

Eriador – Measures affecting the electricity sector

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1. The Case (including clarifications)

1. Eriador is a major industrialised country, and a Member of the WTO, which is actively seeking to limit its dependence on fossil fuels, and to move its economy towards full reliance on sustainable and renewable energy sources. It is a party to the Framework Convention on the Promotion of Renewable Energy 2010 ('FCPRE'), a large multilateral treaty with 173 states parties. 145 countries are both WTO Members and states parties to the FCPRE. The Preamble to the FCPRE reads:

Recognising that existing global energy markets are distorted, due to the failure of such markets to internalise the full cost of carbon,

while Article 11 requires each States party to 'use all available means to encourage the rapid development of renewable energy, with a view to ensuring that at least half of its population's energy needs are met by renewable energy suppliers by 2020'.

2. Electricity generation facilities in Eriador are all privately owned, and include plants representing a wide range of generation technologies (coal, natural gas, nuclear, solar, wind, tidal, hydro). These electricity generators, as well as some foreign suppliers, sell their energy to the Eriadorian Electricity Corporation (EEC), a government agency whose function is to administer the day-to-day functioning of the grid in the interests of stability and efficiency. The EEC then sells the energy directly to consumers. The EEC is under an obligation to ensure that a specified (and gradually increasing) proportion of the electricity it purchases is generated from renewable sources. In 2015, the mandated proportion was 30%, and the actually achieved proportion was 41%. The actually achieved percentage of electricity produced from renewable sources has never fallen below the mandated percentage.

3. Prices at the wholesale level are set by a combination of long-term contracts of 20 to 30 years duration (accounting for one third of supply), medium-term contracts of 5 to 15 years duration (accounting for another third), and spot market transactions for the remainder. Contracts are awarded through open competitive tendering processes. Prices in spot markets are set via the auction method. Electricity producers have always been treated equally by the EEC in its award of general contracts, and the standard terms remain the same, regardless of the source of their electricity. As to dispatch, the general situation is that generation facilities are dispatched in order of their variable operating costs, from lowest to highest cost as electricity demand increases.

4. CleanTech is a large technology company based in Eriador, which specialises in the development and commercialisation of cutting edge, innovative technologies for the renewable energy sector.

5. For many years, CleanTech has been conducting research into cold fusion, a means of producing energy through nuclear reaction at, or close to, room temperature, without the toxic by-products associated with current nuclear (fission) technology. Cold fusion is a carbon-free (or essentially carbon-free) process for the production of electricity. This research has been very successful. In just over a decade, CleanTech managed to develop cold fusion technology close to the point of commercialisation, most significantly through the invention of the Fusillscope, a revolutionary device which enables users temporarily to overcome repulsive forces between atomic particles, at comparatively low energy cost. While the capital costs of Fusillscopes are very high (higher than for solar energy), Fusillscopes have relatively low variable operating costs

(lower than for solar), can be more easily aggregated into generation facilities of much higher capacity than solar, and are flexible enough to provide base-, intermediate- and peak-load electricity as required.

6. In 2008, CleanTech established a production facility for the Fusillscope. Initially, it sought funds for this project from private investors, but was unsuccessful due to the project's extremely high risk profile, the unproven nature of the technology, uncertainty concerning the anticipated costs of electricity generation using the technology, and the huge capital investment needed. Instead, it obtained a \$750m loan on favourable terms from Eribank, an entity majority owned by the Eriadorian state. Eribank is governed by a board of directors appointed by the Eriadorian Ministry of Commerce, but with each appointee acting in his or her independent capacity. (Historically, the appointed directors have had a mix of backgrounds, some from the public sector, some from the private sector. There are no formal criteria for their appointment, and appointments are considered in the usual manner, by reference to the qualifications and experience of the candidate, and the needs of the organisation.) It is run largely on a commercial basis, but by its constitution is required to conduct its business 'having regard to the strategic policy priorities of the Eriadorian state' and 'in consultation, as appropriate, with relevant government ministries'. Eribank typically, but not always, follows the advice of the Eriadorian government when it supports the grant of a loan. In the case of the loan to CleanTech, Eribank consulted with the Eriadorian Ministry of the Environment as to their view of the commercial viability of this new technology, as well as its significance for Eriadorian economy generally. The Ministry of the Environment expressly supported the loan, while acknowledging that the final decision whether or not to grant it was for Eribank itself. Eribank is also, separately, used on occasion as the vehicle through which the Eriadorian government disburses funds to Eriadorian businesses under government grant programs.

7. CleanTech used the money provided by Eribank to construct the production facility. Over the next 12 months, CleanTech perfected its production process, made minor amendments to the design of the Fusillscope, and developed relationships with potential users of the technology, as it prepared this division of its business for sale. Then, in early 2009, CleanTech sold the entire Fusillscope business – including the production facility, as well as all intellectual property rights to the technology – to Future Energy, a company incorporated in Eriador, whose core business is the construction and operation of power plants in Eriador. Future Energy has been operating in the Eriadorian market for some years. It is unrelated to CleanTech, and the purchase of the Fusillscope business was at a price which reflected its full market value, as certified by an independent auditor.

8. Future Energy quickly integrated the Fusillscope into its domestic power generation facilities, and also began selling the Fusillscope to electricity suppliers operating in foreign markets. To safeguard its position as market leader in the commercialisation of cold fusion technology in Eriador, Future Energy does not sell, and is not willing to sell, Fusillscopes to any electricity producers which compete, or may potentially compete, with it in the Eriadorian electricity market.

9. However, it soon became clear that the costs of producing electricity using the Fusillscope were considerably higher than the wholesale price of electricity in the Eriadorian electricity market. It consequently turned to the Eriadorian government for assistance.

10. Convinced of the long term viability of this technology, and of the potential significance of exports of Fusillscopes for the Eriadorian economy, Future Energy was

awarded a \$500m grant under the Eriadorian government's 'Innovation for the Future' program. Open to any business operating in any sector of the Eriadorian economy, this program seeks to provide financial assistance to projects which promise to make a significant contribution to the sustainable growth and global integration of the Eriadorian economy. When firms apply for grants under this scheme, they typically provide information concerning the track record of the company so far, its plans for the future emphasizing its contribution to the goals of the program, and its specific plans for the grant money sought. The Eriadorian government considers all applications by reference to the criteria of whether and to what extent they are likely to 'make a significant contribution to the sustainable growth and global integration of the Eriadorian economy', and makes awards to those projects which in its view are most likely to make the most significant contributions to those objectives. Different sized grants are awarded to different successful candidates, based on the request made, the business plan on which the request is founded, and the judgment of the Eriadorian government as to amount which ought to be awarded. Funds are disbursed in full to successful applicants as soon as an award is made. The overall budget of the grant program is not formally limited. While the regulations establishing this grant program does not contain a formal allocation of a certain amount of funds to any particular sector or industry, over the five years it has been running, 90% of funds disbursed under this scheme have gone to companies operating in the renewable energy sector. (The applicant pool was broadly representative of the Eriadorian economy as a whole – that is, the share of applicants from different industries broadly reflected each industry's share of the Eriadorian economy. Even the highest estimates have the renewable energy sector representing significantly less than 5% of the highly diversified Eriadorian economy.) Future Energy's grant was awarded and disbursed in early 2010. The grant itself contained no formal legal conditions pertaining to export performance. It did not require Future Energy to spend the grant money on a new production facility for Fusilliscopes, though Future Energy did make clear that this was a major part of its plan in the application it made for the grant. The grant was disbursed directly by the Eriadorian government, not by Eribank.

11. In addition, at the same time, the Eriadorian government implemented a new feed-in-tariff scheme to increase the supply of electricity from cold fusion, pursuant to a Direction from the Ministry of Commerce in the exercise of its statutory authority. Participants in the scheme are awarded contracts with the EEC, containing the same standard terms, and of the same duration, as long term purchase agreements between the EEC and other providers of both renewable and non-renewable energy. The only salient difference is the price offered. Under this scheme, Future Energy was awarded a long term purchase agreement with EEC, under which EEC would pay a guaranteed price to Future Energy, for all electricity generated and delivered into the grid from its cold fusion plants, for a period of 30 years. The guaranteed price under the contract was set according to the following formula:

$$C = M + X*Y$$

where C is the daily contract price for each unit of electricity, M is the average unit wholesale electricity price in Eriador for that day, X is the average number of tons of carbon emitted in the production of one unit of electricity placed on the wholesale market, and Y is the true social cost of one ton of carbon, initially set at \$152/ton by an independent agency on the basis of peer-reviewed papers and international practice, but periodically reviewed. Under this formula as it operates in practice, the daily contract price received by Future Energy (C) is significantly higher than the average daily market price (M), typically by at least 10%. The formula was designed to ensure that the price paid to Future Energy closely approximates the 'true' cost of electricity –

namely, what the wholesale cost of electricity would be, if the full social costs of carbon were fully internalised. The Direction of the Ministry of Commerce establishing the scheme notes that it has been adopted in accordance with Eriador’s obligations under Article 11 of the FCPRE. In principle, this scheme is open to all suppliers of cold fusion energy (and only those suppliers), but in practice it only applies to Future Energy, as at present Future Energy is the only supplier operating in Eriador with that technology.

12. In the five years since these measures were put in place, Future Energy has significantly increased its market share in Eriador’s wholesale electricity market, from 2% in 2010 to 36% in 2015. (In 2010, Future Energy supplied 2% of the Eriadorian market, and essentially all of this came from non-renewable sources. This has remained unchanged from 2010-2015: it still supplies 2% of the market using non-renewable energy in 2015, and did so in all the intervening years. Thus, Future Energy’s entire increase in market share has come about as a result of increasing production of energy through cold fusion.) Future Energy has also built several more generation facilities using cold fusion technology, and sells all its energy from them into the grid under the terms of the long term contractual agreement outlined above. In addition, it has spent \$500m constructing and commissioning an additional production facility for Fusilliscopes, which has allowed it massively to expand its export sales of Fusilliscopes. The production facility was designed, built and commissioned over 2010-11, and became operational at full capacity in 2012. It would not have been built were it not for the Innovation for the Future grant. Future Energy now exports this technology under licence to electricity producers in over 50 countries worldwide. It does not sell any Fusilliscopes domestically, in part because that may increase the number of suppliers competing for contracts under the government’s feed-in-tariff scheme.

13. Borduria is an industrialised country, and Member of the WTO, which shares a border with Eriador. Like Eriador, it is a party to the FCPRE. The Electrical grids of the two countries are interconnected, such that Bordurian electricity generators are able to transmit their electricity into the Eriadorian grid, and sell into the Eriadorian market. Borduria’s two primary electricity producers, and its only electricity exporters – both of whom still operate only traditional coal-fired power stations – have complained that their share of the wholesale electricity market in Eriador has declined precipitously since 2010, from 50% to just 23% in 2015, just as Future Energy’s market share has risen, in accordance with the following table.

Company	Nationality	Market Share
Future Energy	Eriador	2010: 2% 2011: 3% 2012: 15% 2013: 22% 2014: 29% 2015: 36%
Borduria Energy Corporation	Borduria	2010: 20% 2011: 20% 2012: 16% 2013: 14% 2014: 12% 2015: 11%
Electricity Borduria	Borduria	2010: 30% 2011: 30% 2012: 26% 2013: 21%

		2014: 17% 2015: 12%
Other	Eriador	2010: 46% 2011: 45% 2012: 41% 2013: 41% 2014: 41% 2015: 40%
Other	Other	2010: 2% 2011: 2% 2012: 2% 2013: 2% 2014: 1% 2015: 1%

Prior to 2010, both companies' market shares had been stable for a long time, at essentially the same levels as shown for 2010. No company other than Future Energy has gained market share in the period from 2010-2015, and the size of the overall market has stayed essentially stable over the period. Furthermore, the percentage of the Eriadorian market supplied by renewable energy other than cold fusion has also remained steady at 7% from 2010-2015. The Bordurian suppliers complain also that their contractual arrangements with the Eriadorian government for the wholesale supply of electricity into the Eriadorian grid have not been renewed, with five major contracts expiring in 2012, 2013 and 2014 (two for the Bordurian Energy Corporation, and three for Electricity Borduria). They note that in its Annual Reports of Operations, the EEC has reported that this was the direct result of the unexpectedly large size and costs of the long-term contracts put in place with Future Energy.

14. Borduria is also home to SolarTech, a world leading company specialising in the production and export of solar panels. In late 2012, it signed a Memorandum of Understanding with Elektrica, an electricity generation company based in the state of Carpathia (also a Member of the WTO), for the supply of 40,000 solar panel units on terms to be agreed. This was an important contract for SolarTech, as 40,000 units represents approximately 10% of its overall annual sales of solar panels. In addition, Elektrica is a strategic customer for SolarTech, as Elektrica is looking to expand its overall production of renewable energy considerably in the coming years. However, in 2013, Elektrica broke off negotiations in their final stages, informing SolarTech that they had been approached by Future Energy with an offer for the sale of Fusilliscopes at 50% of the price at which they would normally be sold, and as a result had decided on the basis of cost to refocus their investments away from the creation of new solar energy facilities, towards cold fusion, and to purchase Fusilliscopes from Future Energy. Future Energy regards the Carpathian market as of strategic interest, and wishes to establish a market-leading position in Carpathia as quickly as possible. It also believes that a large purchase of Fusilliscopes by Elektrica will reassure other potential purchasers that Fusilliscopes are a mature and reliable product. Future Energy felt able to offer such a large discount since its production costs for Fusilliscopes have fallen dramatically as a result of economies of scale achieved through the addition of the second production facility, and as a result of lessons learnt over the years since it started to manufacture Fusilliscopes.

Legal Claims

15. Borduria requests consultations with the government of Eriador, in respect of: (a) the loan by Eribank to CleanTech; (b) the FIT scheme, and the contract between EEC and Future Energy concluded pursuant to it; (c) the 'Innovation for the Future' grant to Future Energy. The Request was accompanied by a Statement of Available Evidence in the form required by Articles 4.2 and 7.2 of the *SCM Agreement*. During the course of these consultations, both parties agreed to proceed on the basis that electricity is a product, not a service. Eriador also made clear that, it does not contest that the Eribank loan would confer a benefit within the meaning of Article 1.1(b) if it were established that the loan was granted by a public body. The parties could not resolve their disagreement concerning the legal relevance to this dispute of the FCPRE.

16. Borduria considers that these measures constitute specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*, and claims that they are inconsistent with Eriador's obligations under that agreement as follows:

- a. that the 'Innovation for the Future' grant is inconsistent with Article 3.1(a) of the *SCM Agreement* because it is contingent in fact upon the export by Future Energy of equipment for renewable energy generation;
- b. that the loan by Eribank and the 'Innovation for the Future' grant, individually and cumulatively, cause serious prejudice to the interests of Borduria within the meaning of Article 5(c) of the *SCM Agreement* and Article XVI:1 of the GATT 1994, as they have resulted in lost sales of solar panels in the market for energy generation equipment in Carpathia within the meaning of Article 6.3(c) of the *SCM Agreement*;
- c. that the long term purchase agreement between Future Energy and EEC, concluded pursuant to the FIT Scheme, causes serious prejudice to the interests of Borduria within the meaning of Article 5(c) of the *SCM Agreement* and Article XVI:1 of the GATT 1994, as it has displaced and impeded imports of electricity from Borduria into Eriador within the meaning of Article 6.3(a) of the *SCM Agreement*.

2. Timeline

2008	Eribank loan granted to CleanTech. CleanTech establishes first production facility for Fusilliscopes.
2009	Early 2009, CleanTech sells Fusilliscope business to Future Energy. Future Energy begins production of Fusilliscopes for export, and production of electricity for Eriadorian market using cold fusion.
2010	Early 2010, Innovation for the Future grant awarded by the Eriadorian government to Future Energy
2010-11	Future Energy designs and builds a second production facility for Fusilliscopes.
2012	Future Energy FIT contract granted. Late 2012, MoU signed between Elektrica and SolarTech.
2013	Future Energy is awarded contract with Elektrica.
2011-2015	Over this period Future Energy also integrates Fusilliscopes into several more of its electricity generation facilities supplying the Eriadorian market.
2015	WTO dispute initiated.

3. Relative weight of claims

The following table indicates the recommended points which markers should assign to different claims and their elements. The higher the number, the more significant the issue, the more time teams will be expected to spend on it, and the more points should be awarded for good arguments made in relation to it. Where an issue is assigned a score of 0.5, this indicates that it is a relatively insignificant legal issue: points should be awarded for showing knowledge of the relevant legal tests, but brevity in respect of these points should be rewarded.

One difficulty concerns the points associated with GATT Article XX. It would be a perfectly reasonable decision for teams not to argue this point at all for strategic reasons, in their Eriadorian submission. It would be even more reasonable for the complainant not to raise it, since it is not for them to raise. In principle, teams should not be penalized for such strategic choices, and it is partly for that reason that we have kept the points assigned to this issue relatively low.

CONTENT

Claim (a)

Financial contribution	0.5
Benefit	0.5
Export contingency (including Article 2.3(a) contingency)	3

Claim (b)

Financial contribution	
<i>Eribank loan Article 1.1(a)(1)(i)</i>	3
<i>Eribank loan Article 1.1(a)(1)(iv)</i>	3
<i>IFF grant</i>	0.5

Benefit

<i>Eribank loan (extinction of benefit issue)</i>	3
<i>IFF grant</i>	0.5

Specificity

<i>Eribank loan</i>	0.5
<i>IFF grant</i>	2

Article 6.3(c): lost sales	3
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Claim (c)

Financial contribution	2
Benefit	5
Specificity	0.5
Article 6.3(a): displacement or impedance	2

GATT Article XX	2
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Systemic issue: the relevance of the FCPRE	3
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STRUCTURE, ORGANIZATION AND WEIGHTING	4
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CREATIVITY OF ARGUMENTATION	4
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CLARITY AND TONE OF WRITTEN EXPRESSION	4
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CORRECT USE OF LEGAL TERMINOLOGY, GRAMMAR ETC.	4
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TOTAL:	50
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4. The claims

[Note: written memoranda need not follow precisely the same structure as this memo. For example, teams may choose to organize by element (financial contribution, benefit, specificity, etc) and address each claim under those headings. They should not be penalized for this.]

4.1. Claim (a): The Innovation for the Future Grant as an export subsidy

4.1.1. Borduria's legal claim

Borduria claims that the 'Innovation for the Future' grant is inconsistent with Article 3.1(a) of the SCM Agreement because it is contingent in fact upon the export by Future Energy of equipment for renewable energy generation. In order to make out this claim, Borduria must in principle show that:

- there is a 'financial contribution by a government or any public body' or 'income or price support' within the meaning of SCM Article 1.1(a);
- a 'benefit' is thereby conferred within the meaning of SCM Article 1.1(b);
- the grant is 'contingent in law or in fact, whether solely or as one of several other conditions, upon export performance' within the meaning of SCM Article 3.1(a).¹

4.1.2. Financial contribution and benefit

The grant represents a 'financial contribution' under Article 1.1(a)(i), that it is given by a government (as it is directly disbursed by the Eriadorian government pursuant to statutory authority), and that giving a non-repayable grant to an enterprise confers a 'benefit' on that enterprise. All of these points should be conceded by Eriador, and Borduria should spend very little space laying out the legal standards for these points and showing they are met. The only question on which there should be meaningful argument is whether the grant is 'contingent in law or in fact, whether solely or as one of several other conditions, upon export performance'. As noted below in footnote 1, the question of specificity is tied to this question by virtue of Article 2.3.

4.1.3. Article 3.1(a): 'contingent in law or in fact ... upon export performance'

SCM Article 3.1(a) prohibits 'subsidies contingent, in law or in fact, whether solely or as one of several conditions, upon export performance, including those illustrated in Annex I'. Note that this provision prohibits both *de jure* and *de facto* contingency. As to *de facto* export contingency, footnote 4 to the agreement clarifies that the standard of 'in fact' contingency 'is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings.' The footnote further notes that '[t]he mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision'.

¹ Note that any subsidy falling within Article 3.1(a) is deemed to be specific by the operation of Article 2.3.

The standard of 'contingency', which is the same for both *de jure* and *de facto* claims, requires the complainant to demonstrate 'a relationship of conditionality or dependence' (*Canada – Aircraft (AB)*, para 171). Export performance must therefore be a condition of the grant or maintenance of the subsidy.

De jure export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument constituting the measure (*Canada – Aircraft (AB)*, para 167). It can be explicit or exist as a necessary implication (*Canada – Autos (AB)*, para 100). Cases which have found export contingency 'in law' have so far involved subsidies which are only made available upon proof of actual exportation, or are necessarily only available in respect of export transactions (eg, *Canada – Autos*, *US – Upland Cotton*, *Canada – Aircraft*).

De facto export contingency can be established by showing that 'the granting of the subsidy [is] geared to induce the promotion of future export performance by the recipient' (*EC – Large Civil Aircraft (AB)*, para 1044). *De facto* export contingency must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy (*Canada – Aircraft (AB)*, para 167). This may include the following factors: (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation (*EC – Large Civil Aircraft (AB)*, para 1048).

Importantly, the Appellate Body in *EC – Large Civil Aircraft* noted that '[w]here the evidence shows, all other things being equal, that the granting of the subsidy provides an incentive to skew anticipated sales towards exports, in comparison with the historical performance of the recipient ... this would be an indication that the granting of the subsidy is in fact tied to anticipated exportation' (para 1047). Conversely, '[t]he granting of the subsidy will *not* be tied to anticipated exportation if, all other things being equal, the anticipated ratio of export sales to domestic sales is not greater than the existing ratio' (para 1048). This is an objective test of the incentives provided by the subsidy: The standard for *de facto* export contingency would be met 'when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy' (para 1045). While the subjective motivations of the granting government may constitute relevant evidence, such motivations are not sufficient to prove *de facto* export contingency (para 1050).

Borduria may argue:

- that the 'Innovation for the Future' grant is contingent *in law* upon export performance because one of the criteria for the award of the grant concerns the project's anticipated contribution to the 'global integration' of the Eriadorian economy, which explicitly links the award of the grant to anticipated export performance;
- that the 'Innovation for the Future' grant is *de facto* contingent upon export performance because historical and projected sales figures are available to the government when making grant decisions, implying that

projects generating the most exports will be those selected for funding, including the grant in question;²

- that while the subsidy may not change the ratio of Future Energy's domestic to export sales (*EC – Large Civil Aircraft*, para 1048), this test is not suitable for situations in which the subsidized firm exports all (or essentially all) of its production, and that in this case the total configuration of facts demonstrates that the 'Innovation for the Future' grant was geared to increase the overall volume of Future Energy's exports of Fusilliscopes.

Eriador may argue:

- that the 'Innovation for the Future' grant is not contingent in law upon export performance because: (a) the grant contains no formal requirement to export, or to fulfil sales targets, as a condition of its disbursement; (b) 'contribution to global integration' should not be equated with 'export performance' and in any case is not a precondition for the award of a grant; (c) while the government may on occasion have export performance figures available to it where the applicant chooses to submit them, submission of such figures is not a requirement of an application and therefore a systematic comparative evaluation of applications on this metric is impossible; and (d) in any case, past and anticipated future export performance can only ever be one of many factors which may (but need not) be taken into account in decisions on whether or not to award a grant, and it is perfectly possible to obtain a grant in the absence of any past or anticipated future export performance;
- that in the case of the specific grant to Future Energy, there were many reasons other than export performance for giving the grant, including the contribution the project made to the 'sustainable growth' of the Eriadorian economy;
- that the grant is not contingent *in fact* upon export performance because the subsidy did not 'skew anticipated sales towards exports', and Future Energy's ratio of export to domestic sales is essentially the same before and after the subsidy.

² cf *Canada – Aircraft (21.5) (Brazil)*, para 5.33.

4.2. Claim (b): The Innovation for the Future Grant and the Eribank loan cause serious prejudice

4.2.1. Borduria's legal claim

Borduria claims that the loan by Eribank and the 'Innovation for the Future' grant cause serious prejudice to the interests of Borduria within the meaning of Article 5(c) of the SCM Agreement and Article XVI:1 of the GATT 1994, as they have resulted in lost sales of solar panels in the market for energy generation equipment in Carpathia within the meaning of Article 6.3(c) of the *SCM Agreement*.

In order to make out this claim, Borduria must show that:

- each of the measures represents a 'financial contribution by a public body' or 'income or price support' within the meaning of SCM Article 1.1(a);
- each of the measures confers a 'benefit' within the meaning of SCM Article 1.1(b);
- each of the measures is 'specific' within the meaning of SCM Article 2; and
- the effect of the loan and the grant, either individually or cumulatively, is 'significant .. lost sales in the same market', within the meaning of SCM Article 6.3(c).

4.2.2. Article 1.1(a): 'financial contribution by a government or any public body' or 'income or price support'

Article 1.1(a)(1) envisages three different possibilities as regards the nature of the bodies involved in making a financial contribution. First, a financial contribution may directly be made by a government in its own right. Second, the financial contribution may be made by a public body. Third, a private body is entrusted or directed by the government to give the financial contribution.

(a) Article 1.1(a)(1)(i)

Loans and grants as a 'direct transfer of funds' fall within the examples of 'financial contribution' listed in SCM Article 1.1(a)(1)(i). The Innovation for the Future grant was made by a government. Both of these points should be conceded by Eriador. There is, however, scope for different arguments on the question of whether the Eribank loan was made by a 'public body'.

The Appellate Body has explained that being vested with, or exercising, governmental authority is the key feature of a public body – not only the fact of government control. That is to say, a public body must be an entity that possesses, exercises or is vested with governmental authority (*US – AD/CVD (AB)*, para 317). Whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates. For example, evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates may inform the question of whether the conduct of an entity is that of a public body. It may also be relevant whether the functions

or conduct of the entity in question are ordinarily classified as governmental in the legal order of the relevant Member, as well as within the WTO Membership generally. The absence of an express statutory delegation of authority does not necessarily preclude a determination that a particular entity is a public body. In order to show that a body is a public body, it is not sufficient to show merely formal links between the body and government (eg, majority government ownership). And while evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority, it is not the case that any entity meaningfully controlled by government is a 'public body'. In interpreting the meaning of 'public body', the existence of Article 1.1(a)(1)(iv) (on entrustment or direction) is relevant context because it demonstrates that there is a distinction between a *public* body and a private entity entrusted or directed for a specific purpose by the government. (See generally *US - AD/CVD (China)(AB)*, para 282-322; *US - Carbon Steel (India) (AB)*, para 4.9-4.30; *US - DRAMS (Korea)*.)

In the present case, **Borduria is likely to point to the following factors** to suggest that Eribank is a 'public body': (a) Eribank's constitution requires it to conduct its business having regard to the strategic policy priorities of the Eriadorian state which implies a degree of responsibility for the implementation of Eriadorian industrial policy; (b) that Eribank is used on occasion to disburse government grants, which is an essentially governmental function; (c) the Eriadorian government appoints Eribank's board; and (d) that Eribank is majority owned by the state.

Eriador may argue that: (a) most of the facts point to a degree of *control* by the government over Eribank, but little by way of the exercise or investiture of governmental authority; (b) the links between the Eriadorian government and Eribank, as regards ownership and the power to appoint the board, are in the nature of 'formal indicia of control' and are on their own insufficient to show that Eribank is a public body; (c) that disbursing funds under government grants ought not to be considered an exercise of governmental authority, as it concerns merely the technical aspects of administering a grant, not the power to award the grants themselves.

(b) *Article 1.1(a)(1)(iv)*

A financial contribution can alternatively be shown to exist, where 'a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments'. This paragraph covers situations where a private body is being used as a proxy by the government, and is intended to ensure that governments do not evade their obligations under the SCM Agreement by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself (*US - CVDs on DRAMS (AB)*, paras 108, 113).

The Appellate Body has interpreted "entrustment" as referring to situations in which a government gives responsibility to a private body and "direction" as referring to situations where a government exercises its authority, including some degree of compulsion, over a private body. Importantly, a 'direction' need not always involve the degree of obligation associated with a 'command': while

mere words of encouragement are not enough, in the right circumstances governmental 'guidance' can constitute direction. Governments have both informal and formal means at their disposal to exercise authority over a private body, some of which are more subtle than others (see generally *US - DRAMS CVDs (AB)*, para 109-116). In cases interpreting this provision, a number of factors have been taken into account, including: the extent of cooperation between the government and the private body; the extent to which the actions of the private body are 'non-commercial'; the degree to which the government is in a position to exercise influence over the private body; and evidence of the intent of the government (see, eg, *US - DRAMS CVDs*; *Japan - DRAMS CVDs*; *US - Countervailing Measures (China)*; *EC - DRAMS CVDs*.)

Borduria may argue that:

- the loan to CleanTech was on non-commercial terms;
- there is clear evidence that the Eriadorian government favoured the granting of the loan, and communicated that to Eribank;
- the Eriadorian government is in a position to exercise influence over the decision-making of Eribank, both directly through the mandated consultation process and through its influence over management as majority shareholder, and indirectly by virtue of its power of appointment of the board;
- Eribank is required by its constitution to make its business decisions having regard to the strategic priorities of the Eriadorian state, which makes Eribank especially susceptible to influence from the state;
- Eribank has a history of cooperating with the Eriadorian government on such matters; and
- as a result it is appropriate to infer either entrustment or direction, or both, on the basis of the totality of the facts.

Eriador may argue that:

- the nature of the influence of the Eriadorian government over Eribank's lending decisions is constitutionally limited to that of advice and consultation,
- directors are expressly required to act in their independent capacity, and the decision in relation to the Eribank loan was expressly stated to be for Eribank only; and
- there is no positive evidence of any action beyond these parameters, whether by threat or inducement, which would elevate it to the level of entrustment or direction.

4.2.3. Article 1.1(b): 'benefit'

Under Article 1.1(b), a subsidy is deemed to exist only if the financial contribution confers a 'benefit' on the recipient. The Appellate Body has explained that whether a benefit has been conferred should normally be determined by assessing whether the recipient has received the financial contribution on terms more favourable than those available to the recipient in the market (eg, *Canada - Aircraft (AB)*, para 157).

There is no question that the Innovation for the Future Grant confers a benefit, because it is a non-repayable grant. Furthermore, Eriador has conceded that the Eribank loan conferred a benefit on CleanTech (Case, para 15). The only difficult legal question, therefore, is whether the benefit of the Eribank loan was

extinguished as a result of the sale of the Fusillscope business from CleanTech to Future Energy.

The Appellate Body has made clear that there is a rebuttable presumption that privatizations of a subsidized state-owned producer at arm's length and for fair market value extinguish the benefit of the subsidy (eg, *US – CV Measures on Certain EC Products AB*), para 127; *US – Lead and Bismuth II (AB)*, para 68). However, in *EC – Large Civil Aircraft*, different members of the Appellate Body could not agree on whether this same principle applied in the case of private-to-private sales (see para 726).

This presumption has been criticized in the secondary literature.³ Different views on this question revolve to a large extent around different understandings of the nature of the 'benefit' in question. If the 'benefit' enjoyed by the recipient of the subsidy is understood as an *increase in its wealth*, then the presumption makes sense: this increase in wealth is fully retained by the seller on sale of the business at fair market value. However, if the 'benefit' is understood as a *decrease in the marginal cost of production* (ie the subsidy allows the subsidized producer to produce more of the good at lower cost), then the presumption does not make sense. This is because this sort of benefit may well also be enjoyed by the buyer of the business, for example where the subsidy resulted in the creation of a new, more efficient production facility which would not otherwise have existed. Discussion of this issue will require teams to think carefully about the rationale of the presumption, and whether this rationale applies equally in the context of the present facts, in light of the basic purpose of the SCM Agreement. Points may be awarded for teams persuasively disagreeing with the AB's reasoning in the privatization cases.

Borduria may argue:

- the presumption of the extinction of the benefit of a subsidy after a sale at fair market value and at arm's length does not apply to private-to-private sales;
- that the Eribank loan clearly resulted in a reduction of CleanTech's marginal costs of production, and an increase in its overall production of Fusillscopes, since the first production facility would not have existed at all absent the loan, and since the creation of this facility permitted CleanTech to make its production process more efficient; and
- that this benefit (the reduction in marginal costs of production and overall increase in production, compared to what otherwise would exist) continued to exist after the sale of the business, and was passed on to Future Energy when it purchased the first production facility.⁴; and

³ See, eg, Gene M. Grossman and Petros C. Mavroidis, 'United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom: Here Today, Gone Tomorrow? Privatization and the Injury Caused by Non-Recurring Subsidies', in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001: The American Law Institute Reporters' Studies* (Cambridge, UK: Cambridge University Press, 2001); Diamond, 'Privatization and The Definition of Subsidy: A Critical Study of Appellate Body Textualism' (2008) 11(3) *JIEL* 649.

⁴ It has been suggested that some teams may further argue that even if the benefit of the subsidies were extinguished as a result of the private-to-private sales transaction, this does not necessarily mean that the *effects* of the extinguished subsidies do not cause serious prejudice. In other words, there is no need for the benefit of a subsidy to coincide temporarily with its effects - there may be a time lag between the effects of a subsidy and the existence of its benefit. (*EC – Large Civil Aircraft (AB)*, paras. 712, 771).

- even if the benefit of the subsidies were extinguished as a result of the private-to-private sales transaction, the effects of the it is clear that there was a benefit at time that the loan was given, and the time this does not necessarily mean that the *effects* of the subsidies do not cause serious prejudice .

Eriador may argue:

- that the presumption which the Appellate Body established in its privatization cases applies equally to private-to-private sales;
- that the term ‘benefit’ in SCM Article 1.1(b) refers to increase in wealth on the part of the recipient of the subsidy, and that this benefit was clearly extinguished by the arm’s length sale to Future Energy at fair market value.

4.2.4. Article 1.2 and Article 2: ‘specific’

By virtue of SCM Article 1.2, a subsidy is subject to the Part III of the agreement only if it is ‘specific’ in accordance with the provisions of Article 2. The requirement of specificity ‘serves to acknowledge that some subsidies are broadly available and widely used throughout an economy and are therefore not subject to the Agreement’s subsidy disciplines’ (*US – Upland Cotton (Panel)*, para 7.1143). Article 2 distinguishes between three different categories of specificity: enterprise-specificity; industry-specificity; and regional specificity.

The teams will be expected to apply Article 2.1 to determine the specificity of the two subsidies at issue here. The somewhat complex structure of Article 2.1 (reproduced at the end of this memo) has been explained by the Appellate Body as follows:

Article 2.1(a) establishes that a subsidy is specific if the granting authority, or the legislation pursuant to which the granting authority operates, *explicitly* limits access to that subsidy to eligible enterprises or industries. Article 2.1(b) in turn sets out that specificity “shall not exist” if the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, the subsidy, provided that eligibility is automatic, that such criteria or conditions are strictly adhered to, and that they are clearly spelled out in an official document so as to be capable of verification.... Finally, Article 2.1(c) sets out that, notwithstanding any appearance of non-specificity resulting from the principles laid down in sub-paragraphs (a) and (b), other factors may be considered if there are reasons to believe that a subsidy may, in fact, be specific in a particular case. (*US – AD/CVDs (China) (AB)*, para 367)

Article 2.1(a) therefore applies where there is a limitation, on the face of the legislation or in other statements or means by which the granting authority expresses its will, that expressly and unambiguously restricts the availability of a subsidy to ‘certain enterprises’ and as a result does not make the subsidy ‘sufficiently broadly available throughout an economy’ (*EC – Large Civil Aircraft (AB)*, para 949; *US – Upland Cotton (Panel)*, para 7.1142). The ‘objective criteria or conditions’ referred to under **Article 2.1(b)** are defined in footnote 2 to mean ‘criteria or conditions which are neutral, which do not favour certain enterprises

over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise'. As to **Article 2.1(c)**, the factors to be considered are: 'use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.' In applying Article 2.1(c), 'account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.'

(a) Specificity of the Eribank loan

Eriador would be wise to concede that the Eribank loan is specific. It is in the nature of a one-off loan transaction, not a loan issued under the terms of a broader programme. It therefore falls to be analysed on its own as single transaction, and as such is explicitly enterprise-specific under Article 2.1(a).

(b) Specificity of the Innovation for the Future grant

The first question to be determined is whether the specificity of the IFF grant should be determined at the level of the subsidy, or the level of the subsidy programme pursuant to which it is awarded. The Panel in *US – Large Civil Aircraft* stated that specificity must generally be analysed at the level of the subsidy programme pursuant to which individual payments are provided (where the subsidy takes the form of a payment, and where it is provided pursuant to a wider programme), and not at the level of each individual payment taken in isolation, absent one or more reasons as to why an analysis at the level of the entire programme is not appropriate (para 7.1252). However, where the programme itself is not found to be specific, it may in some circumstances be possible still to find the individual transaction specific. The Panel in *Japan – DRAMS (Korea)* stated that

An individual transaction would be “specific”, though, if it resulted from a framework programme whose normal operation (1) does not generally result in financial contributions, and (2) does not pre-determine the terms on which any resultant financial contributions might be provided, but rather requires (a) conscious decisions as to whether or not to provide the financial contribution (to one applicant or another), and (b) conscious decisions as to how the terms of the financial contribution should be tailored to the needs of the recipient company. (para 7.374)

Japan – DRAMS (Korea) concerned a restructuring arrangement designed to save a specific individual company from insolvency, and it was in part this political intent which convinced the Panel that it was appropriate in that case to analyse the case at the level of the individual transaction (para 7.373).

At the level of the programme, it will be difficult for Borduria to argue that there is *explicit* specificity of any sort in the terms of the Innovation for the Future programme within the meaning of Article 2.1(a). The programme is open to all businesses operating in any sector of the Eriadorian economy. Like in *US - Large Civil Aircraft*,⁵ the criteria for award of grants are sufficiently broad and vague

⁵ The programme in that case referred to 'high risk, high pay-off, emerging and enabling

not to limit the program to an identifiable industry or group of industries. At the same time, Eriador cannot argue that Article 2.1(b) applies to the IFF program: the criteria according to which grants are awarded are probably not 'objective', certainly do not automatically trigger the award of a grant, do not cover the amount of the grant, and almost certainly don't accord with the requirements of the footnote to Article 2.1(b).

Argument will therefore centre on the application of Article 2.1(c), relating to *de facto* specificity. Since teams have not been given data concerning the nature and number of the *enterprises* to whom grants have been awarded, arguments should only concern *industry-specificity*. Where the granting of the subsidy indicates a disparity between the expected distribution of that subsidy and its actual distribution, a panel will be required to examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of a subsidy to certain enterprises (*US - Large Civil Aircraft (AB)*, para 879). A very large disparity may in itself constitute sufficient evidence of specificity in the absence of convincing rebuttal (*id*, para 888). It is relevant to consider not only the actual, but also the potential recipients of a particular subsidy (*US - Countervailing Measures (China)(AB)* para 4.140). As to the concept of 'industry', the cases indicate that that an industry, or 'group of industries', may be generally referred to by the type of products they produce: 'the concept of an "industry" relates to producers of certain products' (*US - Upland Cotton (Panel)*, para 7.1142; *US - AV/CVDs (China)(AB)*, para 373).

Borduria may argue that:

- the specificity of the IFF grant should be determined at the level of the individual grant, as in *Japan - DRAMS (Korea)*;
- even at the level of the IFF programme, 'the renewable energy sector' represents a 'group of industries' within the meaning of SCM Article 2.1(c), and the fact that 90% of grant recipients are in the renewable energy sector, while that sector represents less than 10% of eligible businesses across the highly diversified Eriadorian economy as a whole, raises a strong prima facie case that the programme is *de facto* specific to a group of industries under SCM Article 2.1(c); and
- there are no facts available in the Case to offer a convincing rebuttal of that prima facie case.

Eriador may argue that:

- the specificity of the grant should be determined at the level of the programme, as the facts of this case are distinguishable from *Japan - DRAMS (Korea)*;
- 'the renewable energy sector' is too broad and differentiated to represent an 'industry' or 'group of industries' within the meaning of SCM Article 2.1(c);
- when account is taken of the limited duration of the project so far, a degree of disproportion is to be expected, which is likely to even out over time; and
- taken as a whole, the facts are insufficient to show a prima facie case of specificity.

4.2.5. SCM Article 5 and Article 6.3(c): 'the effect of the subsidy is significant ... lost sales in the same market'

SCM Article 5 provides that no Member 'should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.: ... (c) serious prejudice to the interests of another Member'. Footnote 13 to that provision clarifies that 'the term "serious prejudice to the interests of another Member" ... includes threat of serious prejudice.' Article 6.3(c) further provides that 'Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where ... (c) the effect of the subsidy is ... significant ... lost sales in the same market.'

Borduria must therefore show that the effect of the Eribank loan and the Innovation for the Future grant, either individually or collectively, has been significant lost sales on the part of the Bordurian producer (SolarTech), and that SolarTech's products compete in the same market as the subsidized product. You should expect most of the argument at this point in the analysis to focus on the question of causation: that is to say, the question of whether the failure of SolarTech to win the contract with Elektrica is the effect of the subsidies to Future Energy, whether individually or cumulatively.

(a) 'the effect of the subsidy ...'

Borduria must show there is a 'genuine and substantial relationship of cause and effect' between the loan and the grant, on one hand, and the lost sales by SolarTech, on the other (*EC - Large Civil Aircraft (AB)*, para 1232). This can be shown through a demonstration that the measures in question are a necessary *and* substantial cause, even if they are not a sufficient cause in themselves (id, para 1233). The causation test will not be satisfied if the effect of other factors is such as to render the impact of the subsidies too remote or attenuated (see generally, *EC - Large Civil Aircraft (AB)*, para 1232-1233). Analysing the effect of the subsidy will necessarily involve counterfactual analysis - that is, a comparison of the existing market situation with the market situation which would have arisen in the absence of the subsidy (*US - Upland Cotton (21.5-Brazil)(AB)*, para 351). Here, that may involve seeking to ascertain the likely outcome of the Elektrica deal in the absence of the subsidy (subsidies) in question.

Generally speaking, it appears easier to show that subsidies contingent on export performance contribute to adverse effects, since in their nature they modify the incentives faced by a domestic producer, reward discrimination in favour of production for export markets over the domestic market, and thereby reduce export prices. Even relatively small subsidies may have significant effects, depending on the nature of the subsidies, and the circumstances in which those subsidies are received, including the relevant market structure and conditions of competition in that market (*US - Large Civil Aircraft (AB)*, para 1253-1254).

Since Borduria is alleging that the lost sales are the result of *two* subsidies, the question arises as to whether the effects of each subsidy are to be analysed separately, or together. It is perfectly possible for each subsidy to be analysed separately as to whether they individually constitute a genuine and substantive cause, though in that case care must be taken to ensure that, as a result of this atomized approach no subsidy at all is found to be a substantial cause (*US -*

Large Civil Aircraft (AB), para 1284). As regards analyzing collective causation, the Appellate Body has stated that there are at least two permissible approaches: *aggregation* (where sufficiently similar subsidies are grouped together, and the effects of the group as a whole are determined); and *cumulation* (where a single subsidy is analysed to determine whether it constitutes a genuine and substantive cause of adverse effects, and other subsidies are analysed to determine the extent to which they have a genuine causal connection to the same effects) (*US – Large Civil Aircraft (AB)*, para 1284ff). Both approaches are probably available in the present case, but the better Bordurian teams should realize that they are likely to have a marginally easier time arguing a case for cumulation, as per the Panel’s approach in *EC – Large Civil Aircraft*. But this is a minor point, and not too much should be made of it.

Arguments about causation are inevitably fact intensive, and you should expect teams to offer a wide range of creative arguments based on various interpretations of the sparse facts in the problem. For the purposes of the moot, the most important thing is that the teams: (a) demonstrate that they understand and can apply the applicable legal tests of causation; and (b) show good judgment in selecting the most plausible and persuasive arguments made available by the facts of the Case. As long as these skills are demonstrated, please do try to stop teams taking too much of their allotted time attempting overly complicated causal arguments, or speculating about facts which are not given in the problem.

Borduria may argue (much like the US in *EC – Aircraft*):

- that without the subsidies Fusilliscopes would not have entered into production at all by the time of the Elektrica sale, or at least would have been an immature and technologically less advanced product, and that therefore Future Energy could not possibly have won the Elektrica contract without the subsidies; and
- even if it is found that the Fusilliscopes could or would have entered production, the subsidies enabled Future Energy to reduced the marginal costs of production of Fusilliscopes (by enabling learning effects and economies of scale), allowing it to offer a price discount below the level that would otherwise have been economically justifiable, which was decisive in Elektrica’s decision to give the contract to Future Energy;
- and that therefore even if other factors contributed to the lost sales, the subsidies, individually and/or cumulatively, nevertheless still constituted a ‘genuine and substantive’ cause of them.

Eriador may argue:

- that without the Eribank loan, CleanTech’s ability to construct the first production would not have been precluded but merely delayed, and that it is very likely that production would have started in any case by the time of the Elektrica deal;
- that Future Energy would have offered the 50% discount to Elektrica even without the subsidies, given the strategic importance of the Carpathian market and of Elektrica as a business partner;
- that Elektrica’s decision to award the contract to Future Energy was not primarily based on price competition, but on other competitive advantages of Fusilliscopes, eg their ability to provide electricity across different load types, their better scalability as compared to solar; their

lower variable costs of electricity production, and their status as an advanced and disruptive technology.

(b) 'significant' lost sales in the 'same market', and 'threat of serious prejudice'

Some Eriadorian teams may offer two further, somewhat weaker arguments in response to this claim. First, they may suggest that, even if the subsidies led to the lost sales in question, these lost sales were not 'significant'. The Appellate Body has noted that the term 'significant' means "important, notable or consequential", and has both quantitative and qualitative dimensions (*US – Upland Cotton (Article 21.5-Brazil) (AB)*, para. 416). Lost sales can have significant beyond their direct revenue effects, for example, to the extent that they delay a manufacturer's ability to benefit from the important learning effects and economies of scale in this industry (*EC – Large Civil Aircraft (AB)*, para 7.1845). They may also have larger significance where the customer is strategic (*ibid.*). In this case, however, the facts strongly suggest that the lost sales are significant. Most teams are therefore likely to concede this point.

Some Eriadorian teams may also try to mount an argument that these lost sales were not in the 'same market' as required by Article 6.3(c). Sales can be lost "in the same market", within the meaning of Article 6.3(c), only if the subsidized product and the complainant's products compete in the same product market (*US – Upland Cotton (AB)*, para 408-9; *EC – Large Civil Aircraft (AB)*, para 1119-1123). While the facts of the Elektrica deal themselves strongly suggest that solar panels and Fusilliscopes compete for the same customers, some teams may attempt to argue that these generation technologies are sufficiently different that they fall within distinct product markets. Although it is not a formal element of a claim under Article 6.3(c) (at least as it relates to lost sales – see *Korea – Vessels*), nevertheless you may find some teams referring to the concept of 'like products' at this point in the argument. It is not unreasonable to suggest that products are 'in the same market' if they are 'like products', and as a result the arguments referred to section 4.3.5 below may be relevant here.

Some Bordurian teams may also mount a secondary case that, even if there is insufficient evidence of adverse effects, nevertheless a threat of lost sales still exists, as per footnote 14 to the SCM Agreement referred to above. The factual basis for such a claim would be quite sparse, and as a result few teams are likely to spend a huge amount of space on it. Nevertheless, those who make a persuasive case on this relatively advanced point may be rewarded.

4.3. Claim (c): The Feed-in-tariff scheme

Important note: from the questions which arose in the requests for clarifications, it is clear that some teams have focused their attention on the discriminatory aspects of this measure. To some extent this is understandable: there is an obvious problem with the FIT contract as an attempt to promote renewable energy in Eriador, namely that it singles out cold fusion for special treatment, while offering no similar assistance at all to other renewable energies which may be equally beneficial for the environment. In other words, there is a strong intuitive argument that it is discriminatory in some sense. But it is important to remember that evidence of discrimination is at best only indirectly relevant under the SCM Agreement, and in reality this aspect would normally be challenged under another agreement. If teams try somehow to bring in the measure's discriminatory aspects into their argument, they must clearly and persuasively make a case for their relevance under a specific provision of the SCM Agreement.

4.3.1. Borduria's legal claim

Borduria claims that the long term purchase agreement between Future Energy and EEC, concluded pursuant to the FIT Scheme, described in para 11 of the Case, causes serious prejudice to the interests of Borduria within the meaning of Article 5(c) of the SCM Agreement and Article XVI:1 of the GATT 1994, as it has displaced and impeded imports of electricity from Borduria into Eriador within the meaning of Article 6.3(a) of the SCM Agreement.

In order to make out this claim, Borduria must show that:

- the FIT contract represents a 'financial contribution by a government or any public body' or 'income or price support' within the meaning of SCM Article 1.1(a);
- the FIT contract confers a 'benefit' within the meaning of SCM Article 1.1(b);
- the FIT contract is 'specific' within the meaning of SCM Article 2; and
- the effect of the FIT contract is to 'displace or impede the imports of a like product', within the meaning of SCM Article 6.3(a).

4.3.2. Article 1.1(a): 'financial contribution by a government or any public body' or 'income or price support'

The measure at issue has been designed to mirror quite closely the relevant aspects of the challenged FIT Programme in *Canada – Feed-in Tariff*. In that case, it was found that the measure was a 'government purchase of goods' under Article 1.1(a)(1)(iii), and the same conclusion is appropriate here. There is no grant aspect to the payments under the FIT contract between EEC and Future Energy: payments made under the contract are for electricity delivered into the grid. The EEC takes possession of the electricity for resale to retail consumers. The EEC is acting entirely under the control of the Eriadorian government in this respect, and in any case is a public body itself. Note also that Eriador and Borduria have both agreed to proceed on the basis that electricity is a 'good' not a 'service'. Eriador would therefore be wise to concede that the FIT scheme is a 'government purchase of goods'.

Some teams on the Bordurian side may seek to make the claim that the measure is also a 'form of income or price support' under Article 1.1(b). This is arguable,

and the possibility was left open by the Panel in *Canada – FIT*. However, the better teams should not spend too much space on this point, as the measure is a ‘government purchase of goods’, and it is better to spend more space on the more difficult and interesting question of ‘benefit’.

4.3.3. Article 1.1(b): ‘benefit’

This is the most important and perhaps the most conceptually difficult question of law in this claim, and a significant amount of space should be spent on arguments concerning it.

Under Article 1.1(b), a subsidy is deemed to exist only if the financial contribution confers a ‘benefit’ on the recipient. As noted above, the Appellate Body has stated that whether a benefit has been conferred should be determined by assessing whether the recipient has received a ‘financial contribution on terms more favourable than those available to the recipient in the market’ (*Canada – Aircraft (AB)*, para 157). Using Article 14(d) as interpretive context, one way to assess this question here is to examine whether the remuneration obtained by cold fusion generators under the FIT scheme is “more than adequate” when compared to the remuneration the same generators would, in the light of the “prevailing market conditions”, otherwise receive on the relevant “market” for electricity in Eriador. This was the approach adopted in *Canada – FIT*. The analysis therefore proceeds in two steps: first, defining the relevant market; and second, determining the relevant benchmark price in that market.

(a) What is the relevant ‘market’?

The first question the teams will have to address is the definition of the market in question, from which a benchmark is to be discerned. This was a major issue in the *Canada – FIT* dispute, on which there was an important disagreement between the Panel and the Appellate Body. The Panel defined the relevant market as the wholesale electricity market as a whole; while the Appellate Body defined it more narrowly as the wholesale market for wind- and solar-PV generated electricity. The Appellate Body’s position has been heavily criticized in the secondary literature,⁶ and as such it is open to teams to disagree with the AB on this point, and/or to distinguish the AB’s ruling in that case on the basis of its facts.

Importantly, the facts of this case have been designed to make it in both sides’ interest to define the market in broad terms as the market for wholesale electricity as a whole, and the better teams will realize this. This is primarily because Eriador’s benchmark price in its FIT contracts is calculated on the basis of a single market for wholesale electricity as a whole. Nevertheless, you should expect some teams to argue this point.

⁶ See, eg, Rubini, ‘The Good, the Bad and the Ugly.’ Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies’ (2014) 48(5) *JWT* 895-938; Charnovitz and Fischer, ‘Canada – Renewable Energy: Implications for WTO Law on Green and Not-so-Green Subsidies’ (2015) 14(2) *World Trade Review* 177-210; Pal, ‘Has the Appellate Body’s Decision in Canada – Renewable Energy / Canada – Feed-In Tariff Program Opened the Door for Production Subsidies’, (2014) 17(1) *JIEL* 125-137; Cosbey and Mavroidis, ‘A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO’ (2014) 17(1) *JIEL* 11-47.

The following factors point to the existence in this case of a single wholesale market for electricity: (a) there is full demand-side substitutability at the retail level between all electricity regardless of how it is produced; (b) there are no physical differences between different forms of electricity depending on how it is produced; (c) there is strong supply-side substitutability, as cold fusion is capable of producing base-, intermediate- and peak-load electricity, making it potentially competitive with all other generation technologies; (d) prior to the FIT scheme, the EEC did not distinguish in its pricing practices between different generation technologies, and still makes no distinction between renewable and non-renewable generation technologies outside the FIT scheme; (e) the FIT formula is calculated on the basis that there is a single wholesale electricity market; (f) the same broad contract types are equally applied to all generators in the market, regardless of generation technology; (g) the fact that 7% of the Eriadorian market was supplied by renewable energy, without specific support for these generators, suggests that government intervention is not necessary to create a market for renewable energy generally (as opposed to cold fusion specifically).

The following factors point to the existence of a separate market for electricity derived from cold fusion (and other comparable renewable energy technologies); (a) the facts suggest that a market for cold fusion electricity would not exist absent the FIT scheme; (b) the production cost structure for cold fusion (high capital costs, low variable operating costs) is similar to solar and wind, and different from traditional non-renewable sources; (c) the government mandated supply mix has the consequence that the EEC must make a distinction in its purchasing decisions between different generation technologies, thus reducing the substitutability in practice between them.

The following analysis proceeds on the basis that the 'market' in this case is the market for wholesale electricity as a whole, taking the government-mandated supply mix as given, which is the better view on the facts of this case. Whichever market is determined to be the appropriate one, it is clear that the market must be defined taking the government-mandated supply mix as given (*Canada – FIT (AB)*, para 5.190).

(b) Identification of the relevant benchmark price in the defined market

Once the market has been defined, the next task is to identify an appropriate benchmark price in that market. For the purposes of the present case, the key principles for the determination of an appropriate benchmark are as follows.

First, proper benchmark prices would normally emanate from the market for the good in question in the country of provision (*US – Carbon Steel (India) (AB)*, para 4.151). The starting point of analysis is therefore the electricity prices in the Eriadorian market as determined by the combination of general contracts and spot markets.

Second, however, these prices may in some circumstances be rejected as inappropriate. The Appellate Body has made clear that existing in-country prices may in some circumstances be rejected as benchmarks if there is a sufficiently significant price distortion in the domestic market, such that the domestic prices are not in reality market determined (see *US – AD/CVDs (Chinas) (AB)* para 446; *US – Countervailing Measures (China) (AB)*, para 4.50; *US – Carbon Steel (India) (AB)*; para 4.155; *US – Softwood Lumber IV (AB)*, para 100). Yet importantly, in all

of these cases, the distortion arose from the actions of government as a market participant affecting market prices through the exercise of market power. This is not the case here, where the distortion results from the fact that prices on the wholesale market do not account for the negative externality of carbon emissions, and the involvement of government in the creation and maintenance of that distortion is of a different kind. It is therefore not clear whether the distortion in the present case is attributable to government action in the same way as in the cases cited above, and if not, whether this line of jurisprudence applies.

Third, *if* existing in-country prices are appropriately rejected as distorted, the question then becomes how to construct an alternative benchmark. Different approaches are possible: data from other countries may be used, or proxy prices may be constructed using various methods, provided that they reflect the prevailing market conditions for the good or service in question in the country of provision or purchase. In *Canada – FIT*, the Panel suggested that a benchmark based on production costs, with a reasonable rate of return, may be appropriate. The Appellate Body disagreed, looking elsewhere for competitively determined prices. Importantly, however, the facts in this case are not sufficient to construct reliable benchmarks on the basis of either foreign country markets, or production costs, and teams will therefore have to base their arguments primarily on the appropriateness of the proxy constructed by Eriador, replicated in the FIT formula.

The better Bordurian teams may well realize that their easiest line of attack might be to challenge the specifics of the FIT formula itself, which has a number of flaws if its purpose is to approximate the cost of electricity in an undistorted market. There are many reasons why the details of this formula might be problematic: should M be an average price or should it be tied to spot market transactions? should Future Energy's supply be excluded from the calculation of the average M? Is M realistic given that the supply mix which would actually exist in a truly competitive market might be very different from the existing market? Is the price given to one ton of carbon reasonable, or it is overestimated?

Following these principles, **Borduria may argue:**

- that actually existing in-country prices outside of the FIT Scheme are appropriate benchmarks, as they are determined by market competition (competitive tender in the case of general contracts, and direct competition in the case of spot market transactions);
- that while the domestic electricity market is distorted by the negative externalities associated with carbon emissions, this is not a price distortion caused by governmental intervention, and therefore is not a reason (under the current jurisprudence) for rejecting in-country prices as benchmarks;
- that even if it is permissible to construct a benchmark by correcting for this distortion, the FIT formula does not correctly do so, and in fact systematically over-estimates the electricity price which would exist in the Eriadorian market if it were not distorted;
- that it is not appropriate to adopt a market benchmark which corrects for only one distortion, and not the many others which arguably beset energy markets;

- even if the Panel finds that existing market prices would not sustain the government-mandated supply mix, and that the price for cold fusion electricity would therefore have to be higher than market prices to sustain this supply mix, nevertheless the FIT formula is clearly too high as it results in a proportion of renewable energy well in excess of the defined minimum.

Eriador may argue:

- that actually existing market prices in Eriador (other than FIT prices) are not appropriate benchmarks because the existing market is distorted since it does not account for the negative externality of carbon emissions, and that this distortion has been recognized as significant by all parties to the FCPRE;
- that, furthermore, actually existing market prices should be rejected because they cannot sustain the supply mix defined by the Eriadorian government, which must be taken as a given for the purposes of benefit analysis;
- that the lack of available reliable information precludes constructing alternative benchmarks based on, eg, foreign markets or production costs + reasonable rates of return,;
- that the best available benchmark is therefore a proxy based on existing market prices in Eriador, *corrected* to remove the distortion;
- that while the FIT formula may not perfectly emulate the price which would exist in an undistorted market, no workable formula can do so, and the FIT formula is a reasonable and unbiased approximation.

4.3.4. Article 1.2 and Article 2: ‘specific’

Eriador is likely to concede that the FIT scheme is ‘specific’ within the meaning of SCM Articles 1.2 and 2. Borduria will note that the scheme is only available to generators of cold fusion energy, and is therefore explicitly limited to ‘certain enterprises’ under SCM Article 2.1(a). In any case, it is *de facto* only used by one enterprise, Future Energy.

4.3.5. SCM Article 5 and Article 6.3(a): ‘the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member’

Borduria must show that the *effect* of the FIT scheme has been to *displace* or *impede* the imports of *like products* from Borduria into the *market* of Eriador.

The market: A ‘market’ within the meaning of Article 6.3(a) is ‘a set of products in a particular geographical area that are in actual or potential competition with each other’. Consequently, the application of Article 6.3(a) requires the definition of the relevant product market in order to determine whether particular products can be treated as forming part of a single product market or several product markets for purposes of an analysis of displacement and impedance (*EC – Large Civil Aircraft (AB)*, para 1123). In this case, arguments concerning the definition of the relevant market are likely to mirror those set out in section 4.3.3 above.

Like products: Borduria must show that the electricity provided by its producers is ‘like’ the electricity produced by Future Energy. Footnote 46 to the agreement

notes that '[t]hroughout this Agreement the term "like product" ... shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.' This definition of 'like products' is specific to the SCM Agreement, and was interpreted by the Panel in *Indonesia – Autos*. In that case, the Panel found that useful guidance can be derived from the interpretation of 'like products' from other WTO agreements (para 14.174). It found physical differences between products to be highly relevant, particularly to the extent that they had an impact on the price of the products in question, the uses to which they are put, and their substitutability (para 14.173). It also found it relevant to consider the ways in which producers themselves analyse market segmentation (para 14.177). Importantly, the AB has made clear that a central aspect of the application of Article 6.3(a) is an assessment of the competitive relationship between specific products in the marketplace (*EC – Large Civil Aircraft (AB)*, para 1123).

Displacement or impedance: 'Displacement' arises under Article 6.3(a) where the effect of the subsidy is that imports of a like product of the complaining Member are substituted by the subsidized product in the market of the subsidizing Member. 'Impedance' refers to situations where the exports or imports of the like product of the complaining Member would have expanded had they not been "obstructed" or "hindered" by the subsidized product. It could also refer to a situation where the exports or imports of the like product of the complaining Member did not materialize at all because production was held back by the subsidized product. (See generally *EC – Large Civil Aircraft (AB)*, paras 1160-1162).

Causation: Borduria must show that this displacement or impedance is *an effect of the subsidy*. To do this, it must show there is a 'genuine and substantial relationship of cause and effect' between the FIT scheme and the loss of market share by Electricity Borduria and the Bordurian Electricity Corporation. This can be shown through a demonstration that the FIT scheme is a necessary *and* substantial cause, even if it is not a sufficient cause in itself. The causation test will not be satisfied if the effect of other factors is such as to render the impact of the FIT scheme too remote or attenuated. Analysing the effect of the subsidy will necessarily involve counterfactual analysis – that is, a comparison of the existing market situation with the market situation which would have arisen in the absence of the subsidy.

Borduria may argue:

- that electricity from Borduria is 'like' electricity produced from cold fusion because the 'product characteristics' of electricity are identical regardless of the technology used to generate it, and because there is a single market for wholesale electricity in Eriador for the reasons given under 4.3.3 above;
- that the FIT scheme provided a strong incentive for Future Energy to increase production, and that it did so, with the direct result that it increased its market share;
- that BEC's and EB's loss of market share is substantially attributable to Future Energy's increased production, as evidenced by the market share data, combined with the statement in the EEC's Annual Reports;

- that even if the government mandated supply mix was also a contributing factor to this loss of market share, the FIT scheme is still a substantial cause, given that the achieved market share of renewable energy is substantially higher than the mandated minimum;
- that, even if there is insufficient evidence of displacement or impedance, nevertheless a threat of displacement or impedance still exists

Eriador may argue:

- that cold fusion energy does not compete in the same market as non-renewable energy for the reasons set out in 4.3.3 above; and
- that BEC's and EB's loss of market share should be attributed to the government mandated supply mix, which required renewable energy to constitute 30% of supply by 2015, and therefore would in any case have led to a loss of market share on the part of non-renewable suppliers. As a result, there is no 'genuine and substantial relationship of cause and effect' between the FIT Scheme and the loss of market share.

4.4. GATT Article XX

Although this problem is designed to be focussed almost exclusively on the SCM Agreement, and the claims are explicitly limited to claims under that agreement, it remains an open question under the present state of the jurisprudence whether GATT Article XX is available as a defence to all claims under the SCM Agreement. We might therefore expect some teams to argue this – particularly as one of the Clarifications questions explicitly concerned this issue. This is a relatively advanced point of law, so teams should be given the space to show their ability to discuss and develop it if they wish to. At the same time, it would be a mistake to spend too much space on this question to the exclusion of extended discussion of the SCM Agreement itself.

(a) Applicability of GATT Article XX to claims under the SCM Agreement

The Appellate Body has considered the applicability of GATT Article XX to non-GATT obligations in a number of cases, and has ruled it inapplicable in relation to some, applicable in relation to others, and declined to decide in relation to others still (*China – Raw Materials*; *China – Audiovisuals*; *US – Measures relating to Shrimp from Thailand*; *US – Poultry*). It has never considered its applicability to the SCM Agreement.

Eriador may claim that Article XX GATT is applicable to claims under the SCM Agreement because:

- the object and purpose of the SCM Agreement is to elaborate, interpret and improve the relevant GATT disciplines relating to the use of subsidies (ie GATT Article XVI), and these GATT disciplines are themselves subject to GATT Article XX;
- that there is no explicit indication in the text, or negotiating history, of the SCM Agreement which excludes the operation of GATT Article XX; and
- that there are strong reasons of policy and principle, including the fundamental right of states to regulate, to apply GATT Article XX to claims under the SCM Agreement.

Borduria may argue:

- that, as a general proposition, the GATT and the specialized Annex 1A agreements (including the SCM Agreement) apply cumulatively (*Argentina – Footwear Safeguards*, para 80ff);
- the use of the term ‘this agreement’ in GATT Article XX presumptively precludes its application to other agreements in the absence of clear reasons to the contrary;
- that, while Part V of the SCM Agreement implements GATT Article VI, Parts II and III contain obligations which are independent of, and additional to, GATT obligations relating to subsidies;
- that, unlike other specialized agreements, the SCM Agreement contains no explicit reference to Article XX, and that there must be a reason for this decision not to include it; and
- that the SCM Agreement contains certain limited carveouts for non-actionable subsidies under Part IV, which implicitly excludes the operation of general exceptions under Article XX.

(b) Application of GATT Article XX to the FIT claim

GATT Article XX states, in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

Even if Eriador succeeds in making its case that Article XX is applicable, it faces considerable difficulties in showing that it passes all the hurdles contained in that provision. In brief:

- under Article XX(g), a question may arise as to whether the FIT scheme has been ‘made effective in conjunction with restrictions on domestic production or consumption’;
- under Article XX(b), which contains a necessity test, Eriador will be vulnerable to the claim that there a less trade restrictive means of achieving its objective, e.g. through the use of a non-discriminatory consumer subsidy for the consumption of renewable energy (or cold fusion energy);
- under the *chapeau*, there is a strong argument that the application of the FIT scheme only to cold fusion is ‘arbitrary and unjustifiable discrimination; as it effectively singles out one Eriadorian producer for special treatment, and does not offer the same or similar arrangement for any other renewable energy suppliers which presumably may have a comparably beneficial climate impact (see, e.g. *US - Shrimp (AB)*), including foreign suppliers who may wish to supply renewable energy into the Eriadorian market now or in the future; and
- under the *chapeau*, Eriador will also be vulnerable to the claim that the price formula contained in the FIT contract constitutes ‘arbitrary and unjustifiable discrimination’ since it systematically overestimates the price of electricity in an undistorted market, for all the reasons set out above. As a result, the formula results in an arbitrary competitive advantage being given to those companies which receive an FIT contract – arbitrary because it is not commensurate with the problem it seeks to address, nor the contribution of those companies to its solution.

4.5. The Framework Convention on the Promotion of Renewable Energy

The inclusion of the Framework Convention on the Promotion of Renewable Energy in the facts of this case provides teams with an opportunity to turn their minds to systemic questions of WTO law outside the confines of the SCM Agreement, and more specifically to demonstrate their knowledge of some basic propositions about the relationship between WTO law and non-WTO law in the context of WTO dispute settlement proceedings.

This section looks in turn at a number of ways in which Eriador may seek to rely on the FCPRE.

4.5.1. As evidence of fact

First, Eriador may seek to rely on the Preamble of the FCPRE as support for its claim, set out in section 4.3.3 above, that the electricity market in Eriador is significantly distorted, as a matter of fact. In that Preamble, all 173 states parties to the FCPRE explicitly acknowledge that fact, as well as its importance.

This is unlikely to be at all controversial. Non-WTO law has been used to support findings of fact in this fashion before in WTO proceedings. The fact that electricity markets are distorted as a result of carbon externalities is well accepted. And in any case the evidentiary value of the FCPRE here is only secondary and supportive.

4.5.2. VCLT Article 31(2): as interpretive context

DSU Article 3.2 provides that WTO agreements are to be interpreted in accordance with customary rules of interpretation of public international law. Many of these customary rules are codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969. According to VCLT Article 31(1), a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

Article 31(2) then provides that 'the context of a treaty shall comprise, in addition to its text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; and (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.'

The most notable example of a 'non-WTO' treaty being accepted as context for the interpretation of WTO agreements in the Harmonized System, which is relevant to the interpretation of tariff headings in schedules (see *EC – Chicken Cuts*; *China – Auto Parts*; *EC – Computer Equipment*). However, this was on the basis of the extremely close link between the HS and the GATT/WTO agreements, including the existence of a broad consensus amongst WTO Members to use the HS as a basis for their Schedules (see *EC – Chicken Cuts (AB)*, paras 197-199). There is no equivalent link between the WTO agreements and the FCPRE – indeed, the FCPRE was not in existence at the time the WTO agreements were negotiated. It is therefore hard to see how the FCPRE could fall

within either of the definitions of context set out in VCLT Article 31(2), as an agreement made 'in connexion with the conclusion of the treaty.'

4.5.3. VCLT Article 31(3)

Article 31(3)(c) of the Vienna Convention on the Law of Treaties states that, in the interpretation of a treaty, '[t]here shall be taken into account, together with the context ... [a]ny relevant rules of international law applicable in the relations between the parties.' Eriador may argue that this provision (coupled with DSU Article 3.2) requires the panel to take into account the FCPRE in its interpretation of the SCM Agreement.

The first question is whether the FCPRE is 'applicable in the relations between the parties' within the meaning of VCLT Article 31, given that not all WTO Members are party to the FCPRE. (Some teams may argue that the FCPRE is a codification of customary international law, though this will be difficult for them to show.) On the approach of the panel in *EC – Biotech*, it would not. In that case, the Panel determined that the phrase 'the parties' should be interpreted to mean all parties to the WTO agreement. However, the teams would be expected to debate the meaning and significance of the following more recent passage from the Appellate Body's decision in *EC – Large Civil Aircraft*:

An interpretation of "the parties" in Article 31(3)(c) should be guided by the Appellate Body's statement that "the purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty." This suggests that one must exercise caution in drawing from an international agreement to which not all WTO Members are party. At the same time, we recognize that a proper interpretation of the term "the parties" must also take account of the fact that Article 31(3)(c) of the *Vienna Convention* is considered an expression of the "principle of systemic integration" which, in the words of the ILC, seeks to ensure that "international obligations are interpreted by reference to their normative environment" in a manner that gives "coherence and meaningfulness" to the process of legal interpretation. In a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members. (para 845)

In a footnote to this passage, the AB also observed that:

We note that Article 31(3)(b) requires a treaty interpreter to take into account, together with context, "any subsequent practice in the application of the treaty which establishes the agreement of *the parties* regarding its interpretation". (emphasis added) According to the Appellate Body in *EC – Chicken Cuts*, Article 31(3)(b) requires the agreement, whether express or tacit, of all WTO Members for a practice to qualify under that provision. The Appellate Body recognized that the agreement of the parties regarding a treaty's interpretation may be deduced, not only from the actions of those actually engaged in the relevant practice, but also from the acceptance of other parties to the treaty through their affirmative reactions, or depending on the attendant

circumstances, their silence. (footnote 1916)

A further question under Article 31(3)(c) is whether the FCPRE is 'relevant' to the interpretation of the SCM Agreement, if so in what specific respects. A rule is "relevant" if it concerns the same subject matter of the provision being interpreted (*EC – Large Civil Aircraft (AB)*, para 846; *US – AD/CVDs (China)(AB)*, para 308).⁷ Eriador may argue that the Preamble to the FCPRE is relevant to the interpretation of the term 'benefit' in SCM Article 1.1(b). More specifically, it may argue that the determination of the market benchmark under that provision ought to take into account the clear statement in the FCPRE that existing market distortions caused by carbon emissions are of global significance and international concern. This would arguably support the conclusion that prices drawn from such distorted markets ought to be rejected as an appropriate benchmark for benefit analysis.

4.5.4. VCLT Article 41

Article 41 of the Vienna Convention on the Law of Treaties addresses the situation in which two or more parties to a multilateral agreement may conclude an agreement to modify the terms of the multilateral agreement as between themselves only. It states:

Article 41 Agreements to Modify Multilateral Treaties between Certain of the Parties Only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) The possibility of such a modification is provided for by the treaty; or
 - (b) The modification in question is not prohibited by the treaty and:
 - (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Given recent attempts to argue Article 41 before the Appellate Body in *Peru – Agricultural Products*, it may be that some Eriadorian teams seek to rely on Article 41 to argue that Eriador and Borduria have effectively entered into an agreement to modify the WTO Agreements *inter se* by virtue of their agreement to Article 11 of the FCPRE.

This argument would confront a number of difficulties. One is that, on its face, Article 41 only applies where all the parties to the modifying agreement are parties to the agreement being modified. This is not the case in respect of the

⁷ This decision is also noteworthy for the way in which it used the ILC Articles on State Responsibility without an explicit finding that they represent customary international law or general principles of law.

FCPRE. Another is that, even if it were admitted that the FCPRE modifies the WTO Agreements to permit the use of subsidies to renewable energy providers, it is hard to see how this would satisfy the requirements of VCLT Article 41(1)(b)(i). A subsidy of this nature would necessarily have the potential to affect the enjoyment of all other WTO Members of their rights under the WTO agreement. And third, the Appellate Body has recently decided, perhaps controversially, that WTO Members have in any case contracted out of Article 41, by putting in place specific rules regarding amendments and waivers (*Peru – Agricultural Products (AB)*, para 5.112).

4.5.5. VCLT Article 30: *lex posterior*

Finally, Eriador may argue that its obligations under FCPRE Article 11 to ‘use all available means to encourage the rapid development of renewable energy’ directly conflict with its obligations under the SCM Agreement, and that in the event of such a conflict the later treaty prevails under VLCT Article 30, with the consequence that the FCPRE limits the application of the SCM Agreement to the extent of any conflict.

While there remains some scholarly disagreement on this issue, the best indications from the current jurisprudence are that this argument is unlikely to succeed. In *EC – Hormones*, for example, the Appellate Body rejected the idea that the precautionary principle, even if it were accepted as an established principle of customary international law, could be used directly in WTO proceedings to modify the effect of the clear terms of the SPS Agreement, saying:

‘the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal principles of treaty interpretation in reading the provisions of the SPS Agreement’. (para 124)

Then, in *Mexico – Soft Drinks*, the Appellate Body rejected an argument from Mexico on the basis that it would require the Appellate Body to determine ‘whether the United States has acted consistently or inconsistently with its NAFTA obligations’. The Appellate Body saw ‘no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes’ (para 56). To the extent that Eriador’s argument would require the Panel to interpret and apply Eriador’s obligations under the FCPRE, the same reasoning would arguably apply.

5. Selected case law

Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011

Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R.

Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014.

Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R.

Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013.

Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R.

Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011.

Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R.

Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012

Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R.

Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000

Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R

Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015

Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006

Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003

6. Annex: The SCM Agreement

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Members hereby agree as follows:

PART I: GENERAL PROVISIONS

Article 1

Definition of a Subsidy

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

- (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
 - (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
 - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)⁸;
 - (iii) a government provides goods or services other than general infrastructure, or purchases goods;
 - (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

⁸ In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

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

and

- (b) a benefit is thereby conferred.

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

Article 2

Specificity

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

- (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
- (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions⁹ governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
- (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a

⁹ Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

subsidy.¹⁰ In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

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

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

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

PART II: PROHIBITED SUBSIDIES

Article 3

Prohibition

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

- (a) subsidies contingent, in law or in fact¹¹, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I¹²;
- (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

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

¹⁰ In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

¹¹ This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

¹² Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

Article 4

Remedies

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

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

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

4.4 If no mutually agreed solution has been reached within 30 days¹³ of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts¹⁴ (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

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

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

¹³ Any time-periods mentioned in this Article may be extended by mutual agreement.

¹⁴ As established in Article 24.

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

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.¹⁵

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate¹⁶ countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.¹⁷

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

PART III: ACTIONABLE SUBSIDIES

Article 5

Adverse Effects

¹⁵ If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

¹⁶ This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

¹⁷ This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

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

- (a) injury to the domestic industry of another Member¹⁸;
- (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994¹⁹;
- (c) serious prejudice to the interests of another Member.²⁰

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

Article 6

Serious Prejudice

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

- (a) the total ad valorem subsidization²¹ of a product exceeding 5 per cent²²;
- (b) subsidies to cover operating losses sustained by an industry;
- (c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

¹⁸ The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.

¹⁹ The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

²⁰ The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

²¹ The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

²² Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

- (d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.²³

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

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

- (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
- (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;
- (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;
- (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity²⁴ as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

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

²³ Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

²⁴ Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

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

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

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist²⁵ during the relevant period:

- (a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;
- (b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;
- (c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;
- (d) existence of arrangements limiting exports from the complaining Member;
- (e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);

²⁵ The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

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

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

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

Article 7

Remedies

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

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice²⁶ caused to the interests of the Member requesting consultations.

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

7.4 If consultations do not result in a mutually agreed solution within 60 days²⁷, any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within

²⁶ In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.

²⁷ Any time-periods mentioned in this Article may be extended by mutual agreement.

120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB²⁸ unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.²⁹

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

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

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

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of Non-Actionable Subsidies

²⁸ If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

²⁹ If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

8.1 The following subsidies shall be considered as non-actionable³⁰:

- (a) subsidies which are not specific within the meaning of Article 2;
- (b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

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

- (a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:^{31, 32, 33}

the assistance covers³⁴ not more than 75 per cent of the costs of industrial research³⁵ or 50 per cent of the costs of pre-competitive development activity³⁶,³⁷; and provided that such assistance is limited exclusively to:

³⁰ It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.

³¹ Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

³² Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.

³³ The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

³⁴ The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

³⁵ The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

³⁶ The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use,

- (i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);
 - (ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;
 - (iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;
 - (iv) additional overhead costs incurred directly as a result of the research activity;
 - (v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.
- (b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development ³⁸ and non-specific (within the meaning of Article 2) within eligible regions provided that:
- (i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

³⁷ In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

³⁸ A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

- (ii) the region is considered as disadvantaged on the basis of neutral and objective criteria³⁹, indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;
- (iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:
 - one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;
 - unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

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

- (c) assistance to promote adaptation of existing facilities⁴⁰ to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:
 - (i) is a one-time non-recurring measure; and
 - (ii) is limited to 20 per cent of the cost of adaptation; and

³⁹ "Neutral and objective criteria" means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

⁴⁰ The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

- (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
- (iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
- (v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.⁴¹

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

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

⁴¹ It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

Article 9

Consultations and Authorized Remedies

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

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

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

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

PART V: COUNTERVAILING MEASURES

Article 10

Application of Article VI of GATT 1994⁴²

⁴² The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance

Members shall take all necessary steps to ensure that the imposition of a countervailing duty⁴³ on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated⁴⁴ and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

Article 11

Initiation and Subsequent Investigation

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

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

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

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

⁴³ The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

⁴⁴ The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

a description of the volume and value of domestic production of the like product accounted for by such producers;

- (ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
- (iii) evidence with regard to the existence, amount and nature of the subsidy in question;
- (iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

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

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed⁴⁵ by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.⁴⁶ The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

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

⁴⁵ 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.

⁴⁶ 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.

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

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

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

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

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

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

Article 12

Evidence

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

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.⁴⁷ Due

⁴⁷ 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

consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

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

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters⁴⁸ and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

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

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

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities.

transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

⁴⁸ It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

Such information shall not be disclosed without specific permission of the party submitting it.⁴⁹

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

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.⁵⁰

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

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

12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and

⁴⁹ Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

⁵⁰ Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

final determinations, affirmative or negative, may be made on the basis of the facts available.

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

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

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and
- (ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

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

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

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

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

Article 13

Consultations

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

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.⁵¹

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

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

Article 14

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

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

- (a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
- (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan

⁵¹ It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.

which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

- (c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
- (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Article 15

*Determination of Injury*⁵²

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products⁵³ and (b) the consequent impact of these imports on the domestic producers of such products.

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

⁵² Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

⁵³ Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

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

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

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

15.5 It must be demonstrated that the subsidized imports are, through the effects⁵⁴ of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

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

⁵⁴ As set forth in paragraphs 2 and 4.

products, which includes the like product, for which the necessary information can be provided.

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

- (i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
- (ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;
- (iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
- (iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (v) inventories of the product being investigated.

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

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

Article 16

Definition of Domestic Industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic

production of those products, except that when producers are related⁵⁵ to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

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

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

16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

⁵⁵ For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

Article 17

Provisional Measures

17.1 Provisional measures may be applied only if:

- (a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;
- (b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and
- (c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

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

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

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

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

Article 18

Undertakings

18.1 Proceedings may⁵⁶ be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

- (a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

⁵⁶ The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.

- (b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

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

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

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

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this

Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 19

Imposition and Collection of Countervailing Duties

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

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties⁵⁷ whose interests might be adversely affected by the imposition of a countervailing duty.

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

19.4 No countervailing duty shall be levied⁵⁸ 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.

⁵⁷ For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

⁵⁸ As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

Article 20

Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

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

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

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

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

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

Article 21

Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

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

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.⁵⁹ The duty may remain in force pending the outcome of such a review.

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

21.5 The provisions of this Article shall apply *mutatis mutandis* to undertakings accepted under Article 18.

Article 22

Public Notice and Explanation of Determinations

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

⁵⁹ When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report⁶⁰, 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) a description of the subsidy practice or practices to be investigated;
- (iv) a summary of the factors on which the allegation of injury is based;
- (v) the address to which representations by interested Members and interested parties should be directed; and
- (vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

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

- (i) the names of the suppliers or, when this is impracticable, the supplying countries involved;
- (ii) a description of the product which is sufficient for customs purposes;

⁶⁰ Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

- (iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;
- (iv) considerations relevant to the injury determination as set out in Article 15;
- (v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

Article 23

Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

PART VI: INSTITUTIONS

Article 24

*Committee on Subsidies and Countervailing Measures
and Subsidiary Bodies*

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

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

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

PART VII: NOTIFICATION AND SURVEILLANCE

Article 25

Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies⁶¹, Members shall ensure that their notifications contain the following information:

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

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

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

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudice either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

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

⁶¹ The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.

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

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

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

25.12 Each Member shall notify the Committee (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and (b) its domestic procedures governing the initiation and conduct of such investigations.

Article 26

Surveillance

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

- (a) developing country Members referred to in Annex VII.
- (b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies⁶², and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the

⁶² For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

developing country Member having reached export competitiveness, or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

- (a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or
- (b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the

notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

PART IX: TRANSITIONAL ARRANGEMENTS

Article 28

Existing Programmes

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

- (a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and
- (b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

Article 29

Transformation into a Market Economy

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

- (a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;
- (b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

PART X: DISPUTE SETTLEMENT

Article 30

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

PART XI: FINAL PROVISIONS

Article 31

Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

Article 32

Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.⁶³

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

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

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

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

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

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

⁶³ This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

ANNEX I

ILLUSTRATIVE LIST OF 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 available⁶⁴ on world markets to their exporters.
- (e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes⁶⁵ or social welfare charges paid or payable by industrial or commercial enterprises.⁶⁶

⁶⁴ The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

⁶⁵ For the purpose of this Agreement:

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

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

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

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

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

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

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

- (f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.
- (g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes⁵⁸ in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.
- (h) The exemption, remission or deferral of prior-stage cumulative indirect taxes⁵⁸ on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).⁶⁷ This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.
- (i) The remission or drawback of import charges⁵⁸ in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported

⁶⁶ The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

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

⁶⁷ Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

- (j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.
- (k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

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

- (l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

ANNEX II

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS⁶⁸

I

⁶⁸ Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

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

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating

authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

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

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

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

ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

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

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

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

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

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

ANNEX IV

CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION

(PARAGRAPH 1(A) OF ARTICLE 6)⁶⁹

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.
2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's⁷⁰ sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.⁷¹
3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.
4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.⁷²
5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.
6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.
7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.

⁶⁹ An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

⁷⁰ The recipient firm is a firm in the territory of the subsidizing Member.

⁷¹ In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned.

⁷² Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

ANNEX V

PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.⁷³ This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.⁷⁴

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country

⁷³ In cases where the existence of serious prejudice has to be demonstrated.

⁷⁴ The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

ANNEX VI

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.
2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.
3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.
4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.
5. Sufficient advance notice should be given to the firms in question before the visit is made.
6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if (a) the authorities of the importing Member notify the representatives of the government of the Member in question and (b) the latter do not object to the visit.
7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.
8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX VII

DEVELOPING COUNTRY MEMBERS REFERRED TO
IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached \$1,000 per annum⁷⁵: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

⁷⁵ The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.