NEGOTIATING ANTI-DUMPING AND SETTING PRIORITIES AMONG OUTSTANDING IMPLEMENTATION ISSUES IN THE POST-DOHA SCENARIO:

A FIRST EXAMINATION IN THE LIGHT OF RECENT PRACTICE AND DSU JURISPRUDENCE

UNCTAD/ITCD/TSB/Misc.72 May 2002

Acknowledgements

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C**ontents**

Page

Annexes

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1. Introduction

The negotiating mandate contained in paragraph 28 of the WTO Ministerial Declaration[1] is probably the result of a carefully drafted compromise containing two mainstream indications. On the one hand, negotiations are "*aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994*", reflecting the desire of victim (including some developing) countries to limit by "clarification" some loopholes or practices existing in the Anti-Dumping Agreement (ADA), and, on the other hand, such negotiations will have to "*preserv[e] the basic concepts, principles and effectiveness of these Agreements*" reflecting the concerns of some WTO Members reluctant to further discuss existing practices.

The above mandate should be read in conjunction with the Work Programme on Implementation-Related Issues and Concerns and the Decision of 14 November 2001[2] where some progress was recorded in the area of anti-dumping with regard to some specific implementation issues.

Other implementation issues that were raised during the preparation for the Doha Ministerial Conference will have to be addressed within the context of the mandate outlined above. These remaining implementation issues are discussed in detail in section 3 of this paper.

During the preparations for the Seattle and Doha Ministerial Conferences, implementation issues and reform of the ADA were one of the recurrent issues in which developing countries placed part of their negotiating capital. Intense debate and discussions took place in the WTO Anti-Dumping Committee on certain practices adopted by Members in administering anti-dumping legislation. But, a number of proposals made regarding the implementation phase resembled those made during the preparations for the Seattle Ministerial Conference with few innovations.

In recent years, it has become progressively evident that the view of anti-dumping as a North–South issue did not correspond to reality. For instance, at an UNCTAD Expert Meeting held in December 2000[3] there was an opportunity to take stock of some of the developments and some new issues were brought into the debate. Prior to the Uruguay Round, the primary users of anti-dumping measures were developed

1. WTO, *Ministerial Declaration adopted on 14 November*, WT/MIN(01)/DEC/1 (20 November 2001).
2. WTO, *Implementation-Related Issues and Concerns, Decision of 14 November 2001*, WT/MIN(01)DEC/17 (20 November 2001).
3. UNCTAD, *Report of the Expert Meeting on the Impact of Anti-Dumping and Countervailing Actions, Geneva, 4-6 December 2000*, TD/B/COM.1/34 (28 December 2000).

countries. However, in the period from 1995 to 1999, anti-dumping investigations more than doubled also because of the increasing adoption and utilization by developing countries of the anti-dumping instrument. Developing countries have also been active petitioners in anti-dumping dispute settlement cases.[4]

Thus, the common perception inherited from the Tokyo Round, until the establishment of WTO, of the ADA as the *rich man's trade remedy* is rapidly changing since many developing countries have become active users of anti-dumping investigations in respect not only of developed countries but also of other developing countries and, in extreme cases, least developed countries (LDCs). The traditional argument used by developing countries that loopholes or absence of clear disciplines in the anti-dumping multilateral rules have increased the possibility of abuses and discretionary practices now also applies to their national legislation and administrations.

During the forthcoming negotiations developing countries will have to take into account that the greater the precision and predictability of the rules, the greater the difficulty in administering them and utilize effectively and lawfully the anti-dumping instrument. This may hold especially true for developing countries' administrations, given their limited human and financial resources. Some developing countries have already experienced difficulties and have been brought before the WTO dispute settlement body.[5] The difficulties encountered by developing countries, and especially the LDCs, in utilizing the anti-dumping instrument have already been raised in the context of the debate on implementation and during the preparatory process for Doha. Some countries have advanced the idea that simplified procedures should be devised for LDCs.[6] There is no doubt that increased technical assistance and capacity-building activities could contribute significantly to improving the capacity of those countries in administering anti-dumping laws.

In the post-Doha scenario and with the prospect of long and real negotiations on anti-dumping issues, it will be important to revisit some of the outstanding issues for negotiations in relation to the progress and the case law developed by the Panels and the Appellate Body (AB) on anti-dumping issues. This exercise may be useful in setting priorities. Also, it is necessary to prioritize the negotiating issues and to fully appreciate the technical implications to avoid unnecessary waste of negotiating capital. This paper attempts to outline some of the negotiating issues raised in the

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4. Inge Nora Neufeld, *Anti-Dumping and Countervailing Procedures: Use or Abuse? Implications for Developing Countries,* UNCTAD, Study Series No. 9 (2001).
5. WTO, *Guatemala Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico,* Report of the Panel,WTO/DS156/R (24 October 2000). WTO, *Argentina – Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy,* Report of the Panel, WTO/DS189/R (28 September 2001).
6. UNCTAD, *Impact of Anti-Dumping and Countervailing Duty Actions – Background note by the UNCTAD secretariat,* TD/B/COM.1/EM.14/2 (24 October 2000).

preparatory process for Doha, with the findings of some Panel and AB reports[7] and practices adopted in the course of anti-dumping proceedings.

The paper will conclude with some discussion on the value and implications of the Panel and AB reports. Sidestepping the question of *res iudicata*, it is important to ascertain at the level of domestic implementation what has been done to abide by the findings of Panel and AB reports. Some negotiators argue that even if AB reports have ruled in favour of a strict interpretation of some articles of the ADA, such findings do not have the authority of a precedent and are applicable only to the party in the dispute. These observations are certainly true. However, Panel practice and implementation by national authorities of AB reports appear to indicate that it is difficult to ignore, in practice, the findings of the AB reports.[8] This has to be taken into account during the negotiations in order to avoid insistence on issues that may not ultimately determine the expected gains or value from a developmental point of view.

2. Issues addressed in the Ministerial Decision

The Decision of the Ministerial Conference on the Implementation-Related Issues and Concerns[9] (the Decision) sets out, in paragraph 7, a series of actions taken by Members with respect to some of the implementation issues raised during the preparation for the Ministerial Conference. In this part, it will first be outlined which decisions were taken at the Conference and which issues were left outstanding.

Paragraph 7, entitled "Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,"[10] contains the following:

"7.1 Agrees that investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.

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

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7. For a detailed analysis of Panel and AB reports in this area, see Edwin Vermulst and Folkert Graafsma, *WTO Dispute Settlement with respect to the Commercial Defense Agreements,* Cameron (forthcoming, May 2002).
8. See David Palmeter and Petros Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure,* Kluwer Law International (1999).
9. See WTO, footnote 2, *supra*.
10. See WTO, footnote 2, *supra*.

7.3 Takes note that Article 5.8 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 does not specify the time-frame to be used in determining the volume of dumped imports, and that this lack of specificity creates uncertainties in the implementation of the provision. The Committee on Anti-Dumping Practices is instructed, through its working group on implementation, to study this issue and draw up recommendations within 12 months, with a view to ensuring the maximum possible predictability and objectivity in the application of time frames.

7.4 Takes note that Article 18.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires the Committee on Anti-Dumping Practices to review annually the implementation and operation of the Agreement taking into account the objectives thereof. The Committee on Anti-dumping Practices is instructed to draw up guidelines for the improvement of annual reviews and to report its views and recommendations to the General Council for subsequent decision within 12 months."

2.1 Back-to-back complaints, paragraph 7.1 of the Decision

The issue of "back-to-back complaints" was subject to lengthy debates during the preparatory process for Doha. It refers to a situation in which domestic industries are filing repeated complaints against allegedly dumped exports. Developing countries, sought a provision impeding such a practice. During the preparations for Doha, this issue was considered a "must" and the draft of a possible provision was circulated. Those who advocated that high priority be devoted to this issue found that the absence of a prohibition constituted an imbalance in the ADA.

In fact, Article 11.2 of the ADA provides that exporters may request a review only once a reasonable period of time has elapsed since the imposition of the anti-dumping duties. Accordingly, a mirror provision should also bar domestic industry from filing a new complaint unless a reasonable period of time has elapsed since the decision to terminate the case with no imposition of duties.

The text of the final draft is not much different from the one circulated during the preparations for Doha: "agrees that investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination demonstrates that circumstances have changed, the investigation shall not proceed".

Given the actual drafting, some commentators doubt that the issue of back-to-back was such an important negotiating priority.[11] While there have been a number of back-

11. Compare Edwin Vermulst and Polya Mihaylova. EC commercial defense actions against textiles from 1995 to 2000: Possible lessons for future negotiations, *Journal of International Economic Law*, Oxford University Press (2001).

to-back investigations, overall this has not been a serious systemic problem. The issue should also be seen in the proper perspective since it could have been a key issue for some developing countries a certain time ago and it may occasionally reappear.

For instance in the European Union (EU), even when technical conditions such as dumping and injury findings have been fulfilled, the imposition of anti-dumping duties has been rejected for political reasons by EU member States pursuing national interests. Perhaps understandably, however, unhappy domestic industries in the EU pursuing anti-dumping relief will then file a new complaint because, in their view, the technical conditions were met in the first place.

Thus, one should wonder whether in such cases victims of European Commission (EC) anti-dumping proceedings should not "count their money and run", so to speak. Indeed, in some of the EC cases, the second proceeding was again terminated without imposition of duties, for example in the cotton yarn cases.[12]

The text, as it has emerged from the decision, appears to be drafted as a “best endeavour” clause, and is therefore unlikely to provide meaningful relief. Indeed, four qualifiers are present in the wording:

(a) special care;
(b) same product;
(c) negative finding;
(d) changed circumstances.

As a result, it seems relatively easy to avoid the scope of application of this decision. Thus, for example, cotton fabrics and unbleached cotton fabrics arguably are not the same product. Similarly, it could be argued that a political decision not to take anti-dumping action does not qualify as a "negative finding" within the meaning of the decision. Lastly, "special care" and "changed circumstances", without further definition, do not add much. In this context, experience with the Article 5.3 of ADA on ‘examination’ may serve as an example.

2.2 Operationalization of Article 15, paragraph 7.2, of the Decision

Article 15 of the ADA is one of the characteristic provisions incorporating the concept of special and preferential treatment usually included in many WTO agreements and in the ADA. However, its wording suggests a best endeavour clause rather than a mandatory provision. Thus in the course of the implementation debate the limited, if any, importance of this provision quickly became one of the focal points for suggested reforms of the ADA.

The decision on implementation clearly spells out that Article 15 is a mandatory provision and that the modalities for its application and clarification will be examined in the Committee on Anti-Dumping Practices. The Committee is instructed to draw

12. These cases were not terminated officially and no notice of termination was ever published. See, Vermulst and Mihaylova, footnote 11, *supra*.

up within 12 months appropriate recommendations on how to operationalise this provision. The question is, however, to what extent recent Panel and AB reports have mooted this point.

Ever since the GATT Panel report *Brazil-Cotton Yarn*,[13] where Brazil raised, but lost the issue, Members of the WTO often assumed that Article 15 was a dead letter, in the form of a political declaration. However, in the case *European Communities –Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*[14] *(EC-Bed Linen)* the Panel report forcefully reversed this perception. The Panel found that Article 15 imposes an obligation to actively consider, with an open mind, the possibility of constructive remedies prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.[15] Pure passivity was not sufficient to satisfy the obligation to "explore" possibilities of constructive remedies, particularly where the possibility of an undertaking had already been broached by the developing country concerned. The failure of the EC to respond in some fashion other than bare rejection, particularly once the desire to offer undertakings had been communicated to it, constituted a failure to "explore constructive remedies", the Panel harshly ruled.[16]

13. GATT, *EC Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil*, Report of the Panel, ADP/137 (4 July 1995).

14. WTO, *European Union – Anti-Dumping Duties on Imports of Cotton – type Bed linen from India*, Report of the Panel, WT/DS/141R (30 October 2001). Report of the Appellate Body, WT/DS/141/AB/R (10 March 2001).

15. See, for the obligation to explore constructive remedies "before the imposition of definitive measures", EC-Bed Linen, Panel, para. 6.233: *"...taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the exploration of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country."*

16. See, for the definition of constructive remedies, EC-Bed Linen, Panel, para. 6.229: *"We cannot come to any conclusions as to what might be encompassed by the phrase constructive remedies provided for under this Agreement, that is, means of counteracting the effects of injurious dumping – except by reference to the Agreement itself. The Agreement provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as a means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute constructive remedies within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute constructive remedies under Article 15, as none have been proposed to us."*

The Panel went further and gave specific examples of what could constitute "constructive remedies". These could take the form of acceptance of undertakings or application of a lesser duty rule. On the other hand, according to the Panel, a decision not to impose an anti-dumping duty on a developing country was not required as a constructive remedy. As Article 15 provides that constructive remedies must be explored before *anti-dumping duties are applied*, the question also arose whether the remedies must be explored before provisional or definitive measures are imposed.[17] In this regard, the Panel held that the obligation arises only before definitive measures are imposed.[18]

Contrasting the finding of the Panel in the *EC-Bed Linen* case with the mandate provided to the Committee on Anti-Dumping Practice to operationalize this provision, it is unclear to what extent the ADA can go beyond a codification of the findings of the *EC-Bed Linen* report. If it can go beyond such a codification, it may be wondered what the decision adds to WTO "jurisprudence".

In conclusion: The Panel held that:

(a) The Panel held that "Constructive remedies" may be lesser duty rule or price undertakings. These findings already contain issues of great interest to the developing countries that are supporting an automatic application of the lesser duty rule and an increased utilization of price undertakings. Both are issues on which developing countries have spent considerable negotiating capital in the past.

(b) The Panel placed the burden on the investigating authorities to show that active consideration had been given to "constructive remedies".

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17. See, for the obligation on the part of investigating authorities to consider actively constructive remedies, EC-Bed Linen, Panel, para. 6.238: *"the rejection expressed in the European Communities in the European Communities' letter of 22 October 1997 does not, in our view, indicate that the possibility of an undertaking was explored, but rather that the possibility was rejected out of hand. We cannot conclude, based on these facts, that the European Communities explored the possibilities of constructive remedies prior to imposing anti-dumping duties. In our view, the European Communities simply did nothing different in this case, than it would have done in any other anti-dumping proceeding – there was no notice or information concerning the opportunities for exploration of possibilities of constructive remedies given to the Indian parties, nothing that would demonstrate that the European Communities actively undertook the obligation imposed by Article 15 of the AD Agreement. Pure passivity is not sufficient, in our view, to satisfy the obligation to explore possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned. Thus, we consider that the failure of the European Communities to respond in some fashion other than bare rejection,* ***particularly once the desire to offer undertakings had been communicated to it****, constituted a failure to explore possibilities of constructive remedies, and therefore conclude that the European Communities failed to act consistently with its obligations under Article 15 of the AD Agreement."*

18. Edwin Vermulst and Folkert Graafsma, *WTO dispute settlement with respect to trade contingency measures: selected issues, Journal of World Trade*, 35:2, 209-229 (2001).

(c) The Panel also held that such exploration of "constructive remedies" must be actively undertaken by the investigating authorities prior to imposition of an anti-dumping duty.

As a result of these Panel findings, if developing countries offer, in future, undertakings or suggest imposition of lesser duty rules, the investigating authorities have the burden to prove that they examined these requests closely before the imposition of duties.

One could go even further and wonder whether insistence at Doha on including Article 15 implementation after the finding of the Panel Report in the *EC-Bed Linen* case was in fact a wise strategic move by developing countries. Even if it is true that Panel reports are binding only upon the parties and do not have the binding character of a precedent, past practice has indicated that Panels and AB reports would have followed a coherent line of reasoning in applying Article 15 to other cases.[19] Obviously, unless codification of the finding of the is made "operational" way during the negotiations in the Committee on Anti-Dumping Practices, the Panel report in the *EC-Bed Linen* case will remain a watershed event in interpreting Article 15.

2.3 Time frame of Article 5.8 to be used in determining the volume of dumped imports

The question of Article 5.8 was discussed during the implementation debate since there was a need to clarify the time frame to be used in determining the volume of the dumped imports for purposes of the negligibility test.

Article 5.8 of the ADA establishes the *de minimis* dumping margin and the negligibility of the volume of dumped import benchmarks. Under this article, an application from the domestic industry to initiate an investigation shall be rejected and an investigation shall be immediately terminated in cases where the dumping margin is less than 2 per cent expressed as percentage of the export price or the volume of dumped imports is less than 3 per cent of the like product in the importing Member. The problem that has arisen in the past is that Article 5.8 does not indicate the time frame for calculating the volume of dumped imports, i.e. the current year, the last six months, the most recent period, etc.

This problem is exacerbated by the fact that availability of trade statistics varies from country to country. Moreover, in the absence of clear guidelines, investigating authorities may arbitrarily select time frames. Negotiations will aim at establishing a fixed period or time frame, which should be universally applicable even if its implementation may prove difficult. From the perspective of developing countries, a question is whether this is not one of those instances where one should be careful about what one asks for, because one may get it.

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19. See Palmeter and Mavroidis, footnote 8, *supra*.

Any rules to be developed will presumably apply to all WTO Members, including developing countries. Are such countries able, for example, to gather timely trade statistics to properly apply the newly formulated rules?

Furthermore, trade statistics are typically based on the Harmonized System. However, the large majority of countries are further subdividing the Harmonized System, from six-digit nomenclature to eight- or ten-digit nomenclature for their statistical purposes. In some cases, anti-dumping investigations are conducted at such a product-specific level that even these further subdivisions called "sub-headings" may not accurately reflect the product under investigation. In these cases, the nearest sub-heading is taken to calculate the volume of dumped imports. However, in some cases this sub-heading will include the trade volume of the product under investigation and of other products, which are not under investigation. As a result, the volume of dumped imports may be artificially inflated. There is no clear-cut solution to such technical problems; however, these factors should be clarified during the negotiations to increase the transparency and predictability of the tests.

Last, another important aspect, not addressed thus far, is the allocation of the burden of proof between investigating authorities and exporters. It should arguably be clearly spelt out that investigating authorities have the burden of proof to demonstrate that they have properly have carried out the *de minimis* dumping margin and negligibility of the volume of dumped imports tests.

2.4 Annual review of the implementation of the operational agreement under Article 18.6

Discussions aimed at strengthening the capacity of the Committee to increase transparency and monitor the use of the anti-dumping took place during the preparatory phase for Doha. Basically, the countries that supported this view hoped that the Committee could assist in preventing abuses or arbitrary use of the anti-dumping instrument.

It is difficult to see how the role of the Committee could be modified to meet such expectations. Abuses and practices not consistent with the ADA are best addressed by the Dispute Settlement Understanding (DSU) mechanism.

3. Outstanding issues

A variety of issues and proposals were submitted for discussion during the preparatory process leading up to the Seattle and Doha Ministerial Conferences. Many of the proposals were then reformulated during the discussion on the implementation issues. During the preparatory process they were widely circulated in official and informal documents.

Some of these issues reflect general concern regarding the lack of transparency and predictability of certain provisions of the ADA. According to this view, a lack of legal certainty leaves too much discretion to investigating authorities. Other issues raised during the discussion on implementation openly aimed at revisiting certain

aspects of the ADA, such as increasing the *de minimis* and negligibility thresholds. Many Members were of the view that such revisiting was tantamount to a renegotiation of the ADA, which could not be dealt with during discussion on implementation. Be that as it may, those outstanding implementation issues that were not subject of a decision in Doha may be the most immediate candidates for future negotiation of the ADA in accordance with the mandate of the Ministerial Declaration. In the following section, each of these outstanding implementation issues is explained and reviewed to critically assess its priority in the future agenda.

3.1 The lesser duty rule

- *"Under Article 9.1 the lesser duty rule shall be made mandatory."*

The ADA provides for the discretionary possibility to apply anti-dumping duty lower than the dumping margin when such lesser duty is adequate to remove the injury. While this is potentially useful with respect to those countries that currently do not apply a lesser duty rule, some commentators[20] have pointed out that it would be actually difficult to verify how this rule, if made compulsory, is effectively implemented, especially in those countries that do not have a system of disclosure of confidential information under administrative protective order. Experience with the lesser duty rule in the EC shows that as there are no rules on calculating injury margins, the investigating authority retains much discretion, which is compounded by the fact that calculation details are considered confidential and therefore cannot be checked.

As a rule of thumb in EC practice, injury margins are lower than dumping margins in approximately 50 per cent of the cases; most of those cases, however, involved non-market-economy countries or Japan, where dumping margins were very high because of biased calculation methods.[21] In cases involving developing countries, dumping margins are often lower than injury margins because normal values are relatively low while price undercutting is often substantial.

A text was discussed at some point in the preparations for the Doha Ministerial Conference, with Members considering either a best endeavour clause or a decision to review the issue in the negotiations, coupled with a "political decision/concession" to use the lesser duty rule during that time and until a final decision is reached in the negotiations.

This line of action did not receive enough support during the negotiations in Doha. Taking into account other impending issues, it may be worth considering the pros and cons of continuing to pursue the adoption of a lesser duty rule as a priority, at least from the perspective of developing countries.

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20. Edwin Vermulst and Paul Waer, The calculation of injury margins in EEC anti-dumping proceedings, *Journal of World Trade* 25:6, 5-43 (1991).
21. See Vermulst and Waer, footnote 20, *supra*.

3.2 Article 2.2 of the ADA "dumping margin"

In the various implementation texts circulated in the preparatory process for Doha, the issues related to Article 2.2 were summarized as follows:

- *"Article 2.2 shall be clarified in order to make appropriate comparison with respect to the margin of dumping."*

- *"Provisions of the Agreement shall be improved with a view to preventing the imposition of arbitrary or primarily protectionist measures. The provisions to be revisited should include, inter alia, (i) the criteria, methodology, and procedures of the reviews specified in the Agreement (expeditious review for new exporters, final review, reviews upon request), (ii) the definition of the product motivating the investigation, (iii) the determination of the margin of dumping, (iv) the imposition and collection of duties, (v) the "cumulation" clauses."*

Both texts, although referring to Article 2.2, are too vague and lack the necessary focus to rely for developing arguments during negotiations.

During the debate on implementation, it was recognized that some action needed to be taken in respect of certain aspects of Article 2.2. A proposal was made to "instruct the Committee on Anti-Dumping Practices to examine problems which the use of constructed normal values may pose for developing-country exporters", but it did not mature in any further detail.[22]

In any case, it has to be pointed out that Article 2.2 is a key provision of the ADA and contains real systemic problems. However, such problems need to be pinpointed with sufficient clarity and precision in order to address, during the negotiations, the specific issues related to Article 2.2.

One of the most controversial operations in dumping margin calculations is the determination of the appropriate normal value. The chapeau to Article 2.2 and its subparagraphs set out the framework, principles and methodology to be applied by investigating authorities during the different procedural steps. These steps are usually threefold:

(a) Are sales in the domestic market representative? This determination is normally made through the 5 per cent test contained in footnote 2 of Article 2.2. In this footnote, it is stated that a sufficient quantity of sales in the domestic market is 5 per cent or more of the volume of exported sales, if these sales are made in the ordinary course of trade. It may be noted that this test is typically applied both on an overall and on a model-by-model basis.

(b) What domestic sales have to be taken into consideration in the determination of the normal value? Article 2.2.1 provides rules to exclude certain domestic

22. Not at least to the knowledge of the author.

sales on the ground that they are not in the ordinary course of trade. According to footnote 5 of Article 2.2, sales below cost per unit are not in the ordinary course of trade if the volume of such sales is more than 20 per cent of the total volume in the domestic market. If this is the case, such sales below cost may be excluded from the determination of normal value, which will then be based on remaining sales above cost.[23]

(c) How are costs of production calculated, both to determine the existence of sales below cost and to calculate constructed normal values in appropriate cases? Apart from the arbitrariness of the two tests above, i.e. 5 per cent and 20 per cent, both raised as separate issues for negotiations, there are other outstanding issues in Article 2.2, and these could be clarified.

With respect to Article 2.2, recent Panel and AB reports have demonstrated that it is difficult to challenge a profit deemed "reasonable" by the investigating authorities. In *EC-Bed-Linen* (profit used of 18.6 per cent) and *Thailand-Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-Beams from Poland*[24] *(Thailand–H-Beams)* (profit used of 36.3 per cent), the Panels confirmed that if the reasonable profit is calculated according to one of the methods outlined in Article 2.2.2, the methods "necessary yields reasonable amounts for profits and that no separate reasonability test is required in respect of those amounts."[25]

The two reports indicate that Panels only examine if the methodologies applied in Article 2.2 have been applied correctly. If, for example, one of the methods leads to a profit of 99 per cent, it will be considered to have met the standard of the ADA, no matter how inconsistent with commercial reality the rate is. Thus, developing countries may wish to argue that the ADA should require a separate reasonability test.

3.2 Increase in the *"de minimis"* and "negilibility text" in Article 5.8

- *"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."*

- *"the threshold volume of dumped imports shall be regarded as negligible (Article 5.8) should be increased from the existing 3 per cent to [5 per cent]* ***[7 per cent]*** *for imports from developing countries."*

- *"The proposed de minimis margin of 5 per cent is applied not only in new cases but also in refund and review."*

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23. The arbitrariness of the 20 per cent threshold will be discussed separately in section 3.4.
24. WTO, *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-Beams from Poland*, Report of the Panel, WT/DS/122/R (28 September 2000). WTO, Report of the Appellate Body, WT/DS/184/AB/R (12 March 2001).
25. Thailand-H-Beams, Panel, 7.128.

In addition, it has been proposed that the cumulation of suppliers that individually meet the negligibility criteria using the 7 per cent rule should be raised or eliminated. This proposal has been widely accepted as self-explanatory. The *de minimis* test was primarily aimed at eliminating cases of nuisance. Certain qualifications are, however, in order since this provision applies to both developed and developing countries and as such it may not be strictly defined as a special and differential treatment provision.

One of the potential weaknesses of the proposal is that as much as the limit of 2 per cent may appear arbitrary the same argument could be adopted for the proposal to increase the threshold to 5 per cent unless analytical findings make it intellectually defendable. At the conclusion of an UNCTAD Expert Meeting on anti-dumping measures,[26] it was rightly recommended that empirical and analytical studies be conducted to ascertain the possible positive impact of such an increase.

Analysis contained in a paper[27] on the application of the 2 per cent threshold on EU anti-dumping investigations from 1995 to 2000 on textiles products has shown that around 25 producers from 6 countries were excluded. The same analysis found that by raising the percentage to 5 per cent nine additional producers would have been excluded.

On the basis of this first attempt, more extensive analysis should be conducted to further strengthen this argument for raising the threshold levels, bearing in mind that the possibility of finding dumping margins higher than the *de minimis* ones may remain open to investigating authorities.

In addition, it could be proposed that the *de minimis* dumping margin of 5 per cent be applied not only in new cases but also in refund and review cases. However, an intellectual foundation is necessary for this argument because administering authorities could argue that the reason the dumping margin has decreased is that the dumping measure is working as it should.

Another proposal is to raise the negligibility threshold volume of dumped imports from the existing 3 per cent to 5 per cent for imports from developing countries.

26. See UNCTAD, footnote 3, *supra*.
27. See Vermulst and Mihaylova, footnote 11, *supra*.

Some commentators[28] have argued that the volume test should be replaced by a market share test since, in some cases, the latter may be more liberal than the WTO test, which is based on the volume test. Indeed, the EC practice has been to apply the market share test or the WTO test, where the latter is more liberal. A similar provision codifying this practice and raising the volume test while providing for a market share test to be utilized whenever one of the two is more liberal could be proposed.

3.4. Sales below cost

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

As described earlier, one of the fundamental steps in calculating normal value is the sales below cost test. If more than 20 per cent of sales are made below costs, such sales may be disregarded in the calculation of normal value, which results in higher than average normal value and ultimately higher dumping margins.

This proposal touches one of the core issues of the anti-dumping calculations and if adopted will have an impact in many cases.

The proposed threshold of 40 per cent will probably not completely solve the problems affecting products following the so-called business cycles. For instance, producers of steel products or semi-conductors may be selling at a loss owing to the fluctuations of certain economic fundamentals at global level. In such cases, even the 40 per cent increase will fall short since virtually all production is sold at a loss. These products are affected by fluctuations in the economical fundamentals forcing both domestic industry and competing exporters to sell at a loss. Unfortunately, at the time of the investigation and calculation of the dumping margin the fact that the domestic industry is also selling at a loss is irrelevant for the investigating authorities.

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28. See Vermulst and Mihaylova, footnote 11, pages 533-534, *supra*: *"In contrast to the ADA rule, Article 5(7) of the EC anti-dumping Regulation No. 384/96 applies a 1% and 3% market-share test. While the EC text may appear more restrictive, analysis reveals that this is not necessarily the case. Suppose that the EC market or consumption for a particular product is 1000. Table 6 compared the results of the two tests in four examples. In a high market share, the EC test will be more liberal than the WTO test. However, where imports are comparatively high, i.e. where the EC industry has a low market share, the WTO test will be more liberal.*

Table 6. operation of the 3% imports and the 1% market-share test

Total imports	*Country x imports*	*3% imports test*	*1% market-share test*
100	*9*	*Not negligible (9%)*	*Negligible (0.9%)*
290	*9*	*Not negligible (3.1%)*	*Negligible (0.9%)*
340	*10*	*Negligible (2.94%)*	*Not negligible (1%)*
700	*20*	*Negligible (2.85%)*	*Not negligible (2%)*

It will therefore depend on the specifics of each case to determine whether the WTO or the EC test is more liberal. However, in cases where the WTO test would be more liberal than the EC test, the European Commission would use the WTO test instead so as not to violate its WTO obligations. There is no explicit regulatory provision requiring this approach, but it is applied by the European Commission as a matter of practice. Exporters therefore have the best of both worlds."

On the other hand, the proposal may address situations where the shelf life of a product is extremely short because models keep changing to follow marketing trends or technological innovations. In such cases the product cycle may demand that a part of the production of the old models is sold at a loss where the latest models are sold at very high prices and ultimately subsidize the other base or old models.

Exclusion of sales below cost will increase the normal value and thereby makes a finding of dumping more likely, as the example below shows. In this example we suppose that the full cost of production is 50:

Date	Quantity	Normal value	Export price
1/8	10	40	50
10/8	10	100	100
15/8	10	150	150
20/8	10	200	200

In this example, involving four sales transactions of 10 units each, the domestic sales transaction made on 1 August at a price of 40 is lower than the cost of 50. As it represents 25 per cent of domestic sales (>20 per cent), it may be excluded. As a result, the average normal value becomes (100 + 150 + 200/3 =) 150. The average export price is (50 + 100 + 150 + 200/4 =) 125. Therefore, the dumping amount is 100 and the dumping margin is 20 per cent. If, on the other hand, the domestic sale of 40 had been included, the average normal value would have been 122.5 and no dumping would have been found.[29]

In such cases the current threshold of 20 per cent may unduly penalize such industries mentioned above, and is arbitrary and too low in the light of commercial realities.

3.5 Foreign exchange rate fluctuations

- *"Article 2.4.1 shall include details of dealing with foreign exchange rate fluctuations during the process of dumping."*

This issue was not specified in the documents circulating during the preparation for Doha but it was raised at an UNCTAD Expert Meeting, it was raised. In particular, some delegations noted that the definition of "sustained movement" in Article 2.4.1[30] is a matter of concern for countries with floating exchange rates. Short-term fluctuations and long-term trends in exchange rates should be clearly distinguished and the long-term trends should be defined as a "sustained movement" which would normally imply a period exceeding 60 days for adjustment of export prices.

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29. See UNCTAD Module on Anti-Dumping (forthcoming, March 2002).

30. This issue was raised during the UNCTAD Expert Meeting on Anti-Dumping and Countervailing Actions, held in Geneva from 4 to 6 December 2001. See UNCTAD, footnote 24, *supra*.

3.6 Material retardation

- *"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."*

In practice, injury cases based on material retardation have been rare. An analysis should be conducted to determine concretely the positive implications that this proposal, if adopted, may have in real cases.

3.7 Special and differential treatment

- *"There should be a provision in the Agreement, which provides a presumption of dumping of imports from developed countries into developing countries, provided certain conditions are met."*

Trade liberalization in developing countries has meant that import increases have exerted pressures on domestic industries. Some developing countries, especially African ones, have started to complain about dumping of products from developed countries and the difficulties encountered in administering anti-dumping legislation at national level.

The proposal made above appears to be motivated by the desire to alleviate such difficulties by instituting an abbreviated or simplified procedure to levy anti-dumping duties on imports from developed countries into developing countries' markets. Such a broader approach might appear more defensible intellectually than a simple presumption of dumping in the case of developed countries.

However, in practice it may be difficult to define a "dual" procedure or track to address these concerns and an alternative mechanism to anti-dumping action might be better explored.

In some cases, domestic industries are subject to import competition as a result of a combination of factors, such as lowering of tariffs stemming from unilateral liberalization and difficulties encountered in the implementation of the customs valuation agreement. In such cases and if the tariff binding permits, a temporary tariff increase and technical assistance to national customs in the application of a customs valuation agreement could go a long way to providing temporary relief to affected domestic industries.

On the issue of human and financial capacity of administrations, increased and meaningful technical assistance should be provided to address the persistent lack of institutional capacity. It should be recognized that this is a systematic problem affecting LDCs' and developing countries' administrations.

3.8 Standard of review

- *"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."*

In the light of the findings of some AB and Panel reports examined in this paper and by commentators[31] one may wonder to what extent pursuing changes in Article 17 may be advantageous. After the Uruguay Round, there was much concern that particularly Article 17.6(i) of the ADA was limiting the ability of AB and Panels to debate the authorities' establishment of facts.[32]

Thus far two permissible interpretations have been found only once by a Panel, but the relevant Panel finding was overturned on appeal.[33]

In contrast, in *United States – Anti-dumping measures on certain hot-rolled steel products from Japan*[34] *(United States-Hot rolled steel)*, the AB overturned the Panel in finding that use of downstream sales prices by affiliates in sales to unrelated customers on the domestic market was a permissible interpretation of Article 2.1.[35]

Recent practice has demonstrated that the special standard of review has not had the biased effect that was feared: quite on the contrary, the majority of recent jurisprudence has been found to enhance transparency and due process.

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31. See Vermulst and Graafsma, footnote 18, *supra*
32. E.G. Horlick and Clarke, *Standards for Panels Reviewing Anti-dumping Determinations Under the GATT and WTO (eds.) in Petermann, International Trade Law and the GATT/WTO Dispute Settlement System* (1997).
33. See EC-Bed Linen, Panel Report, paras. 6-87: "*... we consider that an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible"* and EC-Bed Linen, AB Report, para. 84: *"...we reverse the finding of the Panel...that, in calculating the amount for profits under Article 2.2.2(ii) of the ADA, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade*."
34. WTO, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Panel, WTO/DS/484/R (28 February 2001). WTO, Report of the Appellate Body, WT/DS/184/AB/R (24 July 2001).
35. See United States – Hot rolled steel, AB Report, paras. 172-173: "*In the present case, as we said, Japan and the United States agree that the downstream sales by affiliates were made in the ordinary course of trade. The participants also agree that these sales were of the "like product" and these products were destined for consumption in the exporting country. In these circumstances, we find that the reliance by USDOC on downstream sales to calculate normal value rested upon an interpretation of Article 2.1 of the ADA that is, in principle, permissible following an application of the rules of treaty interpretation in the Vienna convention. We therefore reverse the Panel's finding, in para. 8.1 (c) of the Panel Report, that the reliance by USDOC on downstream sales between parties affiliated with an investigated exporter and independent purchases to calculate normal value was inconsistent with Article 2.1 of the ADA.*

It may be wondered whether modification of Article 17.4 is still necessary. Insistence on this issue may sound like misplaced criticism of the current *modus operandi* of the DSU.

4. Issues not yet officially or openly raised or already addressed in DSU jurisprudence

4.1 AB/Panel rulings on anti-dumping issues

As mentioned above, a recent series of Panels and AB reports have addressed issues that were proposed or discussed during the preparation for the Seattle and Doha Ministerial Conferences. In the next section the leading AB and Panel rulings establishing a record of thoughtful review of certain major systemic issues will be outlined. The findings of this jurisprudence will have to be compared and balanced with the proposals and negotiating issues which countries may wish to continue to pursue during the current negotiations. Some countries indicated that they wish to pursue a "codification" of favourable AB and Panel reports.

4.1.1 Dumping margin and normal value

In the *EC-Bed Linen*,[36] three main claims were raised concerning the dumping margin calculations made by the EC. The claims concerned the determination of controversial issues: the determination of dumping margins as contained in the chapeau of Article 2.2, Article 2.2.2 (ii), and fair comparison under Article 2.4.2.

4.1.1.1 Article 2.2.2(ii), "Determination of reasonable profits in constructing normal value"

Article 2.2.2.(ii) may be applied when constructed normal value in the domestic market has to be calculated in accordance with the chapeau of Article 2.2. Article 2.2.2. sets the general rule for calculating the amounts for administrative, selling and general costs and for profits. Where the general rule for calculating these amounts may not be applied, subparagraphs 2.2.2(i), 2.2.2(ii) or 2.2.2(iii) may be applied.

In the *EC-Bed-Linen* Panel and the AB Report, an important issue concerning sales not made in the ordinary course of trade was upheld.

India had asserted that the EC acted inconsistently with Article 2.2.2(ii) in its application of the provision by using the production and sales amounts "incurred and realized" on transactions **in the ordinary course of trade**, instead of the production and sales amounts "incurred and realized" **on all transactions**. In practice, the exclusion of sales not made in the ordinary course of trade meant that all sales below cost were excluded from the calculation. This practice by the EC investigating authorities has inflated the profit, raised constructed normal value and, ultimately, led to higher dumping margins. The Panel disagreed and found that while a Member is not *obligated* to exclude sales not in the ordinary course of trade for purposes of

36. See EC-Bed Linen, footnote 14, *supra*.

determining the profit rate under the subparagraphs of Article 2.2.2, such exclusion is not prohibited by the text.[37] On appeal by India, the Appellate Body reversed this finding. It first turned to the text of the provision[38] and noted especially that Article 2.2.2(ii) refers to the weighted average of the actual amounts *incurred and realized* by other exporters or producers. This provision does not make any exceptions or qualifications. Therefore, the ordinary meaning of the phrase "actual amounts incurred and realized" includes the Selling and General Administrative expenses (SGA) actually incurred, and the profits or losses actually realized by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin. The Appellate Body noted that there is no basis in Article 2.2.2(ii) for excluding some amounts that were actually incurred or realized from the "actual amounts incurred or realized". Thus, a Member is not allowed to exclude sales that are not made in the ordinary course of trade from the calculation of the "weighted average" under Article 2.2.2(ii). The Appellate Body also found support for its interpretation in the context of the provision.[39]

4.1.1.2 The question of "zeroing" in calculating the dumping margin

Another claim by India concerned Article 2.4.2. India argued that the EC had acted inconsistently with Article 2.4.2 by zeroing "negative dumping" amounts for certain types of bed linen in calculating the overall weighted average dumping margin for the like bed linen product.

The practice of inter-model "zeroing", is a rather technical issue, which is better explained by examples in order to be fully appreciated.

The main rule according to Article 2.4.2

According to Article 2.4.2, prices in the two markets should be compared on a weighted average to weighted average basis or on a transaction-to-transaction basis. A calculation example may be helpful. Assume the following:

Date	Normal value	Export price
1 January	50	50
8 January	100	100
15 January	150	150
21 January	200	200

Under the weighted average method, the weighted average normal value (500/4 = 125) is compared with the weighted average export price *(idem)*, as a result of which the dumping amount is zero.

Under the transaction-to-transaction method, domestic and export transactions which took place on or near the same date will be compared with each other. In the perfectly

37. See EC-Bed Linen, Panel, para. 6.85.
38. See EC-Bed Linen, Appellate Body, para. 80.
39. See EC-Bed Linen, Appellate Body, paras. 81-83.

symmetrical example above, the transactions on 1 January will be compared with each other and so on. Again, the dumping amount will be zero.

Exception to the main rules according to Article 2.4.2: weighted average normal value against individual export price transactions

According to Article 2.4.2, exceptionally, weighted average normal value may be compared with prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of one of the two principal methods.

If we apply the exceptional method to the example above, the result will be quite different:

Date	Normal value WA basis	Export price T-by-T	Dumping amount
1 January	125	50	75
8 January	125	100	25
15 January	125	150	-25
21 January	125	200	-75

The issue of zeroing

In the above example, there is a positive dumping amount of 100 (75 and 25 on the first two transactions) and a negative dumping amount of 100 (-25 and -75 on the last two transactions). The negative dumping occurs because the export price is actually higher than the normal value. If the negative dumping can be used to offset the positive dumping amount, no dumping will be found to exist. However, it has been the practice of some WTO Members not to allow such offset and to attribute a zero value to negatively dumped transactions. This is known as the practice of *zeroing*. As a result of application of this method, in the example above the dumping amount will be 100 and the (simplified) dumping margin 100/500 x 100 = 20 per cent.

Use of this method conceptually implies that if just one transaction is dumped, dumping will be found, even if 999 other transactions are not dumped.[40]

Prior to the conclusion of the Uruguay Round, it was the standard practice of some active users of anti-dumping to apply this practice of zeroing. Because of the pressure exerted by other countries during negotiations, Article 2.4.2 was adopted and WTO Members generally use the weighted average method.

40. If, on the other hand, all transactions are dumped, the weighted average method and the weighted average-to-transaction method will yield the same result. This, however, is relatively rare.

However, within the weighted average method some WTO Members applied a new type of zeroing: inter-model zeroing. If, for example, model A was dumped while model B was not dumped, Members would not allow the negative dumping of model B to offset the positive dumping in the calculation made below.

Model A: Cotton type bed linen

Date	Normal value WA basis	Export price WA basis	Dumping amount
1 January	125	75	50
8 January	125	75	50

Model B: Cotton type bed linen

Date	Normal value WA basis	Export price WA basis	Dumping amount
1 January	125	175	-50
8 January	125	175	-50

In this example, the EC added up the dumping amounts it had calculated for model A and model B. However, in doing so, it treated the negative dumping amounts of model B as zero. Then, having added the positive dumping margin and the zeroes 75 + 25 of model A and 0 + 0 of model B = 100, the EC divided this sum by the cumulative value of all the export transactions involving all types and models of that product, i.e. export transactions of model A and B. The value of all export transactions is equal to 50 + 100 + 150 + 200. The dumping margins 100/500 x 100 = 20 per cent.

In the bed linen cases, India successfully challenged this practice. The EC appealed the Panel finding to the AB, but the latter fully upheld the finding.

4.1.1.3 Implementation of Panel and AB findings by the EC

Following the *EC-Bed-Linen* cases, a series of actions were undertaken at EC level to implement the findings of the Panel and AB reports.

A regulation[41] was promulgated to empower the EC Council to *"(a) repeal or amend the disputed measure; (b) adopt any other special measures which are deemed to be appropriate in the circumstances"*.[42] This regulation did not explicitly concern the *EC-Bed Linen* report since it aimed, according to its preambles 4 and 5, at establishing a procedure:

- *"(4) "With a view to permitting the Community, where it considers this appropriate, to bring a measure taken under regulation (EC) No. 384/96 or*

41. *Council Regulation 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy,* O.J. L.201 (26 July 2001).
42. See, Article 1 of Regulation 1515/2001, footnote 41, *supra*.

Regulation (EC) No. 2026/97 [the main EC regulations implementing the ADA] *into conformity with the recommendations and rulings contained in a report adopted by the DSB, specific provisions must be introduced."*

- *(5) "The Community institutions may consider it appropriate to repeal, amend or adopt any other special measures with respect to measures taken under Regulation (EC) No. 384/96 or Regulation (EC) No. 2026/97, including measures which have not been the subject of dispute settlement under the DSU, in order to take account of the legal interpretations made in a report adopted by the DSB. In addition, the Community institutions should be able, where appropriate, to suspend or review such measures."*

This latter preamble and the corresponding Article 2 of the regulation not only empower the Council on the basis of a proposal of the Commission to amend a disputed anti-dumping regulation to bring it into conformity with the Panel or Appellate Body findings but also provide for the possibility of applying the same ruling or interpretation of WTO law made by the Panel or Appellate Body to other anti-dumping regulations *"which have not been subject of dispute settlement under the DSU"* so as *"to suspend the non-disputed or amended measures"*.

This provision is, however, counterbalanced by the fact that the Commission retains the power of initiating such a review. In other words, private parties may not rely on the findings of a Panel or appellate body to have a non-disputed measure reviewed according to the procedure of Article 2.

A second regulation[43] revised the findings of the investigation, taking into account the recommendations set out in the *EC-Bed Linen* report. In particular, and according to paragraph 2.1, sub-paragraph 5, of the Regulation, the reassessment of the dumping margin was carried out on the recommendations of the reports concerning *"(a) determination of sales, general and administrative expenses and profit when applying article 2(c)(1) of the basic regulations for the purpose of constructed normal value and (b) the practice of 'zeroing' when establishing the weighted average margin of dumping"*.

On this basis the EC authorities carried out a reassessment of the findings of the original investigation and new calculations were made taking into account the finding of the AB report.[44]

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43. *Council Regulation (EC) No. 1644/2001 of 7 August 2001 amending Regulation (EC) No. 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India,* O.J. L.219/1 (14 August 2001).

44. See, for instance, para. 9 of Part 2 (Dumping) of the Council Regulation (EC) No. 1644/2001 (see footnote 43 *supra*), where it is clearly stated that *"It should be noted that sales not made in the ordinary course of trade have not been eliminated when determining the profit margin attributable to the other four com*panies", and para. 11 of Part 2 (Dumping): "*In compliance with the recommendations of the Report, 'no zeroing' was applied in calculating the overall dumping margin for each company*".

Overall, it has to be noted that the reassessment of the findings was carried out on the basis of the information collected at the time of the original investigation. As the EC authorities openly admitted in paragraph 74 of the regulation concerning the methods of calculating sales, general and administrative expenses and profit, the fact that some information was not collected at the time of the original investigation may have implications when a reassessment of findings is carried out. For instance, on the issue of injury, one may argue that the reassessment falls short of establishing a level-playing field for complainants and defendants.

This imbalance stems from the fact that when filing the complaints, domestic industries are apparently not obliged to list all the 15 factors to demonstrate injury. In other words, examination and information on all the 15 factors is not a *condicio sine qua non* for initiating an anti-dumping procedure.

Thus, if the investigating authorities, like the Commission in the original investigation, did not collect information on all 15 factors, it may be difficult to objectively carry out a reassessment of injury factors retroactively.

Therefore, the exporters have to rely on the goodwill of the investigating authorities if the data were not collected at the time of the original investigation. As the *EC-Bed Linen* Panel held: "*It appears from this listing* [the listing of the factors enumerated in the provisional regulation] *that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigation authorities. Surely a factor cannot be evaluated without the collection of relevant data.*"[45]

An objective examination would have required *"ab initio"* that the complaints by domestic producers should have included data on all 15 factors for an objective determination to be carried out. This burden of proof on the part of the complainants and the investigating authorities would strike a balance between this obligation and the one of the exporters to respond on time and with accurate information to the questionnaire of the investigating authorities. Eventually, this may be an issue to be raised as it is an imbalance of rights and obligations between complainants and defendants.

From this perspective, the reassessment of the injury findings carried out by the Commission may not appear immune to criticism.

Finally, a regulation[46] reconsidered and reassessed the findings of the original investigation for Pakistan and Egypt. This reassessment was carried out on the basis of the procedure contained in Article 2 of Regulation 1515/2001.[47]

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45. See EC-Bed Linen, 6.167.
46. *Council Regulation (EC) No. 160/2002 of 28 January 2002 amending Council Regulation (EC) No. 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, and terminating the proceeding with regard to imports originating in Pakistan,* O.J. L. 26/1 (30 January 2002).
47. See Council Regulation 1515/2001, footnote 41, *supra*.

Accordingly, this reassessment was carried out on the basis of the prohibition of "zeroing" as contained in paragraph 6 of Part 2 (Dumping) of the regulation. This new calculation found that no dumping was taking place in the case of Pakistan. The measure was therefore terminated in the case of Pakistan. In the case of Egypt, the lack of data for the original investigation prevented, according to the Commission, a detailed reconsideration of the dumping margin from being carried out.[48] However, the Council, upon consideration of the fact that once "zeroing" was applied, lower dumping margins were found, and taking into account the low level of Egyptian exports, suspended the measure.

4.2 Use of home market sales in the case of related parties

The issue at stake in *US-Hot rolled steel*[49] was the practice of the United States Department of Commerce (USDC) in treating sales by related parties in the domestic market. On the determination of export price, this issue is clearly contained in Article 2.3, which clearly provides for such occurrences.

In some cases, companies do not sell directly to wholesalers or retailers but to an affiliated company based in the export market. Such sales made to an affiliated company are normally considered not to be reliable because of association or compensatory arrangements between importers and exporters. In these cases, Article 2.3 of the ADA provides that the export price may be "constructed on the basis of the price at which the imported products are first resold to an independent buyer."

There is no similar provision for sales through affiliates made in the domestic market. The practice developed by the USDC was such that when calculating normal value sales made by the producer/exporter to the affiliated companies were replaced by sales made by these affiliates to the first independent buyer.

Potentially the most revolutionary decision of this Panel report was the finding that it is not permitted to use resale prices of affiliated companies to serve (in part) as the basis for normal value. In other words, the Panel did not agree with the use of "replacement-sales", i.e. the resales by affiliated companies to independent customers that replaced sales to them by the producer/exporter, in the determination of normal value.

The Panel noted that while it might be true that these replacement sales were, in the broad sense, in the ordinary course of trade, they were not sales which can be taken into account in determining normal value for the companies for which dumping margins were being established, as they were not sales in the ordinary course of trade *of those companies*.[50] The Panel underlined this approach by referring to the overall structure of Article 2.[51] For example, while in the case of a related importer it is explicitly permitted to take its resales and construct the export price, Article 2 does

48. See Council Regulation 160/2002, para. 15, footnote 46, *supra*.
49. See WTO, footnote 34, *supra*.
50. See US – Hot rolled steel, Panel, para. 7.114.
51. See US – Hot rolled steel, Panel, para. 7.115.

not contain a similar possibility for the domestic market; the explicit mention of such a possibility on the export side was therefore an indication that the absence of such a possibility on the domestic side was deliberate.[52] Accordingly, the replacement of excluded sales to affiliates by sales from affiliates to downstream purchasers was found not to be consistent with Article 2.1 of the ADA.

The AB reversed the Panel findings mainly on the ground that the practice of the USDC rested upon an interpretation of ADA "that is, in principle, 'permissible' following application of the rules of treaty interpretation of the Vienna Convention".

4.3 Injury

Panels and AB reports in *Mexico – Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*[53] *(Mexico-HFCS)* and *Thailand-H-Beams*[54] addressed a number of issues related to Article 3 and the determination of the economics factors listed to be taken into account when determining injury findings. In particular, they have clarified how evaluation of the injury factors has to be carried out and that such evaluation must be apparent from the record. In *Mexico-HFCS*, the Panel found that the text of Article 3.4 made it clear that the listed factors in Article 3.4 must be considered in all cases. There might be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. However, consideration of the Article 3.4 factors was required in every case, even though such consideration might lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. The Panel further held that the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.[55]

A similar approach was followed by the Panels in *Thailand-H-beams* and *EC-Bed linen* and *Guatemala-Cement* and the administrative determinations were found defective on similar grounds.

The *Thailand-H-Beams* Panel again emphasized that the evaluation must be clear from the record. It concluded not only that Thailand had failed to consider certain Article 3.4 factors, but also that it had failed to evaluate adequately the factors they did consider under Article 3.4 in that Thailand did not provide an adequate explanation, in terms of the factors that *were* evaluated, of how and why, in light of the positive trends in so many injury factors, it nonetheless concluded that the domestic industry was injured. Thus, the determination of injury could not have been reached on the basis of an "unbiased or objective evaluation" or an "objective examination" of the disclosed factual basis.[56] Upon appeal by Thailand, the AB

52. Compare footnote 89 of US – Hot rolled steel, Panel.
53. WTO, *Mexico – Anti-dumping investigation of High Fructose Corn Syrup (HFCS) from the United States*, Report of the Panel, WT/DS/132/R (28 January 2000). WTO, Report of the AB, WT/DS184/AB/4 (24 July 2001).
54. See WTO, footnote 24, *supra*.
55. See México – HFCS, Panel, para. 7.128.
56. See Thailand-H-Beams, Panel, para. 7.256.

confirmed that evaluation of all 15 factors was mandatory and agreed with the Panel's analysis *"in its entirety"*.[57]

In *Thailand-H-beams*, Poland had argued that Articles 3.1, 3.2 and 3.4 had been violated because the Thai determination was not based on "positive evidence" and did not involve an "objective examination" of the volume and effects on price of the Polish imports, and the impact of those imports on the Thai producer.[58] The Panel found that the textual requirements in Article 3.1 place a considerable responsibility upon the investigating authorities to establish an adequate factual basis for the determination as well as to provide a reasoned explanation for the determination[59] and that the disclosed facts cannot be considered to be "properly established" if they are inaccurate.[60]

4.4 Relevant issues not yet officially raised during intergovernmental meetings

In the calculation of the dumping margin, there are a series of issues which may not be *prima facie* obvious, but are extremely important in most anti-dumping cases. Proposals for changes or modifications to the ADA, unless they are focused on such "nuts and bolts" issues may not address the current deficiencies in the ADA.

While the illegality of inter-model zeroing has now been conclusively established for the main rule of Article 2.4.2 in *EC-Bed Linen*, it is perhaps also important to specify in some detail what this decision does *not automatically* mean or imply:

(a) It does not address the question of zeroing in a dumping margin calculation using the second main rule under Article 2.4.2, i.e. the transaction-to-transaction method.

(b) It does not clarify whether zeroing is still permitted in the course of annual reviews under a retrospective anti-dumping duty system, such as that used by the United States.[61]

(c) It does not specify whether zeroing is still permitted under the exception (second rule) of Article 2.4.2 (weighted average-to-transaction method). It seems likely that since a prohibition of zeroing under the exception would

57. See Thailand-H-Beams Appellate Body, para. 125.
58. See Thailand-H-Beams, Panel, para. 7.130.
59. See Thailand-H-Beams, Panel, para. 7.143.
60. See Thailand-H-Beams, Panel, paras. 7.188-7.189.
61. It is likely that at some point in the future the USDC will argue that while zeroing may not be permitted for its calculation of the *deposit* rate (the dumping margin for the imports in the coming year), it is still permissible for its calculation of the *assessment* rate (determining how much duties were due for the past year). This would be in line with the door that the Appellate Body kept open in its footnote 30 as regards the issue of zeroing and the *collection* of duties.

mathematically lead to the same result as under the main rule, zeroing *is* logically permitted under the exception.[62]

4.4.1 Duty drawback

A practical example of how the absence of concrete rules may affect the result of anti-dumping investigations is the rejection of duty drawback claims on bureaucratic evidentiary grounds. This is a problem particularly for developing countries, where average import duties are higher than in developed countries.

Some investigating authorities are insisting on extremely detailed documentary evidence that import duties have been paid on domestic sales while such duties have not been paid or refunded on exported merchandise, sometimes going as far as to require exporters to conclusively establish this on a transaction-specific basis. Standard input/output ratios used by many developing country duty drawback systems are also often rejected. Lastly, investigating authorities' insistence that imported inputs be tied conclusively to exported finished products may create enormous practical difficulties. For many developing country exporters producing bulk products, it is virtually impossible to distinguish in a warehouse the amount of domestic inputs and imported inputs utilized in the production of domestically sold and exported finished products. Some of these inputs are raw and fungible materials not having a distinct character. Exporters' failure to conclusively prove that imported inputs are *physically incorporated* in exported finished products may then lead the investigating authorities to reject the duty drawback claim, thereby inflating normal value.

4.4.2 Credit costs

The question of credit terms is also of particular relevance. Export credit costs are routinely deducted in the netting back process because they are well documented in letters of credit. However, in many developing countries, domestic credit terms are often based on industry practice. Such domestic credit costs are then not deducted by some investigating authorities on the ground that they are not "contractually agreed." Thus, a normal value including credit costs is compared with an export price excluding credit costs. As domestic credit costs are often relatively high in developing countries because the interest rate on short-term borrowings is high, this asymmetric comparison impacts particularly on them.

In addition, further detailed rules may be necessary with regard to taking into account differences that affect price comparability. In this regard, it is noted that certain traditional users of anti-dumping measures in practice place the burden of proof squarely on the respondent with respect to demonstrating differences in terms of levels of trade or other trade and business conditions affecting price comparability. The provisions of Article 2.4 leave too much leeway to authorities to reject claims regarding such differences.

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62. This would also be in line with *ATC's* where zeroing under the weighted coverage-to-transaction method was considered permissible.

5. Procedures

The relevant Panel findings in *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*[63] *(Guatemala-Cement II)* and *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*[64] *(Argentina-Tiles from Italy)* may serve as an example because they cover many of the procedural requirements[65] and the difficulties encountered by administrations.

"(a) Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation is inconsistent with Article 5.3 of the ADA.

(b) Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation and consequent failure to reject the application for anti-dumping duties by Cementos Progreso is inconsistent with Article 5.8 of the ADA.

(c) Guatemala's failure to timely notify Mexico under Article 5.5 of the ADA is inconsistent with that provision.

(d) Guatemala's failure to meet the requirements for a public notice of the initiation of an investigation is inconsistent with Article 12.1.1 of the ADA.

(e) Guatemala's failure to timely provide the full text of the application to Mexico and Cruz Azul is inconsistent with Article 6.1.3 of the ADA.

(f) Guatemala's failure to grant Mexico access to the file of the investigation is inconsistent with Articles 6.1.2 and 6.4 of the ADA.

(g) Guatemala's failure to timely make Cementos Progreso's 19 December 1996 submission available to Cruz Azul until 8 January 1997 is inconsistent with Article 6.1.2 of the ADA.

(h) Guatemala's failure to provide two copies of the file of the investigation as requested by Cruz Azul is inconsistent with Article 6.1.2 of the ADA.

(i) Guatemala's extension of the period of investigation requested by Cementos Progreso without providing Cruz Azul with a full opportunity for the defence of its interest is inconsistent with Article 6.2 of the ADA.

(j) Guatemala's failure to inform Mexico of the inclusion of non-governmental experts in the verification team is inconsistent with paragraph 2 of Annex I of the ADA.

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63. See, WTO, footnote 5, *supra*.
64. See, WTO, footnote 5, *supra*.
65. The AB report in US – Hot rolled steel and the Panel report in Argentina – Tiles offer interesting material on the use of facts available.

(k) Guatemala's failure to require Cementos Progreso to provide a statement of the reasons why summarization of the information submitted during verification was not possible is inconsistent with Article 6.5.1 of the ADA.

(l) Guatemala's decision to grant Cementos Progreso's 19 December submission confidential treatment on its own initiative is inconsistent with Article 6.5 of the ADA.

(m) Guatemala's failure to 'inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures' is inconsistent with Article 6.9 of the ADA.

(n) Guatemala's recourse to 'best information available' for the purpose of making its final dumping determination is inconsistent with Article 6.8 of the ADA."[66]

In *Argentina–Tiles from Italy* the Panel found that:

"(a) Argentina acted inconsistently with Article 6.8 and Annex II ADA by disregarding in large part the information provided by the exporters for the determination of normal value and export price, and this without informing the exporters of the reasons for the rejection;

(b) Argentina acted inconsistently with Article 6.10 ADA by not determining an individual margin of dumping for each exporter included in the sample for the product under investigation;

(c) Argentina acted inconsistently with Article 2.4 ADA by failing to make due allowance for differences in physical characteristics affecting price comparability;

(d) Argentina acted inconsistently with Article 6.9 ADA by not disclosing to the exporters the essential facts under consideration which form the basis for the decision whether to apply definitive measures."

6. Conclusions and recommendations

From the combined analysis of the outstanding implementation issues, issues raised by commentators and during intergovernmental meetings and the recent jurisprudence of the WTO's DSU, some preliminary indications of a possible list of negotiating priorities may be drawn.

At the outset it appears that advocating "codification" of favourable AB and Panel reports by inserting new articles in the ADA may be redundant, taking into account

66. Guatemala – Cement, Panel, para. # 9. The term AD Agreement has been replaced by "ADA".

the established doctrine and practice of the WTO Dispute Settlement Understanding, the amount of negotiating capital to be spent in this exercise and the possibility of a "*reformatio in peius*" of the existing ADA rules.

One of the most difficult issues in anti-dumping proceedings and negotiations is the level of technical detail and precision required to achieve the desired objectives. Thus, not only the negotiating priorities should be clear and set in advance but also the necessary drafting and alternative scenario should be prepared in advance.

At the same time, decisions have to be taken in advance on how much negotiating capital should be spent on selected issues. From the first examination carried out in this paper it may appear that certain outstanding implementation issues are not easily defensible or require too much negotiating capital to obtain results that may have limited impact in real terms. Among the outstanding implementation issues, it seems that the issues that may have an impact on the anti-dumping instrument may be divided in two categories: those related to substantive issues and those related to procedural ones. Among the substantive issues the calculation of normal value appears a priority, as described below.

6.1 Calculation of normal value

6.1.1 Article 2.2 "Definition of reasonable profit"

Even the most recent WTO jurisprudence has been rather conservative on this issue. A definition of "reasonable" should be inserted to avoid "automatic" findings or reasonable profit as discussed in section 3.2.

6.1.2 Article 2.2.1, footnote 5, "Sales below cost"

The 20 per cent threshold does not meet commercial realities and should be increased.

The other issues that should be addressed as a matter of priority are related to Articles 2.4, 2.4.1 and 2.4.2. Some of these issues are not clearly indicated as outstanding implementation issues and should be clearly spelt out at the first opportunity.

6.2 Comparison of normal value with export prices

6.2.1 Article 2.4, "fair comparison"

This article should be revisited to take into account various factors that may affect the "fair comparison", namely:

(a) There should be comparability of level of trade to avoid situations such as in the *US-Hot rolled steel* case;

(b) Comparable allowances should be permissible in order to carry out "a fair comparison" in respect of credit cost and drawback.

6.3 Other outstanding issues

There are other outstanding issues that may be the subject of further analysis or closely monitoring, such as Article 2.4.2.

6.3.1 Article 2.4.2

As pointed out earlier, the AB report on *EC-Bed-Linen* clearly stated that inter-model zeroing is not allowed. However, this finding may not adequately take into account the evolving practice and methodology applied by the investigating authorities. Thus, three main points have to be closely monitored during negotiations:

(i) Whether practice evolves in such a manner that zeroing is applied when using the second main rule under 2.4.2, i.e. the transaction-to-transaction basis;

(ii) Whether zeroing still applies under a retroactive anti-dumping system;

(iii) Whether, as a result of the *EC-Bed Linen* report, investigating authorities recur more often to the exception of Article 2.4.2, where zeroing may still be permitted.

Depending on the variables mentioned above, practice and DSU jurisprudence, these pending issues might become other candidates for a priority list.

6.4 Procedural issues

6.4.1 Article 5.8, "Negligibility test and *de minimis* dumping"

This article is to be revised as examined earlier.[67] However, some analysis should be carried out to ascertain whether the proposed adjustments to be made are leading to a significant impact, commensurate with the amount of negotiating capital to be spent on this item.

6.4.2 Articles 5.3 and 5.4, "Standing of complainants" and "Burden of proof"

The actual burden of proof on the exporter that the conditions related to the standing of complainants in Articles 5.3 and 5.4 have not been satisfied by investigating authorities should be reversed. Investigating authorities should provide documentary evidence that the 25 per cent and 50 per cent tests have been met. In Article 5.3 the examination to be carried out before initiation should be supported by documentary evidence and disclosed upon request by the affected exporters.

67. See, paragraph 3.2, *supra*.

In addition, there are a variety of other issues which may be raised under the procedural matters such as duration of anti-dumping measures, or sunset reviews, questionnaires, the language of investigating authorities, and price undertakings. In the course of the negotiations, some of these procedural issues may become the subject of debate. At that time, a careful evaluation will have to be carried out of the pros and cons of each issue against the amount of negotiating capital to be spent.

Besides Article 15 of ADA and beyond the negligibility test and the *de minimis* it is difficult to identify a viable horizontal cross-cutting provision to define and capture the concept of special and differential treatment.

During the preparations for the Fourth WTO Ministerial Conference a proposal was made, as mentioned earlier, that a presumption of dumping of imports from developed countries into developing countries be made if certain conditions are met. On the other hand, and taking into account the human and financial constraints of LDCs' administrations, proposals were made to develop a simplified procedure for the taking of anti-dumping actions by LDCs.[68]

The feasibility of such a "dual track" procedure may result, making it extremely difficult to pursue it during the negotiations given the political and technical difficulties that such a course of action will encounter. Alternatively, different criteria and benchmarks will have to be elaborated to trigger protection through anti-dumping measures on imports from developing countries. However, this issue should be the subject of analytical and intellectual research aimed at producing defensible and viable proposals.

Perhaps a first objective might be an overall binding commitment by developed countries, with respect to market access for LDCs, not to launch anti-dumping investigations against LDCs. This commitment might be part of an overall instrument to improve market access for LDC on a solid basis.[69]

The solution of some of the substantive issues raised in this paper, commitments on the "de minimis" and a satisfactory operationalization of Article 15 may constitute a reasonable amount of negotiating issues to be brought forward during the first phase of negotiation.

68. See, WTO, *LDC Trade Ministers Meeting, 22-24 July 2001*, WT/L/489 (6 August 2001).
69. See, for more details, *Improving Market Access for LDCs*, UNCTAD/DITC/TNCD/4 (May 2001).

ANNEX I

Excerpt from WTO document WT/MIN(01)/DEC/1 of 20 November 2001:

Ministerial Declaration – Adopted on 14 November 2001
Ministerial Conference, Fourth Session, Doha, 9-14 November 2001

WORK PROGRAMME

IMPLEMENTATION-RELATED ISSUES AND CONCERNS

12. We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.

WTO RULES

28. In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.

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

ANNEX II

Excerpt from WTO document WT/MIN(01)17 of 20 November 2001:

Implementation-Related Issues and Concerns – Decision of 14 November 2001 Ministerial Conference, Fourth Session, Doha, 9-14 November 2001

7. Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

7.1 Agrees that investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.

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

7.3 Takes note that Article 5.8 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 does not specify the time-frame to be used in determining the volume of dumped imports, and that this lack of specificity creates uncertainties in the implementation of the provision. The Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to study this issue and draw up recommendations within 12 months, with a view to ensuring the maximum possible predictability and objectivity in the application of time frames.

7.4 Takes note that Article 18.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires the Committee on Anti-Dumping Practices to review annually the implementation and operation of the Agreement taking into account the objectives thereof. The Committee on Anti-dumping Practices is instructed to draw up guidelines for the improvement of annual reviews and to report its views and recommendations to the General Council for subsequent decision within 12 months.

ANNEX III

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby *agree* as follows:

PART I

Article 1

Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[1] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

Article 2

Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[3] determine that such sales are made within an extended period of time[4] in substantial quantities[5] and are

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[1]The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

[2]Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

[3]When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

[4]The extended period of time should normally be one year but shall in no case be less than six months.

[5]Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that

at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on

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the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

[6]The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

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

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

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under

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

[8] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

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

Article 3

Determination of Injury[9]

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

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

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

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

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

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

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

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

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

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

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

(iv) inventories of the product being investigated.

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

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

Article 4

Definition of Domestic Industry

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

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

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

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

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

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied[12] only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

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

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

Article 5

Initiation and Subsequent Investigation

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

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

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when the former is legally or operationally in a position to exercise restraint or direction over the latter.

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

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

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

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

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

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

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

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

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

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

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

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

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

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

Article 6

Evidence

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

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

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

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

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

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

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

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

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

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[18]

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

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

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

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

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

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

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

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

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

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

(ii) the government of the exporting Member; and

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

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

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

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

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

Article 7

Provisional Measures

7.1 Provisional measures may be applied only if:

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

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

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

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

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

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

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

Article 8

Price Undertakings

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

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

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

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

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

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

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 9

Imposition and Collection of Anti-Dumping Duties

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

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

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

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

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

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

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

Article 10

Retroactivity

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

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

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

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

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

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

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

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

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

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

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

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

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

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

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

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

Article 12

Public Notice and Explanation of Determinations

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

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

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

(ii) the date of initiation of the investigation;

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

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

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

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

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

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

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

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

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

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

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

(v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

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

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

Article 13

Judicial Review

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

Article 14

Anti-Dumping Action on Behalf of a Third Country

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

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

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

alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

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

Article 15

Developing Country Members

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

PART II

Article 16

Committee on Anti-Dumping Practices

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as the "Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

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

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 17

Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

(i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

PART III

Article 18

Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[24]

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

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

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

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

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

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

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

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

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

ANNEX I

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 7 OF ARTICLE 6

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

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

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

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

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.