transaction method*, dan perbandingan antara *weighted average* dari *normal value* dengan transaksi ekspor secara individual (*targeted dumping*). Pasal ini memang tidak secara langsung mengatur cara perhitungan dengan *zeroing*, namun pasal inilah yang menjadi dasar dilakukannya suatu perhitungan atas *margin dumping* dengan metode yang ada guna mendapatkan perbandingan wajar.

Guna dapat melihat eksistensi dari pengaturan *zeroing*, maka kemudian dijelaskan lebih lanjut dalam pasal 2.4.3. Pasal ini mengatur bila *authorities* menggunakan *multiple comparison* dalam mencari nilai *dumping margin*, dalam tahap penyelidikan anti dumping, maka terhadap metode perhitungan tertentu diperbolehkan perhitungan dengan cara *zeroing*. Kemudian, pasal ini juga menentukan bahwa dengan perhitungan *multiple comparison* tersebut, cara perhitungan dengan *zeroing* juga diperbolehkan pada tahap *review*.

[148] Lihat pasal 2.4 *chairman's text*.

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Untuk ADA, pengaturan mengenai *zeroing* tidak dapat secara eksplisit ditemukan. Pengaturan dalam ADA hanya mengatur mengenai harus dilakukannya perhitungan *dumping margin* berdasarkan perbandingan yang wajar dan juga metode yang dapat digunakan. Pengaturan mengenai hal ini dapat dilihat khususnya pada pasal 2.4 dan 2.4.2 ADA.[149] Demikian pula dengan peraturan domestik Indonesia, PP No.34 tahun 1996 tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan tidak mengatur masalah *zeroing*.

4.1.2 *Sunset Review*

Pengaturan seputar *sunset review* dalam *chairman's text* dapat dilihat pada pasal 11.3, termasuk didalamnya pasal 11.3.1 sampai dengan 11.3.6, dan juga pasal 11.4. Pasal 11.3 menyebutkan:

> *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, unless the authorities determine, in a review that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.*

Berdasarkan pasal ini maka pembebanan bea masuk anti dumping harus berakhir paling lama lima tahun semenjak diberlakukan. Namun demikian, bila *authorities* berpendapat, berdasarkan *review*, bahwa berakhirnya atau dicabutnya pemberlakukan bea masuk anti dumping sepertinya tidak menghilangkan adanya dumping dan *injury*, maka bea masuk anti dumping tersebut dapat tetap diberlakukan.

Pasal 11.3.1 menyebutkan bahwa *review* dimaksud dilakukan dengan keharusan adanya permintaan atau permohonan tertulis oleh atau atas nama industri domestik. Permohonan ini harus berisikan informasi-informasi tertentu sebagai pendukung guna permohonannya tersebut.[150] Pasal ini juga memberikan

[149] Lihat pasal 2.4 dan 2.4.2 ADA.
[150] Lihat pasal 11.3.1 *chairman's text*

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pengaturan mengenai masalah *standing* dari permohonan tersebut. Pasal 11.3.2 kemudian mengatur mengenai pengecualian dari inisiasi *review* atas dasar permohonan tertulis sebagaimana disebutkan dalam pasal 11.3.1. Dalam keadaan tertentu, *review* dapat dilakukan tanpa permohonan tertulis yaitu dengan inisiatif sendiri dari *authorities*. Hal ini hanya dapat dilakukan bila terdapat cukup bukti untuk melakukan pengujian bahwa dumping dan *injury* tampaknya akan tetap ada bila bea masuk anti dumping dicabut. Terhadap inisiasi *review* dengan cara seperti ini, maka *authorities* diwajibkan memberikan pemberitahuan publik atau *public notice* perihal keadaan tertentu yang menjadi dasar dimulainya atau dilakukannya *review*.[151]

Untuk pasal 11.3.3, *draft* ini menempatkan pengaturan mengenai jangka waktu. Jangka waktu yang dimaksud disini adalah waktu saat dilakukannya *review* sebelum berakhirnya masa lima tahun dan hingga kapan *review* tersebut dapat dilakukan. *Review* dapat dilakukan minimal enam bulan sebelum berakhirnya jangka waktu lima tahun dan berakhir paling lama enam bulan setelah jangka waktu tersebut berakhir.[152] Dihubungkan dengan pasal 11.4, ketentuan dalam pasal ini menyebutkan bahwa dalam jangka 12 bulan, keputusan dari *review* tersebut normalnya sudah harus dicapai.[153]

Kemudian, pasal 11.3.4 mengatur perihal keputusan yang diambil oleh *authorities* dalam menentukan apakah diakhirinya pembebanan bea masuk anti dumping akan mengakibatkan dumping dan *injury* terulang atau terjadi lagi. Keputusan yang diambil tersebut, berdasarkan pasal ini, harus didasari atas adanya bukti positif dan pemeriksaan yang obyektif atas semua faktor yang secara relevan mempengaruhi. Namun demikian, bobot dari faktor-faktor tersebut ditentukan oleh atau tergantung dari fakta di setiap kasus atau dengan kata lain bersifat kasuistis.[154]

[151] Lihat pasal 11.3.2 *chairman's text*
[152] Lihat pasal 11.3.3 *chairman's text*
[153] Lihat pasal 11.4 *chairman's text*
[154] Lihat pasal 11.3.4 *chairman's text*

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Selanjutnya, pasal 11.3.5 *draft chairman's text* ini mengatur mengenai adanya *automatic termination* atas pembebanan suatu bea masuk anti dumping. Pasal ini menetapkan bahwa pembebanan bea masuk anti dumping yang telah melewati masa lima tahun, harus berakhir dalam jangka waktu sepuluh tahun semenjak diberlakukannya pembebanan bea masuk anti dumping. Pasal ini, dengan kata lain, menyatakan bahwa pembebanan bea masuk anti dumping maksimal hanya selama sepuluh tahun tanpa dapat diperpanjang kembali dengan alasan apapun.[155] Terakhir, pasal 11.3.6 menyebutkan bahwa bila dalam jangka waktu tidak lebih dari dua tahun semenjak berakhirnya pembebanan bea masuk anti dumping sebagaimana disebutkan pasal 11.3.5 yaitu sepuluh tahun, *authorities* melakukan inisiasi penyelidikan anti dumping maka *authorities* dapat mengambil *expeditious action* yang kemudian dapat berbentuk penerapan tindakan sementara atau *provisional measures*.[156]

Untuk ADA, ketentuan mengenai *sunset review* diatur dalam pasal 11.3. Ketentuan pasal ini menyebutkan:

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

Kemudian, pasal 11.4 ADA menetapkan bahwa "*...Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review*". Berdasarkan pasal-pasal ini maka disimpulkan bahwa setiap bea masuk anti dumping harus dicabut tidak lebih dari lima tahun sejak diberlakukan. Pengecualiannya adalah bila ternyata *authorities* berpendapat atau memutuskan, atas hasil suatu *review* yang normalnya dilakukan selama 12 bulan,

[155] Lihat pasal 11.3.5 *chairman's text*
[156] Lihat pasal 11.3.6 *chairman's text*

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diakhirinya pembebanan bea masuk anti dumping akan cenderung membuat dumping dan *injury* berulang atau terjadi lagi.

Jadi, bila dibandingkan memang pada dasarnya ketentuan pasal 11.3 ADA dan pasal 11.3 *chairman's text* tidak berbeda jauh. Secara redaksional memang ada sedikit perubahan, namun tetap dengan substansi yang sama. Bahkan ketentuan pasal 11.4 ADA jika dibandingkan dengan pasal 11.4 *chairman's text*, sama sekali tidak mengalami perubahan. Namun demikian, harus diperhatikan lebih jauh, ketentuan-ketentuan mengenai *sunset review* sebagaimana diatur dalam c*hairman's text* ini justru memberikan pengaturan lebih lanjut dan lebih detail atas isu penting ini. Hal ini dapat dilihat dengan adanya perubahan redaksional pasal 11.3 yang kemudian juga dilengkapi dengan ketentuan-ketentuan lain yang lebih lanjut diatur dalam pasal 11.3.1 hingga pasal 11.3.6 *chairman's text*.

Dalam hal peraturan domestik Indonesia, pengaturan mengenai *sunset review* dapat dilihat pada beberapa pasal dari PP No. 34 tahun 1996 tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan. Pasal 31 (1) PP tersebut menyatakan bahwa:

> Pengenaaan bea masuk anti dumping atau bea masuk imbalan berlaku sejak ditetapkan oleh Menteri Keuangan sebagaimana dimaksud dalam pasal 27 dan berlaku paling lama lima tahun sejak keputusan pengenaan atau peninjauan kembali yang terakhir.

Kemudian, pasal 32 PP yang sama menyebutkan:

> Atas prakarsa komite atau permohonan pihak yang berkepentingan, pengenaan bea masuk anti dumping atau bea masuk imbalan sebagaimana dimaksud dalam pasal 27 dapat ditinjau kembali paling cepat dua belas bulan setelah ditetapkannya Keputusan Menteri Keuangan.

Selanjutnya, pasal 33 PP tersebut menetapkan bahwa:

> Berdasarkan hasil peninjauan kembali sebagaimana dimaksud dalam pasal 32, komite mengusulkan kepada Menteri Perindustrian dan Perdagangan untuk:
>
> a. menghentikan pengenaan bea masuk anti dumping atau bea masuk imbalan, dalam hal adanya bukti bahwa kerugian yang disebabkan oleh barang dumping atau barang mengandung subsidi sudah dapat dihilangkan; atau

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b. melanjutkan pengenaan bea masuk anti dumping atau bea masuk imbalan, dalam hal adanya bukti bahwa kerugian yang disebabkan oleh barang dumping atau barang mengandung subsidi belum dapat dihilangkan.

Berdasarkan beberapa ketentuan diatas, maka disimpulkan bahwa bea masuk anti dumping berlaku paling lama lima tahun dan terhadapnya dapat dilakukan suatu *review*. *Review* tersebut dapat dilakukan baik atas inisiatif komite (KADI) atau berdasarkan permohonan pihak yang berkepentingan. *Review* ini dapat dilakukan paling cepat dua belas bulan setelah dikeluarkannya Kepmenkeu pembebanan bea masuk anti dumping, dan berujung pada keputusan penghentian ataupun tetap diberlakukannya bea masuk anti dumping. Pengaturan dalam PP ini tidak memisahkan secara tegas ketentuan mengenai *review* sebagaimana diatur dalam pasal 11.2 dan 11.3 ADA. Oleh karena itu, ketentuan mengenai *sunset review* dapat dikatakan tercakup dalam ketentuan pasal-pasal ini.

4.1.3 *Lesser Duty Rule*

Lesser duty rule diatur dalam *chairman's text* melalui pasal 9.1. Pasal ini menyebutkan bahwa:

> *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. Each Member whose national legislation contains provisions on anti-dumping measures shall establish procedures in its laws or regulations to enable its authorities, in making such decisions in an investigation initiated pursuant to Article 5, to take due account of representations made by domestic interested parties whose interests might be affected by the imposition of an anti-dumping duty. 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.*

Berdasarkan pasal ini, maka keputusan untuk membebankan bea masuk anti dumping dan juga besarnya bea masuk anti dumping tersebut diserahkan kepada otoritas yang berwenang menentukan. Pasal ini kemudian mengatur mengenai perlu

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adanya pembentukan prosedur perihal pembebanan bea masuk anti dumping dalam aturan domestik negara anggota WTO. Prosedur dimaksud ditujukan khususnya agar *authorities* dapat memperhatikan kepentingan pihak-pihak yang terkait atas pembebanan bea masuk anti dumping tersebut. Selanjutnya, pasal ini juga menetapkan bahwa baik penerapan prosedur maupun keputusan yang diambil melalui prosedur tersebut tidak dapat diajukan ke depan sistem penyelesaian sengketa WTO.

Ketentuan ini cukup berbeda dengan apa yang diatur dalam ADA. Dalam ADA, *lesser duty rule* juga diatur melalui pasal 9.1 yang berbunyi:

> *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.*

Pasal ini tidak menyinggung mengenai keharusan memiliki prosedur pembebanan bea masuk anti dumping sebagaimana diusulkan dalam pasal 9.1 *chairman's text*. Begitu pula dengan masalah penyelesaian sengketa, pasal ini sama sekali tidak membicarakan hal tersebut. Namun demikian, pasal ini memiliki suatu ketentuan yang menyebutkan bahwa pembebanan bea masuk anti dumping yang lebih kecil dari *dumping margin* sangat disarankan bila ternyata sudah dapat menetralkan atau menghilangkan *injury* yang diderita oleh industri domestik. Ketentuan inilah yang tidak lagi dicantumkan dalam pasal 9.1 *chairman's text*.

Dalam hal peraturan domestik Indonesia, pengaturan mengenai *lesser duty rule* dapat dilihat pada pasal 4 (1) dan juga pasal 26 (1) PP No. 34 tahun 1996 tentang Bea Masuk Anti Dumping dan Bea Masuk Imbalan. Pasal 4 (1) PP tersebut menyatakan bahwa: "Besarnya bea masuk anti dumping sebagaimana dimaksud dalam pasal 2 setinggi-tingginya sama dengan marjin dumping". Sedangkan pasal 26 (1) menyebutkan bahwa:

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> Atas dasar hasil akhir penyelidikan komite yang membuktikan adanya barang dumping dan/atau barang mengandung subsidi yang menyebabkan kerugian sebagaimana dimaksud dalam pasal 12 (2), Menteri Perindustrian dan Perdagangan memutuskan besarnya nilai tertentu untuk pengenaan bea masuk anti dumping atau bea masuk imbalan yang besarnya sama atau lebih kecil dari marjin dumping dan/atau subsidi neto.

Ketentuan-ketentuan ini tidak memuat adanya suatu prosedur pembebanan bea masuk anti dumping dan juga perihal penyelesaian sengketa sebagaimana diusulkan *chairman's text* pada pasal 9.1. Ketentuan-ketentuan ini juga tidak menerangkan lebih lanjut bagaimana ketentuan mengenai *lesser duty* ini kemudian akan diterapkan.

4.1.4 *Circumvention/anti circumvention*

Isu *circumvention/anti circumvention* ditempatkan oleh ketua *NG on Rules* dalam *text*-nya pada pasal 9*bis*. Pasal ini terdiri atas pasal 9*bis*.1 hingga pasal 9*bis*.7. Pasal 9*bis*.1 memberikan kewenangan kepada *authorities* untuk memperluas cakupan dari penerapan bea masuk anti dumping bila terbukti adanya tindakan *circumvention*. Maksudnya adalah bea masuk anti dumping dibebankan tidak hanya sebatas pada produk dumping yang telah terbukti mengakibatkan *injury*, namun juga terhadap produk impor lainnya. Produk impor lainnya ini ditenggarai sebagai bentuk atau hasil dari tindakan *circumvention* atas produk dumping yang telah terlebih dahulu dibebankan bea masuk anti dumping.[157]

Pasal 9*bis*.2 kemudian menyatakan bahwa tindakan *circumvention* tersebut hanya dapat diakui keberadaannya bila dapat ditunjukkan atau dibuktikan adanya beberapa persyaratan yang terpenuhi. Persyaratan tersebut menunjukkan tipe-tipe tindakan *circumvention,* bea masuk anti dumping sebagai penyebab atau alasan utama dilakukannya tindakan *circumvention* tersebut, dan produk impor hasil tindakan *circumvention* secara perlahan-lahan menghancurkan (*undermine*) *remedial effect* dari bea masuk anti dumping yang telah dibebankan.[158] Pasal 9*bis*.3 mengatur mengenai persyaratan tertentu lainnya yang harus dipenuhi dimana

[157] Lihat pasal 9*bis*.1 *chairman's text*
[158] Lihat pasal 9*bis*.2 *chairman's text*

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

khusus berlaku bagi tipe *circumvention* tertentu.[159] Kemudian, pasal 9*bis*.4 mengatur bahwa untuk tipe *circumvention* tertentu, perluasan cakupan penerapan bea masuk anti dumping hanya dapat dilakukan bila terbukti adanya dumping atas produk impor hasil tindakan *circumvention* tersebut.[160]

Pasal 9*bis*.5 menentukan bahwa penentuan keberadaan tindakan *circumvention* harus didasari pada adanya suatu *review* yang telah diajukan. Dengan kata lain penentuan eksistensi tindakan *circumvention* harus diawali dengan adanya pengajuan *review* atas hal tersebut. Pasal ini juga memberikan pengaturan mengenai masalah *standing* dalam hal pengajuan *review* dimaksud.[161] Selanjutnya, pasal 9*bis*.6 mengatur perihal waktu dimulainya *review* dan juga lamanya *review* tersebut harus berakhir atau selesai.[162] Terakhir, pasal 9*bis*.7 menyebutkan bila ternyata terbukti eksistensi dari tindakan *circumvention*, maka terhadap produk impor tersebut dapat dikenakan bea masuk anti dumping. Bea masuk anti dumping ini bahkan dapat diberlakukan secara *retroactive* semenjak dimulainya *review*.[163]

Isu *circumvention/anti circumvention* sebenarnya merupakan isu klasik yang telah lama dibahas guna dimasukkan ke dalam ketentuan anti dumping WTO. Bahkan hingga akhir Putaran Uruguay yang kemudian melahirkan WTO, isu ini meninggalkan suatu pekerjaan rumah yang masih harus diselesaikan. Oleh karenanya, hingga kini pengaturan mengenai isu *circumvention/anti circumvention* ini tidak ditemukan pengaturannya dalam ADA. Untuk Indonesia, ketentuan mengenai isu ini juga tidak dapat ditemukan dalam peraturan domestiknya.

[159] Lihat pasal 9*bis*.3 *chairman's text*
[160] Lihat pasal 9*bis*.4 *chairman's text*
[161] Lihat pasal 9*bis*.5 *chairman's text*
[162] Lihat pasal 9*bis*.6 *chairman's text*
[163] Lihat pasal 9*bis*.7 *chairman's text*

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4.1.5 *Special and Differential Treatment* (S&D)

Untuk isu ini, *draft chairman's text* menempatkannya pada pasal 15. Pasal 15 *draft chairman's text* menyebutkan bahwa:

> *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.*

Pasal ini menentukan perlu adanya perhatian khusus (*special regard*) atas keadaan dari negara berkembang bila suatu negara maju ingin membebankan tindakan anti dumping terhadap produk impor asal negara tersebut. Kemudian, negara maju juga harus meneliti atau mempertimbangkan kemungkinan adanya *constructive remedies*, sebelum membebankan bea masuk anti dumping terhadap negara berkembang, bila dirasakan dapat berdampak pada *essential interests* negara berkembang. Ketentuan dalam pasal 15 ini sama persis dengan apa yang diatur dalam ADA. Ketentuan ini bahkan sama sekali tidak berbeda dengan ketentuan pasal 15 ADA. Dengan kata lain ketua *NG on Rules* tidak merubah sedikitpun ketentuan mengenai S&D ini di dalam *draft text*-nya.

Untuk Indonesia, pengaturan mengenai S&D tidak ditemukan di dalam ketentuan anti dumping domestiknya. Hal ini tidak terlepas dari sifat dasar dari ketentuan S&D itu sendiri dimana prinsip ini ditujukan untuk kepentingan negara berkembang. Negara berkembang merupakan objek dimana ketentuan S&D tersebut seharusnya diberikan atau diberlakukan. Ketentuan S&D dalam hal anti dumping ini merupakan kewajiban bagi negara maju terhadap negara berkembang, bukan antar negara berkembang ataupun sebaliknya negara berkembang terhadap negara maju. Oleh karenanya, sebagai negara berkembang, ketentuan mengenai S&D dalam anti dumping ini tidak ditemukan di dalam peraturan domestik Indonesia.

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Dari beberapa ketentuan penting diatas, maka dapat dilihat bahwa apa yang dicoba untuk diusulkan oleh ketua *NG on Rules* dalam *draft*-nya ternyata cukup beragam. Maksudnya adalah disatu sisi *chairman's text* mencoba untuk mempertahankan ketentuan lama sebagaimana diatur dalam ADA. Disisi lain, *draft* tersebut juga memasukkan suatu ketentuan baru yang sebelumnya tidak diatur dalam ADA. Selebihnya, *chairman's text* cenderung untuk merubah ketentuan yang sudah ada dengan melengkapi atau memberikan perbaikan-perbaikan tertentu atas ketentuan tersebut. Dengan kata lain, ketua *NG on Rules* mencoba untuk memodifikasi atau menyempurnakan ketentuan yang lama dengan memberikan formulasi yang baru. Untuk peraturan domestik Indonesia, ketentuan yang diusulkan dalam *chairman's text* secara umum tidak atau belum diatur. Hal ini tentunya karena memang *chairman's text* merupakan usulan perubahan atas ketentuan anti dumping, dalam hal ini ADA, yang berlaku saat ini. Perubahan atas ADA, bila suatu saat disepakati, akan memberikan konsekuensi perubahan peraturan domestik Indonesia mengenai anti dumping.

4.2 Ketentuan dalam *Chairman's Text* dan Kepentingan Negara Berkembang

Masalah anti dumping dalam Putaran Uruguay merupakan isu yang paling kontroversial dalam agenda perundingan. Posisi yang diambil oleh para peserta sangat beragam. Perang kepentingan antar negara anggota membuat perjanjian di bidang anti dumping harus diakhiri dengan tindakan kompromis. Bahkan dapat dikatakan bahwa kegagalan untuk mencapai konsensus atas ADA merupakan penyebab terlambatnya penyelesaian Putaran Uruguay setidaknya selama dua tahun.[164] Kepentingan para negara peserta yang bertentangan, bahkan kadang berlawanan, akhirnya tergambarkan pada bahasa dari ketentuan dalam perjanjian tersebut yang dirasakan sangat ambigu dan tidak *precise*. Hal ini kemudian

[164]Vivian C. Jones, "WTO: Anti Dumping Issues in the Doha Development Agenda", <http://www.au.af.mil/au/awc/awcgate/crs/rl32810.pdf>, 20April 2006.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

berakibat pada terbukanya ruang diskresi yang cukup luas dan penafsiran yang *multi-interpretation*.[165]

Negara berkembang, sebagai mayoritas anggota WTO, kerap kali dirugikan dengan adanya pengaturan mengenai anti dumping yang diformulasikan demikian. Negara maju dengan mudahnya membebankan tindakan anti dumping terhadap produk-produk yang diimpor dari negara berkembang. Secara historis, mereka juga telah jauh lebih berpengalaman dengan masalah anti dumping sebagaimana telah diatur dalam ketentuan domestik mereka jauh sebelum WTO terbentuk.[166] Hal ini dicurigai sebagai salah satu cara atau tindakan proteksionis negara maju guna melindungi industri domestiknya dari produk-produk asal negara berkembang.

Dalam KTM IV di Doha, Qatar disepakati adanya suatu putaran baru perundingan yang dikenal dengan Putaran Doha. Putaran ini tampaknya memberikan angin segar bagi apa yang selama ini menjadi kekecewaan negara berkembang. Pada Deklarasi Doha, untuk masalah anti dumping, disepakati upaya untuk mengklarifikasi dan juga memperbaiki ketentuan yang ada saat ini atau dengan kata lain menyempurnakan ketentuan yang sudah ada. Deklarasi ini juga menegaskan bahwa perundingan yang dilakukan harus memperhatikan kebutuhan negara berkembang dan oleh karenanya harus dapat dimaksimalkan.

Dengan adanya perubahan yang diusulkan oleh ketua *NG on Rules* dalam *draft*-nya, baik itu mempertahankan ketentuan yang lama; memasukkan ketentuan yang benar-benar baru; ataupun memodifikasi dengan formulasi yang baru, maka hal terpenting yang perlu diperhatikan adalah apakah usulan dalam *draft* tersebut telah merepresentasikan kepentingan negara berkembang pada umumnya dan

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[165] *Ambiguity* dari ketentuan-ketentuan yang ada dalam ADA telah, banyak diantaranya, diklarifikasi dengan adanya *case law*. Namun demikian, banyak juga yang masih menunggu untuk diklarifikasi. Lihat Peter Van Den Bossche, *op. cit.*, hlm 515.

[166] Peraturan domestik anti dumping pertama kali diatur oleh Kanada tahun 1904, kemudian diikuti oleh Selandia Baru tahun 1905, Australia tahun 1906, Afrika Selatan tahun 1914, Amerika Serikat tahun 1916 dan *Great Britain* tahun 1921. Untuk lengkapnya lihat J. Michel Finger, "The Origins and Evolution of Anti Dumping Regulation," <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1991/10/01/000009265_3961002001146/Rendered/PDF/multi0page.pdf>, diakses pada 20 Oktober 2008. Lihat juga C. Sataphaty, "Evolution of Anti Dumping Measures," <http://www.esocialsciences.com/data/articles/Document112122005529.551638E-02.pdf>, diakses pada 20 Oktober 2008.

khususnya kepentingan Indonesia. Hal ini sangat penting dikarenakan *draft* inilah yang menjadi acuan perundingan lebih lanjut masalah anti dumping dalam putaran perundingan saat ini. Memberikan tanggapan ataupun kritik terhadap usulan *draft* ini merupakan upaya bagi negara berkembang pada umumnya dan juga Indonesia pada khususnya agar di kemudian hari dapat memiliki ketentuan anti dumping yang melindungi dan memfasilitasi kepentingan negara berkembang.

Keinginan dan harapan besar yang dimiliki oleh negara berkembang pada umumnya dan Indonesia pada khususnya tampaknya kini mengalami suatu kendala berarti. Negara anggota WTO telah menunggu dengan harapan bahwa *chairman's text* akan memenuhi kepentingan sebagian besar negara anggota WTO, namun dalam kenyataan *draft text* tersebut tidak merefleksikan apa yang selama ini dibahas di dalam *NG on Rules*. Oleh karena itu, sebagian besar negara anggota WTO menyampaikan kekecewaan mereka terhadap *draft chairman's text* yang dianggap sangat tidak *balance* dan tidak ambisius.[167] Berdasarkan hal ini, maka perlu kiranya dilihat bagaimana ketentuan-ketentuan yang diusulkan oleh ketua *NG on Rules* ini dari kacamata kepentingan negara berkembang secara umum, termasuk Indonesia.

4.2.1 *Zeroing*

Zeroing adalah cara dalam praktik perhitungan *dumping margin* dengan merubah *dumping margin* yang negatif menjadi nol. Sebagaimana diketahui, d*umping margin* merupakan selisih dari *normal value* dan *export price*, hasil perhitungannya dapat menunjukkan suatu nilai atau angka baik positif maupun negatif. Nilai positif dihasilkan bilamana *normal value* lebih besar dari *export price* dan hasil negatif ditemukan sebaliknya bila ternyata *normal value* lebih kecil dari *export price*. Dengan perhitungan seperti ini, maka hasil yang menunjukkan nilai negatif tidak dihitung dan perhitungan *dumping margin* hanya dilakukan sebatas pada hasil yang menunjukkan nilai positif saja.

[167] Lihat BB-702/PTRI JENEWA/XII/07 tertanggal 18 Desember 2007 perihal Laporan Sidang *NG on Rules* tanggal 12-14 Desember 2007.

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Permasalahan *zeroing* ini timbul dari masalah praktik perhitungan *dumping margin* sebagaimana diatur dalam ADA khususnya sehubungan dengan pasal 2.4 dan 2.4.2. Implementasi dari pasal ini, khususnya oleh Amerika Serikat, telah menimbulkan kerugian bagi negara asal produk yang dibebankan bea masuk anti dumping. Melalui perhitungan ini *dumping margin* menjadi tinggi dan oleh karenanya bea masuk anti dumping yang dibebankan juga tinggi.

Isu ini dapat dikatakan sebagai isu yang paling kontroversial dalam *chairman's text*. Diaturnya mengenai masalah *zeroing* dalam *chairman's text* telah melahirkan kecaman keras dari hampir semua negara anggota WTO. Penerapan metode *zeroing* pada perhitungan *dumping margin* tidak dapat diterima mengingat metode tersebut bersifat parsial, selektif dan bias. Hal tersebut lebih banyak membawa dampak negatif, karena akan menyebabkan tingginya besaran *dumping margin* dan hal tersebut dapat disalahgunakan sebagai alat proteksi industri dalam negeri. Amerika Serikat sebagai negara yang paling keras menginginkan masuknya *zeroing* dalam *draft* tetap mempertahankan posisinya dengan alasan hal tersebut telah diatur dalam peraturan domestiknya. Selain itu Amerika Serikat juga tetap bersikeras menyatakan bahwa perhitungan dengan *zeroing* tersebut tidak bertentangan dengan ADA sehingga tidak dapat menerima keberatan yang disampaikan oleh negara anggota WTO lainnya.[168]

Serentak setelah dikeluarkannya *draft chairman's text* sekelompok negara langsung memberikan pernyataan ketidaksetujuannya terhadap diaturnya *zeroing* dalam *chairman's text*.[169] Banyak negara yang kemudian bergabung dengan kelompok ini, termasuk Indonesia, guna menyuarakan kecamannya terhadap *zeroing*.[170] Kelompok ini menyatakan bahwa *chairman's text* harus sesuai dengan

[168] Lihat BB-702/PTRI JENEWA/XII/07, *op. cit.* dan BB-71/PTRI-JENEWA/II/08 tertanggal 4 Februari 2008 perihal Laporan sidang *NG on Rules* tanggal 21 Januari-1 Pebruari 2008.

[169] TN/RL/W/214 tertanggal 7 Desember 2007 diajukan oleh *Brasil; Chile; China; Costa Rica; Hong Kong, China; India; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand*. Dapat diakses melalui <http://docsonline.wto.org>

[170] Bergabungnya berbagai negara ke dalam kelompok ini membuat dokumen TN/RL/W/214 harus direvisi ulang sampai beberapa kali. Bandingkan dengan TN/RL/W/214/Rev.3 tertanggal 25 Januari 2008 diajukan oleh *Brasil; Chile; China; Colombia; Costa Rica; Hong Kong, China; India;*

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semangat dari DDA yaitu meningkatkan arus perdagangan, *predictability* dan transparansi. Selain itu, *chairman's text* juga harus mewakili pembahasan aktual yang terjadi di dalam *NG on Rules*. Oleh karena itu, *draft* yang diajukan ketua *NG on Rules* ini dianggap tidak *balance*. Selanjutnya, kelompok ini menyatakan bahwa *zeroing* adalah metode yang bias dan parsial untuk menghitung *dumping margin* dan akan mengakibatkan tingginya bea masuk anti dumping. Jika praktik ini diperbolehkan, maka dapat membatalan hasil yang diraih dari upaya liberalisasi perdagangan.[171]

Kecaman ini kemudian ditindaklanjuti dengan mengajukan usulan atas perubahan ketentuan sebagaimana diusulkan ketua *NG on Rules* mengenai *zeroing*. Mereka menolak diperbolehkannya perhitungan dengan cara *zeroing* baik dalam hal metode, maupun saat dilakukannya perhitungan tersebut terkait dengan tahap penyelidikan anti dumping dan juga pada saat *review*. Selain itu mereka juga mengusulkan konsistensi penggunaan metode dalam perhitungan *dumping margin* pada tahap penyelidikan anti dumping dan *review*.[172]

Draft chairman's text memperbolehkan praktik *zeroing* dalam beberapa hal baik dalam hal metode perhitungan *dumping margin* maupun saat dilakukannya perhitungan tersebut terkait tahap penyelidikan anti dumping dan pada saat *review*. *Draft* ini menyatakan bahwa "*non-dumping margins*" (*negative dumping margin*) harus dipertimbangkan dalam hal menghitung dengan *weighted average to weighted average method*, namun tidak untuk *transaction to transaction method*, dan perbandingan antara *weighted average* dari *normal value* dengan transaksi

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Indonesia; Israel; Japan; Korea; Mexico; Norway; Pakistan; Singapore; South Africa; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Viet Nam. Dapat diakses melalui <http://docsonline.wto.org>

[171] TN/RL/W/214/Rev.3, *ibid*. Dapat diakses melalui <http://docsonline.wto.org>

[172] Lihat TN/RL/W/215 tertanggal 31 Januari 2008 diajukan oleh *Brasil; Chile; China; Colombia; Costa Rica; Hong Kong, China; India; Indonesia; Israel; Japan; Korea; Mexico; Norway; Pakistan; Singapore; South Africa; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Viet Nam*. Dapat diakses melalui <http://docsonline.wto.org>

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ekspor secara individual (*tergeted dumping*). *Draft* ini juga memperbolehkan "*non-dumping margins*" untuk tidak diperhatikan dalam melakukan *review*.[173]

Saat ini telah banyak kasus (*case law*) dalam WTO yang melibatkan permasalahan *zeroing* ini dan hampir semua kasus ditujukan terhadap Amerika Serikat. Namun demikian, *case law* yang pertama kali mempermasalahkan mengenai hal ini justru adalah *EC-Anti Dumping Duties on Imports of Cotton-Type Bed Linen from India* (*EC-Bed Linen*)[174]. Dalam kasus ini, India mempermasalahkan cara perhitungan yang dilakukan oleh EC. Panel berpendapat bahwa memang pasal 2.4.2 ADA tidak melarang *zeroing*. Namun demikian, bukan berarti praktik seperti ini diperbolehkan. Jika hal ini menghasilkan inkonsistensi dengan kewajiban yang diatur dalam pasal tersebut, maka hal ini tidak diperbolehkan dan panel berkesimpulan bahwa hal ini inkonsisten dengan pasal 2.4.2 ADA.[175] Kemudian, untuk kasus lainnya, maka *zeroing* juga dipermasalahkan dalam hal dipergunakannya cara perhitungan tersebut dalam *review*, bukan sebatas pada penyelidikan anti dumping saja. Dalam *US-Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, AB membalikkan putusan *panel* yang menyatakan *zeroing* diperbolehkan dalam *review*.[176] Kasus-kasus *zeroing* ini hanya mewakili banyaknya kasus yang melibatkan cara perhitungan *dumping margin* dengan *zeroing*.[177]

Dalam kasus-kasus yang melibatkan Amerika Serikat, sehubungan dengan penggunaan *zeroing* dalam perhitungan *dumping margin*-nya, baik panel ataupun AB telah berulang kali menyatakan bahwa praktik *zeroing* tidak dapat dibenarkan. Namun tampaknya hal ini tidak menyurutkan Amerika Serikat untuk tetap menggunakan cara perhitungan yang sama. Hal ini tampak berbeda dengan EC

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[173] "Draft text of anti-dumping rules proposed by Chairman of WTO negotiating group," <http://www.moulislegal.com/Drafttextofanti-dumpingrules.html>, 22 Januari 2008.

[174] Lihat WT/DS141/R. Dapat diakses melalui <http://docsonline.wto.org>

[175] Lihat Brian Hindley dan Edwin Vermulst, "Zeroing in on zeroing: Anti-dumping in WTO dispute settlement," <http://www.vvg-law.com/publications/2001Zeroing.pdf>, diakses pada 15 Oktober 2008.

[176] WT/DS294/AB/R, tertanggal 18 April 2006. Lihat Vivian C. Jones, *op cit*., hlm 15.

[177] Kasus lain yang mempermasalahkan *zeroing* antara lain: *US-Zeroing (Japan); US-Softwood Lumber from Canada; US-Continued Zeroing*, dll.

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yang menjadi *respondent* pada (*EC-Bed Linen*), saat ini atas beberapa kasus mengenai penggunaan *zeroing* yang dilakukan Amerika Serikat, EC justru menjadi *complainant.*[178]

Pengaturan *zeroing* seperti diusulkan oleh ketua *NG on Rules* ini tampaknya justru memfasilitasi apa yang Amerika Serikat inginkan. Mengadopsi usulan ini akan melestarikan apa biasa dilakukan oleh Amerika Serikat dalam hal perhitungan *dumping margin*.[179] Bahkan dikatakan, usulan dalam *chairman's text* ini bukan *compromise* tetapi menggambarkan posisi Amerika Serikat dan mewakili sertus persen apa yang Amerika Serikat inginkan. Selain itu, usulan seperti ini tampaknya ditujukan untuk *override* apa yang telah menjadi pendapat AB dalam kasus-kasus zeroing sehingga akan menjadikannya *bad precedent*.[180] *Draft* ini seolah-oleh buta akan berbagai *case law* yang ada dimana perhitungan dengan cara *zeroing* telah dianggap inkonsisten dengan ketentuan WTO baik melalui metode perhitungannya maupun saat dilakukannya perhitungan tersebut terkait pada tahap penyelidikan dan saat *review*.

Oleh karena itu, diaturnya masalah *zeroing* ke dalam *draft text* oleh ketua *NG on Rules* dapat dikatakan sangat tidak mencerminkan kepentingan negara berkembang. Bukan saja negara berkembang, namun hampir seluruh negara anggota WTO. *Draft* ini hanyalah pencerminan dari kepentingan Amerika Serikat, sehingga *draft* ini harus dikatakan sangat tidak *balance* karena justru mengesampingkan keinginan atau kepentingan hampir seluruh negara anggota WTO. Dampak yang dihasilkan melalui perhitungan ini dapat merugikan kepentingan negara anggota WTO termasuk juga negara berkembang. Hal ini dapat disalahgunakan sebagai alat proteksi karena *dumping margin* yang dihasilkan

[178] *US-Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing") dan US-Continued Zeroing.*

[179] "Draft text of anti-dumping rules proposed by Chairman of WTO negotiating group," <http://www.moulislegal.com/Drafttextofanti-dumpingrules.html>, *op cit*.

[180] Kanaga Raja, "Differences over anti-dumping issues in Rules Chair's text," <http://www.twnside.org.sg/title2/wto.info/twninfo20080202.htm>, 25 Januari 2008.

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dengan perhitungan ini akan menjadi tinggi sehingga besarnya bea masuk anti dumping juga berpotensi akan tinggi.[181]

4.2.2 *Sunset Review*

Sunset review merupakan istilah yang dikenal dalam hal tinjauan atas bea masuk anti dumping yang telah dibebankan. Tinjauan yang dimaksud disini adalah tinjauan yang dilakukan menjelang berakhirnya masa berlaku bea masuk anti dumping yaitu lima tahun. Tinjauan ini diperlukan guna menilai apakah masih diperlukan atau tidak pembebanan lebih lanjut bea masuk anti dumping atas produk impor dimaksud. Bila ternyata berdasarkan hasil tinjauan dinyatakan masih perlu untuk membebankan bea masuk anti dumping, maka bea masuk anti dumping tersebut dapat tetap diberlakukan.

Sebagaimana telah dijelaskan sebelumnya, pengaturan seputar *sunset review* dalam *chairman's text* dapat dilihat pada pasal 11.3, termasuk didalamnya pasal 11.3.1 sampai dengan pasal 11.3.6. Kemudian, untuk lamanya waktu *review* tersebut dapat dilihat pada ketentuan pasal 11.4. Pengaturan pada *chairman's text* ini dirasakan bersifat lebih detail dan lengkap karena pengaturan seperti ini, khususnya pasal 11.3, tidak ditemukan pada ADA yang berlaku saat ini. Pengaturan mengenai *sunset review* dalam ADA diakui sangat ringkas, hanya mengatur sedikit petunjuk yang harus diikuti oleh *authorities* dalam hal membuat keputusan atas *sunset review*.[182]

Pengaturan mengenai *sunset review* dalam ADA dapat dilihat pada pasal 11.3 dan juga pasal 11.4 untuk masalah jangka waktunya. Ketentuan dalam pasal-pasal ini menyatakan bahwa sesungguhnya pembebanan bea masuk anti dumping berakhir dalam jangka waktu lima tahun setelah pembebanan. Namun demikian, terhadap bea masuk anti dumping yang telah dibebankan tersebut dapat dilakukan suatu *review* yang normalnya berlangsung selama 12 bulan, sebelum berakhirnya masa berlaku yaitu lima tahun, guna menilai perlu tidaknya pembebanan lebih

[181] Hasil perhitungan *dumping margin* yang dilakukan oleh otoritas Amerika Serikat menghasilkan angka rata-rata antara 60 hingga 70 persen. Lihat Vivian C. Jones, *op cit*., hlm 14.

[182] Lihat Edwin Vermulst (1), *op. cit.,* hlm 194-195.

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lanjut bea masuk anti dumping tersebut. Ketentuan pasal-pasal ini khususnya pasal 11.3 pada praktiknya menimbulkan suatu permasalahan. Hal ini dikarenakan berdasarkan ketentuan tersebut, dan dihubungkan dengan ketentuan pasal 11.1 ADA[183], maka suatu bea masuk anti dumping yang telah dikenakan akan dapat terus dibebankan untuk jangka waktu yang tidak dibatasi. Terhadap bea masuk anti dumping yang akan berakhir masa berlakunya, cenderung dipastikan akan dilakukan *sunset review* yang berujung pada tetap dilanjutkannya pembebanan bea masuk anti dumping. Hal ini kemudian melahirkan istilah "*the sun never set*" karena memang bea masuk anti dumping cenderung akan terus diberlakukan hingga masa yang tidak dibatasi.

Hal ini tentunya akan menimbulkan kerugian bagi negara pengekspor produk dumping tersebut khususnya negara berkembang. Produk yang telah dibebankan bea masuk anti dumping, untuk jangka waktu yang tidak tentu akan tetap dikenakan bea masuk anti dumping. Sebagai contoh, hingga sekitar tahun 2006, Amerika Serikat memiliki atau membebankan 190 bea masuk anti dumping yang telah berlaku lebih dari lima tahun. Bahkan bea masuk terlama yang dibebankan Amerika Serikat adalah sejak tahun 1973 yaitu terhadap produk *polychloroprene rubber* asal Jepang. Kemudian, semenjak Januari 2000 hingga Januari 2005, Amerika Serikat telah melakukan sebanyak 116 kali *sunset review* dimana 37 diantaranya diputuskan untuk dicabut, 52 diputuskan untuk tetap diberlakukan, dan 27 diantaranya belum diputuskan. Hal ini jelas menunjukkan bahwa sebagian besar dari bea masuk anti dumping tersebut akan tetap diberlakukan melebihi masa lima tahun.[184]

Kemudian, masalah lain yang timbul dari pasal 11.3 ADA adalah ketentuan ini tidak secara jelas mengatur mengenai konsep, prosedur dan juga metodologi yang dapat diterapkan terhadap *sunset review*. Kurangnya atau tidak adanya aturan yang eksplisit mengakibatkan atau memungkinkan *authorities* untuk memperkenalkan atau menggunakan aturan, prosedur, dan juga metodologi secara

[183] Pasal 11.1 ADA menyebutkan bahwa: *An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury*.

[184] Lihat Vivian C. Jones, *op cit*., hal 19.

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semena-mena (*arbitrarily*) terhadap *review* ini. Baik aturan, prosedur, maupun metodologi yang digunakan secara *arbitrarily* tersebut secara substansial berbeda dari apa yang berlaku atas penyelidikan anti dumping dan menempatkan beban yang tidak semestinya pada responden.[185] Hal ini akan mengakibatkan adanya standar yang berbeda ditiap negara anggota WTO pada saat mereka melakukan *sunset review* atas bea masuk anti dumping yang tengah dibebankan.

Ketidakjelasan dan ringkasnya pengaturan mengenai *sunset review* telah mengakibatkan lahirnya beberapa sengketa diantara negara anggota WTO untuk diselesaikan pada sistem penyelesaian sengketa (*dispute settlement system*) WTO. Kasus-kasus yang dapat merepresentasikan permasalahan mengenai *sunset review* antara lain adalah: *United States--Corrosion-resistant carbon steel flat products from Japan* dan *United States—Sunset reviews of anti dumping measures on oilcountry tubular goods from Argentina*. Kasus–kasus ini dapat menjadi acuan karena dalam penilaiannya, *Appellate Body* (dan juga *Panel*) telah memberikan klarifikasi penting dari pasal 11.3 ADA.[186] Klarifikasi penting yang ada dalam kasus-kasus ini antara lain adalah penilaian atas *likelihood* harus dilakukan berdasarkan *prospective determination* atau dengan kata lain adanya suatu *forward-looking analysis* dalam melihat apa yang cenderung akan terjadi juga bea masuk anti dumping dicabut. Kemudian, eksistensi *dumping margin* yang ditemukan dalam tahap penyelidikan antidumping tidak dapat serta merta diartikan masih tetap berlangsung terus selama masa dibebankannya tindakan anti dumping.[187]

Permasalahan serupa sepertinya juga tergambarkan pada banyaknya masukan dan proposal dari negara anggota WTO seputar masalah *sunset review* guna menyempurnakan ketentuan yang ada. Masukan ataupun proposal negara-negara anggota sehubungan dengan isu *sunset review* antara lain: perihal perlunya

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[185] Lihat TN/RL/W/10 tertanggal 28 Juni 2002 diajukan oleh *Brasil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; and Thailand.* Dokumen ini merupakan masukan atau kontribusi yang ditujukan sebagai bahan diskusi dalam *NG on Rules*. Dapat diakses melalui <http://docsonline.wto.org>

[186] Edwin Vermulst (1), *op. cit.*, hlm 195.

[187] Untuk lebih detail pembahasan mengenai permasalahan dalam kasus-kasus ini, lihat Edwin Vermulst (1), *Ibid.*, hlm 194-204.

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diadopsi ketentuan mengenai "*automatic sunset*"[188], perlunya ketentuan secara jelas yang menyebutkan bahwa prosedur dan metodologi yang digunakan dalam penyelidikan anti dumping berlaku juga dalam *review*[189], mengeksplorasi perbedaan antara *review* sebagaimana diatur dalam pasal 11.2 ADA dan 11.3 ADA (*sunset review*)[190], dll.[191]

Permasalahan-permasalahan perihal *sunset review* sebagaimana telah disebutkan, kemudian tampaknya cukup disadari oleh ketua *NG on Rules*. Dalam *draft*-nya, ketua *NG on Rules* terlihat mencoba untuk mengatur permasalahan ini secara lebih lanjut dan lebih detail. Dalam pasal-pasal yang terdapat pada *chairman's text*, dapat ditemukan berbagai ketentuan baru dan juga lebih detail atas isu *sunset review*. Ketentuan-ketentan mengenai *sunset review* dalam *chairman's text*, sebagaimana telah dijelaskan sebelumnya, mengatur antara lain: inisiasi atau diawalinya *sunset review* baik berdasarkan permohonan tertulis maupun inisiatif *authorities*; rentang waktu dilakukannya *sunset review*; adanya bukti positif dan pemeriksaan yang obyektif atas semua faktor relevan sebagai dasar diambilnya keputusan; *automatic termination*; dan juga *expeditious action* yang dapat diambil oleh *authorities*.

Berbagai tanggapan, masukan, ataupun kritik dihasilkan terhadap usulan perubahan yang ditawarkan mengenai isu *sunset review* ini. Secara umum, usulan perubahan atas isu *sunset review* mendapatkan tanggapan yang positif khususnya mengenai masalah *automatic termination*[192]. Namun demikian, terdapat beberapa perbedaan mengenai masalah lamanya masa *automatic termination* tersebut.

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[188] Lihat TN/RL/W/111 tertanggal 27 Mei 2003 diajukan oleh *Republic of Korea*. Adapula negara anggota WTO yang mengusulkan hal ini merupakan bagian dari S&D, lihat TN/RL/W/66 tertanggal 6 Maret 2003 diajukan oleh *China*. Dapat diakses melalui <http://docsonline.wto.org>

[189] Lihat TN/RL/W/66, *ibid*. Dapat diakses melalui <http://docsonline.wto.org>

[190] Lihat TN/RL/W/81 tertanggal 23 April 2003 diajukan oleh *Argentina*. Dapat diakses melalui <http://docsonline.wto.org>

[191] Untuk lebih detail mengenai masukan-masukan atau proposal-proposal yang diajukan, lihat TN/RL/W/143 tertanggal 22 Agustus 2003 hal 58-60. Dokumen ini merupakan kompilasi dari berbagai masukan dan proposal yang diajukan oleh negara anggota WTO, yang diperinci berdasarkan pasal termasuk didalamnya masalah seputar *sunset review*. Dapat diakses melalui <http://docsonline.wto.org>

[192] *Automatic termination*, sebagaimana diatur dalam pasal 11.3.5 *chairman's text*, adalah selama sepuluh tahun. Hal inilah yang menjadi *key element* dalam pembahasan mengenai isu *sunset review*. Lihat Kanaga Raja, *op cit*.

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Sejumlah negara anggota WTO, termasuk Indonesia, setuju dengan usulan masa sepuluh tahun untuk *automatic termination*, dimana beberapa negara anggota WTO lainnya menginginkan masa yang lebih singkat yaitu delapan dan lima tahun. Sebagai catatan, beberapa negara maju seperti Amerika Serikat, *European Community* (EC), Australia, Kanada, dan Selandia Baru menolak usulan adanya *automatic termination* ini.[193]

Mengenai ketentuan pasal 11.3.6, banyak negara anggota WTO menolak usulan yang diajukan. Hal ini mengingat bahwa pasal tersebut dapat disalahgunakan dan dapat menimbulkan *expeditious action*, mendorong *authorities* untuk menerapkan *provisional measures* secara lebih cepat dengan menggunakan *best information available*. Untuk masalah ini, Jepang mengusulkan agar ketentuan ini dihapuskan dari *draft chairman's text*.[194]

Dari penjelasan yang telah disebutkan, maka dapat dikatakan bahwa ketentuan mengenai isu *sunset review* dalam *chairman's text*, secara umum, telah cukup memperhatikan apa yang selama ini menjadi kendala dalam penerapannya. Setidaknya apa yang diusulkan oleh *draft* ini sudah lebih baik dibandingkan dengan pengaturan yang ada saat ini. Dengan adanya pengaturan mengenai *automatic termination*, berapapun masa berlakunya, setidaknya telah memperlihatkan upaya untuk memperbaiki praktik yang kini kerap ditemukan dimana bea masuk anti dumping dapat dikenakan untuk jangka waktu yang tidak tentu. Hal ini merupakan sesuatu yang positif bagi negara berkembang pada umumnya, dan Indonesia pada khususnya, karena memberikan suatu kepastian keberlakuan atas bea masuk anti dumping. Produk-produk asal negara berkembang akan kembali mendapatkan *competitiveness*-nya bila bea masuk yang dikenakan terhadapnya dapat dicabut dalam jangka waktu yang pasti. Tindakan pembebanan bea masuk anti dumping yang memakan waktu sangat lama, seperti yang dilakukan Amerika Serikat sebagaimana disebutkan sebelumnya, diharapkan tidak akan ditemukan lagi dalam praktik pembebanan bea masuk anti dumping.

[193] Lihat BB-702/PTRI JENEWA/XII/07, *op cit*., dan BB-71/PTRI-JENEWA/II/08, *op cit.*
[194] Lihat BB-71/PTRI-JENEWA/II/08, *Ibid.*

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Kemudian, ketidakjelasan dan ringkasnya pengaturan mengenai *sunset review* dalam ADA tampaknya juga dicoba untuk diakomodasi oleh ketua *NG on Rules* dalam *draft*-nya ini. Pengaturan mengenai isu ini yang ditempatkan dalam beberapa ketentuan mulai dari pasal 11.3.1 hingga 11.3.6 juga menunjukkan setidaknya adanya suatu langkah penyempurnaan. Tanggapan, masukan, kritik, maupun penolakan atas penyempurnaan ketentuan *sunset review* ini merupakan suatu hal yang wajar dan kiranya dapat menjadi bahan diskusi dalam perundingan selanjutnya.

4.2.3 *Lesser Duty Rule*

Sebagaimana diketahui, pengaturan mengenai *lesser duty rule* dalam ADA ditemukan pada pasal 9.1, yang menyebutkan:

> *...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.*

Ketentuan pasal ini mendorong atau menyarankan penerapan bea masuk anti dumping oleh negara pengimpor yang lebih kecil dari besarnya *dumping margin*. Penerapan ini dapat dilakukan bila ternyata besarnya bea masuk anti dumping yang lebih kecil tersebut sudah dapat menetralkan *injury* yang terjadi atas industri domestik. Walau demikian, sekali lagi ketentuan ini hanya bersifat menyarankan sehingga tidak mewajibkan otoritas yang berwenang di negara pengimpor untuk menerapkannya.

Pada dasarnya, tujuan dari tindakan anti dumping adalah untuk menghilangkan atau menetralkan *injury* yang disebabkan oleh impor barang dumping. Konsekuensi logis dari tujuan tersebut adalah bila ternyata dengan bea masuk anti dumping yang lebih rendah sudah cukup menghilangkan dampak *injury*, maka hal tersebut sepatutnya dilakukan oleh negara pengimpor. Sayangnya, banyak negara anggota WTO melakukan perhitungan atas bea masuk anti dumping tanpa

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menilai atau memperhatikan bahwa bea yang lebih rendah tersebut sudah cukup untuk menetralkan *injury*. Dalam hal ini, tujuan dari bea masuk tersebut sungguh-sungguh disimpangkan. Untuk negara berkembang, situasi seperti ini bahkan memiliki konsekuensi yang lebih serius. Ketika *lesser duty* tidak diterapkan, *trade restrictive effects* dari bea masuk anti dumping akan meningkat sehingga akan memberikan beban tambahan kepada negara berkembang.[195]

Oleh karenanya, banyak negara anggota WTO, khususnya negara berkembang, yang mengusulkan dilakukannya suatu perubahan atas ketentuan *lesser duty* tersebut. Perubahan yang diusulkan terhadap ketentuan ini adalah merubah sifat *lesser duty rule* menjadi sesuatu yang *mandatory*, khususnya terhadap produk asal negara berkembang.[196] Dengan kata lain, negara maju harus menerapkan *lesser duty* bila berhubungan dengan pembebanan bea masuk anti dumping atas produk yang berasal dari negara berkembang. Hal berbeda tidak berlaku bila sebaliknya negara berkembang membebankan bea masuk anti dumping atas produk impor yang berasal dari negara maju.[197]

Dimungkinkannya negara berkembang untuk tidak menerapkan *lesser duty rule* sebagai sesuatu yang bersifat *mandatory* merupakan hal yang esensial. Penerapan *lesser duty* akan menuntut adanya kewajiban tambahan yang mana tidak akan dapat dipenuhi oleh *authorities* negara berkembang. Untuk negara maju, penerapan *lesser duty* ini bukanlah masalah berarti karena *authorities* mereka memiliki keahlian dan sumber daya yang memadai untuk melakukannya. Hal ini

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[195] Lihat TN/RL/W/7 tertanggal 26 April 2002 diajukan oleh *Brazil*. Dapat diakses melalui <http://docsonline.wto.org>

[196] Apa yang diusulkan oleh banyak negara berkembang atas perubahan aturan *lesser duty rule* ini, oleh beberapa negara anggota WTO diklasifikasikan sebagai bagian dari bentuk S&D sebagaimana diatur dalam pasal 15 ADA. Lihat TN/RL/W/4 tertanggal 25 April 2002 diajukan oleh *India*; TN/RL/W/66, *op cit*.; dan TN/RL/W/110 tertanggal 22 Mei 2003 diajukan oleh *Egypt*. Dapat diakses melalui <http://docsonline.wto.org>

[197] Masukan ataupun proposal yang mengusulkan perihal *mandatory lesser duty* dapat dilihat antara lain: TN/RL/W/4, *op cit*.; TN/RL/W/6 tertanggal 26 April 2002 diajukan oleh *Brasil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand, and Turkey*; TN/RL/W/7, *op cit*.; TN/RL/W/66, *op cit*.; dan TN/RL/W/110, *op cit*. Dapat diakses melalui <http://docsonline.wto.org>

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dibuktikan dengan fakta bahwa beberapa negara maju telah memasukkan *mandatory lesser duty* ke dalam peraturan anti dumping domestiknya.[198]

Bila melihat ketentuan yang diusulkan oleh *ketua NG on Rules* dalam *draft text*-nya, maka apa yang menjadi harapan dari negara berkembang untuk diwajibkannya *lesser duty* terhadap produk mereka yang dikenakan bea masuk anti dumping oleh negara maju tampaknya tidak akan terwujud. Ketentuan *draft* ini seolah-olah menghapuskan atau menghilangkan, walaupun tidak, ketentuan mengenai *lesser duty*. Namun demikian, pengaturan mengenai *lesser duty* yang diusulkan dalam *draft* ini benar-benar telah mencederai semangat negara berkembang dalam memperjuangkan *mandatory lesser duty*.

Pasal 9.1 *chairman's text* menyebutkan bahwa: "*...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*". Tidak ditemukan ketentuan dalam pasal ini yang menyebutkan baik alasan diterapkannya *lesser duty rule* maupun sifat penerapannya tersebut. *Draft* ini bukannya menegaskan sifat *mandatory* dari ketentuan *lesser duty*, namun justru 'menghilangkan' sifat '*desirable*' sebagaimana terkandung dalam ketentuan pasal 9.1 ADA. Tuntutan untuk meningkatkan status *lesser duty* dari 'menyarankan' menjadi 'mewajibkan' justru disikapi oleh ketua *NG on Rules* dengan meniadakan sifat 'menyarankan' tersebut.

Ketentuan sebagaimana diusulkan dalam *chairman's text* ini mendapat reaksi keras dari berbagai negara anggota WTO. Hampir seluruh negara anggota WTO, termasuk Indonesia, merasa kecewa dengan ketentuan yang diusulkan oleh ketua *NG on Rules*. Mereka mendesak agar pengaturan sebagaimana diatur dalam ADA ditempatkan kembali pada rumusan *draft text* dan juga menambahkan sifat *mandatory* atas *lesser duty rule*.[199]

[198] Lihat TN/RL/W/110, *ibid*. Dapat diakses melalui <http://docsonline.wto.org>
[199] Lihat BB-71/PTRI-JENEWA/II/08, *op. cit*.

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Reaksi atau kekecewaan negara anggota WTO terhadap ketentuan mengenai *lesser duty rule*, sebagaimana diusulkan dalam *chairman's text*, selanjutnya dapat dilihat melalui suatu *working paper* yang diajukan oleh sekelompok negara anggota WTO.[200] Dalam dokumen ini, diketahui bahwa semua negara anggota WTO sangat terkejut dengan usulan yang ada. Tidak satupun negara anggota WTO yang pernah mengusulkan dihapuskannya ketentuan yang ada saat ini bahkan termasuk negara anggota WTO yang menentang *mandatory lesser duty rule*.

Kemudian, dinyatakan dalam dokumen ini bahwa tujuan dari pengaturan mengenai *lesser duty* sebagaimana diatur dalam ADA adalah tidak untuk secara semena-mena menurunkan bea masuk anti dumping. Tujuan *lesser duty rule* adalah untuk menjamin bea masuk anti dumping ditentukan pada besaran yang tepat agar produk domestik dapat bersaing dengan produk yang dibebankan bea masuk anti dumping tersebut tanpa mengalami *injury*. Oleh karenanya, penerapan *lesser duty rule* seyogyanya merupakan suatu keharusan.

Selanjutnya, diketahui berdasarkan dokumen ini, beberapa negara anggota WTO misalnya Argentina, Australia, Brasil, EC, India, Selandia Baru, dan Turki telah melaksanakan *lesser duty rule* lebih dari apa yang yang diatur dalam ADA. Negara-negara tersebut menyadari bahwa pengaturan yang ada saat ini tidak bersifat *mandatory*, namun mereka memilih untuk melaksanakannya demi sistem yang lebih baik. Tindakan yang mereka lakukan ini merupakan tindakan positif yang sejalan dengan semangat DDA yaitu meningkatkan arus perdagangan, *predictability* dan transparansi.

Dari beberapa penjelasan diatas, maka dapat dikatakan disini bahwa usulan sebagaimana diajukan dalam *chairman's text* nyatanya sama sekali tidak merepresentasikan kepentingan mayoritas negara anggota WTO, termasuk di dalamnya negara berkembang. Usulan ini telah mengecewakan hampir seluruh negara anggota WTO dimana bahkan tidak pernah ada satu negara anggota WTO pun yang mengusulkan perubahan atas ketentuan mengenai *lesser duty rule*

[200] TN/RL/W/224 tertanggal 12 Maret 2008 diajukan oleh *Brazil; Chile; Colombia; Costa Rica; Hong Kong; Israel; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, penghu, Kinmen, and Matsu; and Thailand.* Dapat diakses melalui <http://docsonline.wto.org>

sebagaimana diusulkan oleh ketua *NG on Rules* tersebut. Pengaturan seperti ini dapat dikatakan sebagai penyimpangan atas tujuan dasar pembebanan suatu bea masuk anti dumping dan juga sebagai penghambat upaya positif guna meningkatkan arus perdagangan, *predictability* dan juga transparansi.

4.2.4 *Circumvention/Anti Circumvention*

Isu *circumvention/anti circumvention* merupakan isu klasik yang telah lama dibahas guna dimasukkan ke dalam ketentuan anti dumping WTO. Pada saat berakhirnya Putaran Uruguay, para Menteri mengidentifikasi isu ini sebagai *unfinished work* yang harus diteruskan dan oleh karenanya dicantumkan dalam salah satu *Ministerial Decisions and Declarations* yang menjadi bagian integral dari *the Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations*.[201] *Decision on Anti Circumvention* ini berbunyi:

> *Ministers,*
>
> *Noting that while the problem of circumvention of anti-dumping measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text,*
>
> *Mindful of the desirability of the applicability of uniform rules in this area as soon as possible,*
>
> *Decide to refer this matter to the Committee on Anti-Dumping Practices established under the Agreement for resolution.*

Berdasarkan hal ini, maka kemudian pada tahun 1997 dibentuklah suatu *Informal Group on Anti Circumvention* yang ditugaskan untuk memecahkan persoalan-persoalan yang ada.

Sebagaimana telah dijelaskan dalam bab III, *circumvention* merupakan tindakan penghindaran dari pengenaan bea masuk anti dumping yang telah dibebankan terhadap suatu produk dumping. Tindakan ini merupakan strategi dagang dalam hal mengekspor suatu *complex manufactured products* disaat negara

[201] Lebih lengkapnya lihat Lucia Ostoni, *op. cit.*

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pengimpor memberlakukan bea masuk anti dumping sebagai tindakan perlindungan terhadap industri domestiknya. Beberapa tipe *circumvention* yang dapat dilakukan adalah *third country circumvention*, *importing-country circumvention*, *minor alteration circumvention*, dan pemindahan operasional produksi atau pabrikasi. Tindakan ini diyakini dapat merusak efektivitas dari tindakan anti dumping sebagai *trade remedies*. Penghindaran pembayaran bea masuk anti dumping dengan cara-cara tersebut pastinya membuat tindakan anti dumping menjadi sia-sia atau tidak berarti.

Terhadap tindakan atau praktik *circumvention* tersebut, maka sebagai balasannya dikenal istilah *anti circumvention*. Tindakan *anti circumvention* ini berupa perluasan cakupan pembebanan bea masuk anti dumping. Bea masuk anti dumping dibebankan tidak hanya sebatas pada produk dumping yang telah terbukti mengakibatkan *injury*, namun juga terhadap produk impor lainnya. Produk impor lainnya ini ditenggarai sebagai bentuk atau hasil dari tindakan *circumvention* atas produk dumping yang telah terlebih dahulu dibebankan bea masuk anti dumping. Oleh sebab itu, tindakan *anti circumvention* diperlukan dalam menghadapi praktik penghindaran pembayaran bea masuk anti dumping dan memastikan efektifitas bea masuk tersebut untuk menetralkan *injury* yang terjadi.

Dimasukkannya pengaturan mengenai isu *circumvention/anti circumvention* oleh ketua *NG on Rules* dalam *draft*-nya menimbulkan beragam reaksi dari negara anggota WTO. Negara anggota WTO terpecah menjadi dua kubu besar yakni mendukung dimasukkannya aturan ini dalam *draft* dan menolak sama sekali pengaturan mengenai isu ini. Pada umumnya negara berkembang dan juga beberapa negara maju menolak usulan dimasukkannya aturan ini dalam *draft text*. Walaupun secara prinsip konsep *anti circumvention* dapat diterima dalam rangka menciptakan suatu disiplin yang transparan dan *predictable*, namun hingga kini belum ada kesepakatan yang jelas mengenai definisi *circumvention*. Oleh karenanya, pengaturan masalah tersebut pada saat ini dianggap masih sangat *premature*. Kemudian, hal yang paling dikuatirkan dengan adanya pengaturan mengenai *circumvention* ini adalah sangat mudahnya suatu negara untuk menerapkan

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

tindakan *anti circumvention* terhadap suatu produk yang tidak berada dalam "*product under consideration*" sehingga sangat berpotensi disalahgunakan.[202]

Beberapa negara berkembang, dalam *statement*-nya, juga mengaitkan pengaturan isu ini dalam *draft text* dengan dunia investasi atau penanaman modal. Diaturnya isu ini akan mengakibatkan ketidakpastian (*uncertainty*) dan *unpredictability* kepada lingkungan masyarakat bisnis. Hal ini akan membawa dampak negatif terhadap penanaman modal luar negeri khususnya bagi negara berkembang. Kemudian, ditambahkan pula bahwa pengaturan isu ini dalam *chairman's text* dapat memungkinkan timbulnya konflik terhadap berbagai persetujuan lain dalam WTO seperti *Agreement on Rules of Origin*.[203]

Dengan adanya berbagai tanggapan tersebut, maka dapat dikatakan disini bahwa usulan dimasukkannya aturan mengenai *circumvention/anti circumvention* dalam *chairman's text*, setidaknya untuk saat ini, tidak merefleksikan kepentingan negara berkembang pada umumnya dan Indonesia pada khususnya. Hal yang menjadi sangat krusial disini adalah mengenai definisi dari *circumvention* itu sendiri. Tidak jelas dan *precise*-nya pengaturan mengenai definisi *circumvention* akan membawa kerugian bagi negara berkembang dikemudian hari. Keadaan ini akan melahirkan besarnya potensi terjadinya penyalahgunaan atas tindakan *anti circumvention* sebagai konsekuensi dari eksistensi tindakan *circumvention*.

Selain itu, belum jelasnya definisi dari *circumvention*, bila tidak dilakukan penolakan atas usulan ini, akan membawa negara anggota WTO kembali kepada suatu ketentuan yang ambigu. Ketentuan seperti inilah yang sebenarnya justru sedang diperjuangkan untuk dapat dihilangkan karena cenderung akan merugikan kepentingan negara berkembang. Menerima usulan yang diajukan, untuk saat ini, sama saja menambah persoalan baru. Perlu adanya pembahasan intensif lebih lanjut mengenai isu *circumvention/anti circumvention* ini, khususnya definisi *circumvention*, guna menciptakan pengaturan yang adil karena pada prinsipnya konsep *anti circumvention* merupakan suatu konsep yang baik.

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[202] Lihat BB-71/PTRI-JENEWA/II/08, *op. cit*. Lihat juga TN/RL/W/216 tertanggal 12 Pebruari 2008 diajukan oleh *China, Hong Kong, and Pakistan*. Dapat diakses melalui <http://docsonline.wto.org>

[203] Lihat TN/RL/W/216, *Ibid*. Dapat diakses melalui <http://docsonline.wto.org>

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4.2.5 *Special and Differential Treatment*

Special and Differential Treatment (S&D) merupakan prinsip universal yang diakui dalam sistem perdagangan multilateral WTO. Masuknya atau diakuinya prinsip ini dalam sistem perdagangan multilateral bukan datang secara tiba-tiba ataupun otomatis. Diakuinya prinsip ataupun ketentuan mengenai S&D dalam kerangka perdagangan internasional ini telah melalui serangkaian perkembangan atau evolusi bahkan sejak masa GATT. Perkembangan yang terjadi tersebut bukanlah berjalan tanpa hambatan karena telah melalui atau tak luput dari pasang surut. Prinsip ini dapat dikatakan bermula dari, atau didorong oleh, perbedaan berbagai karakteristik yang dimiliki oleh negara maju dan berkembang. Perbedaan karakteristik ini mengakibatkan perbedaan kedudukan yang mencolok diantara mereka karena mereka tidak berada dalam *the same playing field*. Oleh karenanya, prinsip ataupun ketentuan mengenai S&D ini mencoba untuk menjembatani *gap* yang ada karena perbedaan berbagai karakterisik tersebut. [204]

Prinsip S&D dipahami, walaupun tidak ada definisi eksplisit, sebagai perlakuan khusus dan berbeda yang diberikan kepada, atau dimiliki oleh, negara berkembang dan negara terbelakang secara ekslusif. Karena prinsip ini ditujukan untuk kepentingan negara berkembang dan terbelakang, maka oleh karenanya S&D bukan merupakan hak bagi negara maju untuk mendapatkannya. Bahkan dalam beberapa hal, negara maju wajib menerapkan perlakuan tersebut terhadap negara berkembang dan terbelakang.

Pentingnya kedudukan prinsip ini dapat dilihat dari hasil Deklarasi Doha sebagai awal diluncurkannya Putaran Doha.[205] Deklarasi Doha memandang masalah S&D ini dengan menegaskan bahwa:[206]

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[204] Untuk perkembangan atau evolusi S&D dapat dilihat pada Frank J. Garcia (3), "Beyond Special and Differential Treatment," *Boston College Law School Faculty Papers*, vol. 27 (2004): 311-312. Dapat diakses melalui <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1118&context=bc/bclsfp>. Lihat juga Thomas Fritz, "Special and Differential Treatment for Developing Countries" *Global Issue Papers*, No.18 (2005). Dapat diakses melalui <http://www.germanwatch.org/tw/sdt05e.htm>.

[205] Pengakuan atau bahkan penekanan akan pentingnya S&D ini selanjutnya juga kembali ditegaskan oleh negara-negara anggota WTO dalam *July Package* dan juga *Hong Kong Ministerial Declaration*.

[206] Departemen Luar Negeri, *op. cit.*, hlm 75.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

1. S&D merupakan bagian integral dari persetujuan-persetujuan WTO;[207]
2. semua perundingan dan aspek-aspek dalam program kerja Doha harus mempertimbangkan prinsip S&D tersebut;[208] dan
3. semua ketentuan mengenai S&D harus ditinjau kembali untuk membuatnya lebih *precise*, efektif dan operasional.[209]

Selanjutnya, Deklarasi Doha menetapkan adanya suatu program kerja dalam hal S&D yang ditempatkan pada *Decision on Implementation-Related Issues and Concerns*. Para Menteri dalam *Decision* ini menyatakan bahwa: [210]

> *recognizes that, while article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision.*

Hal ini jelas menunjukkan bahwa S&D memiliki kedudukan dan peran yang sangat penting bagi WTO. *Special and Differential Treatment* (S&D) merupakan suatu prinsip yang menjiwai baik isi persetujuan-persetujuan WTO maupun jalannya perundingan yang sedang berlangsung saat ini. Di sisi lain, ternyata hal ini juga menggambarkan adanya permasalahan besar dari implementasi ketentuan S&D yang ada saat ini. Ketentuan S&D yang ada tidak berjalan efektif sehingga perlu adanya suatu penyempurnaan.

Permasalahan mengenai implementasi ketentuan WTO, termasuk anti dumping khususnya ketentuan pasal 15, tampaknya sudah lama menjadi perhatian. Dalam dokumen WT/COMTD/W/85 tertanggal 9 Pebruari 1998 dimana membahas mengenai *Implementation of WTO Provisions in Favour of Developing Country Members* diketahui bahwa dari beberapa peraturan domestik negara anggota WTO yang telah dinotifikasikan ke WTO, hampir semuanya tidak merefleksikan ketentuan sebagaimana diatur dalam pasal 15. Tidak ada atau kurangnya ketentuan

[207] *Paragraph 40 Doha Declaration*
[208] *Paragraph 50 Doha Declaration*
[209] *Paragraph 40 Doha Declaration*
[210] WT/MIN(01)/17 tanggal 20 Nopember 2001 angka 7.2.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

spesifik yang mengatur hal ini dalam peraturan domestik seharusnya tidak menyurutkan atau menghambat diterapkannya ketentuan tersebut.[211]

Kemudian, guna mengidentifikasi lebih lanjut permasalahan S&D maka dilakukanlah klasifikasi ketentuan S&D yang dibagi menjadi enam tipe yang selanjutnya dijabarkan atau dipaparkan berdasarkan persetujuan-persetujuan yang mengaturnya. Tipe-tipe S&D tersebut adalah:[212]

1. *provisions aimed at increasing the trade opportunities of developing country Members*;
2. *provisions under which WTO Members should safeguard the interests of developing country Members*;
3. *flexibility of commitments, of action, and use of policy instruments*;
4. *transitional time periods*;
5. *technical assistance*; *and*
6. *provisions relating to least-developed country Members*[213].

Berdasarkan tipologi S&D ini, maka ketentuan dalam pasal 15 ADA dapat diklasifikasikan sebagai *provisions under which WTO Members should safeguard the interests of developing country Members*, atau dengan kata lain termasuk dalam tipe 2. Sebagai catatan, ADA merupakan salah satu persetujuan dalam WTO yang hanya memiliki sedikit ketentuan S&D yaitu hanya satu ketentuan saja.[214]

Ketentuan-ketentuan S&D tersebar di berbagai persetujuan WTO. Tiap-tiap persetujuan dapat berisikan ketentuan S&D yang berbeda tipenya dan juga dapat berisikan kombinasi dari tipe-tipe tersebut. Perlu dipahami juga, bahwa tipe-tipe ketentuan S&D yang ada bekerja dengan cara yang berbeda, misalnya tipe 3 dan 4 cenderung untuk merinci aturan pengecualian dimana negara berkembang dapat

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[211] Lihat WT/COMTD/W/35 tertanggal 9 Pebruari 1998. Dapat diakses melalui <http://docsonline.wto.org>

[212] Lihat WT/COMTD/W/77 tertanggal 25 Oktober 2000. Dapat diakses melalui <http://docsonline.wto.org>

[213] Untuk tipe 6 ini, sudah tercakup didalamnya tipe 1 sampai 5. Tipe ini dibedakan karena penerapannya khusus untuk negara terbelakang. Lihat WT/COMTD/W/77/Rev.1/Add.1 tertanggal 21 Desember 2001. Dapat diakses melalui <http://docsonline.wto.org>

[214] Bandingkan dengan persetuan-persetujuan WTO lainnya. Lihat WT/COMTD/W/77/Rev.1 tertanggal 21 September 2001. Dapat diakses melalui <http://docsonline.wto.org>

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mendapatkan perlindungan atau permintaan bantuan (*recourse*) yang mereka pilih. Disisi lain, tipe 2, 5, dan 6 cenderung merinci tindakan apa yang harus dilakukan oleh negara maju terhadap negara berkembang.[215]

Mengenai sifat dari ketentuan-ketentuan S&D yang ada, maka dapat dibedakan atas ketentuan yang bersifat *mandatory* dan *non-mandatory*. Ketentuan yang bersifat *mandatory* dapat dibedakan dari ketentuan *non-mandatory* dengan adanya penggunaan kata "*shall*" dan "*should*". Pembedaan ini relevan terhadap ketentuan S&D yang termasuk tipe 1, 2, 5, dan beberapa ketentuan tertentu dalam tipe 6; namun tidak relevan bagi ketentuan yang dikategorikan dalam tipe 3, 4 dan untuk beberapa ketentuan tertentu dalam tipe 6.[216]

Khusus untuk ketentuan yang bersifat *mandatory*, maka terdapat tambahan *legal classification* yang diperlukan. *Legal classification* dimaksud yaitu apakah ketentuan tersebut:[217]

- mengharuskan negara anggota WTO untuk meraih atau mendapatkan hasil (*result*) tertentu -disebut *obligation of result*-, atau untuk melakukan tindakan tertentu –disebut *obligation of conduct*-; dan
- menetapkan kewajiban dari negara anggota WTO itu diambil secara individual atau kolektif.

Ketentuan S&D yang tergolong *obligation of result* mengharuskan negara anggota WTO untuk meraih atau mendapatkan hasil tertentu namun membebaskan mereka untuk memilih cara yang cocok untuk meraih hasil tersebut.[218] Sedangkan yang tergolong *obligation of conduct* tidak mengharuskan negara anggota meraih atau mendapatkan hasil tertentu, namun sebaliknya mengharuskan untuk melakukan suatu bentuk tindakan tertentu.[219]

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[215] *Ibid*.

[216] Lihat WT/COMTD/W/77/Rev.1/Add.1. *op cit*. Dapat diakses melalui <http://docsonline.wto.org>

[217] Lihat WT/COMTD/W/77/Rev.1/Add.2. tertanggal 21 Desember 2001. Dapat diakses melalui <http://docsonline.wto.org>

[218] Contohnya adalah klausul "Negara maju harus membentuk *contact point* untuk mempermudah akses pemasok dari negara berkembang". *Ibid*.

[219] Misalnya klausul "Negara anggota harus mempertimbangkan *special needs* dari negara berkembang dalam melaksanakan persetujuan ini". *Ibid*.

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Sebagaimana telah dijelaskan sebelumnya, ketentuan S&D untuk anti dumping, baik sebagaimana diatur dalam ADA maupun apa yang diusulkan dalam *chairman's text*, ditempatkan pada pasal 15. Pasal 15 ini menyebutkan bahwa:

> *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.*

Berdasarkan klasifikasi diatas, maka ketentuan ini kemudian dapat dinyatakan sebagai suatu ketentuan S&D yang bersifat *mandatory*. Ketentuan ini berisikan suatu *obligation of conduct* dimana mengharuskan, dalam situasi tertentu, perhatian khusus (*special regard*) diberikan kepada negara berkembang bila negara maju ingin menerapkan tindakan anti dumping atas produk impor asal negara berkembang. Selain itu, negara maju juga harus mempertimbangkan kemungkinan pemberian *constructive remedies*, sebelum membebankan bea masuk anti dumping terhadap negara berkembang, bila dirasakan dapat berdampak pada *essential interests* negara berkembang. Selanjutnya, juga berdasarkan klasifikasi diatas, maka kewajiban yang ditentukan oleh pasal 15 ini merupakan suatu kewajiban yang bersifat individual.[220]

Dalam tulisannya yang berjudul *Beyond Special and Differential Treatment*, Frank J. Garcia kemudian mengatakan bahwa tipologi S&D sebagaimana telah dijelaskan sebelumnya, dalam kaitannya dengan masalah *enforceability*, dapat dibagi berdasarkan sifat dari bahasa yang digunakan untuk menunjukkan tingkat kewajibannya. Pembagian ini mungkin lebih berguna untuk mengambil keputusan terkait apa dan bagaimana membuat ketentuan-ketentuan S&D ini menjadi *mandatory*. Bila dilihat dari bahasanya, ketentuan-ketentuan S&D yang ada dapat dibagi menjadi empat kategori, yaitu:[221]

[220] *Ibid*.
[221] Untuk penjelasan lengkapnya, lihat Frank J. Garcia (3), *op cit.*

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

1. *provisions employing purely discretionary language*;
2. *"best endeavor clauses"*;
3. *de facto non-binding or "fake mandatory" provisions*; dan
4. *mandatory provisions*

Berdasarkan kategori ini, ketentuan sebagaimana diatur dalam pasal 15 ADA, dan *chairman's text*, ternyata masuk ke dalam kategori *de facto non-binding* atau "*fake mandatory*" *provisions*. Frank J. Garcia menyebutkan bahwa kategori ini merupakan sub kategori dari *"best endeavor" clauses*. Ketentuan yang masuk dalam kategori *de facto non-binding* atau "*fake mandatory*" *provisions* merupakan ketentuan yang paling kompleks dalam *legal effect*-nya. Bahasa dari ketentuan tersebut memiliki sifat *mandatory* namun dikarenakan strukturnya, ketentuan tersebut tidak memiliki *legal effect*.[222] Inilah yang menjadi inti permasalahan dari ketentuan S&D anti dumping yang ada saat ini.

Masalah ketentuan pasal 15 ADA ini, sebagaimana tidak dirubah dalam *chairman's text*, dapat dilihat dalam beberapa *case law* antara lain: *EC-Anti Dumping Duties on Imports of Cotton-Type Bed Linen from India* (*EC-Bed Linen*) dan juga *United States-Anti Dumping and Countervailing Measures on Steel Plate from India* (*US-Steel Plate from India*). [223] Dalam *EC-Bed Linen*, dapat ditemukan berbagai masalah yang diklarifikasi sebagai akibat redaksional ketentuan pasal 15 ADA yang "tak bermakna" itu. Klarifikasi-klarifikasi tersebut antara lain: pengenaan *lesser duty* atau *price undertaking* dapat dianggap sebagai suatu *constructive remedies*, namun keputusan untuk tidak membebankan bea masuk anti dumping bukan merupakan bentuk *constructive remedies*. Panel, dalam hal ini, kemudian tidak dapat memberikan contoh tindakan lain yang dapat dikategorikan sebagai suatu *constructive remedies*. Kemudian, mengenai ketentuan "*explored*", dinyatakan bahwa tidak ada kewajiban untuk menawarkan atau menerima suatu *constructive remedies* yang mungkin diidentifikasi dan/atau ditawarkan. Ketentuan ini hanya memberikan suatu kewajiban untuk secara aktif mempertimbangkan

[222] *Ibid*.

[223] Lihat WT/DS141/R, *op cit*., dan WT/DS206/R tertanggal 28 Juni 2002. Dapat diakses melalui <http://docsonline.wto.org>

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

dengan *open mind*, adanya kemungkinan untuk pemberian *constructive remedies* sebelum pembebanan bea masuk anti dumping yang akan berdampak pada *essential interests* negara berkembang.[224]

Permasalahan ini ternyata juga telah mendapatkan berbagai reaksi dari negara anggota WTO termasuk Indonesia. Indonesia termasuk negara yang pernah memberikan pernyataan resmi terhadap kendala yang dihadapi atas ketentuan pasal 15 ADA dalam hal ini terkait dengan pembebanan bea masuk anti dumping atas produk *Polyester Staple Fibre* (PSF) yang berasal dari beberapa negara termasuk Indonesia. Indonesia saat itu mempermasalahkan pembebanan bea masuk anti dumping oleh *European Union* (EU) disaat Asia sedang mengalami krisis ekonomi yang berat. Saat itu, Indonesia sedang berada dalam krisis ekonomi terdalam dimana kurs rupiah turun dari Rp.2300,- menjadi Rp.16.000 per US dollar. Keadaan ini bukan merupakan keadaan biasa dan oleh karenanya semestinya harus diperhatikan. Namun hal ini tampaknya luput dari perhatian EU.[225]

Kemudian, reaksi juga diberikan oleh sekelompok negara anggota WTO, melalui tanggapannya, terhadap ketentuan pasal 15 ADA ini. Mereka menyatakan meskipun ketentuan pasal ini memiliki sifat *mandatory*, namun istilah atau apa yang diaturnya terlalu umum sehingga perlu mengembangkannya agar ketentuan tersebut dapat beroperasi secara penuh. Misalnya adalah pemberian contoh dari cara memberikan "*special regard*" dan juga "*constructive remedies*" yang harus di-*explore* oleh negara maju serta prosedur yang harus diikuti. Tanggapan ini kemudian diakhiri dengan pertanyaan: *Shouldn't the Agreement include specific provisions that will give developing country members meaningful and effective S&D treatment?*[226]

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[224] Lihat WT/DS141/R, *Ibid*. Dapat diakses melalui <http://docsonline.wto.org>

[225] G/ADP/W/416 tertanggal 8 Nopember 2000. Dapat diakses melalui <http://docsonline.wto.org>

[226] Lihat TN/RL/W/46 tertanggal 24 Januari 2003 diajukan oleh *Brasil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand and Turkey*. Dokumen ini merupakan masukan atau kontribusi yang ditujukan sebagai bahan diskusi dalam *NG on Rules*. Dapat diakses melalui <http://docsonline.wto.org>

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Beberapa masukan atau rekomendasi sebenarnya telah lama diberikan oleh negara berkembang sebagai upaya menyempurnakan ketentuan pasal 15 ADA. Rekomendasi yang diajukan oleh negara-negara tersebut antara lain adalah *mandatory lesser duty rule*, *mandatory price undertakings*, perubahan atas *de minimis dumping margin*, dan perubahan *negligible import volume*.[227] Selain itu, sebagai reaksi atas dikeluarkannya *chairman's text*, sekelompok negara juga telah memberikan rekomendasinya agar dilakukan suatu perubahan atas ketentuan pasal 15 ADA ini. Salah satu rekomendasi yang diajukan oleh kelompok negara ini adalah harus dilakukannya suatu konsultasi, oleh negara maju, sebelum mereka melakukan inisiasi penyelidikan anti dumping. Konsultasi ini dilakukan dengan tujuan untuk mencapai adanya suatu *mutually agreed solution*.[228]

Dari berbagai penjelasan yang telah diberikan, maka dapat dikatakan bahwa ketentuan mengenai S&D sebagaimana diatur dalam ADA, dan diusulkan dalam *chairman's text*, sama sekali tidak mencerminkan kepentingan negara berkembang termasuk Indonesia. Redaksional dari ketentuan tersebut membuat sesuatu yang sebenarnya bersifat *mandatory* secara *de facto* ternyata tidak mengikat. Apa yang diwajibkan dalam ketentuan ini hanya sebatas pada memberikan perhatian saja. Perhatian tanpa ditindaklanjuti dengan tindakan atau bentuk konkrit tidak akan memberikan manfaat apapun bagi kepentingan negara berkembang.

Raj Bhala dan David A. Gantz dalam *WTO Case Review 2001*, bahkan menyebutkan bahwa sebenarnya negara berkembang merasa ketentuan-ketentuan S&D yang ada dalam persetujuan WTO, termasuk didalamnya ADA, merupakan suatu "*empty promises*" atau "*right without remedies*".[229] Ketentuan pasal 15 ADA sepertinya memang diformulasikan sebagai "janji palsu" yang faktanya tidak akan pernah ditepati oleh negara maju. Ketentuan tersebut telah "menghilangkan" hak negara berkembang untuk diperlakukan secara khusus dan berbeda dalam keadaan tertentu. Ketentuan pasal ini seolah-olah mengatur adanya suatu kewajiban besar

[227] Lihat TN/RL/W/4, *op cit*.; TN/RL/W/66, *op cit*.; TN/RL/W/110, *op cit*. Dapat diakses melalui <http://docsonline.wto.org>. Lihat juga Vivian C. Jones, *op cit*. hlm. 18.

[228] Lihat TN/RL/GEN/154 tertanggal 25 Perbruari 2008 diajukan oleh *ACP and African Groups*

[229] Raj Bhala dan David A. Gantz, "*WTO Case Review 2001*," *Arizona Journal of International and Comparative Law*, vol. 19, No.18 (2002): 542.

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yang dimiliki oleh negara maju yang nyatanya hanya suatu kewajiban kecil yang tidak memiliki efek apapun terhadap negara berkembang.

Pengaturan S&D semacam ini tidak berimplikasi sedikitpun kepada negara berkembang. Tidak dirasakan adanya beban apapun dari negara maju untuk memberikan *previlege* kepada negara berkembang, atau memang sebatas itu sajakah kewajiban yang dimiliki negara maju berdasarkan ketentuan ini. Jadi, dimanakah sebenarnya esensi dari S&D dalam ketentuan anti dumping tersebut. Sangatlah tidak adil apa yang dirasakan oleh negara berkembang atas ketentuan pada pasal 15 ini.

Klarifikasi-klarifikasi yang dilakukan oleh panel ataupun AB dalam *case law* pun tidak akan berguna banyak bagi negara berkembang. Redaksional pasal yang dirasa mengambang, tidak tuntas, tanpa penjabaran konkrit tentunya juga akan membatasi panel atau AB dalam melakukan klarifikasi. Terlepas dari klarifikasi yang dilakukan oleh *panel* itu "baik" atau "tidak" tetap saja klarifikasi tersebut berpijak diatas suatu ketentuan yang memang dari awalnya sudah dirasakan tidak adil. Jadi sebaik-baiknya hasil klarifikasi, tidak akan merubah sifat dari ketentuan pasal tersebut yang tidak adil.

Oleh karenanya, masalah S&D ini sepatutnya menjadi perhatian besar negara berkembang. Ketentuan ini harus dipulangkan kepada esensi S&D sebenarnya dimana untuk mempermudah integrasi negara berkembang ke dalam sistem perdagangan multilateral dan juga menjembatani *gap* antara negara maju dan berkembang akibat perbedaan karakteristik. Jika aturan secara pantas dibuat untuk mengakomodasi kepentingan nasional yang berlainan, maka ketentuan S&D yang ada didalamnya harus menjawab kebutuhan pembangunan dan menjadi tempat transit sementara sampai negara-negara mencapai tingkat pembangunan yang lebih tinggi. Namun jika aturan dibentuk dengan tidak baik dan akses kepada S&D semakin ditiadakan, negara-negara akan menemukan dirinya sebagai pihak dimana aturan itu dianggap tidak berpihak atau mendukung pembangunan mereka.[230]

[230]Alexander Keck dan Patrick Low, "Special and Differential Treatment in the WTO: why, when and how?" < http://www.wto.org/english/res_e/reser_e/ersd200403_e.htm>, Mei 2004.

Jadi, dari penjelasan mengenai masalah-masalah atau isu-isu yang telah diberikan, dapat dikatakan bahwa secara umum perubahan ketentuan mengenai anti dumping sebagaimana diusulkan dalam *chairman's text*, ternyata tidak merepresentasikan kepentingan negara berkembang pada umumnya dan Indonesia pada khususnya. *Draft text* ini dianggap sangat tidak *balance* karena kepentingan mayoritas negara anggota WTO tidak terefleksikan didalamnya. Bahkan dalam hal tertentu, *draft* ini justru hanya memfasilitasi kepentingan suatu negara saja. Oleh karena itu, sebagian besar negara WTO merasa kecewa atas isi dari *draft* ini yang sama sekali tidak memenuhi harapan mereka.

Untuk Indonesia khususnya, pengaturan sebagaimana diusulkan dalam *chairman's text* akan mencederai kepentingan nasional Indonesia.[231] Dengan pengaturan seperti ini maka industri domestik akan sangat dirugikan. Bea masuk yang dibebankan kepada produk impor asal Indonesia, bila terbukti dumping dan mengakibatkan *injury*, akan sangat tinggi. Hal ini akan mengakibatkan hilangnya *competitiveness* produk tersebut. Produk lainnya dengan adanya perluasan cakupan pembebanan bea masuk anti dumping juga akan terancam. Hal ini kemudian juga diperkuat dengan tidak dapat diterapkannya secara efektif ketentuan-ketentuan yang menjadi hak ekslusif Indonesia sebagai negara berkembang. Perlindungan terhadap kepentingan negara berkembang termasuk Indonesia, sebagaimana diberikan dalam ketentuan tersebut, pada praktiknya tidak akan dapat berjalan sebagaimana mestinya.

[231] Tidak ada definisi secara khusus mengenai kepentingan nasional, namun apa yang menjadi kepentingan nasional kiranya dapat dilihat pada UU No.24 tahun 2000 tentang Perjanjian Internasional.

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4.3 Perubahan Ketentuan Anti Dumping yang Ideal bagi Kepentingan Negara Berkembang

Sebagaimana diketahui, KTM IV yang berlangsung di Doha telah melahirkan putaran perundingan baru yaitu Putaran Doha. Para Menteri negara anggota WTO dalam Deklarasi Doha menyatakan:[232]

> *International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates.* ***The majority of WTO Members are developing countries****. We seek* ***to place their needs and interests at the heart of the Work Programme*** *adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall* ***continue to make positive efforts designed to ensure that developing countries****, and especially the least-developed among them,* ***secure a share in the growth of world trade commensurate with the needs of their economic development****. In this context,* ***enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play****.*

Dari pernyataan ini maka dapat dilihat bahwa sesungguhnya memang negara berkembang merupakan mayoritas dari negara anggota WTO. Program Kerja yang dihasilkan dari deklarasi ini pun didasari atau disemangati oleh kebutuhan dan kepentingan dari negara berkembang. Kebutuhan dan kepentingan negara berkembang ini merupakan "jantung" dari Program Kerja yang telah disusun. Para Menteri juga mengakui perlu dilanjutkannya upaya positif yang dibentuk untuk menjamin negara berkembang menjadi bagian dari pertumbuhan perdagangan dunia sesuai dengan kebutuhan pembangunan ekonominya. Guna memastikan hal ini berjalan, maka beberapa hal yang memainkan peranan penting disini adalah peningkatan akses pasar, aturan yang *balance*, dan bantuan teknis serta *capacity building*.

Dalam Program Kerjanya, untuk masalah anti dumping, para Menteri menetapkan dalam *paragraph* 28 bahwa:

> *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 Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing*

[232] WT/MIN(01)/DEC/1, *paragraph* 2. *op cit*.

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> *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****.*

Berdasarkan paragraph tersebut, maka perundingan untuk masalah anti dumping ditujukan untuk lebih memperjelas dan meningkatkan atau memperbaiki aturan yang ada. Selain itu, dipertegas disini bahwa perundingan harus dilakukan dengan tetap mempertimbangkan kepentingan atau kebutuhan dari negara berkembang dan terbelakang.

Sebagaimana yang telah dijelaskan sebelumnya, usulan dari ketua *NG on Rules* untuk perubahan ADA ternyata secara umum tidak mencerminkan kebutuhan atau kepentingan negara berkembang. *Draft chairman's text* tersebut dirasakan sangat tidak *balance* karena justru kepentingan dari mayoritas negara anggota WTO tidak diperhatikan. Negara berkembang anggota WTO dapat dikatakan kecewa dan menuntut dilakukannya perubahan atas *draft* tersebut kearah yang lebih *balance*.

Apa yang telah dilakukan oleh ketua *NG on Rules* dalam *draft*-nya tersebut dapat dikatakan telah menodai semangat dari perundingan Doha. Mandat yang diberikan oleh KTM sebagai badan pengambil keputusan tertinggi WTO tidak tergambarkan dalam *chairman's text* ini. Sebagai pengambil keputusan tertinggi di WTO, seharusnya apa yang dihasilkan oleh KTM merupakan pedoman bagi badan-badan yang berada di bawahnya. Keputusan yang diambil oleh KTM mengikat semua pihak untuk menjalankannya.

Negara berkembang merupakan mayoritas anggota WTO, dan kebutuhan atau kepentingan dari kelompok ini seharusnya menempati porsi terbesar kepentingan WTO. Keberadaan negara berkembang, walaupun mayoritas, faktanya belum tentu dapat memerankan dirinya dengan maksimal. Dengan keunggulan karakteristik yang dimiliki oleh negara maju, kerap menempatkan mereka pada kedudukan yang lebih "tinggi". Dengan kedudukan ini mereka dapat memainkan perannya dengan lebih dominan diantara pada negara anggota WTO lainnya. Guna menjembatani *gap* yang ada diantara negara maju dan negara berkembang, maka

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diperlukan suatu aturan main yang khusus dimana aturan tersebut hanya diberlakukan terhadap kelompok tertentu, dalam hal ini, negara berkembang.

Frank J. Garcia mengatakan bahwa cara yang dapat dilakukan untuk menjembatani hal tersebut adalah dengan ketentuan mengenai S&D. Dengan ketentuan ini, negara berkembang dapat melindungi kepentingannya sekaligus memaksimalkan perannya dalam perdagangan internasional. Kemudian, diharapkan pula, dengan ketentuan ini, dapat membantu pembangunan ekonomi negara berkembang.

Ketentuan S&D tentunya akan menjadi efektif bila memang benar-benar dapat dioperasionalkan. Ketentuan S&D sebagaimana diatur dalam pasal 15 ADA pada kenyataannya hanyalah suatu tulisan di atas kertas saja yang tidak dapat diimplementasikan. Ketentuan S&D dalam pasal ini walaupun sifatnya *mandatory* namun kenyataanya tidak mengikat. Ketentuan seperti ini, oleh Frank J. Garcia, dikategorikan sebagai salah satu "*fake mandatory*" *provisions*. Redaksional pasal ini membuat sesuatu yang pada hakikatnya bersifat *mandatory*, pada kenyataanya tidak memiliki *legal effect*.

Terhadap ketentuan yang seperti ini maka perlu dilakukan suatu penyempurnaan atau perubahan. Perubahan yang tentunya berpihak kepada negara berkembang agar ketentuan tersebut benar-benar dapat dimanfaatkan demi kepentingan negara berkembang. Perubahan yang dapat dilakukan adalah dengan merubahnya dari *de facto* "*non binding*" *provision* menjadi *truly mandatory provision*.[233] Hal ini harus dilakukan agar ketentuan S&D dalam anti dumping dapat lebih *precise*, efektif dan operasional. Dengan perubahan ini maka diharapkan tidak ada lagi celah bagi negara maju untuk mengelak dari kewajibannya terhadap negara berkembang.

Beberapa masukan yang diberikan oleh negara berkembang kiranya dapat dijadikan pedoman untuk melakukan perubahan tersebut. Sifat *mandatory* dari ketentuan ini harus lebih diterjemahkan kepada tindakan atau hasil yang lebih konkrit. Sebagaimana telah disebutkan sebelumnya, pasal 15 ini mengandung

[233] Frank J. Garcia (3), *op cit.*

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obligation to conduct namun tindakan yang diwajibkan oleh ketentuan ini faktanya tidak memberikan manfaat apapun kepada negara berkembang. Usul sebagaimana diajukan oleh negara berkembang untuk mengharuskan adanya konsultasi yang dilakukan oleh negara maju sebelum dilakukannya penyelidikan anti dumping terhadap produk asal negara berkembang merupakan contoh dimana *obligation to conduct* memiliki bentuk konkritnya. Kiranya hal ini menjadi masukan yang positif agar pada tahap konsultasi tersebut diharapkan disepakati atau ditemukan bentuk *constructive remedies* yang akan diberikan.

Perubahan lainnya yang tampaknya dapat memberikan manfaat bagi negara berkembang adalah menjadikan ketentuan pasal ini mengandung *obligation of result*. Rekomendasi dari negara berkembang yang dapat dipertimbangkan adalah adanya *mandatory lesser duty rule* ataupun *mandatory price undertakings* yang diberikan kepada negara berkembang oleh negara maju. Dengan ketentuan seperti ini maka diharapkan negara maju tidak membebankan bea masuk anti dumping secara semena-mena. Pembebanan bea masuk anti dumping dapat menjadi *the last resort* dan besarnya bea masuk anti dumping tersebut tidak berlebihan.

Ketentuan S&D tentunya dapat berjalan dengan efektif bila pengaturan mengenai S&D itu sendiri sudah tepat. Maksudnya adalah baik formulasinya maupun penerapannya. Efektifitas dari ketentuan S&D akan menjadi lebih sempurna bila persetujuan yang mengaturnya juga sudah tepat. Tepat disini maksudnya adalah persetujuan tersebut telah adil atau memfasilitasi kepentingan dalam sudut pandang negara berkembang. Oleh karena itu, untuk anti dumping, maka penyempurnaan ketentuan S&D dalam ADA harus berjalan simultan dengan penyempurnaan ketentuan-ketentuan lainnya. Ketentuan-ketentuan yang dirasakan tidak adil bagi negara berkembang harus disempurnakan. Dengan kata lain, terhadap substansi atau ketentuan-ketentuan dalam ADA yang saat ini menimbulkan masalah dan juga yang perlu diperbaiki harus dilakukan penyempurnaan. Bukan justru menambahkan ketentuan yang kontroversial dan akan merugikan kepentingan negara berkembang.

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Negara berkembang, sebagai pihak yang kerap dirugikan, harus didengarkan atau difasilitasi kepentingannya. Merakalah yang paling mengerti keterbatasan dan kemampuan yang mereka miliki, apa yang sanggup mereka capai, apa yang tidak mungkin mereka raih, dsb. Mereka juga yang merasakan apa yang selama ini menjadi hambatan dalam berinteraksi melalui sistem perdagangan multilateral WTO. Oleh karenanya, baik tanggapan, masukan, ataupun kritik yang diberikan oleh negara berkembang merupakan refleksi secara umum atas kepentingan mereka. Masukan, tanggapan, maupun kritik ini adalah gambaran umum mengenai apa yang seharusnya atau sebaiknya diatur dalam ketentuan anti dumping WTO.

Masuknya usulan pengaturan seperti *zeroing* ke dalam ketentuan anti dumping WTO merupakan suatu hal yang wajib ditentang karena hanya merefleksikan kepentingan negara tertentu saja. Masuknya pengaturan mengenai *circumvention/anti circumvention* dirasakan masih terlalu dini. Walaupun konsep ini sebenarnya baik namun dirasakan belum matang untuk dituangkan ke dalam bentuk *text* sehingga masih perlu pembahasan mendalam guna menyempurnakannya. Untuk perubahan ketentuan *sunset review*, dalam beberapa hal, ternyata juga masih dirasa perlu pembahasan lebih lanjut. Sedangkan untuk *lesser duty rule*, ketentuan ini harus dikembalikan pada apa yang sedianya diatur dalam ADA serta diupayakan untuk perubahan sifatnya menjadi *mandatory*. Hal-hal inilah yang secara umum merupakan gambaran atas keinginan dari negara berkembang terhadap aturan anti dumping. Hal ini merupakan pencerminan apa yang menjadi kepentingan negara berkembang terhadap ketentuan anti dumping WTO yang adil.

Setiap ketentuan dari persetujuan perdagangan harus dinilai (*assessed*) atas dampaknya terhadap pembangunan, dan dibuat untuk menjamin pembangunan tersebut ditingkatkan, memanfaatkan ketentuan S&D yang diperlukan. Keseluruhan dari persetujuan perdagangan harus dinilai (*assessed*) untuk menjamin *fair share of benefit*s bertambah untuk negara berkembang.[234]

[234] Joseph E. Stiglitz dan Andrew Charlton, *op cit.*, hlm. 105.

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Oleh karena itu, guna memiliki ketentuan anti dumping yang dapat merepresentasikan kepentingan negara berkembang, maka harus ada perubahan atau penyempurnaan atas ketentuan-ketentuan yang ada dalam ADA termasuk, tanpa mengesampingkan, ketentuan mengenai S&D. Ketentuan S&D harus ditopang oleh substansi persetujuan yang memadai bagi negara berkembang dan begitupula sebaliknya. Dengan persetujuan yang memadai, maka ketentuan S&D dapat berpijak kuat diatasnya. Perubahan atau penyempurnaan ini tidak bisa ditawar bila ingin memiliki ketentuan ADA yang dirasakan adil bagi negara berkembang. Apa yang menjadi tanggapan, masukan ataupun kritik dari negara berkembang merupakan pencerminan dari kepentingan mereka. Perubahan inilah yang dirasakan merupakan perubahan ideal atas ketentuan anti dumping.

Diyakini bahwa memang hal tersebut tampaknya akan sulit tercapai, karena perundingan masalah anti dumping melibatkan seluruh negara anggota WTO termasuk negara maju. Disepakatinya suatu hasil perundingan harus melibatkan seluruh negara anggota WTO dalam menyetujuinya. Toleransi-toleransi tertentu tampaknya akan mewarnai jalannya perundingan, namun tetap harus dipegang teguh apa yang telah menjadi mandat dalam Deklarasi Doha. Diperlukan upaya keras dari negara berkembang dan itikad baik dari negara maju untuk dapat mensukseskan hal ini.

Hasil maksimal mungkin tidak akan tercapai, namun setidaknya perubahan harus dilakukan ke arah yang lebih baik, sehingga ketentuan mengenai anti dumping dapat setidaknya lebih condong kepada kepentingan negara berkembang sebagai mayoritas anggota WTO. Perubahan seperti yang diusulkan oleh ketua *NG on Rules* dalam *draft text*-nya harus, secara umum, ditolak. Usulan yang diberikan dalam *chairman's text* itu akan membawa pada ketentuan anti dumping yang lagi-lagi tidak adil bagi negara berkembang. *No agreement is better than another bad agreement*.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

BAB 5
PENUTUP

5.1. Kesimpulan

Berdasarkan penjelasan yang telah diberikan pada bab-bab sebelumnya, maka kesimpulan yang sekaligus jawaban atas permasalahan dalam penelitian ini adalah:

1. Bahwa apa yang diusulkan dalam *Draft Consolidated Chair Texts of the AD and SCM Agreements* atau *chairman's text* ternyata cukup beragam. Disatu sisi *chairman's text* mencoba untuk mempertahankan ketentuan lama sebagaimana diatur dalam ADA. Disisi lain, *draft* tersebut juga memasukkan suatu ketentuan baru yang sebelumnya tidak diatur dalam ADA. Selebihnya, *chairman's text* cenderung untuk merubah ketentuan yang sudah ada dengan melengkapi atau memberikan perbaikan-perbaikan tertentu atas ketentuan tersebut. Untuk peraturan domestik Indonesia, ketentuan yang diusulkan dalam *chairman's text* secara umum tidak atau belum diatur. Hal ini tentunya karena memang *chairman's text* merupakan usulan perubahan atas ketentuan anti dumping, dalam hal ini ADA, yang berlaku saat ini. Perubahan atas ADA, bila suatu saat disepakati, akan memberikan konsekuensi perubahan peraturan domestik Indonesia mengenai anti dumping.
2. Secara umum perubahan ketentuan mengenai anti dumping sebagaimana diusulkan dalam *chairman's text*, ternyata tidak merepresentasikan kepentingan negara berkembang pada umumnya dan Indonesia pada khususnya. *Draft text* ini dianggap sangat tidak *balance* karena kepentingan mayoritas anggota WTO tidak terefleksikan didalamnya. Bahkan untuk hal tertentu, *draft* ini justru hanya memfasilitasi kepentingan suatu negara saja. Oleh karena itu, sebagian besar negara anggota WTO merasa kecewa atas isi dari *draft* ini yang sama sekali tidak memenuhi harapan mereka.

Untuk Indonesia khususnya, pengaturan sebagaimana diusulkan dalam *chairman's text* akan mencederai kepentingan nasional Indonesia. Dengan pengaturan seperti ini maka industri domestik akan sangat dirugikan. Bea masuk yang dibebankan kepada produk impor asal Indonesia, bila terbukti dumping dan mengakibatkan *injury*, akan sangat tinggi. Hal ini akan mengakibatkan hilangnya *competitiveness* produk tersebut. Produk lainnya dengan adanya perluasan cakupan pembebanan bea masuk anti dumping juga akan terancam. Hal ini kemudian juga diperkuat dengan tidak dapat diterapkannya secara efektif ketentuan-ketentuan yang menjadi hak ekslusif Indonesia sebagai negara berkembang. Perlindungan terhadap kepentingan negara berkembang termasuk Indonesia, sebagaimana diberikan dalam ketentuan tersebut, pada praktiknya tidak akan dapat berjalan sebagaimana mestinya.

3. Perubahan ketentuan anti dumping yang ideal bagi kepentingan negara berkembang adalah perubahan atas substansi atau ketentuan-ketentuan yang ada dalam ADA termasuk, tanpa mengesampingkan, ketentuan mengenai S&D. Ketentuan S&D harus ditopang oleh substansi persetujuan yang memadai bagi negara berkembang dan begitupula sebaliknya. Dengan persetujuan yang memadai, maka ketentuan S&D dapat berpijak kuat diatasnya. Perubahan atau penyempurnaan ini tidak bisa ditawar bila ingin memiliki ketentuan ADA yang dirasakan adil bagi negara berkembang. Apa yang menjadi tanggapan, masukan ataupun kritik dari negara berkembang merupakan pencerminan dari kepentingan mereka. Perubahan seperti inilah yang dapat merepresentasikan kepentingan negara berkembang, termasuk Indonesia.

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5.2. Saran

Guna memiliki ketentuan anti dumping yang ideal bagi kepentingan negara berkembang, maka beberapa upaya yang dapat dilakukan. Pertama, identifikasi terhadap masalah yang dihadapi oleh negara berkembang atas ketentuan ADA yang berlaku saat ini. Identifikasi ini perlu untuk mengetahui kemampuan yang dimiliki dan menyadari ketentuan-ketentuan tertentu yang dirasakan tidak berpihak pada negara berkembang. Selain itu, identifikasi juga dapat dilakukan untuk mengetahui ketentuan-ketentuan tertentu yang kiranya perlu diatur dalam ketentuan anti dumping WTO. Kedua, berpartisipasi aktif dalam perundingan dalam hal memberikan tanggapan dan masukan untuk perubahan ketentuan anti dumping. Untuk lebih memperkuat posisi, maka dapat dilakukan pengelompokkan secara bersama-sama dengan negara anggota WTO lainnya yang memiliki kepentingan serupa. Ketiga, kiranya perlu upaya khusus untuk mengingatkan jalannya perundingan akan mandat yang diberikan oleh para Menteri dalam Deklarasi Doha, agar jalannya perundingan tetap pada jalur yang telah ditentukan.

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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 quantities[5] and are at prices which do not provide for the recovery of all costs

[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.

[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

within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations 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 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

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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.

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], 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.

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

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

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

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

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

[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.

Article 3

Determination of Injury[9]

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

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

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

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

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

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.

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

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[10] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

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

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

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

(iv) inventories of the product being investigated.

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

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.

Article 4

Definition of Domestic Industry

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

(i) when producers are related[11] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such

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

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

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[12] 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.

Article 5

Initiation and Subsequent Investigation

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

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

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

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

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

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

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

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

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

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

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

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be

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

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

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.

Article 6

Evidence

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

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[15] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

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

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[16] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

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

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

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

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 all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[17]

6.5.1 The authorities shall require 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 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.

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.[18]

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.

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

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

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

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

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and 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 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.

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

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

(ii) the government of the exporting Member; and

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

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

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

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

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

Article 7

Provisional Measures

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

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

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

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

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

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

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

Article 8

Price Undertakings

8.1 Proceedings may[19] be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

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

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the

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

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 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 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.

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.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.[20] Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

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

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

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 they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on

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

an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

Article 10

Retroactivity

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

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

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

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

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

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

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

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

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

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

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, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[21] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.

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

[21] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

[22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[23], adequate information on the following:

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

(ii) the date of initiation of the investigation;

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

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

(v) the address to which representations by interested parties should be directed;

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

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

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

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

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

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

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

(v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of

[23] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

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

12.3 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

Article 13

Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Article 14

Anti-Dumping Action on Behalf of a Third Country

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

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

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

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

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. 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.[24]

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

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

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

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

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

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

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

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

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

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 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. 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 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 II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

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

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 should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should 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 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, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

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 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 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 be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should 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 do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

WORLD TRADE ORGANIZATION

TN/RL/W/213
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(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.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

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.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

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.

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.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

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:

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

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

Article 3

Determination of Injury[10]

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

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

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

[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".

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

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

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries 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;

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[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.

(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:

[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.

(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.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

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.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

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.

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.

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[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:

(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

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

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

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

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding fourssix 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 sixnine 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,

[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.

[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.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

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.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

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~~ii) 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.

Usulan perubahan..., Banny R. Ramadhani, FH UI, 2009.

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.

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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

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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.

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

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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.

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 authority~~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. 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.

[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. It is recognized that in a case of violation of

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.

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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.

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.

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[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.

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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.

[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.

[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

[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.

(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.

[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.

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(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.

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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.

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(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.

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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.

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.

[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.

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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.

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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.

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[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 C*ode 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.

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[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.