

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN/GNG/NG10/W/38/Rev.1

4 September 1990

Special Distribution

Original: English

Group of Negotiations on Goods (GATT)
Negotiating Group on Subsidies
and Countervailing Measures

DRAFT TEXT BY THE CHAIRMAN

Attached hereto is a revision of the text circulated in MTN.GNG/NG10/W/38 of 18 July 1990. The status of this text is exactly the same as that of its first version, i.e. it has been put forward on my own responsibility, it does not, in any way, commit any delegation at this stage and it is used as the basis of negotiations in the Group.

The revision of the paper has not been extensive because the rebalancing of the paper is hardly possible until the issues covered by discussion papers (circulated separately) have been resolved. I intend, therefore, to revise again the text at an appropriate time in the light of the discussion of these issues and of other issues relevant to other parts of the text.

Michael D. Cartland
Chairman
Negotiating Group on Subsidies
and Countervailing Measures

PART 1: PROHIBITED SUBSIDIES

Article 1

Identification

1.1 Signatories agree that the following subsidies, within the meaning of Article 3.1 below, shall be considered as prohibited subsidies:

- (a) subsidies contingent, in law or in fact¹ whether solely or as one of several other conditions, upon export performance;
- (b) subsidies listed in the Illustrative List of export subsidies (Annex I);
- (c) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods;

1.2 Signatories shall not grant subsidies referred to in paragraph 1.

Article 2

Remedies

2.1 If a signatory maintains a prohibited subsidy, any signatory affected by that subsidy shall have the right, subject to the provisions of paragraphs 2.2-2.8 below, to take appropriate countermeasures (including withdrawal of GATT concessions or obligations).

2.2 Whenever a signatory has reason to believe that a prohibited subsidy is being granted or maintained by another signatory, such signatory may request consultation with such other signatory.

2.3 A request for consultations under paragraph 2.2 above shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

2.4 Upon request for consultations under paragraph 2.2 above, the signatory believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose

* See drafting footnote ** on page 7.

¹ This standard is met whenever the facts which were known or should have been known to the government when granting the subsidy demonstrate that the subsidy, without having been made expressly contingent upon export performance, would operate as an export subsidy.

of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

2.5 If no mutually acceptable solution has been reached within thirty days of the request for consultations, any signatory party to such consultations may request that the matter be reviewed by the Committee on Subsidies and Countervailing Measures.²

2.6 Where a matter is referred to the Committee, the Committee shall immediately review the evidence with regard to the existence and nature of the subsidy in question and shall provide an opportunity for the other signatory to demonstrate that this measure is not a prohibited subsidy.³ The Committee may request the assistance of the Permanent Group of Experts with regard to the determination of whether the measure in question is a prohibited subsidy. The Permanent Group of Experts shall immediately review the matter and report back to the Committee. The Group's conclusions shall be deemed to be adopted by the Committee unless the Committee disapproves.

2.7 If, as a result of its review, the Committee concludes that the subsidy in question is a prohibited subsidy, it shall recommend that the subsidizing signatory withdraw this subsidy without delay. The subsidizing signatory shall promptly comply with this recommendation. In the event the recommendation is not followed within such period as the Committee shall state in its recommendation, the Committee shall authorize such signatory affected by the subsidy in question to take appropriate countermeasures.

2.8 Any review of a matter referred to the Committee under paragraph 2.5 above shall be completed within 90 days of the request for such a review.

²As established in Part V of this Agreement and hereinafter referred to as "the Committee".

³To be established by the Committee pursuant to Article.

PART II: ACTIONABLE SUBSIDIES

Article 3

Definition

3.1 Any measure where:

(a)(1) there is a financial contribution by a government or any public body within the territory of a signatory (hereinafter referred to as "government"), i.e.:

- (i) government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers or liabilities (e.g. loan guarantees);
- (ii) government revenue that is otherwise due, foregone or not collected (e.g. fiscal incentives such as tax credits);
- (iii) government provides goods or services;
- (iv) government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

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

and

(b) any advantage resulting therefrom is specific, within the meaning of Article 4 below, to an enterprise or industry or group of enterprises or industries (hereinafter referred to as "certain enterprises");

such measure constitutes a subsidy.

3.2 A subsidy as defined in paragraph 3.1 above is actionable or countervailable if it causes any of the adverse effects within the meaning of Article 5 below.

Article 3a

Definition of "so-called new practices"

Article 4

Application of the concept of specificity

4.1 In order to determine whether a subsidy, as defined in Article 3, above shall be deemed to be specific to certain enterprises, and as such grants an advantage to these enterprises over those available to other enterprises or industries, the following shall apply:

- (a) Where the granting authority explicitly limits access to a subsidy to certain enterprises, such subsidy would be specific, subject to the provisions of paragraphs (b), (c), and (d) of this Article;
- (b) Where the granting authority establishes neutral criteria or conditions⁴ for eligibility and for the amount of subsidy granted, specificity shall not be deemed to exist to the extent that eligibility were automatic and the amount of subsidy were consistent with the criteria or conditions. The criteria or conditions must be clearly spelled out in law or regulation and be capable of verification.
- (c) Where discretion is exercised in the course of the administration of a subsidy, specificity shall not be deemed to exist if there is a clear indication, substantiated on the basis of positive evidence, that discretion has not been exercised so as to limit access to the subsidy to certain enterprises or to award amounts of subsidy so as to direct the subsidy to certain enterprises. In this regard, information on the frequency with which applications for the subsidy are refused and the reasons for such refusal shall, in particular, be considered.
- (d) A subsidy may be specific in fact if it can be demonstrated, on the basis of facts which were known - or should have been known - to the granting authority at the time of establishment of the subsidy programme, that the subsidy would be limited to certain enterprises.***

⁴ Neutral criteria or conditions would normally be economic in nature, and horizontal in application, (i.e. not restricted to certain enterprises); examples would be levels of unemployment, average per capita income, number of employees, size of enterprise, amount of equity or revenues, but could also include such factors as incidence of pollution or health and safety standards.

It remains for signatories to address the issue of limited access as a result of the inherent characteristics of goods, services or extraction or harvesting rights provided by a government.

4.2 Notwithstanding the provisions of paragraph 4.1 above, a regional subsidy⁵ shall be deemed to be specific regardless of the degree of availability within the region or regions in question and irrespective of the nature of the granting authority. However, a regional subsidy may nevertheless become non-actionable and non-countervailable if the conditions in Article 8 are met.

4.3 Any export subsidy shall be deemed to be specific.

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

Article 5

Trade effects

No signatory should cause, through the use of any subsidy referred to in Article 3 above, adverse effects to the interests of other signatories, i.e.:

- (a) injury to the domestic industry of another signatory;⁶
- (b) nullification or impairment of benefits accruing directly or indirectly to other signatories under the General Agreement, in particular the benefits of concessions bound under Article II of the General Agreement;
- (c) serious prejudice to the interests of another signatory.⁷

⁵ A regional subsidy is a subsidy given by any central or local public body or agency solely on the basis of the location of the beneficiary in a given region and with a purpose linked to the particular characteristics of the region.

⁶ Injury to the domestic industry is used here in the same sense as it is used in Part IV of this Agreement.

⁷ Serious prejudice to the interests of another signatory is used in this Agreement in the same sense as it is used in Article XVI:1 of the General Agreement, and includes threat of serious prejudice.

Article 6

Serious prejudice

6.1 Serious prejudice in the sense of Article 5(c) exists if:

- (a) the total ad valorem subsidy on a product exceeds ... per cent; **
- (b) a subsidy is contingent upon production performance, in the sense that it requires the attainment of certain production surpluses and increases with the increasing production;
- (c) subsidies are granted to firms or industries which sell ... per cent or more of their production for exports.

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

- (a) the effect of the subsidy is to displace or impede the imports of like product into the market of the subsidizing country;
- (b) the effect of the subsidy is to displace or impede the exports of like product of another signatory from a third country market;
- (c) there is a significant price undercutting by the subsidized products as compared with the price of a like product of another signatory in the same market or the subsidized imports result in price suppression, price depression or lost sales in the same market;
- (d) the world market share of the subsidizing country in a specific product has increased compared to the share it had during the previous period of [X years] and this increase results from a consistent trend over a period when subsidies have been granted.

6.3 The existence of serious prejudice in the sense of paragraphs 6.1(a) through 6.1(c) may be rebutted if the subsidizing signatory demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 6.2 above.

6.4 For the purpose of paragraph 6.2(a), displacing or impeding imports shall include any case in which it has been demonstrated to the Committee that a subsidy has been granted or significantly increased on a product which directly competes with the product on which a GATT concession as set out in the GATT schedule, or another GATT benefit has been granted.

** It is for consideration whether this provision should appear under this Article or under Article 1 with a different percentage threshold.

6.5 For the purpose of paragraph 6.2(b), displacing or impeding exports shall include any case in which, subject to the provisions of paragraph 6.8 below, it has been demonstrated to the Committee that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period of, in normal circumstances, at least one year, sufficient to demonstrate clear trends in the development of the market for the product concerned). "Change in relative shares of the market" shall include any of the following situations: (i) there is an increase in the market share of the subsidized product; (ii) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; (iii) the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.6 For the purpose of paragraph 6.2(c), price undercutting should be demonstrated through comparing prices of the subsidized product with prices of like non-subsidized products supplied to the same market. The comparison shall be made at the same level of trade and at comparable times. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.7 Each signatory, in the market of which serious prejudice is alleged to have arisen, shall make available to the parties to a dispute and to the Committee all relevant information that can be obtained as to the changes in market shares of the disputing parties as well as concerning prices of the products involved.

6.8 Displacement resulting in serious prejudice shall⁸ not be deemed to occur where any of the following circumstances exist⁸ during the relevant period:

- (a) prohibition or quantitative restriction on exports of the like product from the complaining signatory or on imports from the complaining signatory into the third market concerned;
- (b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining signatory to another country or countries;
- (c) natural disasters, strikes, transport disruptions or other force majeure substantially affecting production, qualities, quantities or prices of the product available for exports from the complaining signatory;

⁸ The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either the General Agreement or this Agreement.

- (d) existence of arrangements limiting exports from the complaining signatory;
- (e) voluntary decrease in the availability for export of the product concerned from the complaining signatory (including, inter alia, a situation where firms in the complaining country have been autonomously reallocating exports of this product to new markets);
- (f) failure to conform to standards and other regulatory requirements in the importing country.

Article 7

Remedies

7.1 Whenever a signatory has reason to believe that any subsidy, referred to in Article 3, granted or maintained by another signatory results in injury to its domestic industry, nullification or impairment or serious prejudice to its trade and production interests, such signatory may request consultations with such other signatory.

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

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

7.4 If a mutually acceptable solution has not been reached within sixty days of the request for consultations, any signatory party to such consultations may refer the matter to the Committee.

7.5 The Committee shall, upon request, review the matter referred to it and shall present its conclusions within 120 days.

7.6 In any case in which it is determined by the Committee that any subsidy has resulted in adverse effects to the interests of another signatory within the meaning of Article 5 of this Agreement, the signatory granting or maintaining such a subsidy shall take appropriate steps to remove such adverse effects or shall withdraw the subsidy. If no such steps are taken within the period of [X] months, and in the absence of agreement on compensation, the Committee shall authorize the affected signatory to take countermeasures, commensurate with the degree and nature of adverse effects determined to exist.

PART III: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of non-actionable subsidies

Signatories agree that the following shall be considered as non-actionable:

- (a) measures which are de jure generally available within the territory of a signatory and which are not deemed to be specific in fact within the meaning of Article 4 above,
- (b) subsidies as defined in Article 3.1 above, which meet all of the following conditions:

- (i) they are granted for one of the following purposes:

- regional development (generally available to enterprises or industries within designated geographic area or designated exclusively to offset geographical disadvantages)
- research and development (taking place prior to the stage of industrial or commercial exploitations and the results of which are published and may be utilized without restriction)
- environmental protection (limited to compensation aids)
- employment adjustment assistance provided to workers;

and

- (ii) they are granted for a strictly defined period, not exceeding [X] years, and, where applicable, they are degressive;

and

- (iii) they have been notified in advance of their implementation to the Committee as proposed for non-actionability, with detailed information on all items contained in the questionnaire on subsidies (reproduced on pages 193-194 of the BISD, Ninth Supplement);

and

- (iv) no signatory has objected in writing to the Committee, within one month of the date of the notification, to their proposed non-actionability, demonstrating that the notified subsidies will have adverse effects (i.e. injury, nullification or impairment or serious prejudice) to its trade interests, and provided that the Committee has not rejected such objection.

Article 9

Special "safeguard" procedures

9.1 If, in the course of implementation of a programme referred to in Article 8(b) above, a signatory determines that this programme has resulted in serious and long-lasting adverse effects to its trade or production interests, such signatory may request consultations with such other signatory.

9.2 A request for consultations under paragraph 1 above shall include (a) a statement of evidence with regard to the injury caused by the non-actionable subsidy to the domestic industry or serious prejudice to the interests of the signatory requesting consultations and (b) an explanation as to why the adverse effects are of a long-lasting nature. Such adverse effects shall be demonstrated by positive evidence, through an economic examination of the impact on trade or production of the requesting signatory.

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

9.4 If, as a result of consultations, no mutually acceptable solution has been reached within 60 days of the request for consultations, the requesting signatory may refer the matter to the Committee.

9.5 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of serious and long-lasting adverse effects. If the Committee determines that the non-actionable subsidy has resulted in serious and long-lasting adverse effects, it may recommend to the subsidizing signatory to modify this programme in such a way as to remove those effects. In the event the recommendation is not followed, the Committee shall authorize the requesting signatory to take appropriate countermeasures commensurate with the nature and degree of the long-lasting adverse effects determined to exist. The Committee shall not authorize countermeasures which would clearly go beyond what is necessary to offset such adverse effects. The decision shall be taken not later than 120 days after the matter has been referred to the Committee.

PART IV: COUNTERVAILING MEASURES

Article 10

Application of Article VI of the General Agreement⁹

Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty¹⁰ on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement.

Article 11

Initiation and subsequent investigation

11.1 Countervailing duties may only be imposed pursuant to investigations initiated¹¹ and conducted in accordance with the provisions of this Agreement. An investigation to determine the existence, degree and effect of any alleged subsidy shall normally be initiated upon a written request by or on behalf of the industry¹² affected. The request shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Agreement¹³, and (c) a causal link between the subsidized imports and the alleged injury. Before initiating an

⁹ The provisions of Parts I and II and Part IV of this Agreement may be invoked in parallel: however, with regard to the effects of a particular subsidy in the domestic market of the importing country, only one form of relief (either a countervailing duty or a countermeasure under Articles 2 or 7 of this Agreement) shall be available. The provisions of Part IV may not be invoked regarding measures considered non-actionable in accordance with the provisions of Part III of this Agreement.

¹⁰ The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of off-setting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of the General Agreement.

¹¹ The term "initiated" as used hereinafter means procedural action by which a signatory formally commences an investigation as provided in paragraph 4 of this Article.

¹² As defined in Article 16

¹³ 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 Article 15.

investigation, the authorities concerned shall satisfy themselves on the basis of positive evidence that the request is supported by the domestic industry. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) through (c) above.

11.2 A request within the meaning of paragraph 1 shall in particular contain such evidence which can reasonably be expected to be available to the complainant on the following: (a) identity of the complainant and of the domestic industry on whose behalf the complaint is lodged, (b) evidence that the request is supported by the domestic industry, (c) available evidence with regard to the existence, amount and nature of the subsidy in question, (d) volume and prices of the allegedly subsidized imports and their effect on the affected domestic industry, as demonstrated by developments in production, capacity utilization, sales, sales prices, stocks, consumption, market shares, profits or losses, and employment, and (e) evidence that any alleged material injury to a domestic industry is caused by subsidized imports, through the effects of subsidies, and not by other factors.

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

11.4 The competent authorities shall review the adequacy of the evidence provided in the request for the initiation of an investigation in light of any relevant and readily available information and determine whether the evidence is sufficient to justify the opening of an investigation. In determining whether to initiate an investigation, the competent authorities should take into account the position adopted by the affiliates of a complainant party¹⁴ which are resident in the territory of another signatory.

11.5 Upon initiation of an investigation and thereafter, the evidence referred to in paragraph 11.1(a)-(c) above should be considered simultaneously. In any event the evidence of points (a) through (c) shall be considered simultaneously (a) in the decision whether or not to initiate an investigation and (b) thereafter during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

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

¹⁴ For the purpose of this Agreement "party" means any natural or juridical person resident in the territory of any signatory.

11.7 An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There should be immediate termination in cases where the amount of a subsidy or the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be negligible if the subsidy is less than ... per cent ad valorem. The volume of the subsidized imports shall be considered negligible if this volume represents less than ... per cent of the domestic market for the like product in the importing country, unless imports from countries whose individual market shares represent less than ... per cent collectively account for more than ... per cent of the domestic market for the like product in the importing country.

11.8 An investigation shall not hinder the procedure of customs clearance.

11.9 Investigations shall, except in special circumstances, be concluded within one year after their initiation.

Article 12

Evidence

12.1 Interested signatories and interested parties¹⁵ shall be given ample opportunity to present in writing all information and argument that they consider relevant in respect of the investigation in question. Taking account of the need to protect confidential information, written information and argument submitted by one interested signatory or interested party shall be made available promptly to other interested signatories or interested parties participating in the investigation. Interested signatories and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were submitted in writing to this authority and which were available to interested signatories and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

¹⁵ Any "interested signatory" or "interested party" shall refer to a signatory or a party economically affected by the subsidy in question.

12.2 Respondents to a countervailing duty questionnaire shall be given at least thirty days for reply. As a general rule, the time-limit for exporters should 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 day on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting country. Due consideration should be given to any request for an extension of the thirty day period and, upon case shown, such an extension should be granted whenever possible.

12.3 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 he 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 investigating authorities. Such information shall not¹⁶ be disclosed without specific permission of the party submitting it. Investigating authorities shall either require parties providing confidential information to furnish non-confidential summaries thereof or shall prepare such summaries. Those summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In the event such parties indicate that such information is not susceptible of summary, a statement of reasons why summarization is not possible must be provided.

12.4 However, if the investigating authorities find that a request for confidentiality is not warranted and if the supplier of the information is unwilling to make¹⁷ the information public, the authorities may disregard such information.

12.5 The investigating authorities may carry out investigations in the territory of other signatories as required, provided that they have notified in good time the signatory in question and unless the latter objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the signatory in question is notified and does not object. The procedures set forth in Annex IV to this Agreement shall apply to investigations on the premises of a firm.

¹⁶ Signatories are aware that in the territory of certain signatories disclosure pursuant to a narrowly-drawn protective order may be required.

¹⁷ Signatories agree that requests for confidentiality should not be arbitrarily rejected.

12.6 In cases in which any interested party or signatory refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations¹⁸, affirmative or negative, may be made on the basis of the facts available.

12.7 Before final determinations are made, investigating authorities shall inform all interested parties of the essential facts and considerations on the basis of which it is intended to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

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

Article 13

Consultations

13.1 As soon as possible after a request for initiation of an investigation is accepted, and in any event before the initiation of any investigation, signatories the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in Article 11:1 above and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, signatories the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.¹⁹

¹⁸Because of different terms used under different systems in various countries the term "determination" is hereinafter used to mean a formal decision or finding.

¹⁹It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Parts I and II of this Agreement.

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

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

Article 14

Criteria for the calculation of the amount of a subsidy

[To be added]

Article 15

Determination of injury

15.1 A determination of injury for purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products²⁰ and (b) the consequent impact of these imports on the domestic industry concerned.

15.2 With regard to the volume of subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing signatory. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been significant price undercutting by the subsidized

²⁰ Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration or in the absence of such a product, another product which although not alike in all respects, has both physical, technical and/or chemical characteristics and applications or uses closely resembling those of the product under consideration.

imports as compared with prices of the like domestic product, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, that otherwise would have occurred to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess effects of such imports only if they determine that (1) the amount of subsidization established in relation to the imports from each supplier is more than de minimis and that the volume of imports from each country is not negligible as defined in Article 11.7 and (2) that a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact 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 such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects²¹ of subsidies, causing injury within the meaning of this Agreement. The authorities shall consider whether there are other factors²² which at the same time are injuring the domestic industry and the injuries caused by other factors must not be attributed to the subsidized imports. Determinations of injury shall contain explanations of how the authorities have considered such other factors.

²¹ As set forth in paragraphs 2 and 4 of this Article.

²² Such factors can include inter alia, the volume and prices of non-subsidized imports of the product in question, contraction in demand or changes in the pattern of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

15.6 A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding threat of material injury, the investigating authorities should consider, inter alia, such factors as: nature of subsidy in question and the trade effects likely to rise therefrom; a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importations thereof; sufficient freely disposable capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing country's market taking into account the availability of other export markets to absorb any additional exports; whether exports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further exports; and inventories in the importing country of the product being investigated. It is understood that no one of these factors by itself can necessarily give decisive guidance but that the totality of factors considered must lead to the conclusion that further subsidized imports are imminent and that unless protective action is taken, material injury would occur.

15.7 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realization, profits. When the domestic production of the like product has no separate identity in these terms the effects of subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

Article 16

Domestic industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 3 below, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related²³ to the exporters or importers or are themselves

²³ For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

importers of the allegedly subsidized product or a like product from other countries, "domestic industry" may be interpreted as referring to the rest of the producers. The term "major proportion" shall be interpreted as meaning at least [x] per cent by value of the total domestic production of the like product.

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

16.3 When the industry has been interpreted as referring to the producers in a certain area, as defined in paragraph 3 above, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing signatory does not permit the levying of countervailing duties on such a basis, the importing signatory may levy the countervailing duties without limitation, only if (a) the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 19 of this Agreement, and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

16.4 Where two or more countries have reached under the provisions of Article XXIV:8(a) of the General Agreement 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 industry referred to in paragraphs 1 and 2 above.

Article 17

Imposition of countervailing duties

17.1 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less are decisions to be made by the authorities of the importing signatory. It is desirable that the imposition should be permissive in the territory of all signatories, that the duty should be less than the total amount of the subsidy if such lesser

duty would be adequate to remove injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties²⁴ whose interests might be adversely affected by the imposition of a countervailing duty.

17.2 No countervailing duty shall be levied²⁵ on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

17.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and to be causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to co-operate, shall be entitled to an expedited investigation in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter or exempt the exporter from the application of such duty. Any such expedited investigation shall be concluded within X months after the date on which a request for such investigation was made.

17.4 If, after reasonable efforts have been made to complete consultations, a signatory makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this section unless the subsidy is withdrawn.

Article 18

Provisional measures and retroactivity

18.1 Provisional measures shall not be applied unless a formal investigation has been initiated and a notice published to that effect and interested signatories and interested parties have been given adequate

²⁴ For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

²⁵ As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax. This definition is without prejudice to the meaning of the term "levy" in Article VI of the General Agreement.

opportunities to submit information and make comments. Provisional measures may be taken only after a preliminary affirmative determination has been made that a subsidy exists and that there is material injury or threat thereof, to a domestic industry caused by subsidized imports. Provisional measures shall not be applied unless the authorities concerned judge that they are necessary to prevent injury being caused during the period of investigation. Provisional measures shall normally not be applied sooner than [X] days from the date of the initiation of the investigation.

18.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

18.3 The imposition of provisional measures shall be limited to as short a period as possible, not exceeding four months.

18.4 The relevant provisions of Article 17 shall be followed in the imposition of provisional measures.

18.5 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 threat of injury where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

18.6 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

18.7 Except as provided in paragraph 5 above, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

18.8 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.

18.9 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of the General Agreement and of this Agreement and where it is deemed necessary,

in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than ninety days prior to the date of application of provisional measures.

Article 19

Undertakings

- 19.1 (a) Proceedings may²⁶ be suspended or terminated without the imposition of provisional measures or countervailing duties, if undertakings are accepted under which:
- (i) the government of the exporting country agrees to eliminate or limit the subsidy or take other measures concerning its effects; or
 - (ii) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under undertakings shall not be higher than necessary to eliminate the amount of the subsidy. Price undertakings shall not be sought or accepted from exporters unless the importing signatory has first (1) initiated an investigation in accordance with the provisions of Article 11 of this Agreement, (2) made determinations of subsidy and injury resulting therefrom based on sufficient evidence resulting from such an investigation and (3) obtained the consent of the exporting signatory. Undertakings offered need not be accepted if the authorities of the importing signatory consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons.
- (b) If the undertakings are accepted, the investigation of injury shall nevertheless be completed if the exporting signatory so desires or the importing signatory so decides. In such a case, if a determination of no injury or threat thereof is made, the undertaking shall automatically lapse, except in cases where a determination of no threat of injury is due in large part to the existence of an undertaking; in such cases the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement.

²⁶The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings, except as provided in paragraph (b) of this Article.

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

19.2 Authorities of an importing signatory may require any government or exporter from whom undertakings have been accepted to provide periodically information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data. In case of violation of undertakings, the authorities of the importing signatory may take expeditious actions under this Agreement in conformity with its provisions 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 goods entered for consumption not more than ninety 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.

19.3 Undertakings shall not remain in force any longer than countervailing duties could remain in force under this Agreement. The authorities of an importing signatory shall review the need for the continuation of any undertaking, where warranted, on their own initiative, or if interested exporters or importers of the product in question so request and submit positive information substantiating the need for such review.

Article 20

Duration of countervailing duties

20.1 A countervailing duty shall remain in force only as long as, and to the extent necessary to counteract the subsidization which is causing injury. The investigating authorities shall review the need for continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review.

20.2 Notwithstanding the provisions of paragraph 20.1, every countervailing duty shall be terminated within 5 years of its imposition unless the investigating authorities determine on the basis of a review that there is "good cause" for the continuation of the duty, after all interested parties have had a full opportunity to present their views.

Article 21

Measures to prevent circumvention

21.1 Where, following the entry into force of a countervailing duty imposed in accordance with this Agreement:

- (i) parts and components are shipped from the country covered by the countervailing duty finding to the importing country for assembly or completion into a product covered by the countervailing duty finding, and the value of the parts and components imported from the country subject to the countervailing duty finding is equal to or exceeds [X] per cent of the total value of the assembled or finished product; or
- (ii) parts and components are shipped from the country covered by the countervailing duty finding to a third country for assembly or completion into the product covered by the countervailing duty finding, which is then exported to the importing country, and the value of the parts and components imported from the country subject to the countervailing duty finding is equal to or exceeds [X] per cent of the total value of the assembled or finished product;

Signatories may apply the measures specified in paragraphs 4 and 5 below, subject to the conditions set forth in paragraphs 2 and 3 of this Article.

21.2 In the case referred to in subparagraph 1(i) investigating authorities should satisfy themselves that: (i) imports of the parts or components have increased since the issuance of the countervailing duty measure; (ii) the exporter of the parts or components, the producer covered by the countervailing duty measure, and the assembler in the importing country are related parties; (iii) the most significant parts or components are being shipped to the importing country for assembly or completion, and (iv) the assembly or completion process was started or substantially expanded since the issuance of the countervailing duty measure.

21.3 In the case referred to in subparagraph 1(ii) investigating authorities should satisfy themselves that: (i) shipments of the parts or components to the third country have increased since the issuance of the countervailing duty measure; (ii) exports to the importing country of the merchandise assembled or completed in the third country have increased since the issuance of the countervailing duty measure; (iii) the exporter of the parts or components, the producer covered by the countervailing duty measure, and the assembler or finisher in the third country are related parties; (iv) the most significant parts or components are being shipped to the third country for assembly or completion, and (v) the assembly or completion process was started or substantially expanded since the issuance of the countervailing duty measure.

21.4 In a situation as described in subparagraph 1(i) the authorities concerned may, if the conditions set forth in paragraph 2 are fulfilled, take the following action:

[To be added]

21.5 In a situation as described in subparagraph 1(ii), the authorities concerned may, if the conditions set forth in paragraph 3 are fulfilled, take the following action:

[To be added]

21.6 For the purpose of calculation of the rate and amount of duties which may be applied pursuant to paragraph 4 and 5, the following rules shall apply:

[To be added]

21.7 For the purpose of this Article the term "related parties" shall be interpreted to mean:

[To be added]

21.8 Measures authorized under this Article shall be taken only if the authorities concerned have carried out formal investigations. The provisions of this Agreement concerning initiation of investigations, rights of interested parties and public notice shall apply mutatis mutandis to investigations carried out under this Article.

Article 22

Public Notice and Explanation of Countervailing Duty Determinations

22.1 When the investigating authorities are satisfied that there is sufficient evidence to justify initiating an investigation, the signatory or signatories, the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein and the complainants shall be notified and a public notice shall be given.

22.2 Investigating authorities shall provide the full text of the complaint to the exporters²⁷ and to the authorities of the exporting country and make it available, upon request, to the importers and other interested parties

²⁷ It being understood that where there are numerous exporters, the full text of the complaint should instead be provided only to the authorities of the exporting country or to the relevant trade association who then should forward copies to the exporters concerned.

involved as soon as a decision has been made to open an investigation, due regard being paid to the requirement for the protection of confidential information. In cases where confidential information is provided in the complaint, investigating authorities shall require a non-confidential summary of such information in the non-confidential copy. The possibility of not providing a summary of confidential information shall be confined to extremely exceptional cases and in such cases the parties providing confidential information shall fully explain the reasons therefor. Investigating authorities shall avoid, unless a decision has been made to open an investigation, any publicizing of the complaint or its release.

22.3 A public notice of the initiation of an investigation shall contain adequate information on the following: (i) the name of the exporting country and the product involved, (ii) the date of initiation of the investigation, (iii) a description of the subsidy practice or practices to be investigated, (iv) a summary of the factors which have led to the allegation of injury, (v) the address to which representations by interested parties should be directed and (iv) the time-limits allowed to interested parties for making their views known.

22.4 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 19, of the termination of such an undertaking, and of the revocation of a determination. Each such notice shall set forth the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities in sufficient detail. All such notices shall be forwarded to the signatory or signatories the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

22.5 A public notice of the imposition of provisional measures shall set forth adequate reasons for the preliminary determinations on the existence of a subsidy and injury (insofar as there is no separate preliminary injury determination and a notice thereof) and shall refer to the matters of fact and law which have led to arguments being accepted or rejected, due regard being paid to the requirement for the protection of confidential information, and in particular: (1) the names of the suppliers or when this is impracticable, the supplying countries involved; (ii) a description of the product which is sufficient for customs purposes; (iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined; (iv) factors which have led to the injury determination including factors other than subsidized imports which have been taken into account when the injury determination is made, insofar as there is no separate notice concerning such injury determination and including such information; (v) the main reasons leading to the determination.

22.6 A notice of suspension or conclusion of an investigation in the case of an affirmative determination involving the imposition of a definitive duty or the acceptance of an undertaking shall contain all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or to the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information, and in particular: (i) the names of the suppliers or when this is impracticable, the supplying countries involved; (ii) a description of the product, which is sufficient for customs purposes; (iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined; (iv) factors which have led to the injury determination including information on factors other than dumping which have been taken into account when the injury determination is made, insofar as there is no separate notice concerning such injury determination and including such information; (v) the main reasons leading to the determination, (vi) the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers.

22.7 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 19 shall include the non-confidential part of the undertaking.

22.8 The provisions of this Article concerning publication and notification of interested parties shall apply mutatis mutandis to the initiation and completion of administrative reviews pursuant to Article 20 and to decisions under Article 18 to apply duties retroactively.

Article 23

Judicial Review

Each signatory shall maintain juridical, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative action relating to final determinations and reviews of determinations within the meaning of Articles ... of this Agreement. Such tribunals or procedures shall be independent of the authority responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative action with access to review.

PART V

Article 24

Committee on Subsidies and Countervailing Measures
and other subsidiary bodies

24.1 There shall be established under this Agreement a Committee on Subsidies and Countervailing Measures composed of representatives from each of the signatories to this Agreement. 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 signatory. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the signatories and it shall afford signatories the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The GATT secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will rotate every year. The Committee may request the Group of Experts to prepare a proposed ruling on the existence of a prohibited subsidy, as provided for in Article 2.6 above. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The Group of Experts may be consulted by any signatory and give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that signatory. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7 of this Agreement.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a signatory, it shall inform the signatory involved.

PART VI

NOTIFICATION AND SURVEILLANCE

Article 25

Notifications

25.1 Signatories agree that, without prejudice to the provision of Article XVI:1 of the General Agreement, their notifications of subsidies shall be submitted not later than ... of each year and shall conform to the provisions of paragraphs 25.2-25.6.

25.2 Signatories shall notify any subsidy as defined in Article 3:1 above, granted or maintained within their territory.

25.3 The content of notifications should be sufficiently specific to enable other signatories to evaluate the trade effects and to understand the operation of notified subsidies programmes. In this connection and without prejudice to the contents and form of the questionnaire on subsidies^{28,*}, signatories shall ensure that their notifications contain the following information:

- (i) form of a subsidy (i.e. grant, loan, tax concession, etc.);
- (ii) subsidy per unit or, in cases where it is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);
- (iii) policy objective and/or purpose of a subsidy;
- (iv) duration of a subsidy and/or any other time-limits attached to it;
- (v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 25.3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

²⁸ BISD, 9S/193-194 and BISD, 11S/58.

* The Group may wish to address the contents and form of the questionnaire.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sectors.

25.6 Signatories which consider that there are not measures or schemes in their countries requiring notification under Article XVI:1 shall so inform the GATT secretariat in writing.

25.7 Signatories recognize that notification of a measure does not prejudice either its legal status under the General Agreement and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any signatory may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another signatory (including any subsidy referred to in Part III above), or for explanation of the reasons for which a specific measure has been considered as not notifiable.

25.9 Signatories so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting signatory. In particular they shall provide sufficient details to enable the other signatory to assess their compliance with the terms of this Agreement. Any signatory which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any interested signatory which considers that any practice of another signatory having the effects of a subsidy has not been notified in accordance with the provisions of Article XVI:1 of the General Agreement may bring the matter to the attention of such other signatory. If the subsidy practice is not thereafter notified promptly, such signatory may itself bring the subsidy practice in question to the notice of the Committee.

25.11 Signatories shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports will be available in the GATT secretariat for inspection by government representatives. The signatories shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months.

Article 26

Surveillance

26.1 The Committee shall examine new and full notifications submitted under Article XVI:1 of the General Agreement and Article 25:1 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under Article 25.11 above at each regular meeting of the Committee. The semi-annual reports shall be submitted on an agreed standard form.

PART VII: SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

PART VIII: TRANSITIONAL ARRANGEMENTS

PART IX: DISPUTE SETTLEMENT

PART X: FINAL PROVISIONS

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

- (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
- (b) Currency retention schemes or any similar practices which involve a bonus on exports.
- (c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.
- (d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available¹ on world markets to their exporters.
- (e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes² or social welfare charges paid or payable by industrial or commercial enterprises.³
- (f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.
- (g) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes² in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.
- (h) The exemption, remission or deferral of prior stage cumulative indirect taxes¹ on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowance for waste) in the exported product.⁴ This item shall be interpreted in accordance with the guidelines on physical incorporation contained in Annex 2.

- (i) The remission or drawback of import charges² in excess of those levied on imported goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on physical incorporation contained in Annex 2 and the guidelines in the determination of substitution drawback systems as export subsidies, contained in Annex III.
- (j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.
- (k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

- (l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement.

NOTES

¹The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

²For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes.

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

³The signatories recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The signatories reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any signatory may draw the attention of another signatory to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the signatories shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of signatories under the General Agreement, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a signatory from taking measures to avoid the double taxation of foreign source income earned by its enterprises or the enterprises of another signatory.

⁴Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

ANNEX II

GUIDELINES ON PHYSICAL INCORPORATION

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior stage cumulative indirect taxes levied on goods that are physically incorporated (making normal allowance for waste) in the exported product. Similarly, drawback schemes can allow for the remission or drawback of import charges levied on goods which are physically incorporated (making normal allowance for waste) in the exported product.

2. The Illustrative List of Export Subsidies annexed to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement (the Code) makes reference to the term "physically incorporated" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior stage cumulative indirect taxes in excess of the amount of such taxes actually levied on goods physically incorporated in the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on goods that are physically incorporated in the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding physical incorporation. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are physically incorporated, as part of a countervailing duty investigation pursuant to the Code, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs physically incorporated, the investigating authorities should first determine whether the government of the exporting country has a place and applies a system or procedure to confirm which inputs are physically incorporated and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with Article 2:8 of the Code, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting country based on the actual products involved would need to be carried out in the context of determining whether an excess payment occurred. If the importing country deemed it necessary, a further examination would be carried out in accordance with paragraph 1 above.

3.* Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The signatories note that an input need not be present in the final product in the same form in which it entered the production process.

4.* In determining the amount of a particular input which is physically incorporated, a "normal allowance for waste" should be taken into account, and such waste should be treated as physically incorporated. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not physically present in the final product (for reasons such as inefficiencies) and is not recovered, used nor sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting country have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

*With respect to inputs, such as catalysts, which are consumed in the course of their use to obtain the exported product and which are not mere aids to manufacture, the relationship between signatories rights to grant remission or drawback of import charges in accordance with the rules laid down in the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention) and its annexes and paragraphs 3 and 4 of these guidelines was not decided.

ANNEX III

Guidelines in the Determination of Substitution
Drawback Systems as Export Subsidies

I

Drawback systems can allow for the refund or drawback of import charges on goods which are incorporated into another product and where the export of this latter product contains domestic goods having the same quality and characteristics as those substituted for the imported goods. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies annexed to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Code) substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported goods for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to the Coee, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market goods may be substituted for imported goods in the production of a product for export provided such goods are equal in quantity to, and have the same quality and characteristics as, the imported goods being substituted. the existence of a verification system or procedure is important because it enables the government of the exporting country to ensure and demonstrate that the quantity of goods for which drawback is claimed does not exceed the quantity of similar goods exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported goods in question.
2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting country has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with Article 2:8 of the Code, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting country based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the importing country deemed it necessary a further examination would be carried out in accordance with paragraph 2 above.

4. The existence of a substitution drawback provision where in exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

ANNEX IV

Procedures for on-the-spot investigations pursuant to Article 12.5

- (a) upon initiation of an investigation, the authorities of the exporting country and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations;
- (b) if in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting country should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.
- (c) it should be standard practice to obtain explicit agreement of the firms concerned in the exporting country before the visit is finally scheduled;
- (d) as soon as the agreement of the firms concerned has been obtained the investigating authorities should notify the authorities of the exporting country of the names and addresses of the firms to be visited and the dates agreed.
- (e) sufficient advance notice should be given to the firms in question before the visit is made;
- (f) visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made, provided the authorities of the importing country notify the representatives of the government of the country in question and unless the latter do not object to the visit;
- (g) 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 country 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;
- (h) enquiries or questions put by the authorities or firms of the exporting countries and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.