COUNCIL REGULATION (EC) No 3284/94

of 22 December 1994

on protection against subsidized imports from countries not members of the European Community

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 113 thereof,

Having regard to the Regulations establishing the common organization of agricultural markets and the Regulations adopted pursuant to Article 235 of the Treaty applicable to goods manufactured from agricultural products, and in particular the provisions of those Regulations which allow for derogation from the general principle that protective measures at frontiers may be replaced solely by the measures provided for in those Regulations,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament [1],

Whereas, by Regulation (EEC) No 2423/88 [2], the Council adopted common rules for protection against dumped or subsidized imports from countries which are not members of the European Community;

Whereas, these rules were adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement on Tariffs and Trade ('the GATT'), from the Agreement on Implementation of Article VI of the GATT ('the 1979 Anti-Dumping Code') and from the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT ('the 1979 Subsidies Code');

Whereas, the conclusion of the Uruguay Round of multilateral trade negotiations has led to the establishment of the World Trade Organization ('the WTO');

Whereas, Annex 1A to the Agreement establishing the WTO ('the WTO Agreement') contains, *inter alia*, the General Agreement on Tariffs and Trade 1994 ('the GATT 1994'), an Agreement on Agriculture ('the Agreement on Agriculture'), a new Agreement on implementation of Article VI of the GATT 1994 ('the Anti-Dumping Agreement'), and a new Agreement on Subsidies and Countervailing Measures ('the Subsidies Agreement');

Whereas, in order to reach greater transparency and effectiveness in the application by the Community of the rules laid down in the Anti-Dumping Agreement and the Subsidies Agreement respectively, it is considered necessary to adopt two separate Regulations which will lay down in sufficient detail the requirements for the application of each of these commercial defence instruments;

Whereas, it is therefore appropriate to amend Community rules governing the application of countervailing measures in the light of the new multilateral rules, with regard *inter alia* to the procedures for initiation of proceedings and the conduct of subsequent investigations, including the establishment and treatment of the facts, the application of provisional measures, the imposition and collection of countervailing duties, the duration and review of countervailing measures, and the public disclosure of information relating to countervailing investigations;

Whereas, in view of the extent of the changes brought about by the new Agreements and to ensure an adequate and transparent implementation of the new rules, it is appropriate to transpose the language of the new Agreements into Community legislation to the extent possible;

Whereas, furthermore, it seems advisable to explain, in adequate detail, when a subsidy shall be deemed to exist, according to which principles it shall be countervailable (in particular whether the subsidy has been granted specifically), and according to which criteria the amount of the countervailable subsidy is to be calculated;

Whereas, it is clear that in determining the existence of a subsidy it is necessary to demonstrate that there has been a financial contribution by a government or any public authority within the territory of a country, or that there has been any form of income or price support in the sense of Article XVI of the GATT 1994, and that a benefit has thereby been conferred to the recipient enterprise;

Whereas, it is necessary to explain in sufficient detail which kind of subsidies are not countervailable and which procedure shall be followed if during an investigation it is determined that an investigated enterprise has received non-countervailable subsidies;

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[1] Opinion delivered on 14 December 1994 (not yet published in the Official Journal).

[2] OJ No L 209, 2. 8. 1988, p. 1. Regulation as amended by Regulation (EC) No 521/94 (OJ No L 66, 10. 3. 1994, p. 7) and Regulation (EC) No 522/94 (OJ No L 66, 10. 3. 1994, p. 10).

Whereas, the Subsidies Agreement states that the provisions concerning non-countervailable subsidies shall cease to apply five years after the date of entry into force of the WTO Agreement, unless they are extended by mutual agreement of the Members of the WTO, and that it may therefore be necessary to amend this Regulation accordingly, if the validity of those provisions is not so extended;

Whereas, the measures listed in Annex 2 to the Agreement on Agriculture are non-countervailable, to the extent provided for in that Agreement;

Whereas, it is desirable to lay down clear and detailed guidance on the factors which may be relevant for the determination of whether the subsidized imports have caused material injury or are threatening to cause injury; and whereas, in demonstrating that the volume and price levels of the imports concerned are responsible for injury sustained by a Community industry, attention should be given to the effect of other factors and in particular existing market conditions in the Community;

Whereas, it is advisable to define the term 'Community industry' and provide that parties related to exporters may be excluded from such industry and to define the term 'related'; and whereas it is also necessary to provide for countervailing duty action to be taken with regard to producers in a region of the Community and to lay down guidelines on the definition of such a region;

Whereas, it is necessary to set down who may lodge a countervailing duty complaint, including the extent to which it should be supported by the Community industry, and the information on countervailable subsidies, injury and causality which such complaint should contain; and whereas it is also expedient to specify the procedures with regard to the rejection of complaints or the initiation of proceedings;

Whereas, it is necessary to lay down how interested parties shall be given notice of the information which the authorities require, ample opportunity to present all relevant evidence and a full opportunity for the defence of their interests; whereas, it is also desirable to set out clearly the rules and procedures to be followed during the investigation, in particular that interested parties have to make themselves known present their views and submit information within specified time limits, if such views and information are to be taken into account; and whereas it is also appropriate to set out the conditions under which an interested party may have access to, and comment on, information presented by other interested parties; whereas there should also be cooperation between the Member States and the Commission with regard to the collection of information;

Whereas, it is necessary to lay down the conditions under which provisional duties may be imposed, including that they may not be imposed sooner than 60 days from initiation and no later than nine months from initiation; whereas, such duties may in all cases be imposed by the Commission only for a four-month period;

Whereas, it is necessary to specify procedures for the acceptance of undertakings which eliminate or offset the countervailable subsidies and injury instead of the imposition of provisional or definitive duties; whereas it is also appropriate to lay down the consequences of violation or withdrawal of undertakings and that provisional duties may be imposed in cases of suspected violation or where further investigation is necessary to complete the findings; whereas, in accepting undertakings, care should be taken that the proposed undertakings, and their enforcement, do not lead to anti-competitive behaviour;

Whereas, it is necessary to provide for the termination of cases, by termination without measures or by conclusion with definitive measures, normally within 12 months, and in no case later than 13 months, from the initiation of the investigation;

Whereas, an investigation should be terminated in case the amount of the subsidy is found to be *de minimis* or if, particularly in case of imports originating in developing countries, the volume of subsidized imports or the injury is negligible, and it is appropriate to define these criteria; whereas, where measures are to be imposed, it is necessary to provide for the termination of investigations and to lay down that measures should be less than the amount of countervailable subsidies if such lesser amount would remove in injury, as well as to specify the method of calculating the level of measures in cases of sampling;

Whereas, it is necessary to provide for the retroactive collection of provisional duties as deemed appropriate and to define the circumstances which may trigger the retroactive application of duties to avoid the undermining of the definitive measures to be applied; whereas it is also necessary to provide that duties may be applied retroactively in cases of violation or withdrawal of undertakings;

Whereas, it is necessary to provide that measures shall lapse after five years unless a review investigation indicates that they should be maintained; whereas, it is also necessary to provide, in cases where sufficient evidence is submitted of changed circumstances, for interim reviews or for investigations to determine whether refunds of countervailing duties are warranted;

Whereas, even though the Subsidies Agreement does not contain provisions concerning circumvention of

countervailing measures, the possibility of such circumvention exists, in terms similar, albeit not identical, to the circumvention of anti-dumping measures; whereas it appears therefore appropriate to enact an anti-circumvention provision in this Regulation;

Whereas, it is expedient to permit the suspension of countervailing measures where there is a temporary change in market conditions which make the continued imposition of such measures temporarily inappropriate;

Whereas, it is necessary to provide that imports under investigation may be made subject to registration upon importation to enable measures to be subsequently applied against such imports;

Whereas, to ensure a proper enforcement of measures, it is necessary that Member States monitor and report to the Commission the import trade in products subject to investigation and subject to measures and the amount of duties collected pursuant to Regulation;

Whereas, it is necessary to provide for consultations of an Advisory Committee at regular and specified stages of the investigation; whereas the Committee shall consist of representatives of Member States with a representative of the Commission as chairman;

Whereas, it is expedient to provide for verification visits to check information submitted on countervailable subsidies and injury, though such visits should be dependent on proper replies to questionnaires being received;

Whereas, it is essential to provide for sampling in cases where the number of parties or transactions are large in order to permit a timely completion of investigations;

Whereas, it is necessary to provide that for parties who do not cooperate satisfactorily other information may be used to establish findings and such information may be less favourable to the party than if it had cooperated;

Whereas, provision should be made for the treatment of confidential information so that business or governmental secrets are not divulged;

Whereas, it is essential that provision is made for the proper disclosure of the essential facts and considerations to parties which qualify for such treatment and that such disclosure is made, with due regard to the decision-making process in the Community, within a time period which permits parties to defend their interests;

Whereas, it is prudent to provide for an administrative system under which arguments can be presented in relation to whether measures are in the Community interest, including the interests of consumers, and to lay down the time periods within which such information has to be presented as well as the disclosure rights of the parties concerned;

Whereas, it is imperative to link the implementation of time limits to the establishment of the necessary administrative structure within the Commission's services; whereas the Council, therefore, should specify, in a decision to be adopted by qualified majority no later than 1 April 1995, when these time limits shall apply;

Whereas, in applying the rules of the Subsidies Agreement it is essential, in order to maintain the balance of rights and obligations which this Agreement sought to establish, that the Community take account of their interpretation by the Community's major trading partners, as reflected in legislation or established practice,

HAS ADOPTED THIS REGULATION:

Article 1

Principles

1. This Regulation lays down provisions for protection against subsidized imports from countries not members of the European Community. A countervailing duty may be imposed for the purpose of offsetting any subsidy granted, directly or indirectly, for the manufacture, production, export or transport of any product whose release for free circulation in the Community causes injury.

2. For the purpose of this Regulation, a product is considered as being subsidized if it benefits from a countervailable subsidy as defined in Articles 2 and 3 of this Regulation.

3. Such subsidy may be granted by the government of the country of origin of the imported product, or by the government of an intermediate country from which the product is exported to the Community, known for the purpose of this Regulation as 'the country of export'. The term 'government' is defined, for the purposes of this

Regulation as a government or any public body within the territory of the country of origin or export.

4. Notwithstanding the above, where products are not directly imported from the country of origin but are exported to the Community from an intermediate country, the provisions of this Regulation shall be fully applicable and the transaction or transactions shall, where appropriate, be regarded as having taken place between the country of origin and the Community.

5. For the purpose of this Regulation 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.

Article 2

Definition of a subsidy

A subsidy shall be deemed to exist if:

1. (a) there is a financial contribution by a government (as defined in Article 1 (3)) in the country of origin or export, that is to say, where:

(i) a government practice involves a direct transfer of funds (for example grants, loans, equity infusion), potential direct transfers of funds or liabilities (for example, loan guarantees);

(ii) government revenue that is otherwise due, is foregone or not collected (for example, fiscal incentives such as tax credits); in this regard, 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 amount not in excess of those which have been accrued, shall not be deemed to be a subsidy, provided that such an exemption is granted in accordance with the provisions of Annexes I to III to this Regulation;

(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 points (i) to (iii) which would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments; or

(b) there is any form of income or price support within the meaning of Article XVI of the GATT 1994; and

2. a benefit is thereby conferred.

Article 3

Countervailability of subsidies

A. PRINCIPLE

1. Subsidies as defined in Article 2 shall be subject to countervailing measures only if they are specific, as defined in paragraphs 2 to 4.

B. SPECIFICITY

2. In order to determine whether a subsidy, as defined in Article 2 is specific to an enterprise or industry or group of enterprises or industries (hereinafter referred to as 'certain enterprises') within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions 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.

For the purpose of this Article, objective criteria or conditions 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.

The criteria or conditions must be clearly spelled out by law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain

enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In this regard, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall, in particular, be considered.

In applying this provision, 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.

3. A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. 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 Regulation.

4. Irrespective of the provisions of paragraphs 2 and 3, the following subsidies shall be deemed to be specific:

(a) Subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I to this Regulation.

Subsidies shall be considered to be contingent in fact upon export performance 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 accorded to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

(b) Subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

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

C. NON-COUNTERVAILABLE SUBSIDIES

6. The following subsidies shall not be subjected to countervailing measures:

(a) Subsidies which are not specific within the meaning of paragraphs 2 and 3.

(b) Subsidies which are specific, within the meaning of paragraphs 2 and 3, but which meet the conditions provided for in paragraphs 7, 8 or 9.

(c) The element of subsidy which may exist in any of the measures listed in Annex IV to this Regulation.

7. Subsidies for research activities conducted by firms or by higher education or research establishments on a contract basis with firms shall not be subject to countervailing measures, if the subsidies cover not more than 75 % of the costs of industrial research or 50 % of the costs of pre-competitive development activity, and provided that such subsidies are limited exclusively to:

(i) personnel costs (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.

For the purpose of this paragraph:

(a) the allowable levels of non-countervailable subsidy referred to in this paragraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

In case of programmes which span both 'industrial research' and 'pre-competitive development activity', the allowable level of non-countervailable subsidy shall not exceed the simple average of the allowable levels of non-countervailable subsidy applicable to the above two categories, calculated on the basis of all eligible costs as set forth in points (i) to (v) of this paragraph;

(b) 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;

(c) the term 'pre-competitive development activity' means the translation of industrial research findings into a

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

The provisions of this paragraph shall not apply to civil aircraft (as defined in the 1979 Agreement on Trade in Civil Aircraft, as amended, or in any later Agreement amending or replacing such Agreement).

8. Subsidies to disadvantaged regions within the territory of the country of origin and/or export, given pursuant to a general framework of regional development, and which would be non-specific if the criteria laid down in paragraphs 2 and 3 were applied to each eligible region concerned, shall not be subject to countervailing measures provided that:

(i) each disadvantaged region is a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria, indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out by law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria 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 % of the average for the territory of the country of origin or export concerned,

— unemployment rate, which must be at least 110 % of the average for the territory of the country of origin or export concerned;

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

For the purpose of this paragraph:

(a) 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;

(b) '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 subsidy which can be granted to each subsidized project. Such ceilings must be differentiated according to the different levels of development of eligible regions and must be expressed in terms of investment costs or the cost of job creation. Within such ceilings, the distribution of subsidy 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. This subparagraph shall be applied in the light of the criteria set out in paragraphs 2 and 3.

9. Subsidies to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, shall not be subject to countervailing measures, provided that the subsidy:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 % of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the subsidized 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.

For the purpose of this paragraph the term 'existing facilities' means facilities having been in operation for at least two years at the time when new environmental requirements are imposed.

Article 4

Calculation of the amount of the countervailable subsidy

A. PRINCIPLE

1. The amount of countervailable subsidies, for the purpose of this Regulation, shall be calculated in terms of the benefit conferred to the recipient which is found to exist during the investigation period for subsidization. Normally this period shall be the most recent accounting year of the beneficiary, but may be any other period of at least six months prior to the initiation of the investigation for which reliable financial and other relevant data are available.

B. CALCULATION OF BENEFIT TO THE RECIPIENT

2. As regards the calculation of benefit to the recipient, the following rules shall apply:

(a) Government provision of equity capital shall not be considered as conferring a benefit, unless the investment can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of the country of origin and/or export.

(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 that the firm would pay for a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between the 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 for a comparable commercial loan in the absence of 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 purchases 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 product or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

C. GENERAL PROVISIONS ON CALCULATION

3. The amount of countervailable subsidies shall be determined according to the following provisions:

(a) The amount of the countervailable subsidies shall be determined per unit of the subsidized product exported to the Community.

(b) In establishing this amount the following elements may be deducted from the total subsidy:

(i) any application fee, or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy;

(ii) export taxes, duties or other charges levied on the export of the product to the Community specifically intended to offset the subsidy.

Where an interested party claims a deduction, it must prove that the claim is justified.

(c) Where the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount of countervailable subsidy shall be determined by allocating the value of the total subsidy, as appropriate, over the level of production, sales or exports of the products concerned during the investigation period for subsidization.

(d) Where the subsidy can be linked to the acquisition or future acquisition of fixed assets, the amount of the countervailable subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned. The amount so calculated which is attributable to the investigation period, including that which derives from fixed assets acquired before this period, shall be allocated as described in subparagraph (c).

Where the assets are non-depreciating, the subsidy shall be valued as an interest-free loan, and be treated in accordance with paragraph 2 (b).

(e) Where a subsidy cannot be linked to the acquisition of fixed assets, the amount of the benefit received during the investigation period shall in principle be attributed to this period, and allocated as described in subparagraph 3 (c), unless special circumstances arise justifying attribution over a different period.

Article 5

Determination of injury

1. Pursuant to this Regulation, the term 'injury' shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry, and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury 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 Community market for like products, and (b) the consequent impact of these imports on the Community industry.

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

4. Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the effects of such imports shall be cumulatively assessed only if it is determined that: (1) the amount of countervailable subsidies established in relation to the imports from each country is more than *de minimis* as defined in Article 11 (5) and that the volume of imports from each country is not negligible; and (2) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product.

5. The examination of the impact of the subsidized imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including: the fact that an industry is still in the process of recovering from the effects of past subsidization or dumping, the magnitude of the amount of countervailable subsidies, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilization of capacity; factors affecting Community 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.

6. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the subsidized imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.

7. Known factors other than the subsidized imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the subsidized imports pursuant to paragraph 6. Factors which may be considered in this respect include, *inter alia*, the volume and prices of non-subsidized imports, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and Community producers, developments in technology and the export performance and productivity of the Community industry.

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

9. A determination of a threat of material injury shall be based on facts on 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.

10. In making a determination regarding the existence of a threat of material injury, consideration should be given to, *inter alia*, such factors as:

(i) the 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 Community market indicating the likelihood of substantially increased imports;

(iii) sufficient freely disposable or an imminent, substantial increase in capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the Community market, taking into account the availability of other export markets to absorb any additional exports;

(iv) whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would likely increase demand for further import; and

(v) inventories of the product being investigated.

11. No one of the factors listed above 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.

Article 6

Definition of Community industry

1. For the purposes of this Regulation, the term 'Community' industry shall be interpreted as referring to the Community producers as a whole of the like product or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 7 (8), of the total Community production of those products, except that:

(i) when producers are related to the exporters or importers or are themselves importers of the allegedly subsidized product, the term 'the Community industry' may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of the Community 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 Community. In such circumstances, injury may be found to exist even where a major proportion of the total Community 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.

2. For the purpose of paragraph 1, producers shall be considered 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.

3. Where the Community industry has been interpreted as referring to the producers in a certain region, the exporters or the Government granting countervailable subsidies shall be given an opportunity to offer undertakings pursuant to Article 10 in respect of the region concerned. In such cases, when evaluating whether the measures are in the Community interest, special account shall be taken of the interest of the region. If an adequate undertaking is not offered promptly or the situations set out in Article 10 (9) and (10) apply, a provisional or definitive countervailing duty may be imposed in respect of the Community as a whole. In such cases the duties may, if practicable, be limited to specific producers or exporters.

4. The provisions of Article 5 (8) shall apply to this Article.

Article 7

Initiation of proceedings

1. Except as provided for in paragraph 10, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.

(i) The complaint may be submitted to the Commission, or a Member State, which shall forward it to the Commission. The Commission shall send Member States a copy of any complaint it receives. The complaint shall be deemed to have been lodged on the first working day following its delivery to the Commission by registered mail or the issuing of an acknowledgement of receipt by the Commission.

(ii) Where, in the absence of any complaint, a Member State is in possession of sufficient evidence of subsidization and of injury resulting therefrom for the Community industry it shall immediately communicate such evidence to the Commission.

2. A complaint pursuant to paragraph I shall include sufficient evidence of the existence of countervailable

subsidies (including, if possible, of their amount), injury and a causal link between the allegedly subsidized imports and the alleged injury. The complaint shall contain such information as is reasonably available to the complainant on the following:

(i) identity of the complainant and a description of the volume and value of the Community production of the like product by the complainant. Where a written complaint is made on behalf of the Community industry, the complaint shall identify the industry on behalf of which the complaint is made by a list of all known Community producers of the like product (or associations of Community producers of the like product) and, to the extent possible, a description of the volume and value of Community 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 and/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, nature and countervailability of the subsidies in question;

(iv) 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 Community market and the consequent impact of the imports on the Community industry, as demonstrated by relevant factors and indices having a bearing on the state of the Community industry, such as those listed in Article 5 (3) and (5).

3. The Commission shall, to the degree possible, examine the accuracy and adequacy of the evidence provided in the complaint to determine whether there is sufficient evidence to justify the initiation of an investigation.

4. An investigation may be initiated in order to determine whether or not the alleged subsidies are specific within the meaning of Article 3 (2) and (3) of this Regulation.

5. An investigation may also be initiated in respect of subsidies non-countervailable according to Article 3 (7), (8) or (9) in order to determine whether or not the conditions laid down in those paragraphs have been met.

6. If a subsidy is granted pursuant to a subsidy programme which has been notified in advance of its implementation to the WTO Committee on Subsidies and Countervailing Measures in accordance with the provision of Article 8 of the Subsidies Agreement, and in respect of which the Committee has failed to determine that the relevant conditions laid down in Article 8 of the Subsidies Agreement have not been met, an investigation shall not be initiated in respect of a subsidy granted pursuant to such a programme, unless a violation of Article 8 of the Subsidies Agreement has been ascertained by the competent WTO Dispute Settlement Body or through arbitration as provided in Article 8 (5) of the Subsidies Agreement.

7. An investigation may also be initiated in respect of measures of the type listed in Annex IV to this Regulation, to the extent that they contain an element of subsidy as defined by Article 2, in order to determine whether the measures in question fully conform to the provisions of Annex IV.

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

9. The Commission shall avoid, unless a decision has been made to initiate an investigation, any publicising of the complaint for the initiation of an investigation. However, as soon as possible after the receipt of a properly documented complaint pursuant to this Article, and in any event before the initiation of an investigation, the Commission shall notify the government of the country of origin and/or export concerned, and this government shall be invited for consultations with the aim of clarifying the situation as to matters referred to in paragraph 2 and arriving at a mutually agreed solution.

10. If in special circumstances, the Commission decides to initiate an investigation without having received a written complaint by or on behalf of the Community industry for the initiation of such investigation, this shall be done on the basis of sufficient evidence of the existence of countervailable subsidies, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11. The evidence of both subsidies and injury shall be considered simultaneously in the decision whether or not to initiate an investigation. A complaint shall be rejected where there is insufficient evidence of either countervailable subsidies or of injury to justify proceeding with the case. Pursuant to this Article,

proceedings shall not be initiated against countries whose imports represent a market share of below 1 %, unless such countries collectively account for 3 %, or more, of Community consumption.

12. The complaint may be withdrawn prior to initiation, in which case it shall be considered not to have been lodged.

13. Where, after consultation, it is apparent that there is sufficient evidence to justify initiating proceedings the Commission shall initiate proceedings within 45 days of the lodging of the complaint and publish a notice in the *Official Journal of the European Communities*. Where insufficient evidence has been presented, the complainant shall, after consultation, be so informed within 45 days of the date on which the complaint is lodged with the Commission.

14. The notice of initiation of the proceeding shall announce the initiation of an investigation, indicate the product and countries concerned, give a summary of the information received and provide that all relevant information is to be communicated to the Commission; it shall state the periods within which interested parties may make themselves known, present their views in writing and submit information, if such views and information are to be taken into account during the investigation; it shall also state the period within which interested parties may apply to be heard by the Commission in accordance with Article 8 (5).

15. The Commission shall advise the exporters, importers and representative associations of importers or exporters known to it to be concerned, as well as the government of the country of origin and/or export and the complainants, of the initiation of the proceedings and, with due regard to the protection of confidential information, provide the full text of the written complaint received pursuant to paragraph 1 to the known exporters, and to the authorities of the country of origin and/or export, and make it available, upon request, to other interested parties involved. Where the number of exporters involved is particularly high, the full text of the written complaint should instead be provided only to the authorities of the country of origin and/or export or to the relevant trade association.

16. A countervailing duty investigation shall not hinder the procedures of customs clearance.

Article 8

The investigation

1. Following the initiation of the proceedings, the Commission, acting in cooperation with the Member States, shall commence an investigation at Community level. Such investigation shall cover both subsidization and injury and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of subsidization, shall normally cover the investigation period provided for in Article 4 (1). Information relating to a period subsequent to the investigation period shall, normally, not be taken into account.

2. Parties receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply. 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 day on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the country of origin and/or export. An extension of the 30 day period may be granted, taking due account of the time limits of the investigation and provided the party gives a good reason, in terms of its particular circumstances, for such extension.

3. The Commission may request Member States to supply information, and Member States shall take whatever steps are necessary in order to give effect to such requests. They shall send to the Commission the information requested together with the results of all inspections, checks or investigations carried out. Where this information is of general interest or where its transmission has been requested by a Member State, the Commission shall forward it to the Member States, provided it is not confidential, in which case a non-confidential summary shall be forwarded.

4. The Commission may request Member States to carry out all necessary checks and inspections, particularly amongst importers, traders and Community producers, and to carry out investigations in third countries, provided the firms concerned give their consent and the government of the country in question has been officially notified and raises no objection. Member States shall take whatever steps are necessary in order to give effect to such requests from the Commission. Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties.

5. The interested parties, which have made themselves known in accordance with Article 7 (14), shall be heard if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceedings and that there are particular reasons why they should be heard.

6. Opportunities shall, on request, be provided for the importers, exporters and the complainants, which have made themselves known in accordance with Article 7 (14), and the government of the country of origin and/or

export, to meet those parties with adverse interests so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Oral information provided pursuant to this paragraph shall be taken into account by the Commission in so far as it is subsequently reproduced in writing.

7. The complainants, the government of the country of origin and/or export, importers and exporters and their representative associations, users and consumer organizations, which have made themselves known in accordance with Article 7 (14), may, upon written request, inspect all information made available to the Commission by any party to an investigation, as distinct from internal documents prepared by the authorities of the Community or its Member States, provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 20, and that it is used in the investigation. Such parties may respond to such information and their comments may be taken into consideration, to the extent that they are sufficiently substantiated in the response.

8. Except in circumstances provided for in Article 19 the information supplied by interested parties and upon which findings are based shall be examined for accuracy to the degree possible.

9. For proceedings initiated pursuant to Article 7 (13), an investigation shall, whenever possible, be concluded within one year. In any event, such investigations shall in all cases by concluded within 13 months of initiation, in accordance with the findings made pursuant to Article 10 for undertakings or the findings made pursuant to Article 11 for definitive action.

10. Throughout the investigation the Commission shall afford the government of the country of origin and/or export a reasonable opportunity to continue consultations with a view to clarifying the factual situation and arriving at a mutually agreed solution.

Article 9

Provisional measures

1. Provisional measures may be applied if proceedings have been initiated in accordance with the provisions of Article 7, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments in accordance with paragraph 14 of Article 7, a provisional affirmative determination has been made that the imported product benefits from countervailable subsidies and of consequent injury to the Community industry, and the Community interest calls for intervention to prevent such injury. The provisional measures shall be imposed no sooner than 60 days from the initiation of the proceedings but no later than nine months from the initiation of the proceedings.

2. The amount of the provisional countervailing duty shall not exceed the total amount of countervailable subsidies as provisionally established but it should be less than this amount, if such lesser duty would be adequate to remove the injury to the Community industry.

3. Provisional measures shall take the form of a security and the release of the products concerned for free circulation in the Community shall be conditional upon the provision of such security.

4. The Commission shall take provisional action after consultation or, in cases of extreme urgency, after informing the Member States. In this latter case, consultations shall take place 10 days, at the latest, after notification to the Member States of the action taken by the Commission.

5. Where a Member State requests immediate intervention by the Commission and the conditions of paragraph 1 of Article 9 are met, the Commission shall, within a maximum of five working days of receipt of the request, decide whether a provisional countervailing duty should be imposed.

6. The Commission shall forthwith inform the Council and the Member States of any decision taken pursuant to this Article. The Council, acting by qualified majority, may decide differently.

7. Provisional countervailing duties shall have a maximum period of validity of four months.

Article 10

Undertakings

1. Investigations may be terminated without the imposition of provisional or definitive duties upon acceptance of satisfactory voluntary undertakings under which:

(i) the government of the country of origin and/or export agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(ii) any exporter undertakes to revise its prices or to cease exports to the area in question as long as such exports benefit from countervailable subsidies, so that the Commission, after consultation, is satisfied that the injurious effect of the subsidies is eliminated. Price increases under such undertakings shall not be higher than necessary to offset the amount of countervailable subsidies, and should be less than the amount of

countervailable subsidies if such increases would be adequate to remove the injury to the Community industry.

2. Undertakings may be suggested by the Commission, but no government or exporter shall be obliged to enter into such an undertaking. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, it may be determined that a threat of injury is more likely to be realized if the subsidized imports continue. Undertakings shall not be sought or accepted from governments or exporters unless a provisional affirmative determination of subsidization and injury caused by such subsidization has been made. Save in exceptional circumstances, undertakings may not be offered later than the end of the period during which representations may be made pursuant to Article 21 (5).

3. Undertakings offered need not be accepted if their acceptance is considered impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. The exporter and/or the government of the country of origin and/or export concerned may be provided with the basis on which it is intended to propose the rejection of the offer of an undertaking and may be given an opportunity to make comments thereon. The reason for rejection shall be set out in the definitive decision.

4. Parties which offer an undertaking shall be required to provide a non-confidential version of such undertaking, so that it may be made available to interested parties to the investigation.

5. Where undertakings are, after consultation, accepted, and there is no objection raised within the Advisory Committee, the investigation shall be terminated. In all other cases, the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the proceedings be terminated. The proceedings shall stand terminated if, within one month, the Council, acting by qualified majority, has not decided otherwise.

6. If the undertakings are accepted, the investigation of subsidization and injury shall normally be completed. 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 may require that an undertaking be maintained for a reasonable period. 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 Regulation.

7. The Commission shall require any government or exporter from whom undertakings have been accepted to provide, periodically, information relevant to the fulfilment of such undertaking, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a violation of the undertaking.

8. Where undertakings are accepted from certain exporters during the course of an investigation, they shall, for the purpose of Article 13, be deemed to take effect from the date on which the investigation is concluded for the country of origin and/or export.

9. In case of violation or withdrawal of undertakings by any party, a definitive duty shall be imposed in accordance with Article 11, on the basis of the facts established within the context of the investigation which led to the undertaking, provided that such investigation was concluded with a final determination on subsidization and injury, and the exporter concerned, or the government of the country of origin and/or export, except in the case of withdrawal of undertakings by the exporter or such government, has been given an opportunity to comment.

10. A provisional duty may, after consultation, be imposed in accordance with Article 9 on the basis of the best information available, where there is reason to believe that an undertaking is being violated, or in case of violation or withdrawal of undertakings where the investigation which led to the undertaking was not concluded.

Article 11

Termination without measures and imposition of definitive duties

1. Where the complaint is withdrawn, proceedings may be terminated unless such termination would not be in the Community interest.

2. Where, after consultation, protective measures are unnecessary and there is no objection raised within the Advisory Committee, the investigation or proceedings shall be terminated. In all other cases, the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the proceedings be terminated. The proceedings shall stand terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise.

3. There shall be immediate termination of the proceedings where it is determined that the amount of countervailable subsidies is *de minimis,* in accordance with the provisions of paragraph 5, or where the volume of subsidized imports, actual or potential, or the injury, is negligible.

4. For all proceedings initiated pursuant to Article 7 (13), injury shall normally be regarded as negligible where the market share of the imports is less than the amounts set out in Article 7 (11). With regard to investigations concerning imports from developing

countries, the volume of subsidized imports shall also be considered negligible if it represents less than 4 % of the total imports of the like product in the Community, unless imports from developing countries whose individual shares of total imports represent less than 4 % collectively account for more than 9 % of the total imports of the like product in the Community.

5. For the same investigations, the amount of the countervailable subsidies shall be considered to be *de minimis* if such amount is less than 1 % *ad valorem*, except that

(a) as regards investigations concerning imports from developing countries the *de minimis* threshold shall be 2 % *ad valorem*; and

(b) for those developing countries Members of the two referred to in Annex VII of the Subsidies Agreement as well as for developing countries Members of the WTO which have completely eliminated export subsidies as defined in Article 3 (4) (a) of this Regulation, the *de minimis* subsidy threshold shall be 3 % *ad valorem*; where the application of this provision depends on the elimination of export subsidies, it shall apply from the date that the elimination of export subsidies is notified to the WTO Committee on Subsidies and Countervailing Measures, and for so long as export subsidies are not granted by the developing country concerned; this provision shall expire eight years from the date of entry into force of WTO Agreement;

provided that it is only the investigation that shall be terminated where the amount of the countervailable subsidies is below the relevant *de minimis* level for individual exporters and they shall remain subject to the proceedings and may be re-investigated in any subsequent review carried out for the country concerned pursuant to Article 13.

6. Where the facts as finally established show the existence of countervailable subsidies and injury caused thereby, and the Community interest calls for intervention in accordance with Article 22, a definitive countervailing duty shall be imposed by the Council, acting by simple majority on a proposal submitted by the Commission after consultation of the Advisory Committee, unless the subsidy or subsidies are withdrawn or it has been demonstrated that the subsidies no longer confer any benefit on the exporters involved. Where provisional duties are in force, a proposal for definitive action shall be submitted to the Council not later than one month before the expiry of such duties. The amount of the countervailing duty shall not exceed the amount of countervailable subsidies from which the exporters have been found to benefit, established pursuant to this Regulation, but should be less than the total amount of countervailable subsidies, if such lesser duty would be adequate to remove the injury to the Community industry.

7. A countervailing duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis, on imports of a product from all sources found to benefit from countervailable subsidies and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation shall specify the duty for each supplier, or, if that is impracticable, the supplying country concerned.

8. When the Commission has limited its examination in accordance with Article 18, any countervailing duty applied to imports from exporters or producers which have made themselves known in accordance with Article 18 but were not included in the examination shall not exceed the weighted average amount of countervailable subsidies established for the parties in the sample. For the purpose of this paragraph, the Commission shall disregard any zero and *de minimis* amounts of countervailable subsidies and amounts of countervailable subsidies established under the circumstances referred to in Article 19. The authorities shall apply individual duties to imports from any exporter or producer which is granted individual treatment as provided for in Article 18.

Article 12

Retroactivity

1. Provisional measures and definitive countervailing duties shall only by applied to products which enter for consumption after the time when the decision taken under Article 9 (1) and Article 11 (6), respectively, enters into force, subject to the exceptions set out in this Regulation.

2. Where a provisional duty has been applied and the facts as finally established show the existence of countervailable subsidies and injury, the Council shall decide, irrespective of whether a definitive countervailing duty is to be imposed, what proportion of the provisional duty is to be definitively collected. For this purpose, 'injury' shall not include material retardation of the establishment of a Community industry, nor threat of material injury, except where it is found that this would, in the absence of provisional measures, have developed into material injury. In all other cases involving such threat or retardation, any provisional amounts shall be released and definitive duties can only be imposed from the date that a final determination of threat or material retardation is made.

3. If the definitive countervailing duty is higher than the provisional duty, the difference shall not be collected. If the definitive duty is lower than the provisional duty, the duty shall be recalculated. Where a final determination is negative, the provisional duty shall not be confirmed.

4. A definitive countervailing duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures but not prior to the initiation of the investigation, provided that the imports have been registered in accordance with Article 15 (5), the importers concerned have been given an opportunity to comment by the Commission and it is found that:

(i) there exist critical circumstances where for the subsidized product in question injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from countervailable subsidies under the terms of this Regulation; and,

(ii) where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports.

5. In cases of violation or withdrawal of undertakings definitive duties may be levied in accordance with this Regulation on goods entered for consumption not more than 90 days before the application of provisional measures provided that the imports have been registered in accordance with Article 15 (5) and that any such retroactive assessment shall not apply to imports entered before the violation or withdrawal of the undertaking.

Article 13

Duration, reviews and refunds

1. A countervailing measure shall remain in force only as long as and to the extent necessary to counteract the countervailable subsidies which are causing injury.

A. *Expiry reviews*

2. A definitive countervailing measure shall expire five years from its imposition or five years from the date of the most recent review which has covered both subsidization and injury, unless it is determined in a review that the expiry would be likely to lead to continuation or recurrence of subsidization and injury. Such an expiry review shall be initiated on the initiative of the Commission or upon a request made by or on behalf of the Community producers and the measure shall remain in force pending the outcome of such review.

3. An expiry review shall be initiated where the request contains sufficient evidence that the removal of measures would be likely to result in a continuation or recurrence of subsidization and injury. Such a likelihood may, for example, be indicated by evidence of continued subsidization and injury or evidence that the removal of injury is partly or solely due to the existence of measures or evidence that the circumstances of the exporters, or market conditions, are such that they would indicate the likelihood of further injurious subsidization.

4. In carrying out investigations under this section, the exporters, importers, the government of the country of origin and/or export and the complainants shall be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request and conclusions shall be reached with due account taken of all relevant and duly supported evidence presented in relation to the question of whether the removal of measures would be likely, or unlikely, to lead to the continuation or recurrence of subsidization and injury.

5. Under this section, a notice of impending expiry shall be published in the *Official Journal of the European Communities* at an appropriate time as defined in this paragraph in the final year of the period of application of the measures. Thereafter, the Community producers shall, no later than three months before the end of the five-year period, be entitled to lodge a review request in accordance with paragraph 3. A notice announcing the actual expiry of measures under this section shall also be published.

B. *Interim reviews*

6. The need for the continued imposition of measures may also be reviewed, where warranted on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request by any exporter, importer or the Community producers or the government of the country of origin and/or export which contains sufficient evidence substantiating the need for such an interim review.

7. An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset the countervailable subsidy and/or the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the countervailable subsidy which is causing injury.

8. Where the countervailing duties imposed are less than the amount of countervailable subsidies found, an interim review shall be initiated if the Community producers provide sufficient evidence that the duties have led to no movement or insufficient movement of resale prices of the imported product in the Community. If the investigation proves the allegations to be correct, countervailing duties may be increased to achieve the price increase required to remove injury, although the increased duty level shall not exceed the amount of the countervailable subsidies.

9. In carrying out investigations under this section, the Commission may, *inter alia*, consider whether the circumstances with regard to subsidization and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established in accordance with Article 5 of this Regulation. In these respects, account shall be taken of all relevant and duly supported evidence in the final determination.

C. *Accelerated reviews*

10. Any exporter whose exports are subject to a definitive countervailing duty but who was not individually investigated during the original investigation for reasons other than a refusal to cooperate with the Commission, shall be entitled, upon request, to an accelerated review in order that the Commission promptly establish an individual countervailing duty rate for that exporter. Such a review shall be initiated after consultation of the Advisory Committee and Community producers have been given an opportunity to comment.

D. *General provisions on reviews*

11. The relevant provisions of Articles 7 and 8, excluding those relating to time limits, shall apply to any review carried out pursuant to paragraphs 2 to 5, 6 to 9 and 10. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

12. Reviews pursuant to this Article shall be initiated by the Commission after consultation of the Advisory Committee. Where warranted by reviews, measures shall be repealed or maintained pursuant to paragraphs 2 to 5, or repealed, maintained or amended pursuant to paragraphs 6 to 9 and 10, by the Community institution responsible for their introduction. Where measures are repealed for individual exporters, but not for the country as a whole, such exporters shall remain subject to the proceedings and may be re-investigated in any subsequent review carried out for that country pursuant to this Article.

13. Where a review of measures pursuant to paragraphs 6 to 9 is in progress at the end of the period of application of measures as defined in paragraphs 2 to 5, the measures shall also be investigated under the provisions of paragraphs 2 to 5.

E. *Refunds*

14. Notwithstanding paragraphs 2 to 5, an importer may request reimbursement of duties collected where it is shown that the amount of countervailable subsidies, on the basis of which duties were paid, has been eliminated, or reduced to a level which is below the level of the duty in force.

15. In order to request a refund of countervailing duties, the importer shall submit an application to the Commission. The application shall be submitted via the Member State in the territory of which the products were released for free circulation within six months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or the date on which a decision was made definitively to collect the amounts secured by way of provisional duty. Member States shall forward the request to the Commission forthwith.

16. An application for refund shall only be considered to be duly supported by evidence where it contains precise information on the amount of refund of countervailing duties claimed and all customs documentation relating to the calculation and payment of such amount. It shall also include evidence, for a representative period, on the amount of countervailable subsidies for the exporter or producer to which the duty applies. In cases where the importer is not associated to the exporter or producer concerned and such information is not immediately available or the exporter or producer is unwilling to release it to the importer, the application shall contain a statement from the exporter or producer that the amount of countervailable subsidies has been reduced or eliminated, as specified in this Article, and that the relevant supporting evidence shall be provided to the Commission. It shall be understood that where such evidence is not forthcoming from the exporter or producer, within a reasonable period of time, the application shall be rejected.

17. The Commission shall, after consultation of the Advisory Committee, decide whether and to what extent the application should be granted or it may decide at any time to initiate an interim review and the information and findings from such review, carried out in accordance with the provisions applicable for such reviews, shall be used to determine whether and to what extent a refund is justified. Refunds of duties shall normally take place

within 12 months, and in no case more than 18 months after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the countervailing duty. The payment of any refund authorized should normally be made by Member States within 90 days of the above-noted decision.

F. *Final provision*

18. In all review or refund investigations carried out pursuant to this Article, the Commission shall apply, in so far as circumstances have not changed, the same methodology as in the investigation which led to the duty, with due account taken of the provisions set out in Article 4 and Article 18 of this Regulation.

Article 14

Circumvention

1. Countervailing duties imposed pursuant to this Regulation may be extended to apply to imports from third countries of like products, or parts thereof, when circumvention of the measures in force is taking place. Circumvention shall be defined as a change in the pattern of trade between third countries and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification, other than the imposition of the duty, and there is evidence that the remedial effects of the duty are being undermined, in terms of the prices and/or quantities of the like products, and the imported like product and/or parts thereof still benefit from the subsidy.

2. Investigations shall be initiated pursuant to this Article where the request contains sufficient evidence on the factors set out in paragraph 1. Initiations shall be made, after consultation of the Advisory Committee, by Commission Regulation which shall also instruct the customs authorities to make imports subject to registration in accordance with Article 15 (5) or request guarantees. Investigations shall be carried out by the Commission, which may be assisted by customs authorities, and shall be concluded within nine months. Where the facts, as finally ascertained, justify the extension of measures this shall be done by the Council, acting by simple majority on a proposal from the Commission, from the date that registration was imposed pursuant to Article 15 (5) or guarantees were requested. The relevant procedural provisions of this Regulation with regard to initiations and the conduct of investigations shall apply pursuant to this Article.

3. Products shall not be subject to registration pursuant to Article 15 (5) or measures where they are accompanied by a customs certificate declaring that the importation of the goods does not constitute circumvention. These certificates may be issued to importers, upon written application, by the authorities following authorization by a decision of the Commission, after consultation of the Advisory Committee, or the decision of the Council imposing measures and they shall remain valid for the period, and under the conditions set down therein.

4. Nothing in this Article shall preclude the normal application of the provisions in force concerning customs duties.

Article 15

General provisions

1. Provisional or definitive countervailing duties shall be imposed by Regulation, and collected by Member States in the form, at the rate specified and according to the other criteria laid down in the Regulation imposing such duties. Such duties shall also be collected independently of the customs duties, taxes and other charges normally imposed on imports. No product shall be subject to both anti-dumping and countervailing duties to compensate for the same situation arising from dumping or export subsidization.

2. Regulations imposing provisional or definitive countervailing duties, or Regulations or Decisions accepting undertakings or terminating investigations or proceedings, shall be published in the *Official Journal of the European Communities*. Such Regulations or Decisions shall contain, in particular, and with due regard to the protection of confidential information the names of the exporters, if practical, or countries involved, a description of the product and a summary of the facts and considerations relevant to the countervailable subsidies and injury determinations. In each case, a copy of the Regulation or Decision shall be sent to known interested parties. The provisions of this paragraph shall apply *mutatis mutandis* to reviews.

3. Special provisions, in particular with regard to the common definition of the concept of origin, as contained in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1], may be adopted in, or pursuant to this Regulation.

4. In the Community interest, measures imposed pursuant to this Regulation may, after consultation of the Advisory Committee, be suspended by a decision of the Commission for a period of nine months. The suspension

[1] OJ No L 302, 19. 10. 1992, p. 1.

may be extended for a further period, not exceeding one year, if the Council so decides, by simple majority, on a proposal from the Commission. Measures may only be suspended where market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension, and provided that the Community industry has been given an opportunity to comment and these comments have been taken into account. Measures may, at any time and after consultation, be reinstated if the reason for suspension is no longer applicable.

5. The Commission may, after consultation of the Advisory Committee, direct the customs authorities to take the appropriate steps to register imports, so that measures may subsequently be applied against these imports from the date of such registration. Imports may be made subject to registration following a request from the Community industry which contains sufficient evidence to justify such action. Registration shall be introduced by Regulation which shall specify the purpose of the action and, if appropriate, the estimated amount of possible future liability. Imports may not be made subject to registration for a period longer than nine months.

6. Member States shall report to the Commission, on a monthly basis, the import trade of products subject to investigation and subject to measures, and the amount of duties collected pursuant to this Regulation.

Article 16

Consultations

1. Any consultations provided for in this Regulation, except those referred to in Article 7 (9) and 8 (10), shall take place within an Advisory Committee, which shall consist of representatives of each Member State, with a representative of the Commission as chairman. Consultations shall be held immediately on request by a Member State or on the initiative of the Commission, and in any event within a time frame which allows the time limits set by this Regulation to be respected.

2. The Committee shall meet when convened by its chairman. He shall provide the Member States, as promptly as possible, with all relevant information.

3. Where necessary, consultation may be in writing only; in such case the Commission shall notify the Member States and shall specify a period within which they shall be entitled to express their opinions or to request an oral consultation, which the chairman shall arrange, provided that such oral consultation can be held within a time frame which allows the time limits set by this Regulation to be respected.

4. Consultation shall in particular cover:

(i) the existence of countervailable subsidies and the methods of establishing their amount;

(ii) the existence and extent of injury;

(iii) the causal link between the subsidized imports and injury;

(iv) the measures which, in the circumstances, are appropriate to prevent or remedy the injury caused by the countervailable subsidies and the ways and means for putting such measures into effect.

Article 17

Verification visits

1. The Commission shall, where it considers it appropriate, carry out visits to examine the records of importers, exporters, traders, agents, producers, trade associations and organizations, to verify information provided on subsidization and injury. In the absence of a proper and timely reply a verification visit may not be carried out.

2. The Commission may carry out investigations in third countries as required, provided it obtains the agreement of the firms concerned, it notifies the representatives of the government of the country in question and the latter does not object to the investigation. As soon as the agreement of the firms concerned has been obtained the Commission should notify the authorities of the country of origin and/or export of the names and addresses of the firms to be visited and the dates agreed.

3. The firms concerned shall be advised of the nature of the information to be verified during verification visits and of any further information which needs to be provided during such visits, though this should not preclude requests being made during the verification for further details to be provided in the light of information obtained.

4. In investigations carried out pursuant to this paragraph, the Commission shall be assisted by officials of those Member States who so request.

Article 18

Sampling

1. In cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available to it at the time of the selection, or to the

largest representative volume of the production, sales or exports which can reasonably be investigated within the time limit available.

2. The final selection of parties, types of products or transactions made under these sampling provisions shall rest with the Commission, though preference shall be given to choosing a sample in consultation with, and with the consent of, the parties concerned, provided such parties make themselves known and make sufficient information available, within three weeks of initiation, to enable a representative sample to be chosen.

3. In cases where the examination has been limited in accordance with this Article, an individual amount of countervailable subsidization shall, nevertheless, be calculated for any exporter or producer not initially selected who submits the necessary information within the time limits provided for in this Regulation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome and prevent the timely completion of the investigation.

4. Where it is decided to sample and there is a degree of non-cooperation by some or all of the parties selected which is likely to materially affect the outcome of the investigation, a new sample may be selected. However, if a material degree of non-cooperation persists of there is insufficient time to select a new sample the relevant provisions of Article 19 shall apply.

Article 19

Non-cooperation

1. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits as provided for in this Regulation, or significantly impedes the investigation, preliminary or final findings, affirmative or negative, may be made on the basis of the facts available. Where it is found that any interested party has supplied false or misleading information the information shall be disregarded and use may be made of the facts available. Interested parties should be made aware of the consequences of non-cooperation.

2. A lack of a computerized response shall not be deemed to constitute non-cooperation provided that the interested party shows that presenting the response as requested would result in an unreasonable extra burden or unreasonable additional cost.

3. Where the information presented by an interested party may not be ideal in all respects it should not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and provided the information is appropriately submitted in timely fashion, is verifiable and the party has acted to the best of its ability.

4. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons thereof and have an opportunity to provide further explanations within the time limit specified. If the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information should be disclosed and given in any published findings.

5. If determinations, including those with respect to the amount of countervailable subsidies, are based on the provisions of paragraph 1, including the information supplied in the complaint, it should, where practicable and with due regard to the time limits of the investigation, be checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation.

6. If an interested party does not cooperate, or only cooperates partially, and thus relevant information is being withheld, the result could be less favourable to the party than if it had cooperated.

Article 20

Confidentiality

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

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

3. If it is considered that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information available or to authorize its disclosure in generalized or summary form, such information may be disregarded unless it can be satisfactorily demonstrated from appropriate sources that the information is correct. Requests for confidentiality should not be arbitrarily rejected.

4. This Article shall not preclude the disclosure of general information by the Community authorities, and in particular the reasons on which decisions taken pursuant to this Regulation are based, nor disclosure of the evidence relied on by the Community authorities in so far as is necessary to explain those reason in court proceedings. Such disclosure must take into account the legitimate interest of the parties concerned that their business or governmental secrets should not be divulged.

5. The Council, the Commission and the Member States, or the officials of any of these, shall not reveal any information received pursuant to this Regulation for which confidential treatment has been requested by its supplier without specific permission from the supplier. Exchanges of information between the Commission and Member States, any information relating to consultations made pursuant to Article 16 or consultations described in Articles 7 (9) and (10), or any internal documents prepared by the authorities of the Community or its Member States, shall be not be divulged except as specifically provided for in this Regulation.

6. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.

Article 21

Disclosure

1. The complainants, importers and exporters and their representative associations, and representatives of the country of origin and/or export may request disclosure of the details underlying the essential facts and considerations, on the basis of which provisional measures have been imposed. Requests for such disclosure shall be made in writing immediately following the imposition of provisional measures and the disclosure shall be made in writing as soon as possible thereafter.

2. The parties mentioned in paragraph 1 may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures, with particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures.

3. Requests for final disclosure, as defined in paragraph 2, shall be addressed to the Commission in writing and be received, in cases where a provisional duty has been applied, not later than one month after publication of the imposition of that duty. Where a provisional duty has not been applied parties shall be provided with an opportunity to request final disclosure within time limits set by the Commission.

4. Final disclosure shall be given in writing. It shall be made, with due regard paid to the protection of business or governmental secrets, as soon as possible, and normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 11. Where the Commission is not in a position to disclose certain facts or considerations at that time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council but where such decision is based on any different facts and considerations these shall be disclosed as soon as possible.

5. Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.

Article 22

Community interest

1. Pursuant to this Regulation, a determination as to whether the Community interest calls for intervention shall be based on an assessment of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers, and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious subsidization and to restore effective competition shall be given special consideration. Measures, as determined on the basis of subsidization and injury found, may not be applied where the authorities, on the basis of all the information submitted, can safely conclude that it is not in the Community interest to apply such measures.

2. In order to provide a sound basis on which the authorities can take account of all views and information

in the decision on whether, or not, the imposition of measures is in the Community interest, the complainants, importers and their representative associations, representative users and representative consumer organizations may, within the time limits specified in the notice of initiation of the countervailing duty investigation, make themselves known and provide information to the Commission. Such information, or appropriate summaries thereof, shall be made available to the other parties specified in this Article, and they shall be entitled to respond to such information.

3. The parties which have acted in conformity with paragraph 2 may request a hearing. Such requests shall be granted when they are submitted within the time limits set in paragraph 2, and when they set out the reasons, in terms of the Community interest, why the parties should be heard.

4. The parties which have acted in conformity with paragraph 2 may provide comments on the application of any provisional duties imposed. Such comments shall be received within one months of the application of such measures if they are to be taken into account and they, or appropriate summaries thereof, shall be made available to other parties who shall be entitled to respond to such comments.

5. The Commission shall examine the information which is properly submitted, and the extent to which it is representative, and the results of such analysis, together with an opinion on its merits, shall be transmitted to the Advisory Committee. The balance of views expressed in the Committee shall be taken into account by the Commission in any proposal made pursuant to Article 11.

6. The parties which have acted in conformity with paragraph 2, may request the facts and considerations on which final decisions are likely to be taken to be made available to them. Such information shall be made available to the extent possible and without prejudice to any subsequent decision taken by the Commission or the Council.

7. Pursuant to this Article, information shall only be taken into account where it is supported by actual evidence which substantiates its validity.

Article 23

Relationships between countervailing duty measures and multilateral remedies

If an imported product is made subject to any countermeasures imposed following recourse to the dispute settlement procedures of the Subsidies Agreement, and such measures are appropriate to remove the injury caused by the countervailable subsidies, any countervailing duty imposed with regard to that product shall immediately be suspended, or repealed, as appropriate.

Article 24

Final provisions

This Regulation shall not preclude the application of:

(i) any special rules laid down in agreements concluded between the Community and third countries;

(ii) the Community Regulations in the agricultural sector and Council Regulations (EC) No 3448/93 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products, Regulation (EEC) No 2730/75 of the Council of 29 October 1975 on glucose and lactose [2] and Regulation (EEC) No 2783/75 of the Council of 29 October 1975 on the common system of trade for ovalbumin and lactalbumin [3]; this Regulation shall operate by way of complement to those Regulations and in derogation from any provisions thereof which preclude the application of countervailing duties;

(iii) special measures, provided that such action does not run counter to obligations under the GATT.

Article 25

Repeal of existing legislation

Regulation (EEC) No 2423/88 is hereby repealed. References to the repealed Regulation shall be construed as references to this Regulation.

Article 26

Entry into force

This Regulation shall enter into force on 1 January 1995.

It shall apply to proceedings and interim review investigations initiated after 1 September 1994 and to expiry review investigations for which the notice of impending expiry of measures has been published after the same date. However, for proceedings initiated pursuant to Article 7 (13), the references to time limits shall only apply after a date which the Council shall specify in a Decision to be adopted by a qualified majority no later than 1 April 1995 on the basis of a Commission proposal to be submitted to the Council once the necessary budgetary resources have been made available.

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[1] OJ No L 318, 20 12. 1993, p. 18.
[2] OJ No L 281, 1. 11. 1975, p. 20. Regulation as last amended by Regulation (EEC) No 222/88 (OJ No L 28, 1. 2. 1988, p. 1).
[3] OJ No L 282, 1. 11. 1975, p. 104. Regulation as last amended by Regulation (EEC) No 4001/87 (OJ No L 377, 31. 12. 1987, p. 44).

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 December 1994.

For the Council

The President

H. Seehofer

ANNEX I

ILLUSTRATIVE 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 favourably than those commercially available (1) on world markets to their exporters.

(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes (1) or social welfare charges paid or payable by industrial or commercial enterprises (2).

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect of production for domestic consumption, in the calculation of the base on which taxes are charged.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes (1) in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption remission or deferral of prior-stage cumulative indirect taxes (2) 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) (3). This item shall be interpreted in accordance with the guidelines on comsumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided,

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

(2) For the purpose of this Regulation and its Annexes:
- the term 'direct taxes' shall mean tax 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 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 state of production,
- 'remission' of taxes includes the refund or rebate of taxes,
- 'remission of drawback' includes the full or partial exemption or deferral of import charges.

(3) Deferral may not amount to an export subsidy where, for example, appropriate interest charges are collected.

(4) 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).

however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by 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 at 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 of the WTO is a party to an international undertaking on official export credits to which at least 12 original such Members 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 of the WTO applied 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.

(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 PROCESS [1]

I

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

2. The Illustrative list of export subsidies in Annex I 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

3. In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation, the Commission must normally proceed on the following basis:

4. 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 Commission must normally first determine whether the government of the exporting country 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 Commission must normally 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 Commission may deem it necessary to carry out, in accordance with Article 17 (2), certain practical tests in order to verify information or to satisfy itself that the system or procedure is being effectively applied.

5. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting country based on the actual inputs involved will normally need to be carried out in the context of determining whether an excess payment occurred. If the Commission deems it necessary, a further examination may be carried out in accordance with paragraph 4.

6. The Commission must normally treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. An input need not be present in the final product in the same form in which it entered the production process.

7. In determining the amount of a particular input that is consumed in the production of the exported product, a 'normal allowance for waste' must normally be taken into account, and such waste must normally 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

[1] Inputs consumed in the production processes 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.

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.

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

ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

1. 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 submitted 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

2. In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Regulation, the Commission must normally proceed on the following basis:

3. 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 country to ensure and demonstrate that the quantity on 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.

4. Where it is alleged that a substitution drawback system conveys a subsidy, the Commission must normally first proceed to determine whether the government of the exporting country has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the Commission shall normally 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 will be presumed to exist. It may be deemed necessary by the Commission to carry out, in accordance with Article 17 (2), certain practical tests in order to verify information or to satisfy itself that the verification procedures are being effectively applied.

5. 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 to be applied effectively, there may be a subsidy. In such cases, further examination by the exporting country based on the actual transactions involved would need to be carried out to determinate whether an excess payment occurred. If the Commission deems it necessary, a further examination would be carried out in accordance with paragraph 4.

6. 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.

7. 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

(This Annex reproduces Annex 2 to the Agreement on Agriculture. Any terms or expression which are not explained herein or which are not self-explanatory are to be interpreted in the context of that Agreement)

DOMESTIC SUPPORT: THE BASIS OF EXEMPTION FROM THE REDUCTION COMMITMENTS

1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal trade-distorting effects of effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

   (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,

   (b) the support in question shall not have the effect of providing price support to producers;

   plus policy-specific criteria and conditions as set out below.

Government service programmes

2. *General services*

   Policies in this category involve expenditures (or revenue foregone) in relation to programmes which provide services to benefits to agriculture or the rural community. They shall not involve direct payments to producers or processors. Such programmes, which include but are not restricted to the following list, shall meet the general criteria in paragraph 1 and policy-specific conditions where set out below:

   (a) research, including general research, research in connection with environmental programmes, and research programmes relating to particular products;

   (b) pest and disease control, including general and product-specific pest and disease control measures, such as early-warning systems, quarantine and eradication;

   (c) training services, including both general and specific training facilities;

   (d) extension and advisory services, including the provision of means to facilitate the transfer of information and the results of research to producers and consumers;

   (e) inspection services, including general inspection services and the inspection of particular products for health, safety, grading or standardization purposes;

   (f) marketing and promotion services, including market information, advice and promotion relating to particular products but excluding expenditure for unspecified purposes that could be used by sellers to reduce their selling price or confer a direct economic benefit to purchasers; and

   (g) infrastructural services, including: electricity reticulation, roads and other means of transport, market and port facilities, water supply facilities, dams and drainage schemes, and infrastructural works associated with environmental programmes. In all cases the expenditure shall be directed to the provision or construction of capital works only, and shall exclude the subsidized provision of on-farm facilities other than for the reticulation of generally available public utilities. It shall not include subsidies to inputs or operating costs, or preferential user charges.

3. *Public stockholding for food security purposes* [1]

   Expenditures (or revenue foregone) in relation to the accumulation and holding of stocks of products which form an integral part of a food security programme identified in national legislation. This may

[1] For the purpose of paragraph 3 of this Annex, governmental stockholding programmes for food security purposes in developing countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines shall be considered to be in conformity with the provisions of this paragraph, including programmes under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS.

include government aid to private storage of products as part of such a programme.

The volume and accumulation of such stocks shall correspond to predetermined targets related solely to food security. The process of stock accumulation and disposal shall be financially transparent. Food purchases by the government shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.

4. *Domestic food aid* [1]

Expenditures (or revenue foregone) in relation to the provision of domestic food aid to sections of the population in need.

Eligibility to receive the food aid shall be subject to clearly-defined criteria related to nutritional objectives. Such aid shall be in the form of direct provision of food to those concerned or the provision of means to allow eligible recipients to buy food either at market or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent.

5. *Direct payments to producers*

Support provided through direct payments (or revenue foregone, including payments in kind) to producers for which exemption from reduction commitments is claimed shall meet the basic criteria set out in paragraph 1, plus specific criteria applying to individual types of direct payment as set out in paragraphs 6 through 13. Where exemption from reduction is claimed for any existing or new type of direct payment other than those specified in paragraphs 6 through 13, it shall conform to criteria (b) through (e) in paragraph 6, in addition to the general criteria set out in paragraph 1.

6. *Decoupled income support*

(a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.

(b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.

(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

(d) The amount of such payments in any given years shall not be related to, or based on, the factors of production employed in any year after the base period.

(e) No production shall be required in order to receive such payments.

7. *Government financial participation in income insurance and income safety-net programmes*

(a) Eligibility for such payments shall be determined by an income loss, taking into account only income derived from agriculture, which exceeds 30 % of average gross income or the equivalent in net income terms (excluding any payments from the same or similar schemes) in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry. Any producer meeting this condition shall be eligible to receive the payments.

(b) The amount of such payments shall compensate for less than 70 % of the producer's income loss in the year the producer becomes eligible to receive this assistance.

(c) The amount of any such payments shall relate solely to income; it shall not relate to the type or volume of production (including livestock units) undertaken by the producer; or to the prices, domestic or international, applying to such production; or to the factors of production employed.

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[1] For the purposes of paragraphs 3 and 4 of this Annex, the provision of foodstuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices shall be considered to be in conformity with the provisions of this paragraph.

(d) Where a producer receives in the same year payments pursuant to this paragraph and pursuant to paragraph 8 (relief from natural disasters), the total of such payments shall be less than 100 % of the producer's total loss.

8. *Payments (made either directly or by way of a government financial participation in crop insurance schemes) for relief from natural disasters*

(a) Eligibility for such payments shall arise only following a formal recognition by government authorities that a natural or like disaster (including disease outbreaks, pest infestations, nuclear accidents, and war on the territory of the Member concerned) has occurred or is occurring; and shall be determined by a production loss which exceeds 30 % of the average of production in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry.

(b) Payments made following a disaster shall be applied only in respect of losses of income, livestock (including payments in connection with the veterinary treatment of animals), land or other production factors due to the natural disaster in question.

(c) Payments shall compensate for not more than the total cost of replacing such losses and shall not require or specify the type or quantity of future production.

(d) Payments made during a disaster shall not exceed the level required to prevent or alleviate further loss as defined in criterion (b).

(e) Where a producer receives in the same year payments pursuant to this paragraph and pursuant to paragraph 7 (income insurance and income safety-net programmes), the total of such payments shall be less than 100 % of the producer's total loss.

9. *Structural adjustment assistance provided through producer retirement programmes*

(a) Eligibility for such payments shall be determined by reference to clearly defined criteria in programmes designed to facilitate the retirement of persons engaged in marketable agricultural production, or their movement to non-agricultural activities.

(b) Payments shall be conditional upon the total and permanent retirement of the recipients from marketable agricultural production.

10. *Structural adjustment assistance provided through resource retirement programmes*

(a) Eligibility for such payments shall be determined by reference to clearly defined criteria in programmes designed to remove land or other resources, including livestock, from marketable agricultural production.

(b) Payments shall be conditional upon the retirement of land from marketable agricultural production for a minimum of three years, and in the case of livestock on its slaughter or definitive permanent disposal.

(c) Payments shall not require or specify any alternative use for such land or other resources which involves the production of marketable agricultural products.

(d) Payments shall not be related to either type or quantity of production or to the prices, domestic or international, applying to production undertaken using the land or other resources remaining in production.

11. *Structural adjustment assistance provided through investment aids*

(a) Eligibility for such payments shall be determined by reference to clearly-defined criteria in government programmes designed to assist the financial or physical restructuring of a producer's operations in response to objectively demonstrated structural disadvantages. Eligibility for such programmes may also be based on a clearly-defined government programme for the reprivatization of agricultural land.

(b) The amount of such payments in any given year shall not be related to, or based on the type or volume of production (including livestock units) undertaken by the producer in any year after the base period other than as provided for under criterion (e).

(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

(d) The payments shall be given only for the period of time necessary for the realization of the investment in respect of which they are provided.

(e) The payments shall not mandate or in any way designate the agricultural products to be produced by the recipients except to require them not to produce a particular product.

(f) The payments shall be limited to the amount required to compensate for the structural disadvantage.

12. *Payments under environmental programmes*

(a) Eligibility for such payments shall be determined as part of a clearly-defined government environmental or conservation programme and be dependent on the fulfilment of specific conditions under the government programme, including conditions related to production methods or inputs.

(b) The amount of payment shall be limited to the extra costs or loss of income involved in complying with the government programme.

13. *Payments under regional assistance programmes*

(a) Eligibility for such payments shall be limited to producers in disadvantaged regions. Each such region must be a clearly designated contiguous geographical area with a definable economic and administrative identity, considered as disadvantaged on the basis of neutral and objective criteria clearly spelt out in a law or regulation and indicating that the region's difficulties arise out of more than temporary circumstances.

(b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period other than to reduce that production.

(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

(d) Payments shall be available only to producers in eligible regions, but generally available to all producers within such regions.

(e) Where related to production factors, payments shall be made at a degressive rate above a threshold level of the factor concerned.

(f) The payments shall be limited to the extra costs of loss of income involved in undertaking agricultural production in the prescribed area.