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CURRENT DEVELOPMENTS ON ISSUES OF INTEREST TO AFRICAN COUNTRIES IN THE CONTEXT OF POST-SEATTLE WTO TRADE NEGOTIATIONS

Issues pertaining to the implementation of WTO Agreements from the perspective of developing countries

Report prepared by the UNCTAD Secretariat

CONTENTS

OVERVIEW

1. The major concerns of many developing countries with regard to the implementation of the World Trade Organization (WTO) multilateral trade agreements (MTAs) are that progress towards liberalization in sectors of particular interest to them is lagging behind, and that significant imbalances exist between their rights and obligations under some of the MTAs, as well as with the conditions of market access. Few agreements have given rise to as many concerns as the Agreement on Textiles and Clothing (ATC). This is because of the great importance of trade in textiles and clothing for developing countries, accounting for about 20 per cent of their exports of manufactured products and for some of them even more. However, the implementation of the ATC has failed to come up to their legitimate expectations; after being in effect for almost six years, the committed progressive liberalization of quotas has not yet materialized. As a result, only a few quota restrictions have actually been eliminated, leaving the great bulk of restrictions still in place.

2. Many developing countries have faced difficulties in meeting the various procedural (including notification) and enforcement obligations of the MTAs. They feel that the transitional periods under some of the agreements are unrealistic, and that financial burdens faced by their administrations as well as the economic implications of adjustment of their domestic producers to new rules are too high. According to them, there are also a number of areas where the deadlines for actions set in the "Built-in Agenda" of the WTO have not been met. These include, for example, the negotiation of an arrangement to limit export credits in agriculture, a GATS (General Agreement on Trade in Services) emergency safeguard clause, the completion of negotiations on rules of origin and anti-circumvention measures with respect to anti-dumping.

3. At the same time, developing countries' expectations of the benefits from the S&D (special and differential) treatment provisions have not yet effectively materialized. These include provisions as provided for in Article IV of GATS, the transfer of technology provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).

4. At the Second Session of the WTO Ministerial Conference in Geneva in May 1998, Ministers agreed that:

> "Full and faithful implementation of the WTO Agreement and Ministerial Decisions is imperative for the credibility of the multilateral trading system and indispensable for maintaining the momentum for expanding global trade, fostering job creation and raising standards of living in all parts of the world. When we meet at the Third Session we shall further pursue our evaluation of the implementation of individual agreements and the realization of their objectives. Such evaluation would cover, *inter alia*, the problems encountered in implementation and the consequent impact on the trade and development prospects of Members. We reaffirm our commitment to respect the existing schedules for reviews, negotiations and other work to which we have already agreed."

5. During the preparatory process in 1999 leading up the Third Session of the WTO Ministerial Conference in Seattle, United States, developing countries devoted considerable time and effort, pursuant to the above-mentioned mandate, to present their problems and elements of concern with respect to the implementation of the MTAs, which were incorporated and/or reflected in the draft ministerial text. There was also widespread recognition of the concerns of the developing countries over the implementation of some of the WTO MTAs and the need to address these concerns.

6. Following the setback of the WTO Seattle Ministerial Conference, it became apparent that concerted efforts would have to be made to find the means to address the specific needs and concerns which the developing countries, and particularly the least-developed among them, had so clearly raised. Effective and tangible measures were urgently required, not only to extend greater trade benefits and market liberalization, but also to improve the capacity (especially supply capabilities) of these countries to take advantage of the benefits. This would be seen as an important step to rebuild the confidence of the international community in the multilateral trading system after the Seattle crisis.

7. While the negotiations mandated by the agreements on services and agriculture as a result of the built-in agenda of the Uruguay Round were launched as required, a programme for addressing implementation issues and concerns was also adopted at the meeting of the WTO General Council on 3 May 2000. Under the programme, the Special Session of the WTO General Council held the first round of discussions on 23 June and 3 July 2000 to consider the proposals on implementation, especially those reflected in the compilation of proposals in WTO document Job(99)4797/Rev.3 of 18 November 1999 and in paragraphs 21 and 22 of the draft Ministerial Text of 19 October 1999 (WTO document: Job(99)5868/Rev.1). It was also decided that the Special Session of the WTO General Council would hold the second round of discussions on 18 and 19 October 2000.

8. From the point of view of many developing countries including African countries, the implementation issues and concerns can be categorized as: (i) problems that developing WTO Members face in implementation of the WTO MTAs; and (ii) problems deriving from the implementation of some MTAs by other WTO Members.

9. While each country may have its own perception of the problems of implementations, the following highlights some of the problems that are of interest to a large number of developing countries, and the annexed table summarizes some key provisions of the WTO agreements on work programmes, reviews and transitional periods and their status of implementation. In any case, they are illustrative and by no means exhaustive.

A: Agriculture

10. One of the major concerns of developing countries is export subsidies, as the massive subsidized agricultural exports of some developed countries has significantly distorted international commodity markets. The continuation of such policy is permitted under the Agreement on Agriculture, and has therefore resulted in creating imbalance in the rights and obligations among Members to the detriment of developing countries, as many developing countries are deprived of the financial resources to afford such an export competition policy[1]. Furthermore, while, under reduction commitments, those countries that had previously practiced export subsidies continue to be able to do so, those without any record of export subsidies during the base period (1986-90), mainly developing countries, are no longer allowed to introduce subsidies to promote their agricultural exports. Since the trade policy regime in the agricultural sector in many developing countries is more liberal than that in the developed countries, the impact of subsidized exports on developing countries' trade, and on their domestic production is becoming more evident.[2] For

[1] See chapter III of the main report on agriculture. See also Josling, T. and Tangermann, S., "The interests of developing countries in the next round of WTO agricultural negotiations" in UNCTAD, *Positive agenda and future trade negotiations*, New York/Geneva, 2000, United Nations Publication Sales No. E.00.II.D.8.

[2] *Ibid.*, chapter III of the main report. While many developing countries underwent unilateral liberalization and deregulation prior to the Uruguay Round and the level of liberalization exceeds that required by their commitments under the Agreement, the agricultural sector in developed countries remain highly protected owing to persisting tariff

example, the use of export subsidies for the world as a whole increased to US$ 6.5 billion in 1998 from US$ 5.6 billion in 1997.[3] The European Union accounts for almost 90 per cent of this total, or US$ 5.8 billion of the world total export subsidy used in 1998, which is roughly 4 times larger than the average agricultural value-added gross domestic product (GDP) of sub-Saharan African countries in the same year.

11. The issue of the impact of the agricultural reform on the Net Food Importing Developing Countries (NFIDCs) and the least developed countries (LDCs) also needs to be addressed in a more concrete and operational manner. Despite the recognition given to the issue by Ministers, the Marrakech Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries has not generated any concrete action as it provides no operational mechanism. In the meantime, the situation of most of these countries continues to deteriorate. Some proposals to this effect are outlined in Chapter III of the main report.

12. Furthermore, the Agreement on Agriculture does not reflect the socio-economic importance of the agricultural sector in developing countries for their economic growth and developmental objectives. In the view of these concerns for developing countries, the new negotiations on agriculture should take their situation into account and the S&D treatment provisions could be devised to include a possible development box.

B: Services

13. A new round of negotiations on trade in services was also initiated in February 2000. At a meeting in May of the Council for Trade in Services, the negotiations achieved some progress on the so-called "road map" for the first phase, which is expected to end in March 2001 (see chapter IV of the main report). By then, a review (or stocktaking) of the results achieved will be conducted. The second phase of negotiations would begin immediately after. Several proposals have already been tabled. So far, developing countries have been active on tourism.

14. Many developing countries have implemented regulatory reforms liberalizing trade in services since the conclusion of the Uruguay Round.[4] Article XIX of GATS mandates the establishment of modalities to recognize such autonomous liberalization, but the issue needs further elaboration in the negotiations.

15. Classification of services sectors has been subject to many criticisms.[5] It has been felt, among WTO Members, that the current services sectoral classification list earlier established in GATS (MTN.GNS/W/120) was not representative of the market realities prevailing today. Consequently, work is underway in the Committee on Specific Commitments to clarify some services definitional issues for the purpose of facilitating mandated negotiations on services. Some WTO Members are particularly concerned about the issue of sectoral definition, as it is often necessary that liberal regulatory framework be extended to neighbouring interrelated services if liberalization in one services sector is to be commercially meaningful. Hence, the need to consider

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peaks in sensitive products, tariff escalation on processed products, and the steadily increasing level of domestic support as well as export subsidies.

[3] OECD, *Agricultural policies in OECD countries: Monitoring and evaluation 2000*, Paris, 2000.

[4] See, for example, various country studies undertaken under the Coordinated African Programme of Assistance on Services (CAPAS).

[5] See, for example, the Proposal of Dominican Republic, El Salvador and Honduras, **"**Proposal Regarding the GATS (Paragraph 9(a)(ii) of the Geneva Ministerial Declaration)", WT/GC/W/372.

a so-called "cluster" of inter-related services sectors.[6] This principle was actually adopted in a proposal submitted on tourism.[7] The discussions are ongoing as to how to adopt this approach, including a number of legal and scheduling issues. A checklist of inter-linked sectors might be created. Sectors that have been proposed for clustering are environment, energy, legal, courier, and construction services. It is widely recognized that commercial realities of these sectors are not fully reflected in the current WTO list of classification, as those sectors encompass sub-sectoral activities that are currently classified in different heading of services sectors. Developing countries stressed, though, that the request and offer approach in negotiations is to remain a corner stone in the approach to negotiations.

16. Sectoral initiatives often tend to arise in those areas where no multilateral rules have been developed, such as pro-competitive regulatory principles that were adopted for basic telecommunications negotiations in the absence of more general rules on competition.[8] In principle, it is expected that rule making should gain prominence. However, the process is lengthy and complicated in all areas under consideration, including domestic regulation, government procurement and subsidies. In respect of emergency safeguards – the area of priority interest to developing countries – there exists no consensus among WTO Members, especially on the part of developed countries, as to the need for having this mechanism in general.

17. A review of the most favoured nation clause (MFN) exemptions has taken place and remains on the agenda. The annex on air transport is up for review as well, although it is not likely that this sector will be incorporated under the GATS framework in full. Negotiations will also extend to the maritime services, since post-Uruguay Round negotiations, as mandated by the Annex and the Ministerial Decision on Negotiations on Maritime Transport Services, have been inconclusive and thus negotiations are expected to resume on the sector. Specific proposals are to be made in the area by developing countries as well, as it should prove to be a sector of their interest.

18. Apart from the negotiations on further liberalization of trade in services, as mandated under Article XIX of GATS, the "Built-in Agenda" for services also contains several other elements. These include a series of mandated reviews, the continuation of a rule-making agenda inherited from the Uruguay Round, and work on classification and scheduling issues.

C: Textiles

19. After a long "transitional" period or "breathing" space of around 25 years, the Agreement on Textiles and Clothing (ATC) provides for a 10-year-transitional period to phase out all textile

[6] A cluster approach would group a series of sectors and sub-sectors corresponding to commercial realities in order to seek maximum liberalization commitments for the services within the cluster, as well as to subject services within the cluster to common multilateral regulatory requirements. The approach was drawn from successful experiences of the negotiations on basic telecommunications services, where the final protocol included a "Reference Paper", which set out regulatory principles for creating a pro-competitive environment in the sector. UNCTAD, Regulation and liberalization in the construction services sector and its contribution to the development of developing countries, TD/COM.1/EM12/2, 12 September 2000.

[7] Proposal by the Dominican Republic, El Salvador and Honduras, WT/GC/W/372.

[8] Currently the WTO does not include rules on competition. A WTO Working Group on the Interaction of Trade and Competition Policy has been discussing areas that may merit further consideration in WTO framework. Outside the WTO, there exists no generic legally binding multilateral disciplines on competition. The only existing fully multilateral disciplines in the field of competition, while not legally binding, is the Set of Multilateral Agreed Equitable Principles and Rules for the Control for the Restrictive Business Practices adopted by the United Nations (UN) General Assembly on 5 December 1980.

quotas by the end of the year 2004. However, after almost 6 years in effect of the ATC, the committed progressive phasing-out of quotas has not yet materialized. In summary:

- Although 33% of trade in the sector has been "integrated" by the major restraining countries (e.g. the United States, EU, Canada) in a narrow technical sense, this comprises mainly imports of products, which were not under restriction. This has resulted in the elimination of only a few quota restrictions (13 out of 750 by the United States; 14 out of 219 by EU; and 29 out of 295 by Canada), leaving the great bulk of restrictions still in place.

- Additional access granted by the restraining Members has been limited to the minimum increases in quota growth rates under the ATC.

- Developing countries, including small suppliers and least-developed countries, have not received commercially meaningful increases in their access possibilities. For instance, during the first two stages of the integration, trade in the products freed from quota under the Agreement accounts for a minuscule share of the total restrained imports, particularly in the two major markets; that is about 6 percent in the case of the United States and less than 5 percent in the case of the EU.[9] Some major restraining countries maintain quota restriction for LDC imports.

20. Consequently, despite solemn commitments, the process of liberalization has failed to be progressive in character. It has not allowed developing countries to benefit from strong consumer demand in major developed country markets.

21. Conversely, major developed restraining Members have applied a number of trade restrictive measures through (i) transitional safeguard actions, (ii) changes in rules of origin, (iii) customs administration, and (iv) anti-dumping actions. A large number of safeguard actions have been implemented as a way of new restrictions, involving exports from small suppliers for which the ATC in fact envisages more favourable treatment. For instance, one restraining country has implemented 28 transitional safeguard measures during 4 years of transitional period up to 1998, affecting US$ 1 billion worth of trade, while the Agreement requires that such measures be taken "as sparingly as possible". As to changes in rules of origin, the United States has substantially altered their rules of origin for textile and clothing products as part of its legislation implementing Uruguay Round Agreements, which resulted in tightening of origin-conferring criteria, especially for intermediary countries. Customs and administrative formalities implemented by a restraining country to address issues of circumvention have also amounted to tightening market access opportunities, as measures such as enforcement of bond requirements for shipments suspected of transshipments, later extended to all textiles and apparel imports from all sources, had increased costs of doing business. Anti-dumping actions have often targeted products already under quota restrictions, thus causing "double jeopardy". Furthermore, those anti-dumping investigations have often been repeated at short intervals without resulting in the imposition of anti-dumping duty. The imports of countries subject to anti-dumping investigations were reported to have declined at a faster rate than that of overall imports, hence the disruptive effect of anti-dumping investigations.[10]

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[9] Submission by Hong Kong (China), WT/GC/W/283. See also submissions by Pakistan, India and Hong Kong (China), respectively WT/GC/W/159, 226 and 357.

[10] *Ibid.* WT/GC/W/283. For instance, in the case of the EU, total imports of cotton fabrics declined by 6.52 per cent between 1996 and 1997, while imports from six countries subject to anti-dumping investigations declined by over 33 per cent. Over the entire period that the investigations were in process (1993-97), imports from the targeted countries declined at an annual rate of 7 per cent.

D: Subsidies

22. The major imbalance in the area of industrial subsidies derives from the fact that stronger discipline has been placed on export and domestic subsidies (other than agriculture) which are generally used by developing countries for the development of their industrial production and export. Conversely, an exemption has been created for certain non-actionable subsidies such as those for research and development (R&D), development of disadvantaged regions and adaptation to environmental standards, which are generally more prevalent in developed countries than in developing countries because of the scarce financial resources available in the latter.

23. In the implementation of the Agreement on Subsidies and Countervailing Measures (ASCM), the difficulties faced by developing countries are mainly in two aspects. First, due to their Government's institutional constraints, many developing countries are not able to meet the notification requirements of the Agreement, in particular those related to specific subsidies, subsidy programmes, export and local-content subsidies. Fulfillment of these requirements is important as it may affect the rights and obligations of a country once that country failed to do so and to be challenged by another country. Second, many developing countries are confronted with the difficulty of making use of the Agreement to defend their interests in case their industry and trade are hurt by the subsidy programmes of their trading partners, particularly the developed countries who have the resources to subsidize their industry and trade. In other words, developing countries in general lack of the ability (and/or capacity) to challenge the unfair practices of others. Over the past five years, none of the developing countries have been able to make any counter-notifications in relation to measures of another Member having the effects of a subsidy that has not been notified in accordance with Article XVI:1 of General Agreement on Tariffs and Trade (GATT) 1994 and Article 25.1 of the ASCM.

24. In the status of submission of annual notifications, it should be noted that the situation was highly unsatisfactory as a large number of countries had yet to submit their notification.

25. Article 8.2, footnote 25 of the ASCM requires the review of the exemption for specific R&D subsidies within 18 months of the entry into force of the WTO agreement (i.e., by the end of June 1996). In view of the lack of experience and lack of green subsidies notifications submitted, it was agreed that such review would be conducted at a future time if WTO Members wished to do so.

26. Under Article 31 of the ASCM, the provisions on R&D subsidies (Article 6.1), regional assistance (Article 8) and environment subsidies (Article 9) shall apply for a period of five years, and the Committee on SCM is required to conduct a review of these provisions no later than 6 months before the end of this period. In May 1999, the Committee on SCM authorized its Chairman to begin the review process on the basis of informal consultations of the Committee. Informal consultations were held in June, July and October 1999. The issue of review was also discussed at the Committee on SCM in November and December 1999. So far, no direct and clear consensus of how to proceed in this regard has been reached.

27. Compared to the Tokyo Round Subsidies Code, the Uruguay Round Agreement on Subsidies and Countervailing Measures provided more explicit definitions of subsidies[11] and stronger, clearer disciplines on countervailing duty. Because of these explicit definitions, and strong and clearer discipline, there has been a decline in the initiation of countervailing investigations since the entry into force of the WTO Agreement.

[11] See Article 1 of the ASCM. The ASCM defines subsidies in three categories (prohibited subsidies, actionable subsidies and non-actionable subsidies) according to specificity.

28. During the first five-year operation of the WTO Agreement, there has been about 100 countervailing cases, most of which were initiated by the United States (33) and the EU (33).[12] Products that have been mostly targeted are base metals (40), prepared foodstuffs (20) and plastics (11). Countries and economies that have mainly been affected by these measures are India (16), Italy (10), the Republic of Korea (9), the EU (7), Indonesia (6), Taiwan Province of China (6), Thailand (6) and South Africa (5).

E: Rules of Origin

29. In order to ensure that rules of origin do not themselves create unnecessary obstacles to trade, the WTO Agreement on Rules of Origin, in Article 1.2, provides that the harmonized set of rules shall apply to all non-preferential commercial policy instruments, from MFN treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping/countervailing duties; safeguards; origin marking requirements; and any discriminatory quantitative restrictions or tariff quotas. They also include rules of origin used for Government procurement and trade statistics. According to the Agreement, such a work programme should be completed within three years. The work programme was initiated in July 1995. Since this work programme did not achieve completion within three years on 7 July 1998, WTO Members agreed to the continuation of the work programme with a view to completing the negotiations by November 1999. In accordance with this schedule, the Technical Committee on Rules of Origin (TCRO) of the World Customs Organization has submitted the final result of its work to the WTO Committee on Rules of Origin (CRO) as contained in document G/RO/37. Although significant progress has been made in the development of the overall architecture, there have been a great number of outstanding issues awaiting decision by the CRO, including a great number of unresolved issues related to product-specific rules. For example, on Chapter 28-40 (chemicals), consensus was only reached on 4 out of 38 outstanding issues. Thus, the deadline for the conclusion of work needs to be further renewed.

30. The negotiations in the WTO Committee on Rules of Origin on the disciplines to govern the application of rules of origin are still ongoing, far behind the original schedule set up by the Agreement. In the meantime, the delay in harmonizing the rules of origin is upsetting the balance of rights and obligations, particularly due to the interim arrangements that have been introduced by some Members that could have restrictive effects on trade, in particular, in sectors of export-interest to developing Members. For example, the changes introduced by the United States on 1 July 1996 with regard to their rules of origin for textiles and clothing products, as discussed in section C above, have had an adverse impact on the export-interest of many developing countries, as the new rules tended to take little account of intermediary operations that often take place in determining origin status in developing countries. Such rules have therefore resulted in tightening market access opportunities for countries where intermediary operations may be undertaken, such as dyeing, printing, designing, cutting and sewing, and thus had a bearing on the rights of these countries under the WTO Agreements, acting as non-tariff barriers to trade.

F: Trade-Related Investment Measures (TRIMs)

31. The main problems faced by the developing countries in implementing the WTO Agreement on TRIMs are related to both the limited transition period allowed for removing TRIMS as well as

[12] Based on the information provided by the WTO Secretariat Rules Division.

the time period envisaged in Article 5.1 for submission of the required notification for availing themselves of transitional arrangements. Under the Agreement, developing countries have a five-year transition period (seven years for least developed countries) to bring the TRIMs which existed before the end of June 1994 into conformity with the provisions of the Agreement. However, there is no transition period for TRIMs introduced after that date.

32. Developing countries also have difficulties in assessing the degree of compliance with the notification requirements, particularly those of Article 5.1 of the Agreement. Article 5.1 provides for a one-time notification possibility, under which all TRIMs that are not in conformity with the provisions of the Agreement should be notified within 90 days of the entry into force of the WTO Agreement. However, so far only 38 such notifications from 26 countries have been submitted and among them 20 submissions were made after the 90-day time-limit. In the review process of the Committee on TRIMs, information was also sought by some developed countries on steps taken by developing countries having made Article 5.1 notifications to comply with their obligation to eliminate notified measures by the end of the five-year transition period specified in Article 5.2. These developing countries had indicated that, in their view, the Agreement does not require them to provide such information.

33. With the five-year implementation experience, particularly those with the WTO Dispute Settlement Body (DSB), many developing countries have come to hold the view that the TRIMs Agreement has resulted in restricting their freedom to channel investments in such a manner as to fulfil their development needs despite the provision of Article 5.3, which recognizes the importance of taking account of the development, financial and trade needs of developing countries while dealing with TRIMs.[13] Since the entry into force of the WTO Agreement, a number of dispute cases have been brought to the DSB against several developing countries on the TRIMs introduced and maintained by them in particular with respect to their automobile sector. These cases either completed or still pending at the DSB would have serious policy implications for many developing countries and for their implementation of the TRIMs Agreement. For example, the completed case against Indonesia on the automobile sector has made many developing countries argue that the Agreement was operating against their interests, disregarding the obvious structural inequalities among the countries, with the effect of maintaining the existing industrialization gap between developed and developing countries.[14] The Indonesian case also indicated that the transitional periods would not be sufficient for developing countries and LDCs to adjust them. The "one-time" notification requirement and the 90-day period were not reasonable and too short for developing countries.

34. In view of their difficulties in eliminating the TRIMs by 1 January 2000, a number of developing countries submitted, in December 1999, their application for extension of the TRIMs, under Article 5.3 of the TRIMs Agreement, to the WTO Council for Trade in Goods. Following the decision taken by the General Council on 8 May 2000, the Chairman of the Goods Council is conducting the consultations with a view to find solutions to transition period issues.

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[13] See proposals for the Third WTO Ministerial Conference by India (WT/GC/W/108 and 203), Egypt (WT/GC/W/109 and 136), Brazil (WT/GC/W/271), Colombia (WT/GC/W/311) and Mexico (WT/GC/W/351). For the negotiating interests of developing countries with regard to the review of TRIMs Agreement, see, for example, Correa, C., *Preparing for the Third Ministerial Conference of the World Trade Organization: Issues for the members States of the Islamic Development Bank in the build-in review of the Agreement on Trade-.Related Investment Measures (TRIMs) of the WTO,* study prepared for the Islamic Development Bank under the supervision of UNCTAD, October 1999.

[14] See, for example, the submission by Brazil WT/GC/W/271. Also see proposals submitted by Colombia, Egypt, India and Mexico (WT/GC/W/108,203,109,136,271,311 and 351).

G: Anti-Dumping

35. The Uruguay Round negotiations on anti-dumping resulted in the third multilateral agreement on this subject (Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994). It introduced an element of predictability in the application of anti-dumping measures. The main thrust of the WTO Agreement on Anti-Dumping (AAD), however, was to harmonize practices among the major users at the time, not always in the direction of limiting the scope for the application of anti-dumping actions. Thus, the AAD still permits protectionist interest groups to use anti-dumping actions as an instrument to "harass" trade.

36. During the first five years of operation of the WTO Agreements (i.e. from 1 January 1995 to 31 December 1999), WTO Members initiated 1,200 anti-dumping measures. These anti-dumping measures cover a large number of tariff lines and sectors that have been mostly targeted such as base metals and articles thereof (340); chemical products (184); plastics (145); machinery and electrical equipment (129); textiles and clothing (97); pulp (73); and stone, plaster and cement (45). Among these measures, almost 500 (or nearly 42 per cent of total actions) were initiated by the Australia, Canada, the EU, New Zealand and the United States.

37. As compared to other trade measures, such as safeguards and countervailing measures, anti-dumping measures can be invoked relatively easily and selectively, targeting imports from certain countries without being required to apply the same measures to imports from other countries. As a consequence, anti-dumping measures have been the most frequently used trade remedies, owing to such a discriminatory and unilateral nature. The application of anti-dumping measures has led to a variety of competition-reducing outcomes. Indeed, the adverse impact of anti-dumping measures is much greater than the volume of imports directly affected by the imposition of anti-dumping duty, as the mere initiation of an anti-dumping investigation can have an immediate adverse impact on trade flows, as it prompts importers to seek alternative sources of supply. In addition, serious problems exist even if final duties are not imposed, as anti-dumping investigations entail huge burdens on respondents, and restrictive effects on trade of the countries in question are significant.

38. The significant reduction and elimination of tariffs and non-tariff measures by developing countries have also resulted in their Governments being under increased pressure to adopt anti-dumping legislation as well, and indeed to have frequent recourse to such measures to protect domestic industry against injury from dumped imports.[15] The number of WTO Members initiating anti-dumping investigations tripled in recent years. Developing countries have now initiated more anti-dumping measures than developed countries. Among the 1,200 measures referred to above, nearly 700, or 57 per cent of the total, were initiated by developing WTO Members. Countries and economies that have been seriously affected by these measures were China (156); the Republic of Korea (95); the United States (78); Taiwan Province of China (60); Japan (52); Germany (48); India (46); the Russian Federation (46); Indonesia (45); Brazil (42) and Thailand (40).

39. Since the establishment of the WTO, a series of reviews on the national legislation and their consistency with the Agreement on Anti-Dumping have been conducted, based on notifications submitted by WTO Members. During these reviews a number of issues, both procedural and substantive, were raised with respect to the implementation of the Agreement on Anti-Dumping. In order to further clarify and prepare recommendations on these issues, an Ad Hoc Group on Implementation was established. Unfortunately, the Group had not addressed any of the substantive issues referred to above. At the insistence of the major trading nations, the mandate of the Group was limited to procedural aspects of the Agreement on Anti-Dumping.

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[15] UNCTAD, Impact of countervailing and anti-dumping duty actions, TD/B/COM.1/EM.14/2, 24 October 2000.

40. Since the creation of the WTO, a total of 24 disputes related to the AAD have been referred to the WTO dispute settlement procedures (as of 22 June 2000), which accounted for 12 per cent of the total WTO disputes. Among these anti-dumping disputes, the petitioners were mainly Mexico (6), the EU (4), the Republic of Korea (3), India (3), Costa Rica (2), the United States (2) and Japan (2), and the respondents were mainly the United States (8), the EU (2), Guatemala (2), Mexico (2), Argentina (2), Ecuador (2) and Trinidad and Tobago (2). The main products involved were steel products, cement and pasta.

41. Increased recourse to anti-dumping measures as well as the rising disputes are mainly due to (i) lack of appropriate implementation of the AAD owing to its vague and ambiguous provisions; and (ii) insufficient disciplines in the relevant provisions of the AAD to avoid inappropriate anti-dumping measures. Furthermore, the problems of implementation are less a result of blatant neglect of the obligations contained in the AAD, than that of importing countries permitting domestic complainants to make full use of flexibility provided in the AAD, where its provisions are imprecise and ambiguous. These would include the following issues and elements related to the determination of dumping and injury, causal link and procedures.

42. In the preparatory process leading up to the Seattle Conference, a great number of proposals, including many from developing countries, were submitted with a view to improve the provisions of the AAD, such as the following:

- No investigation should be initiated for a period of one year (or 365 days) from the date of finalization of a previous investigation for the same product;

- Under Article 9.1 the lesser duty rule should be made mandatory;

- The substantial quantities test should be increased from the present threshold of 20 per cent to at least 40 per cent;

- The existing *de minimis* dumping margin of 2 per cent of export price below which no anti-dumping duty can be imposed (Article 5.8), needs to be raised to 5 per cent for developing countries in both new and review cases;

- The negligible volume of imports should be increased from the existing 3 per cent to 5 per cent for imports from developing countries; and

- Article 17 should be suitably modified so that the general standard of review laid down in the WTO dispute settlement mechanism applies equally and totally to anti-dumping disputes.

H: Sanitary and Phytosanitary Regulations

43. Despite growing concerns that certain sanitary and phytosanitary measures applied by some importing countries may be inconsistent with the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and unfairly impede on agricultural trade, developing countries have faced difficulty in addressing this issue. The latter often lack technical expertise and institutional capacities required to effectively address the issue, without access to information on a number of measures applied by their developed trading partners that affect their exports. Even if they have access to information, they may find themselves unable to determine the compatibility of individual measures with the SPS Agreement as they are often deprived of reliable estimate on the

impact that such measures could have on their exports. The sources of the problem are their insufficient technical and institutional capacities in scientific research, testing, conformity assessment and equivalence. Moreover, they are in many cases unable to effectively participate in the international standard setting process and, therefore, face difficulties when requested to meet SPS measures in foreign markets based on international standards. Transparency-related requirements (i.e. notification) represent a major burden for many developing countries, and they are often unable to benefit from them, due to lack of appropriate infrastructure. The provision of adaptation to regional conditions, which in principle would be of great benefit to developing countries, has been little used because of the difficulties related to its scientific aspects. The provisions relating to S&D remain rather theoretical and have apparently not materialized in any concrete step in favour of developing countries.

44. The issue of health protection is getting very high in several developed countries' agenda. Related to this issue is the use of measures to ensure food safety and protect human, animal and plant health. The EU introduced a Communication on the Precautionary Principle at the meeting of SPS Committee held in February 2000. According to it, the EU, like other WTO Members, have the right to establish the level of protection - particularly of the environment, human, animal and plant health - that they deem appropriate. Applying the precautionary principle is a key tenet of their policy: it provides a basis for action when science is unable to give a clear answer, but there are reasonable grounds for concern that potential hazards may affect the environment or human, animal or plant health in a way inconsistent with the high level of protection chosen by the EU. Both developing and developed countries voiced their concerns about the EU Communication at the SPS Committee and stressed that the SPS Agreement already contained rules to deal with cases where emergency measures were needed but related science was not fully available. They stated that a wide application of the precautionary principle in international trade would lead to a situation of unpredictability related to market access, which would jeopardize the results of the Uruguay Round. Moreover, the implementation of precautionary measures without a strict time frame would encourage inefficiency and slow down scientific research. Developing countries' concern is that developed countries would increasingly use measures meant to protect health, safety and the environment for protectionist purposes.

45. At the same time, in several developed countries, consumers are very demanding and put pressure on their authorities to impose strict safety and quality standards. While all efforts should be made to limit the protectionist use of SPS measures, and for this purpose some clarifications of the text of the SPS Agreement may be worth considering, in many cases SPS measures reflect genuine concerns regarding the protection of health and safety. For developing countries the best option is, therefore, to develop capabilities to respond to the exigencies which are emerging in their target markets by providing good quality and safe products. This implies building up knowledge, skills and capabilities. Strengthening domestic capacities in the SPS domain would also help developing countries to identify products that they may wish to keep out of their markets because of the potential negative impact on local people's health, animal health or the environment. Developed countries and the relevant international organizations should be willing to support developing countries in this endeavour.

I: Technical Barriers to Trade (TBT)

46. Although the WTO Agreement on TBT calls for technical standards and regulations to be based on international standards, the participation of developing countries in the standardization activities and the Mutual Recognition Agreements (MRAs) has been marginal despite the efforts made by international organizations such as International Organization for Standardization (ISO).

This is mainly due to the lack of proper human and technical resources in many developing countries. The special development, financial and trade needs of developing countries as recognized in the Agreement would appear not to have fully been taken into account by developed country WTO Members.

47. In order to facilitate the effective participation of the developing country members in the implementation of the Agreement on TBT, means have to be found to ensure the effective participation of developing countries in the setting of standards by international standard-setting organizations. Technical cooperation is also required to upgrade conformity assessment procedures in developing countries to gain their acceptance in developed markets.

J: Customs Valuation

48. So far many countries have not been able to apply the provisions of the WTO's customs valuation agreement (namely the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994). These include such provisions as the imputed value method, reservation concerning minimum values, reservation concerning reversal of sequential order of Articles 5 and 6 of the Agreement, and reservation concerning application of Article 5.2, whether or not the importer so requests. One reason for the reluctance of these Members' customs administrations to change over to the Agreement's valuation system is that the Agreement does not prescribe changes particularly suited to the administrative environments that exist in these Members.

49. The existing administrative environment in the valuation system in many developing country Members is based on the Brussels Definition of Value, which is vastly different from that applied in other WTO Members. Many developing countries have argued that such change to the new system could lead to a loss of fiscal revenue.[16] The loss of revenue could also occur from the provisions in the Agreement which require customs administrations of these Members to deviate from the existing practices to add to the "price paid or payable", "buying commissions" and "special discounts obtained by importers who operate as sole agents".

50. The experience of those developing WTO Members that have applied the provisions of the Agreement has also brought out practical difficulties which arise in applying the rules of the Agreement. For instance, even though the Marrakesh decision permits customs administrations to reject the value declared by the importer, where they consider that it has been deliberately under or over-valued, in practice it is not possible for them to make use of the authority given by the Marrakech decision because of the non-availability of reliable and up-to-date "date on prices" required for price comparison purpose.[17]

51. The rules of the Agreement also pose problems in determining dutiable value of goods traded on the basis of "transfer pricing", between parent companies on the one hand and their subsidiaries and affiliates on the other. In a number of developing Members, with the gradual

[16] See various requests for extension of transitional period under Annex III of the Agreement submitted, for example, by Côte d'Ivoire (G/VAL/W/46). It is argued that the application of valuation method pursuant to the Customs Valuation Agreement would have negative impact on customs revenues as valuation method based on the transaction value may be prone to under-invoicing and fraudulent practices and the leeway of customs authorities to challenge transaction value is limited.

[17] See WTO documents WT/GC/W/227 and 301 - position and proposal submitted by India, and Kenya on behalf of the African Group.

removal of restrictions that were previously applied to foreign direct investment, industry to industry trade among the member units of the transnational corporations is on the increase.

52. In order to facilitate the effective participation of the developing Members, some proposals have been put forward with a view to improving the Agreement. The transitional period provided to developing Members to apply the provisions of the Agreement expired on 1 January 2000. Despite the technical assistance provided by the WTO Secretariat and some developed country Members, limited in scope, it appears difficult for developing country Members to implement the Agreement by the scheduled date (the year 2000) owing to their lack of institutional and human resources.

53. It should be noted that, so far, developed countries have not met their commitment set out in Article 20.3 of the Agreement concerning special and differential treatment, which requires developed country Members to furnish technical assistance to developing countries.[18] This provision specifically requires that developed country Members draw up programmes of technical assistance for the benefit of developing Members, relating to the training of personnel, the preparation of implementation measures, access to sources of information regarding customs valuation methodology, and advice on the application of the provisions of the Agreement.

54. Given the non-implementation of Article 20.3, many developing Members consider that the transition period granted to them is insufficient. They will thus be obliged to request an appropriate extension in accordance with the relevant provisions of the Agreement, in particular Annex III, in order to enable them to acquire the necessary technical assistance and expertise to implement the Agreement without thereby affecting their comparative advantages.[19] At present, individual cases requesting extensions are being discussed in the Committee on Customs Valuation and some have been granted. For instance, extension has been granted to Paraguay[20] to permit it to delay the application of the provisions of the Agreement until 1 January 2001. Gabon has been allowed to continue its reservation concerning minimum values until 1 January 2003.[21]

K: Trade-Related Aspects of Intellectual Property Rights (TRIPS)

55. Divergent views have been expressed at the Council for TRIPS on practically all issues under consideration. Developing countries were very active during the preparatory process for the Third WTO Ministerial Conference and put forwards a number of proposals related to the items included in the built-in agenda, as well as to other topics of interest to them (like the protection of traditional knowledge). They have been making efforts to discuss some of the pre-Seattle proposals in the TRIPS Council. However, several developed countries are against discussing the proposals, claiming that they do not fit in the agenda of the Council for TRIPS and therefore the Council has no mandate. Nevertheless, some discussions have already taken place on Article 71 (review of the implementation after the expiration of the transitional period on 1 January 2000), and on implementation of Article 66.2 (incentives for technology transfer to LDCs).

56. Negotiations or reviews have also started regarding: (a) the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits (as

[18] *Ibid.*, WTO document WT/GC/W/301. An inventory of technical assistance activities under Article 20.3 has been drawn up by the WTO Committee on Customs Valuation. See WTO document G/VAL/W/25, *Article 20.3 of the Agreement on Customs Valuation: inventory of technical assistance*.
[19] See WTO document WT/GC/W/301- proposal submitted by Kenya on behalf of the African Group.
[20] See WTO document G/VAL/17 of 2 December 1999.
[21] See WTO document G/VAL/14 of 30 November 1999.

mandated by Article 23.4); (b) the implementation of the provisions related to geographical indications (as mandated by Article 24.2); (c) the extension of the provisions on additional protection to products of interest to developing countries, other than wines and spirits; (d) the review of Article 27.3 (b) dealing with the protection of plant varieties; and (e) the application of the so-called "non-violation complaints" under the Agreement on TRIPS.

L: Dispute Settlement

57. The strengthening of the GATT's dispute settlement mechanism is one of the major achievements of the Uruguay Round. Since the WTO Multilateral Trade Agreements entered into force on 1 January 1995, the number of disputes referred to the new dispute settlement mechanism has increased dramatically compared to the situation under the former GATT. The main substantive issues involved in the dispute cases are those related to GATT provisions (mainly Articles I, III, X, XI, and XIII), the Agreement on Agriculture, the Agreement on Anti-Dumping, and the Agreement on Subsidies and Countervailing Measures. It is interesting to note that in nearly two thirds of these cases, panel and appellate body reports have been circulated and adopted, and the respondents were developed members. Additionally, in more than one third of these cases, panel and appellate body found that the respondents had violated the key provisions of the GATT regarding MFN and national treatment.[22]

58. Many developing WTO Members have effectively pursued the resolution of trade disputes through recourse to the WTO dispute settlement mechanism as they viewed such a mechanism as a central element in the "rule-based" multilateral trading system. It provides for the trade certainty, predictability and security inherent in the element of automaticity in settling disputes and time-bound nature of the process, as well as its outlawing of unilateral trade sanctions and threats.

59. However, in the light of the operations of the mechanism some developing WTO Members have very mixed feelings indicating some emerging signs of disadvantages for them. First of all, as some of the recent WTO dispute settlement process and panel/appellate body rulings have begun to attract increasing attention among the public - civil society, business groups, parliamentarians, etc. it is clear that in most countries, the WTO, and its current and future reach, can no longer be handled without informed debate and involvement of various sections of Governments and the public. Second, the recent banana and hormones disputes have thrown up problems relating to Articles 21 and 22 and the ongoing DSU (Dispute Settlement Understanding) review process leading to the possible amendments to those provisions.[23] Third, questions have been raised as to whether or not the recommendations and rulings of the DSB have created or expanded the obligations for developing countries, or reduced their rights (Article 3.2).[24] Fourth, the issue related to whether or not the DSU provisions for special and more favourable treatment of developing countries have been implemented, and how these provisions should be implemented in the future.[25]

60. The major concern of the developing countries over the application of special and differential treatment is the lack of clarity regarding the manner in which various Dispute

[22] See WTO website http://www.wto.org/wto/dispute/bulletin.htm, Dispute Overview.

[23] See WTO document WT/MIN(99)/8 of 22 November 1999, proposed amendment of the dispute settlement understanding, communication from Canada, Costa Rica, Czech Republic, Ecuador, the European Communities and its member States, Hungary, Japan, the Republic of Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela.

[24] See Chakravarthi Reghavan?s forthcoming paper on WTO dispute settlement understanding; and also, WTO document WT/GC/162, position and proposal paper submitted by Pakistan.

[25] See WTO documents WT/GC/W/108, WT/GC/W/109, WT/GC/W/135 and WT/GC/W/162, positions and proposals submitted by India, Egypt and Pakistan.

Settlement Understanding provisions are implemented.[26] In order to ensure that these S&D provisions are accorded to developing countries in practice, it was suggested that there was a need for developing a screening process to check whether these requirements are adhered to[27].

61. It has also been recognized that dispute settlement proceedings are extremely expensive, that developing countries and least developed countries do not have the necessary legal expertise to handle such cases, and that dispute settlement proceedings are being competitively used by certain developed countries to prove to its domestic constituencies, their aggressive trade policy stance towards their trading partners.[28] Therefore, it is called for that procedures be developed to ensure that the interests of developing countries be fully taken into account in the dispute settlement processes and that developed countries do not use dispute settlement proceedings as instruments for coercion of developing countries.[29]

[26] The main S&D provisions of the DSU, as identified by India (WT/GC/W108) and Egypt (WT/GC/W/109 and 135), would include articles 3.12, 4 .10, 8.10, 12.10, 12.11, 21.2, 21.3, 21.6, 22, 24 and 27.2.
[27] WTO document WT/GC/W/108, proposal by India,
[28] See WTO documents WT/GC/W/108, 109 and 135.
[29] See WTO document WT/GC/W/108: proposal by India.

ANNEX

PROPOSALS BY OR INVOLVING AFRICAN COUNTRIES RELATING TO PARAGRAPH 9(a)(i) ISSUES (IMPLEMENTATION OF EXISTING AGREEMENTS AND DECISIONS) OF THE GENEVA MINISTERIAL DECLARATION

A. Agriculture

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda

WT/GC/W/354

Implementation issues to be addressed before/at Seattle

Developing countries with predominantly rural agrarian economies shall have sufficient flexibility in the green box to adequately address their non-trade concerns, such as food security and rural employment. Support provided by developing countries for non-trade concerns, even if outside the ambit of the green box, shall be exempt from the Aggregate Measure of Support (AMS).

If in the calculation of the AMS, domestic support prices are lower than the external reference price (so as to ensure access of poor households to basic foodstuffs), thereby resulting in negative product specific support, then Members shall be allowed to increase their non-product specific support by an equivalent amount. A suitable methodology shall be adopted for taking into account the high levels of inflation while making the domestic support notification.

Tariff rate quota (TRQ) administration shall be made transparent, equitable and non-discriminatory, in order to allow new/small-scale developing country exporters to obtain market access. Imports by developed countries under TRQs shall not be made conditional to absorption of domestic production. To this end, notifications submitted to the Committee on Agriculture shall also include details on guidelines and procedures of allotment of TRQ.

The Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (NFIDCs) shall be revised before 1 January 2001, in order to ensure its effective implementation through the incorporation of concrete, operational and contractual measures, including provisions for technical and financial assistance, that are both effective and responsive to the special needs of LDCs and NFIDCs.

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, Sri Lanka, Uganda and Zimbabwe

WT/GC/W/374

Implementation Issues to be addressed before/at Seattle

(a) Assessment of the Agreement on Agriculture (AoA)

Even before negotiations commence, there must be an assessment of the effects of the AoA on developing and developed countries. The preliminary study of the Food and Agriculture Organization (FAO) shows that poverty and unemployment in developing countries is on the rise as a result of the type of agricultural liberalization that the AoA has implemented.

A thorough assessment must be undertaken before further negotiations begin so as:

(i) to provide both developed and developing countries with a clearer picture of the exact impact of agricultural trade liberalization and hence clarify what the priorities should be in the coming agricultural negotiations;

(ii) to ascertain where the present imbalances and needs of countries are, so as to know how the agreement can be rebalanced such that benefits will flow equally to the developing countries, in a manner that will not exacerbate the rural poor, but will in fact raise living standards of even the small farmers.

(b) Market Access

The TRQ administration should be made transparent, equitable and non-discriminatory, in order to allow new/small-scale developing country exporters to obtain market access. Notifications submitted to the Committee on Agriculture shall include details on guidelines and procedures of allotment of TRQ.

The Special Safeguard Provision should be made permanent for use by all developing countries as part of Special and Differential Treatment. However, the "triggers" must be tightened so that the Special Safeguard Provision is not abused. Developed countries should depend on the general safeguard provisions of the GATT 1994.

(c) Domestic Supports

Some developing countries made some genuine mistakes in the calculation of their country schedules (tariff rates, AMS – base period, currency base, etc). They should be allowed to recalculate their AMS levels to reflect a more accurate picture of their support and tariff levels.

Countries with under-utilized product specific *de minimis* levels should be able to "transfer" this credit to their "non-product specific" *de minimis* amounts. This will be fair to the developing countries that are reluctant to provide product-specific *de minimis* as this might raise product prices.

(d) Special and Differential Treatment Provisions

Developing countries must be allowed the flexibility of using domestic supports and transparent import controls as national Governments see fit, to encourage domestic food production for domestic consumption.

Developing countries should have the flexibility in the areas of import restraint and domestic support to protect and provide support to small farmers and household farmers. This will not be trade distorting since what is produced by this sector is used for subsistence and is not traded on the international market.

Where people are highly dependent on a very small number of export commodities for their livelihoods, flexibilities must be allowed in providing the needed domestic supports for these commodities.

Open up the existing Special Treatment Clause for use by all developing countries for food security purposes.

(e) Marrakesh Decision

The Marrakesh Decision is at present only an enabling and best endeavour provision. It should be revised in order to ensure its effective implementation through the incorporation of concrete, operational and contractual measures, including provisions for technical and financial assistance that are both effective and responsive to the special needs of LDCs and NFIDCs. In the area of financial assistance, all agricultural exporting developed countries must be obligated to contribute to a fund for NFIDCs (as a proportion of their export earnings). This fund should also be used by NFIDCs to increase their domestic production, so that they can be less dependent on food imports especially in staple products.

(f) Sanitary and Phytosanitary Standards

When developed countries introduce new and higher sanitary and phytosanitary standards, these conditions must be met:

(i) prompt notification and commitment by developed countries to take into account the comments by developing countries on the changes made;

	(ii) that standards revised by developed countries must not disrupt imports from developing countries. If they prove to be prohibitive, it is incumbent on the developed country setting those standards to provide the financial and technical assistance needed to exporting developing countries to comply with the new standards. The importing developed country with revised standards will not be allowed to curb the inflow of imports from developing countries based on the change in regulation.

B. Services

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/354	**Implementation issues to be addressed before/at Seattle** Developed countries shall fully implement commitments undertaken by them in Mode 4. In regard to Mode 4 commitments: (a) there shall be no application of the economic needs test; (b) there shall be automatic issuance of visas and exemption from work permit/residency requirements for short periods of presence, for the sectors where commitments have been undertaken by developed country Members. A monitoring and notification mechanism shall be established to ensure effective implementation of Article IV.

C. Anti-Dumping

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/354	**<u>Implementation issues to be addressed before/at Seattle</u>** In order to restrict the initiation of back-to-back investigations, no investigation shall be initiated for a period of 365 days from the date of finalization of a previous investigation for the same product resulting in non-imposition of duties. The lesser duty rule shall be mandatory while imposing an anti-dumping duty against a developing country Member by any developed country Member. There shall be an undertaking to this effect under Article 9.1. Article 2.2 shall be clarified so that where sales on the domestic market do not permit a proper comparison, the margin of dumping is determined by comparison with the export price to a third country, and only where this is not representative should the export price be determined on the basis of the constructed value of the cost of the product in the country of origin.
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/355	**<u>Implementation issues to be addressed in the first year of negotiations</u>** Article 15 of the Agreement on Implementation of Article VI is only a best-endeavour clause. Consequently, Members have rarely, if at all, explored the possibility of constructive remedies before applying anti-dumping duties against exports from developing countries. Hence, the provisions of Article 15 need to be operationalized and made mandatory. The existing *de minimis* dumping margin of 2 per cent of export price below which no anti-dumping duty can be imposed (Article 5.8), needs to be raised to 5 per cent for developing countries, so as to reflect the inherent advantages that the industries in these countries enjoy vis-à-vis comparable production in developed countries. The major users have so far applied this prescribed *de minimis* only in newly initiated cases, not in review and refund cases. It is imperative that the proposed *de minimis* dumping margin of 5 per cent is applied not only in new cases but also in refund and review cases.

	The threshold volume of dumped imports which shall normally be regarded as negligible (Article 5.8) should be increased from the existing 3 per cent to 5 per cent for imports from developing countries. Moreover, the stipulation that anti-dumping action can still be taken even if the volume of imports is below this threshold level, provided countries which individually account for less than the threshold volume, collectively account for more than 7 per cent of the imports, should be deleted. Article 5.8 should also be clarified with regard to the time-frame to be used in determining the volume of the dumped imports. The definition of "substantial quantities" as provided for in Article 2.2.1 (footnote 5) is still very restrictive and permits unreasonable findings of dumping. The substantial quantities test should be increased from the present threshold of 20 per cent to at least 40 per cent. Article 2.4.1 shall include details of dealing with foreign exchange rate fluctuations during the process of dumping. Article 3 shall contain a detailed provision dealing with the determination of the material retardation of the establishment of a domestic industry as stipulated in footnote 9. As developing countries liberalize, the incidence of dumping in to these countries is likely to increase. It is important to address this concern, since otherwise the momentum of import liberalisation in developing countries may suffer. There should therefore be a provision in the Agreement, which provides a presumption of dumping of imports from developed countries into developing countries, provided that certain conditions are met. Presently there is a different and more restrictive standard of review pertaining to adjudication in anti-dumping cases. There is no reason why there should be such discrimination for anti-dumping investigations. Hence, Article 17 should be suitably modified so that the general standard of review laid down in the WTO dispute settlement mechanism applies equally and totally to disputes in the anti-dumping area. The annual review provided under Article 18.6 has remained a proforma exercise and has not provided adequate opportunity for Members to address the issue of increasing anti-dumping measures and instances of abuse of the Agreement to accommodate protectionist pressures. This Article must be appropriately amended to ensure that the annual reviews are meaningful and play a role in reducing the possible abuse of the Anti-Dumping Agreement.
Egypt WT/GC/W/324	**Article 2.4.1:** This Article should include further details on how the investigating authority can effectively solve the problems arising during the process of investigation with regard to foreign exchange rates, as exchange rate fluctuations could affect the dumping margin calculations and this causes difficulties for the investigating authority and limits its ability to easily determine the dumping action. **Article 3:** This Article should contain a detailed provision dealing with the determination of the material retardation of the establishment of a domestic industry, as stipulated in footnote 9. **Article 15:** Article 15 of the Agreement on Anti-Dumping should be modified in order to be more comprehensive, operational and mandatory; constructive remedies should be more specific and reasonable for developing countries. The lesser duty rules should be applied with regard to imports from developing countries. It should be noted that the repeated anti-dumping investigations, which have been conducted by certain trade partners on the same product lines, notwithstanding Article 15 as previously mentioned, have resulted in trade harassment to developing countries' exporters. **Anti-Circumvention:** Egypt believes that there is a need to add a new detailed provision concerning anti-circumvention in order to set guidelines for all Members in conducting anti-circumvention investigations.

Kenya WT/GC/W/233	Exports of developing countries have been facing more frequent anti-dumping and countervailing measures. The frequent use of anti-dumping actions against exports from developing countries by major trading partners has become a matter of serious and growing concern. In some cases, benefits from trade liberalization have been considerably neutralized by the use of anti-dumping measures by developed countries. The process of investigation on dumping is expensive and cumbersome. It should be simplified and lengthened to enable developing countries to undertake thorough investigations.
Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe Job(99)/3169 and Add. 1	In the light of the experience of the operation of the Agreement it would be necessary to clarify the rules of the Agreement to ensure that: - anti-dumping investigations are initiated by the investigating authorities only in cases where the applications show demonstrable evidence of dumping and injury; - anti-dumping investigations are not initiated on imports of the same products for a period of at least one year, where the investigations undertaken on the basis of a complaint by the industry are terminated on the ground of lack of evidence; - in cases where there are no or low sales of like product in the domestic market, resort to constructed value calculated on the basis of cost of production for comparison with export price in order to determine whether the products being dumped should only be made where the investigating authorities find that prices charged by the same exporter to third country markets are not available or are not representative; - the existing special provisions in the Agreement relating to settlement of disputes in the anti-dumping area which *inter alia* require dispute settlement panels not to challenge "the evaluation of facts" made by the national investigating authorities, "where the establishment of facts was proper and the evaluation was unbiased and objective" should be modified to provide that the common rules provided by the Dispute Settlement Understanding would apply to disputes relating to anti-dumping actions brought to the WTO for settlement.

D. Subsidies Agreement

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Nicaragua and Thailand WT/GC/W/164/ Rev.2	In the next Ministerial Conference to be held in Seattle, USA, from 30 November to 3 December 1999, Annex VII of the Agreement on Subsidies and Countervailing Measures has to be modified as follows: - 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) The developing countries, including the least-developed countries, Members of the WTO that are included in the Low and Lower-Middle Income Category of the World Bank; (b) Countries indicated in paragraph (a) above will be excluded from this Annex if their Gross National Product (GNP) per capita has exceeded the top level of the Lower-Middle Income Category of the World Bank. They will be automatically included in this Annex, if their GNP per capita falls under the top level of the Lower-Middle Income Category of the World Bank.
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India,	**<u>Implementation issues to be addressed before/at Seattle</u>** Subsidies used by developing countries for development, diversification and upgrade of their industry and agriculture are actionable under the Agreement. Article 8:1 of the

Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda

WT/GC/W/354

Subsidies Agreement dealing with non-actionable subsidies shall be expanded to include subsidies referred to in Article 3:1 of the Agreement when such subsidies are provided by developing-country Members, so that action cannot be taken against them either through the dispute settlement route or through the countervailing duty route.

Export credits given by developing countries shall not be considered as subsidies so long as the rates at which they are extended are above LIBOR.

Any countervailing duties shall be restricted only to that amount by which the subsidy exceeds the *de minmiis* level, when action is being contemplated in case of products from developing countries.

Annex VII of the Agreement shall be modified to read as follows:

> "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:
>
> (i) The developing countries, including the least-developed countries, Members of the WTO that are included in the Low and Middle Income Category of the World Bank.
>
> (ii) Countries indicated in paragraph (a) above will be excluded from this Annex if their GNP per capita has exceeded the top level of the Middle Income Category of the World Bank. They will be automatically included in this Annex, if their GNP per capita falls at or under the top level of the Middle Income Category of the World Bank."
>
> The prohibition of using export subsidies under Article 27:6 shall be applicable to a developing country only after its export levels in a product have remained over 3.25 per cent of world trade continuously for a period of five years. Furthermore, an automatic inclusion provision shall be added in Article 27:6 to enable developing countries to reintroduce export subsidies if the share of their export of a product decreases to a level below 3.25 per cent of world trade.

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda

WT/GC/W/355

<u>Implementation issues to be addressed in the first year of negotiations</u>

Aggregate and generalized rates of duty rate remission should be allowed in the case of developing countries even though the individual units may not be able to establish the source of their inputs.

Developing countries should be allowed to neutralize the cost-escalating effect of taxes collected by government authorities at different levels, i.e. the taxes such as sales tax, octroi, cess, etc., which are not refunded, without these being termed as subsidies.

Article 11:9 should be modified to provide an additional dispensation for developing countries, inasmuch as that any subsidy investigation shall be immediately terminated in cases where the subsidy being provided by a developing country is less than 2.5 per cent *ad valorem*, instead of the existing *de minimis* of 1 per cent presently applicable to all Members.

The present *de minimis* level of 3 per cent, below which countervailing duties may not be imposed for developing countries, needs to be increased (Article 27:11). Countervailing duty investigations should not be initiated or, if initiated, should be terminated when imports from developing countries are less than 7 per cent of the total imports, irrespective of the cumulative volume of imports of the like products from all developing countries.

Article 27:3 of the Agreement allows a developing country to grant a subsidy for the use of domestic products in preference to imported products (defined in Article 3:1(b) of the Agreement). There should be a clarification in Article 27:3 that it is applicable notwithstanding the provisions of any other agreement.

	The definition of "inputs consumed in the production process" (footnote 61) needs to be expanded to include all inputs, not just physical inputs, which may have contributed to the determination of the final cost price of the exported product. Annex I of the Agreement shall be amended to provide developing countries with the flexibility to finance their exporters, consistent with their developmental objectives. Annex I shall clarify that developing countries shall not be compelled to conform to any undertaking or arrangement designed for developed countries which proves to be unrealistic given the difficulties and constraints confronted by developing countries.
Kenya WT/GC/W/233	There should be a provision in Annex VII to the effect that a developing country will be excluded from the Annex only if its GNP per capita stays above the critical level mentioned in the Annex for a continuous period of two years. Furthermore, it would be proper to wait for some time before a country is excluded in order to see whether or not the higher level of GNP per capita is stable. There should also be a provision in the Annex stating that a developing country will automatically be included in this Annex if its GNP per capita falls below this critical level.
Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe Job(99)/3169 and Add. 1	The rules of the Agreement, particularly those relating to subsidies other than export subsidies, appear to be biased against developing countries. The category of subsidies that are treated as "non-actionable" includes subsidies that are generally granted by developed countries such as those granted for research and development, regional development and adoption of environmental standards. On the other hand, subsidies of key importance to developing countries, such as those used for promoting industries or given under diversification programmes are treated as "actionable" and therefore liable to the levy of countervailing duties, if the conditions laid down in the Agreement are fulfilled. This inequity in the provisions needs to be removed. In the light of the experience of the operation of the Agreement it would be necessary to clarify the rules of the Agreement to ensure that the investigations for levy of countervailing duties are commenced only after the investigating authorities are satisfied that consultations with the Government of the country granted subsidy have been held; there should be an obligation on the Government of the country where the complaint has been made, to submit a report in writing to the investigating authorities on the reports of these consultations.

E. Sanitary and Phytosanitary Measures

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/354	**<u>Implementation issues to be addressed before/at Seattle</u>** Though Article 10:1 of the SPS Agreement provides that, in the preparation and application of SPS measures, Members shall take account of the special needs of the developing-countries, this has rarely been done. The provisions in Article 10 shall be made mandatory, and shall include that if an SPS measure creates a problem for more than one developing country, then the country which has adopted it shall withdraw it. Similarly Article 10:2, which provides for longer time-frames for compliance on products of interest to developing-country Members has only been followed in the breach. This provision shall be made mandatory for developed countries to provide a time period of at least 12 months from the date of notification for compliance of new SPS measures for products from developing countries. International standard-setting organizations shall ensure the presence of countries at different levels of development and from all geographical regions, throughout all phases of standard-setting. In the formulation of such standards, the specific conditions prevailing in developing countries shall be taken into account. Only standards formulated in such a manner shall be recognized as "international standards". International standard-

	setting organizations with observer status in the SPS Committee shall periodically report on the participation of developing countries in standardizing activities. Paragraph 2 of Annex B of the Agreement stipulates that Members shall allow a reasonable interval between publication of a sanitary or phytosanitary regulation and its entry into force in order to allow producers, particularly in developing countries, to adapt their products and methods of production to the new requirements. This has rarely been done. The provisions of paragraph 2 of Annex B shall be made mandatory, and a "reasonable interval" shall mean not less than 12 months. Though Article 4 of the SPS Agreement encourages equivalency, this principle is invariably interpreted as meaning "sameness". Article 4 shall be clarified so that developing countries can enter into equivalency agreements.
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, Indi a, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/355	**<u>Implementation issues to be addressed in the first year of negotiations</u>** Though the SPS Agreement encourages Members to enter into MRAs, so far developing countries have not been included into such agreements. It is suggested that: (i) MRAs are developed in a transparent way; (ii) they should be open to parties that may wish to join them at a later stage; and (iii) they should contain rules of origin which allow all products which pass the conformity assessment procedures to benefit from the MRA. The definition of an international standard, guideline and recommendation (paragraph 3 of Annex A) needs to be revised so that a differentiation is introduced between mandatory international standards and voluntary international guidelines/recommendations. Article 12:7 provides for a review of the operation and implementation of the Agreement three years after the date of entry into force of the Agreement and thereafter as the need arises. This review shall be carried out once every two years.
Kenya WT/GC/W/233	Article 10 of the SPS Agreement, which stipulates that "developed countries should take account of the special needs of developing countries in the preparation and application of sanitary and phytosanitary measures", should be examined in the light of the difficulties facing developing countries in the implementation of these agreements. For example: - Notification procedures should be simplified and/or have explanatory notes to enable developing countries understand monitor and notify their SPS measures promptly. - All the vague areas within the SPS Agreement such as "reasonable time" should be clarified. - Technical assistance offered to developing countries should be enhanced in terms of quality and should be delivered as and when required. The issue of active participation of developing countries in international standard setting bodies in accordance with Article 10:4 of the SPS Agreement should be addressed from a wider perspective, namely that active participation requires adequate institutional infrastructure, human and financial resources and effective follow-up capabilities. Kenya therefore proposes that a regional approach should be taken by the developed countries in order to assist developing countries to effectively participate in international standard-setting bodies.

F. Technical Barriers to Trade

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/354	**<u>Implementation issues to be addressed before/at Seattle</u>** International standard-setting organizations shall ensure the presence of countries at different levels of development and from all geographical regions, throughout at all phases of standard-setting. In the formulation of such standards, the specific conditions prevailing in developing countries shall be taken into account. Only standards formulated in such a manner shall be recognized as "international standards". International standard setting organizations with observer status in the Committee on Technical Barriers to Trade (TBT Committee) shall periodically report on the participation of developing countries in standardizing activities. A specific mandate shall be given to the TBT Committee as part of its triennial work programme to address the problems faced by developing countries in both international standards and conformity assessment and strengthen the provisions of Article 12 of the TBT Agreement.
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/355	**<u>Implementation issues to be addressed in the first year of negotiations</u>** The triennial work programme of the TBT Committee shall as a matter of priority address the following issues and find solutions: Means have to be found to ensure effective participation of developing countries in setting of standards by international standard-setting organizations. It shall be obligatory for international standardizing bodies to ensure the presence of developing countries in the different phases of standard setting. Moreover, a clear provision that the international standardizing bodies must comply with the Code of Good Practice (shall be introduced). Article 11 shall be made obligatory so that technical assistance and cooperation is provided to developing countries for upgrading conformity assessment procedures. Acceptance by developed-country importers of self-declaration regarding adherence to standards by developing-country exporters and acceptance of certification procedure adopted by developing country certification bodies based on international standards. Such a provision is to be introduced in Article 12. A specific provision is to be introduced in Article 12 stating that developing countries shall be given a longer time-frame to comply with measures regarding products to export of interest to them. Furthermore, a specific provision in Article 12 shall state that if a measure brought forward by a developed country creates difficulties for developing countries, then the measure should be reconsidered.
Kenya WT/GC/W/233	Besides circulating copies of notifications, the secretariat should also draw the attention of developing countries to any notifications relating to products of particular interest to them as provided for in Article 10:6 of the TBT Agreement. Technical assistance should be enhanced in order to develop financial and human resource capacities to enable an effective participation of developing countries in international standardizing bodies. Kenya notes with concern that some countries are exporting products that are sub-standard, rejects, expired and/or environmentally damaging to developing countries. Kenya therefore proposes that all exported products meet the requirement of international standards where they exist or the national requirements of the exporting country. A clear definition and understanding of standards of equivalence should be established for the promotion of trade where international standards do not exist.

G. Sanitary and Phytosanitary Measures/ Technical Barriers to Trade

Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe

Job(99)/3169 and Add. 1

Adoption of more precise definitions of international standards developed for use in mandatory regulations

Solution to some of the policy issues which the recent developments in standardization activities raise as well as those arising from ineffective participation of developing countries in these activities could perhaps be found by adopting a separate definition for international standards that are to be used as a basis for technical regulations and SPS measures. In other words, international standards could be distinguished according to whether the primary purpose for which they are being adopted is for use on voluntary or mandatory basis. The broader existing definition which states that all standards prepared by international standardization bodies should be treated as international standards would be applied to standards which are expected to be used on voluntary basis. For standards which are developed with a possible view of using them as a basis for TBT or SPS measures a narrower definition could be adopted. Such narrower definition could provide that for the purpose of use in technical and SPS regulations, a standard prepared by an international body shall be considered as an international standard only if:

- in the work on formulation of such a standard, an agreed minimum percentage of countries from different regions have participated in the technical work throughout the process relating to its adoption; and

- it has been adopted by consensus.

Problems posed when scientific opinion is not acceptable to the public

A related issue which needs to be addressed is what course of action Governments should follow under the provisions of the TBT or SPS Agreements, when international scientific opinion as well as that in the country is in favour of the international standard, but the public is sceptical or holds the opposite view. There is always a time-gap (which may extend to a number of years) between agreement among scientists that a particular product or process is not harmful to human or animal health and its acceptance by the public. For the dilemma which Governments face in such situations, the SPS and TBT Agreements provide very few solutions. Their exhortations that Governments could, in such situations, use "less restrictive" measures, such as labelling, are far from helpful when public opinion is totally against the product being marketed in any form.

Practical problems

In addition to the issues described above which raise questions of principle, some practical problems that have arisen in the implementation of the two Agreements would have to be addressed in the future work.

Both the Agreements emphasize that compliance by the exporting enterprises would be greatly facilitated if there was transparency in national regulations. Towards this end they impose obligations on countries to establish “enquiry points” from which all interested parties could obtain information on technical regulations and SPS measures applicable to the products in which they have export interest.

In addition, in all cases where a country proposes to adopt a technical regulation or a SPS measure which is not based on an existing international standard it is expected to notify the WTO Secretariat of its intention to adopt it. The purpose of requiring countries to make such prior notifications is to provide an opportunity for the other countries to comment on them, so that standards and processes used in outside countries are fully reflected in the regulations or measures that are finally adopted.

Two factors have so far prevented developing countries from making use of these notifications. Firstly notifications do not give any information on the methodology used or, in the case of SPS measure, risk assessment and other factors that are taken into account in

	formulating the draft measure. Secondly, the interval provided for making comments does not provide Governments of developing countries with sufficient time to get the relevant information from the agencies responsible for the formulation of the regulation or measure, and to study and examine it with a view to making comments. Furthermore, in order to ensure that the adoption of a new SPS regulation does not cause barriers to trade, the SPS Agreement provides that there should be a reasonable interval between its publication and its entry into force. It further provides that "longer time-frames for compliance" may be provided for developing countries in all cases where phased introduction of an SPS regulation is technically feasible. The basic purpose of these provisions is to provide sufficient time to producers in outside countries to adopt their products to the requirements of new regulations. In practice compliance of these provisions by countries introducing new measures, has been unsatisfactory. It would be necessary to examine how the implementation of the provisions described above could be improved, if necessary, by making the obligations which they impose more binding.

H. Textiles

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/354	**<u>Implementation issues to be addressed before/at Seattle</u>** Since Articles 2:10 and 2:15 of the Agreement on Textiles and Clothing allow a Member to advance the integration of products, importing countries shall, on the first day of the 85th month that the WTO Agreement is in effect, integrate products which accounted for not less than 50 per cent of the total volume of the Member's 1990 imports of the products in the Annex to the ATC. The importing countries are to apply growth-on-growth for stage 3 with effect from 1 January 2000 instead of 1 January 2002. A moratorium shall be applied by importing countries on anti-dumping actions until two years after the entire textiles and clothing sector is integrated into GATT. Any change in rules or origin shall be examined in the Council for Trade in Goods for its possible impact on market access of exporting countries, before it is applied.
Kenya WT/GC/W/233	In the textile sector, the major importing developed countries have not implemented the phase-out of the Multi-Fibre Arrangement (MFA) restrictions, as was expected under the Textiles and Clothing Agreement. As a result, products of interest to developing countries are still excluded from the existing liberalization schedules. Of particular concern to Kenya is the quota restraint on its textile apparels in the United States. This has not only contributed to loss of production and employment but also constrains in expansion of a sector with great potential for its export trade. The psychological impact of this action has been reduced investments in the textile sector.
Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe Job(99)/3169 and Add. 1	There is an urgent need for improvements in the implementation of the Agreement by the restraining countries in the remaining period of the Agreement through *inter alia:* - the inclusion of at least 50 per cent of the products under restraint, spread equally over all four groups, in the third phase of integration; - the reaffirmation as to the implementation of the ATC both in letter and spirit; - the reaffirmation that the restraining countries would refrain from frequent and repeated recourse to safeguard action/anti-dumping measures and other market restricting instruments. This is necessary to lend certainty and predictability to trade;

	- the implementation of positive measures in favour of small suppliers, least-developed countries, and cotton producing and exporting countries, which are provided for in various Articles of the ATC, in accordance with the provisions and objectives of the ATC; - the preclusion of the possibility of any extension of the ATC by requiring the major textiles and clothing importing countries to adopt a planned policy of structural adjustment in the text iles sector which should be notified to the WTO. In this context, it is important to note that at present restrictions on imports of textiles in accordance with the provisions of the ATC are being applied by countries maintaining restrictions only to imports from a few developing countries. Imports from a large number of developing countries, particularly least developed ones, which are trying to develop exports of textile and clothing products are being allowed without any limitations on quantities imported. It would have to be ensured that the efforts which these countries are making for the development of exports are not frustrated by using the flexibility provided in the ATC to take temporary safeguard measures to restrict imports, when in the view of restraining countries, imports are increasing in such a way as to cause injury to their domestic industry. Appropriate steps would also have to be taken through provision by the International Trade Centre (ITC) and other international organizations to give technical assistance to the industries in these countries so that they can prepare themselves to meet increased competition they would be facing in restricted markets, when restrictions that are at present applied to imports, are removed by the restraining countries.

I. Transfer of Technology

Cuba, Egypt, Honduras, Indonesia, India, Malaysia, Pakistan and Uganda WT/GC/W/327	A working group should be established to study the implications of existing trade agreements for the transfer of technology on a commercial basis, and the ways of enhancing such transfers, particularly to developing countries.

J. Trade-Related Investment Measures

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda	**<u>Implementation issues to be addressed before/at Seattle</u>** The provisions in the Agreement relating to local-content requirements shall be revised to allow for accelerating the industrialization process in developing countries and enable these countries to maintain balance-of-payments stability. With a view to ensuring that these instruments can be maintained by developing countries, the transition period mentioned in Article 5 paragraph 2 shall be extended until such time that their development needs demand.
WT/GC/W/354	Developing countries shall have another opportunity to notify existing TRIMs measures which they would be then allowed to maintain till the end of the new transition period.
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda	**<u>Implementation issues to be addressed in the first year of negotiations</u>** Article 5.3, which recognises the importance of taking account of the development, financial and trade needs of developing-countries while dealing with trade-related investment measures, has remained inoperative and ineffectual. The provisions of this Article must therefore be suitably amended and made mandatory.

WT/GC/W/355	Developing countries shall be exempted from the disciplines on the application of domestic content requirement by providing for an enabling provision in Articles 2 and 4 to this effect.
Kenya WT/GC/W/233	Kenya does not maintain any of the prohibited trade-related investment measures as defined in the illustrative list annexed to the Agreement. These measures have been phased out in the course of the economic reforms that the country has so far undertaken outside the WTO framework in order to liberalize trade and create an enabling environment for domestic as well as foreign investment. However, the removal of those measures has not attracted investment into the country as was expected. It is therefore suggested that when the Agreement on TRIMs comes up for review, investment friendly measures by developing countries should be incorporated. In particular these countries could benefit more from a longer transition period within the TRIMs.
Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe Job(99)/3169 and Add. 1	It is necessary to review the provisions of the Agreement on TRIMs, in order to examine whether the developing countries (including least-developed countries) should be permitted to use local content requirements and all or some of the other TRIMs prohibited by the Agreement.

K. Trade-Related Aspects of Intellectual Property Rights

Kenya on behalf of the African Group WT/GC/W/302	**Overlaps and Sequencing** The African Group considers it appropriate that the work of the TRIPS Council should be staggered and sequenced in a manner that enables developing countries with meagre resources to participate effectively in its work. This can be achieved by, *inter alia*, delaying some of the reviews or speeding up those on which conclusion is nearing such as the one on non-violation complaints. **Article 64.3 - Non-Violation Complaints** The moratorium on the application of the non-violation remedy under the TRIPS Agreement should be maintained indefinitely until Members agree by consensus that sufficient experience has been gained with the application of the Agreement and that the remedy if adopted will not increase Members' level of obligations. **Article 66.2 - Incentives for Transfer of Technology to LDCs** There is a need for a regular full review of the implementation of the provisions of Article 66.2 by developed countries. **Article 27.3(B) - Protection Of Plant Varieties** **Part 1 - On procedures and interpretation** Nature and scope of review: Members will need to clarify the mandate of the TRIPS Council on this issue. It is the firm understanding of the African Group that the mandate of the Council is to review the substantive provisions of Article 27.3(b). Since no provision is made for the review of implementation of this specific Article (except implicitly in the context of the overall review scheduled for 2000 in Article 71.1) members of the African Group consider it appropriate that any information (to be) submitted under the current review will not be used for the purpose of reviewing the implementation of the provisions of this Article.

Timing for implementation of Article 27.3(b) provisions: Members of the African Group consider it appropriate that the implementation deadline should be extended to take place after the completion of the substantive review of Article 27.3(b). The period given for implementation of the provisions should be the same as that allowed in Article 65(1) and (2), namely, five years from the date the review is completed. This period is provided to allow developing countries to set up the necessary infrastructure entailed by the implementation.

Part 2 - On substantive provisions

Artificial distinctions between biological and mic robiological organisms and processes:

(a) The review of the substantive provisions of Article 27.3(b) should clarify the following:

- Why the option of exclusion of patentability of plants and animals does not extend to micro-organisms as there is no scientific basis for the distinction.

- Why the option of exclusion of patentability of "essentially biological processes" does not extend to "microbiological processes" as the latter are also biological processes.

(b) The review process should clarify that plants and animals as well as microorganisms and all other living organisms and their parts cannot be patented, and that natural processes that produce plants, animals and other living organisms should also not be patentable.

Clarifying the option of a *sui generis* system for plant varieties: After the sentence on plant variety protection in Article 27.3(b), a footnote should be inserted stating that any *sui generis* law for plant variety protection can provide for:

(i) the protection of the innovations of indigenous and local farming communities in developing countries, consistent with the Convention on Biological Diversity and the International Undertaking on Plant Genetic Resources;

(ii) the continuation of the traditional farming practices including the right to save, exchange and save seeds, and sell their harvest;

(iii) preventing anti-competitive rights or practices which will threaten food sovereignty of people in developing countries, as is permitted by Article 31 of the TRIPS Agreement.

Relation between Article 27.3(b), CBD and the International Undertaking on Plant Genetic Resources

The review process should seek to harmonize Article 27.3(b) with the provisions of the CBD and the International Undertaking, in which the conservation and sustainable use of biological diversity, the protection of the rights and knowledge of indigenous and local communities, and the promotion of farmers' rights, are fully taken into account.

Article 23.4 of the TRIPS Agreement - Establishment of a Multilateral System of Notification and Registration of Geographical Indications

Considering that Ministers made no distinction between the two above-mentioned products, the African Group is of the view that the negotiations envisaged under Article 23.4 should be extended to other categories, and requests, in this regard, that the scope of the system of notification and registration be expanded to other products recognizable by their geographical origins (handicrafts, agro-food products).

Cuba, Dominican Republic, Egypt, Honduras, India Indonesia, Nicaragua and Pakistan WT/GC/W/208	**Article 23** On different occasions, in the context of the Council for TRIPS, certain WTO Members have expressed interest in having the above-mentioned protection (the additional protection for geographical indications for wines and spirits under Article 23) extended to cover other products of special importance to them. In this connection, the above-mentioned countries request that the said additional protection be extended to products other than wines and spirits.
Cuba, Egypt, and Honduras WT/GC/W/209 and Corr.1	**Transition period** The TRIPS Agreement necessitates the modernization of national intellectual property systems, including legislations, enabling the developing countries, in the very long term, to take advantage of the institutions most useful to them, in addition to attracting the foreign direct investment that is of importance to their economic development. The challenge faced by the developing countries in adapting to the requirements of the Agreement in the light of the technological and financial gap between the developing and the developed countries, can be seen in the difficult and costly tasks that lie ahead, including modernizing the administrative infrastructure; modernizing and drafting new laws on the granting and protection of intellectual property rights; strengthening institutions and creating a culture for the protection of intellectual property; and creating an appropriate framework for promoting research and development and ensuring that developing countries do not continue to be mere consumers of foreign technology. Some of the above-mentioned tasks are already being carried out by many of the developing countries. Others remain to be undertaken, and this will only be possible if sufficient resources are available. Despite these efforts it has been noted with concern that the end of the transition period allowed under Article 65.2 of the TRIPS Agreement is now approaching. Accordingly, a request for an extension of the transition period for the developing countries has been made.
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/354	**<u>Implementation issues to be addressed before/at Seattle</u>** In the light of provisions contained in Article 23 and 24 of the TRIPS Agreement, additional protection for geographical indications shall be extended for products other than wines and spirits. It is widely agreed that the TRIPS Agreement is incompatible with the Convention on Bio-Diversity. Pending a thorough examination of this issue, a clear understanding in the interim that patents inconsistent with Article 15 of the CBD shall not be granted is needed. Article 64, paragraph 2 shall be modified so as to make it clear that subparagraphs (b) and (c) of Article XXIII of GATT 1994 shall not apply to the TRIPS Agreement. The provisions of Article 66.2 shall be made obligatory and shall be subject to periodical notification, in order to monitor their effective implementation. Guidelines on categories of incentives shall also be established. The application of this Article shall be extended to all developing countries. The period given for implementation of the provisions of Article 27.3(b) shall be five years from the date the review is completed. The list of exceptions to patentability in Article 27.3(b) of the TRIPS Agreement shall include the list of essential drugs of the World Health Organization.

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/355	**Implementation issues to be addressed in the first year of negotiations** Article 7 and 8 of the TRIPS Agreement are to be operationalized by providing for transfer of technology on fair and mutually advantageous terms. Article 27.3(b) is to be ammended in light of the provisions of the Convention on Biological Diversity and the International Undertaking, in which the conservation and sustainable use of biological diversity, the protection of the rights and knowledge of indigenous and local communities, and the promotion of farmers' rights, are fully taken into account. Further, the review of the substantive provisions of Article 27.3(b) should: - clarify artificial distinctions between biological and microbiological organisms and processes; - ensure the continuation of the traditional farming practices including the right to save, exchange and save seeds, and sell their harvest; and - prevent anti-competitive practices which will threaten food sovereignty of people in developing countries, as permitted by Article 31 of the TRIPS Agreement.
Kenya WT/GC/W/233	The short period given to the developing countries for implementation of the TRIPS Agreement is not adequate. Kenya recommends an additional five years to fully implement and realize the impact of the TRIPS Agreement. Kenya also proposes the following: - Amendment of the TRIPS Agreement's Article 23 on geographical indications to provide for the protection, notification and registration of agricultural products, foodstuffs and handicraft in addition to wines and spirits. - Amendment of Article 27:3(b) to increase the scope of protection to include protection of indigenous knowledge and farmers' rights. - Harmonization of the Convention on Bio-Diversity (CBD) and TRIPS Agreement on the protection of indigenous knowledge, farmers' rights and pieces of intellectual creation.
Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe Job(99)/3169 and Add. 1	**Plant varieties** It may be necessary to clarify the provisions of the Agreement relating to patentability of plant varieties by providing that, where a country grants protection to plant based inventions, it could impose obligations on holders of rights: to declare the origin of the materials used and to demonstrate the prior consent of the country of origin and, where relevant, of the indigenous or farming communities; and to pay compensation to the country or to the communities that had the material or the traditional knowledge used in the development of a new variety. **Micro-organisms** It should be further clarified that the provisions in the Agreement providing that "micro-organisms" could be patented apply only to genetically modified micro-organisms and not to those which are naturally available. **Pharmaceutical products and compulsory licensing** It would be necessary to review the provisions of the Agreement relating to compulsory licensing, in order to ensure that the Governments of developing countries (particularly least-developed countries) are able to grant such compulsory licences to domestic industries

	for manufacture and marketing in cases where, patented drugs, particularly those in the WHO list of essential drugs are being sold at unreasonably high prices.

L. Customs Valuation

Kenya on behalf of the African Group WT/GC/W/301	Given the non-implementation of Article 20.3, the majority of African countries consider that the transition period granted to them is insufficient and will be obliged to request an appropriate extension, in accordance with the relevant provisions of the Agreement, in particular Annex III, in order to enable them to acquire the necessary technical assistance and expertise to implement the Agreement without thereby affecting their comparative advantages.
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/354	**Implementation issues to be addressed before/at Seattle** A multilateral solution, that enables customs administrations of importing countries to seek and obtain information on export values contained in the export declaration to the customs administrations of exporting countries, in a time-bound manner, in doubtful cases, shall be included in the Agreement. The addition of cost of services such as engineering, development, and design work, which are supplied directly or indirectly by the buyer free of charge or at reduced cost for the production of goods under import, shall be included in Article 8:1(b)(iv), in the valuation of imported goods, irrespective of whether the services were undertaken in the country of importation. In order to ensure that due cognisance is taken of the domestic price and export price in a third country as is done in the Agreement on Anti-Dumping, the residual method of determining customs value under Article 7 shall be inclusive of all residual eventualities, thus allowing valuation based on domestic market price or export price in a third country with appropriate adjustments.
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/355	**Implementation issues to be addressed in the first year of negotiations** In order to avoid manipulation of import prices and enable a better approximation of 'transaction value', the Agreement should be amended to provide for the highest value when more than one transaction value of identical or similar goods is found. In order to address the problem of manipulation through artificially reduced re-invoice prices, mainly under-invoicing and the artificial splitting of value, especially when purchases are first made by buying agents and are re-invoiced to the importer, for the purposes of Article 8 of the Agreement, buying commissions should be taken into account in the determination of customs value of imported goods as it forms a legitimate component of the landed cost of imported goods. For the purposes of valuation of imports by sole agents, sole distributors, and sole concessionaires of large corporations, including trans-national corporations, under Article 15.5 of the Agreement, and in order to shift the burden of proving that the prices quoted are not influenced by the relationship to the agents, distributors or concessionaires, as the case may be, persons associated with each other as sole agents, sole distributors, and sole concessionaires, howsoever described, should automatically be deemed 'related'.
Kenya WT/GC/W/233	Where reference prices can be demonstrated to be representative of the value, the Agreement should allow for it to be a basis for rejecting the transaction value and resort to the alternative methods.

Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe Job(99)/3169 and Add. 1	**Strengthening of the provision of technical assistance** To facilitate accession to the Agreement by countries which have not been able so far to join the Agreement, it would be necessary to strengthen and reorient the technical assistance provided by the WTO, the World Customs Organization (WCO) and other international organizations. Such re-orientations would require greater emphasis being placed on training of officials at operative level who are primarily responsible for the collection of duties in applying methods prescribed by the Agreement, adopting the modern methods in customs clearance, building of price database that could be used for price comparison purposes, and assisting customs administrations in adopting new management techniques. **Extension of the transition period** The transition period provided for developing countries to accede to the Agreement expires on 1 January 2000. Even though the provision of technical assistance may help, it is unlikely that many of them would be able to accede within the limited time available between now and the target date. It would therefore be desirable to extend the transition period by five years for all countries which request for such extension. **Clarifications and modifications in the rules of the Agreement** It would be further necessary to examine, *inter alia*: - whether any changes in the rules relating to treatment of "buying commissions" and "special discounts obtained by sole agents" in determining dutiable value by customs administrations are necessary; - how the customs administrations could be assisted in developing a "price data base" which they need for price comparison purposes where they have reasonable grounds to believe that the imported goods have been deliberately undervalued; and - whether the existing provisions of the Agreement are adequate enough to enable customs administrations in developing countries to deal with trade that takes place on the basis of transfer pricing.

M. Preshipment Inspection

Kenya WT/GC/W/233	There appears to be a broad agreement within the Working Party on Pre-shipment Inspection that the absence of any regular monitoring by a WTO body has been unacceptable. Kenya does not support the creation of a preshipment inspection committee for monitoring of the implementation of the Preshipment Inspection Agreement. In fact, Kenya does not support the proliferation of WTO bodies as they tend to overburden developing countries whose Missions are, in most cases, suffering from inadequate staffing, technical, and financial resources. Kenya believes that the Committee on Customs Valuation can adequately address the Preshipment Inspection issues as and when they arise. The Agreement on Preshipment Inspection should be reviewed with the aim of incorporating the importers' interests/concerns.

N. Rules of Origin

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria,	**<u>Implementation issues to be addressed before/at Seattle</u>** Noting that the Committee on Rules of Origin (CRO), which was mandated to complete the work programme on harmonizing non-preferential rules of origin by 20 July 1998, has not completed its work, despite periodic extensions of the deadline, and that the interim arrangements are creating restrictive, distortive and disruptive effects on the

Pakistan, Sri Lanka and Uganda WT/GC/W/354	trade, in particular, of developing country Members, the CRO shall complete its remaining work on harmonizing non-preferential rules of origin by 31 July 2000. In the meanwhile, no new interim arrangements shall be introduced. Further, any interim arrangements introduced by any Member with effect from 1 January 1995, or any subsequent date, shall be suspended with effect from 4 December 1999.
Kenya WT/GC/W/233	Kenya shares the concern, raised by others, that completion of the work programme to harmonize non-preferential rules of origin was not achieved within the three years set forth in the Agreement because of the following: - the complexity and amount of technical work; - lack of common understanding among Members as to the implications of the future discipline to "equally apply" the harmonized rules of origin for "all purposes". The Council for Trade in Goods should look into the above-mentioned issues to enhance prospects for progress on the technical work.

O. GATT 1994

1. Articles XV and XVIII and the Understanding on Balance-of-Payments Provisions

Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/354	**<u>Implementation issues to be addressed before/at Seattle</u>** Article XVIII shall be clarified to the effect that only the Committee on Balance of Payments (BOP) shall have the authority to examine the overall justification of BOP measures. While examining the overall justification the Committee shall keep in view that Article XVIII is a special provision for developing countries and shall ensure that Article XVIII does not become more onerous than Article XII.
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/355	**<u>Implementation issues to be addressed in the first year of negotiations</u>** A complete review of Article XVIII shall be undertaken, with a view to ensuring that it subserves the original objective of facilitating the progressive development of economies in developing countries and to allow them to implement programmes and policies of economic development designed to raise the general standard of living of their people.
Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe Job(99)/3169 and Add. 1	Provisions of Article XV, Article XVIII:B and the Understanding on BOP Provisions is to be reviewed with a view to clarifying that: - in accordance with the provisions of Article XV(2), the role of the International Monetary Fund (IMF) should be confined strictly to giving opinion on the level of monetary reserves and other financial matters, and that it is for the BOP Committee and the General Council to make final determinations on whether the application of the restrictions is justified;

	- in deciding on the choice of trade restrictive measures, a developing country in balance-of-payments difficulties could, in accordance with the provisions of Article XVIII(b), resort to imposition of quantitative restrictions. Furthermore, there may be a need to encourage the BOP Committee to take a broader perspective and to consider the level of foreign exchange inflows and reserves and their composition, as well as the other elements of the balance-of-payments, in determining whether the continued maintenance of restrictions is justifiable. It may also be necessary to clarify relevant provisions: - to make it further clear that the BOP Committee and the General Council are solely responsible for examining the justification of the measures imposed under Article XVIII(b); and - that panels and the Appellate Body should accept these limits on their authority and confine their examination only to how far the way in which the measures are being applied is consistent with WTO rules.

2. Article XVIII (C) (Governmental assistance required to promote the establishment, transformation, expansion or reconstruction of particular industries)

Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe Job(99)/3169 and Add. 1	In order to facilitate the adoption by developing countries (particularly least-developed countries) of measures under Article XVIII(c) in appropriate cases, it would be necessary to examine how the existing procedures prescribed by Article XVIII(c) for grant of approval can be modified and improved. One possible approach would be to make the rules applicable to measures taken for providing increased temporary protection for the "establishment of new industries" comparable to the rules applicable under the Agreement on Safeguards, to safeguard actions taken in emergency situations. In the latter case, countries can take actions involving increase in the bound rates of duties or imposition of the quantitative restrictions, if the conditions laid down by the Agreement on Safeguards are met. There is no need to seek prior approval of the WTO, except in cases where quantitative restrictions are to be applied, not on MFN basis to imports from all sources, but to imports from a selected number of countries.

P. Notification Obligations

Kenya WT/GC/W/233	In addition to the sheer number of notifications, there are also difficulties related to the quality and completeness of the content as well as the comparability between notifications provided by Members. Although the WTO has prepared a handbook aiming at helping developing countries in preparing the required notification on standard formats, there is a need for additional assistance for capacity building.
Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe Job(99)/3169 and Add. 1	Taking into account the practical difficulties facing a large number of least-developed countries in meeting their notification obligations and to gradually prepare them to abide by these obligations, it is suggested that the possibility of extending to these countries "special and differential (S&D) treatment" in complying with them should be examined. Such S&D treatment could *inter alia* consider the following three factors: - longer frequencies of three or four years for certain types of notification; - simplification of questionnaires or forms; - exemption from notifying certain types of ad hoc measures.

Q. Special and Differential Provisions Under the WTO Agreements	
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/354	**<u>Implementation issues to be addressed before/at Seattle</u>** In many areas of the WTO provisions, special and differential provisions are phrased only as best endeavour clauses, the implementation of which has remained ineffectual and has therefore been difficult to assess. All S&D provisions shall be converted into concrete commitments, especially to address the constraints on the supply side of developing countries.
Kenya WT/GC/W/233	Given that circumstances that led to the inclusion of S&D provisions in the WTO agreements still persist, S&D provisions should be made a permanent feature in the WTO agreements. Countries should apply them until they graduate to the status of a developed country. "Best endeavour" clauses should be reinforced by WTO Members through clarity and conversion into specific obligations instead of being just aspirations. Developed countries should faithfully and effectively implement the S&D provisions of the WTO, so as to create market access for developing countries. This is because developing countries have made more market access commitment without adequate trade-off in market access accruing to them in sectors and modes of supply of export interest to them.