

FTAA – Free Trade Area of the Americas

Draft Agreement

Chapter XV Subsidies, Antidumping and Countervailing Duties

[CHAPTER XV SUBSIDIES, ANTIDUMPING AND COUNTERVAILING DUTIES

Section A General Aspects

Article 1. [Definitions]

[The **Agreement on Subsidies** means the *Agreement on Subsidies and Countervailing Measures* in Annex 1 A to the WTO Agreement;]

[The **Antidumping Agreement** means the *Agreement Relating to the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* in Annex 1 A to the WTO Agreement;]

[A **countervailing duty** means a special duty levied for the purpose of offsetting any subsidy granted directly or indirectly to the manufacture, production, or export of any merchandise.]

[**Domestic industry** shall be interpreted as referring to the totality of domestic producers of the like product, or, when this is not possible, to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.]

[The **FTAA Agreement** includes any successor agreement as well as any amendments to, or official interpretations of, its provisions.]

[The **initiation of an investigation** refers to the procedural action by which a Party formally initiates an investigation to determine the existence, degree, and effects of dumping or subsidies.]

[**Injury** refers to a material injury inflicted upon a domestic industry, a threat of material injury to a domestic industry, or a material retardation in the creation of such an industry.]

[**Interested party** includes: a) exporters, foreign producers, or importers of a product subject to investigation, or trade, labor and business associations in which the majority of members are producers, exporters, or importers of such product; b) the Government of the exporting Party; and c) producers of the like product in the importing Party or the trade, labor and business associations in which the majority of members are producers of the like product in the territory of the importing Party.]

[**Like product** means a product that is identical, i.e., alike in all respects to the product in question, or, in the absence of such a product, another product that, although not alike in all respects, has characteristics closely resembling those of the product in question.]

[The term **Party** means any signatory country to the FTAA;]

[The term **party** means any interested person, whether actual or juridical;]

[**Public information** includes:

- a) That which has been made known by whatever means of disclosure, regardless of its coverage, or placed at the disposal of the public by the person presenting it, or had authorized a third person to disclose it;

- b) Summaries of confidential information;
- c) Public information found in on-site investigation reports;
- d) Any other information or facts considered to be public information in accordance with the internal legislation of each Party and other international treaties.]

[**Subsidy** means a subsidy within the meaning of the Agreement on Subsidies]

[The **WTO Agreement** means the *Marrakesh Agreement Establishing the World Trade Organization*].

[**Zeroing** means the practice of assigning a zero margin to the negative dumping margins that are obtained for one or more product types, through the calculation of the dumping margin of the product under investigation.]

[**Zeroing** means the practice of assigning a zero margin to the negative dumping margins obtained by product type or by transaction.]

Article 2. [General Provisions]

[2.1. Except as otherwise provided in this Chapter, the Marrakesh Agreement Establishing the World Trade Organization¹ and any successor agreements, shall govern the rights and obligations of the Parties in respect of subsidies and the application of antidumping and countervailing duties.^{2 3}]

[2.1. The Parties may only initiate and conduct investigation procedures⁴ and apply antidumping and countervailing duties on goods from any other contracting Party in conformity with the provisions of this Chapter. Unless expressly provided for in this Chapter, the provisions of the World Trade Organization Agreements⁵ and subregional and national legislation shall be applied in addition to the above.]

[2.1. In applying antidumping and countervailing duty measures, Parties shall abide by the rights and obligations established under the World Trade Organization (WTO) Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) and the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement).⁶ The procedural provisions⁷ set forth in this chapter shall also apply in antidumping and countervailing proceedings conducted by one Party with respect to imports from another Party. No provision of any other Chapter of

¹ This is subject to confirmation that the reference to the *Marrakesh Agreement*, by virtue of Article II.2 thereof, also encompasses the annexed agreements thereto.

² Includes review procedures.

³ The Negotiating Group recognizes that:

- a) the work being undertaken in the Technical Committee on Institutional Issues in respect of the priority of agreements will be relevant to the ultimate need for, and content of, a Chapter-specific General Provision in respect of this matter;
- b) the relationship between this Chapter and regional agreements remains to be determined; and
- c) further consideration will need to be given to appropriate language to ensure that, where a successor agreement to the Marrakesh Agreement accords more preferential treatment than that required by this Chapter, the more preferential treatment will apply.

⁴ Includes annual review or examination procedures and antidumping and countervailing duty sunset procedures.

⁵ And of any other successor agreement(s).

⁶ This article is not intended to incorporate by reference the WTO Agreements.]

⁷ Procedural provisions means the process by which antidumping and countervailing duty investigations and reviews are conducted (e.g., access to information, notice to parties, disclosure of results, opportunity to comment) and does not include the substantive rules governing the determination or calculation of dumping, subsidies, countervailing duties and injury. Nothing in this Agreement is intended to modify the substantive rules of the WTO Antidumping and SCM Agreements.]

this Agreement shall be construed as imposing obligations on a Party with respect to the application of antidumping or countervailing duties.]

Section B Substantive Provisions

Article 3. [Determination of Dumping] [or Subsidies]

[3.1. For the purposes of Article 2.2 of the WTO Antidumping Agreement, the authority may construct the normal value, pursuant to the following order of priorities, in those cases where:

- a) Sales of the like product in the exporting party are not made in the normal course of trade, are made in special market situations, or there is a low volume of sales in the domestic market of the exporting country; and
- b) There is no comparable price to that of the like product when the like product is exported to an appropriate third country because they are not made in the normal course of trade or the prices are not representative.

The decision to construct the normal value shall be accompanied by the legal reasoning that supports it. The reasoning shall demonstrate that the decision is clearly substantiated by positive evidence.]

[3.1. For the purposes of Article 2.2 of the WTO Antidumping Agreement, when sales of an identical or like product are not made in the country of origin, when they are not made in the course of normal operations, or when, due to special market situations or a low volume of sales in the domestic market of the exporting country, such sales do not allow for valid comparisons to be made, the normal value shall be deemed to be:

- a) The comparable price of an identical or like product exported from the country of origin to a third country in the normal course of trade. This price must be the highest price, provided that it is a representative price; or
- b) The reconstructed value in the country of origin, based upon the sum of the production costs, overhead expenses, and reasonable profits, which must all correspond to normal trade transactions in the country of origin.]

The decision to construct the normal value shall be accompanied by the legal reasoning that supports it. The reasoning shall demonstrate that the decision is clearly substantiated by positive evidence.]

[3.2. In relation with Article 2.2.2 iii) of the WTO Antidumping Agreement, a greater amount of profits than that declared by the exporter or producer in question shall not be attributed, if the exporter or producer is operating in a competitive market, a competitive market being understood to be a market characterized by a plural number of companies in the relevant market for the product being investigated or the non-existence of high barriers to access to the competition.]

[3.3. In relation to Article 2.2.2 of the WTO Antidumping Agreement, for the purpose of calculating profits, the following shall be understood as the general category of products, in the order given below:

- a) Types of products whose normal value is determined according to domestic prices.

- b) The first category of products that, according to a company's accounting information systems, contains the product under investigation and for which profit figures exist.
- c) If only company-level profit figures are available, the company as a whole shall be considered as a general category. In these cases, the profit margin assigned to the product under investigation must be equivalent to the average profit margin recorded for all the company's products.
- d) The weighted average of the real amounts spent and obtained by other exporters or producers that have been investigated in relation to the production and sale of like products in the country of origin.
- e) Any other reasonable method, provided that the amount attributed to profits thereby does not exceed the amount of profits normally obtained by other exporters or producers through the sale of products from the same general category in the domestic market of the country of origin.]

[3.4. For the purpose of footnote 5 of Article 2.2.1 of the WTO Antidumping Agreement, sales shall be considered to have been made at prices below per unit costs in substantial quantities when:

- a) the authority establishes that the weighted average sales prices of transactions considered in determining the normal value is below the weighted average per unit costs, or
- b) the volume of sales made at prices below the per-unit costs accounts for at least [40%] [20%] of the volume sold in transactions under consideration for the determination of the normal value. If more than [40%] [20%] of domestic market sales are made at a loss, these sales may be excluded from the normal value calculation, in which case, the price of the remainder of sales to the domestic market shall be used to determine the normal value, as long as such sales correspond to [at least 10% of the total sales in said market or] account for at least 5% of exports of the product under consideration to the importing Member.]

[3.4. For the purpose of determining the normal value, after sales at prices lower than unit costs are eliminated, in accordance with the criteria established in Article 2.2.1 of the Antidumping Agreement, the investigating authority shall consider sales of the like product under investigation made above per-unit costs of production when they represent at least 5% of the importing country's total exports of the product under investigation. Domestic sales by product type shall not be subject to a sufficiency calculation.]

[3.5. With regard to Article 2.2 of the WTO Antidumping Agreement, when the normal value is being constructed owing to the fact that domestic sales have been ruled out because they are being made at a loss, no profit should be added in the calculation of the constructed value.]

[3.6. For the purpose of Article 2.2 of the Antidumping Agreement of the WTO, normal value shall be determined on the basis of costs representative of normal operating conditions and not on the basis of costs affected by random events. Costs shall be adjusted appropriately to take into account generally accepted business practices in circumstances where economies are undergoing a program of structural adjustment or recovering from the impact of a natural disaster.]

[3.7. The export price may not be constructed unless the investigating authority has determined either that there is no export price or that the export price is not reliable because of an association or a compensatory

arrangement between the exporter and the importer or a third party. The export price between related companies [may not be ruled out solely by virtue of this fact, and it shall be the responsibility of the interested parties to provide the necessary evidence to demonstrate that the price between the related parties is not affected by the ties between them] [may only be ruled out if it is examined and if it is found that the relationship affects the export price.]

[The investigating authority shall submit reasons for accepting the export price. When the investigating authority rejects the export price, they shall submit:

- a) detailed reasons explaining their finding that:
 - i) there is no export price, or
 - ii) the export price is unreliable by reason of an association or a compensatory arrangement between the exporter and the importer or a third party; and
- b) a detailed explanation of the methodology used to construct the export price, on the basis of Article 2.3 of the Antidumping Agreement.]

[3.8. For the comparison of the two prices to be considered equitable, adjustments required by differences that influence the comparability of the prices will be made, in each case and according to the particular circumstances. Such differences include, *inter alia*, differences in conditions and terms of sale, levies on imports and indirect taxes, levels of trade, quantities, physical characteristics, transportation and storage, insurance, unloading and ancillary costs, packaging, credit, after-sale costs, commissions paid, and currency conversions. These adjustments shall be calculated using the data from the investigation period. When the normal value is being constructed, the indirect taxes shown to apply to inputs shall not be calculated, in order to guarantee an equitable comparison with the export price, in those cases where it does not include such taxes.]

[3.9. In all proceedings related to the determination of the margin of dumping, the determination of the margin of dumping shall be established solely on the basis of a comparison between:

- a) a weighted average normal value and a weighted average of the export prices of all comparable transactions;
- b) normal value and export prices on a transaction-to-transaction basis, in which case the investigating authority shall give detailed reasons to justify the use of this method; or
- c) a weighted average normal value and prices of individual export transactions, if the authority finds a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if a detailed explanation is provided as to why such differences cannot be duly taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

In the calculation of the margin of dumping, zeroing will not be allowed]

[3.10. In cases where the investigated imports relate to tenders, the following documents may be considered as evidence for determining the margin of dumping:

- a) in the case of normal value, the bid documents and the price awarded in the exporting country in question; and
- b) in the case of export price, the bid documents and the award prices resulting from the tender.]

[3.11. For the purpose of determining the margin of dumping or amount of the subsidy, the period of investigation to determine the existence of dumping or the period of calculation of the amount of the subsidy shall normally correspond to the twelve (12) months as near as possible to the [opening] date [of presentation of the request], and in no case shall it be less than six (6) months.]

[Without prejudice to the foregoing, when seasonal products are involved, the period of investigation shall duly reflect the seasonality of the product.] [For seasonal or cyclical products, the period of investigation shall be at least 12 months depending on the nature of the product under investigation. In this case, the authority shall explain the reasons justifying the adoption of a different period.]

[In the case of an investigation into below-cost sales, the examination period may last for a longer span of time than the investigation period. In the event that such periods do not coincide, the investigating authorities shall explain the reasons that justify the adoption of a different period.]

Article 4. [Determination of Injury]

[4.1. A determination of injury shall be based on positive evidence and involve an objective examination of:

- a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products; and
- b) the consequent impact of these imports on domestic producers of such products.

Where the tariff classification of the products under investigation includes products that are not under investigation, the authority shall determine the volume of imports solely of the product under investigation.]

[4.2. With regard to the accumulation of imports, the parties shall consider the situation carefully when imports from countries with large market shares are accumulated with those from countries with small market shares, and shall exclude the latter from their enforcement of antidumping duties, to the extent that they do not contribute to the injury.]

[4.3. For the purposes of Article 3.3 of the Antidumping Agreement, in the analysis of the conditions of competition between the imported products and between the latter and the like domestic product, the investigating authority may examine, *inter alia*:

- a) physical characteristics and uses as well as the degree of interchangeability, fusion or substitution of those products. Considerations such as quality, function, technical specifications, specific requests and perceptions of consumers can be relevant;
- b) levels of prices for the like domestic product and for the imported product from each country considered for accumulation purposes. This examination shall take into account the evolution of these prices, as well as the relationship between them;

- c) the levels in, and the evolution of, the volume of imports from each country of accumulation, in absolute terms or relative to the output or consumption of the importing country;
- d) other considerations that may be relevant for the examination of the competition conditions include whether there exist sales of, or offers to sell, the like domestic product and the imported product through the same distribution channels or through similar channels, in the same geographic areas or in overlapping areas, and in the same periods or in overlapping periods.

The preceding list is not exhaustive and no one or several of these factors can necessarily give decisive guidance on whether the accumulation of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic products.

The examination of competition conditions shall correspond to the period of the investigation to determine the existence of injury.]

[4.4. In order to determine the existence of material injury, there shall normally be a requirement that the domestic industry incur losses during the determined period. The determination of material injury in the presence of positive earnings may be an exception, provided that it is justified in terms of special circumstances of that domestic industry.]

[4.5. For the purposes of quantifying the volume of dumped or subsidized imports, the investigating authority shall exclude from the total volume of imports of the product under investigation the sales of exporters for whom a *de minimis* subsidy amount or margin of dumping has been determined.]

[4.6. In addition to the provisions of Article 3.5 of the WTO Antidumping Agreement and Article 15.5 of the WTO Agreement on Subsidies and Countervailing Measures, before antidumping or countervailing duties can be imposed, proof shall be submitted that the dumped or subsidized imports constitute the principal or dominant cause of the injury caused to the domestic industry.]

The investigating authority shall determine that the dumped exports cause or threaten to cause injury if the exporters under investigation as a whole have substantial market power in the country of origin or receive a subsidy which enables the practice of dumping. The exporters as a whole will be considered to have substantial market power if they have the capacity to fix the sale price and displace their competitors in the market of origin.]

[4.7. For the purposes of determining the existence of a threat of material injury, the authority shall consider, in addition to the factors set out in Article 3.7 of the WTO Antidumping Agreement, all the factors listed in Articles 3.1, 3.2, 3.4, 3.5 and, where appropriate, 3.3 of the Agreement.]

[4.8. In investigations involving products sold totally or partially through tenders, the investigating authority may, for purposes of calculating the apparent consumption by the importing country, consider the dates on which the tenders were awarded to be the effective dates on which the product involved was sold. In such case, the product that was the object of the tender shall, for purposes of analyzing the injury, be considered to have been sold or imported on the date on which the tender was awarded.]

[4.9. For the purpose of the determination of injury in antidumping or countervailing duty investigations, the period of investigation for the determination of injury shall be no less than three (3) years and shall include the entire period of investigation for the determination of dumping or the period of calculation of the amount of the subsidy.

Further, if the time period for obtaining information to determine injury in a specific investigation, as determined by the investigating authority, is different, the reasons for such discrepancy shall be included in the public notice or in the relevant report.]

Article 5. [Initiation of Investigation and Investigation Procedures]

[5.1. An antidumping or subsidy investigation shall not be initiated unless the authority has determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than fifty (50) per cent of the total production of the like product destined for internal consumption.

In the case of fragmented domestic production that entails an extremely high number of producers, an investigation may be initiated with the support of at least 25% of the total affected domestic production, whenever said situation is justified and duly substantiated according to the investigating authority.]

[5.2. After evaluating that which is established in Article 5.6 of the WTO Antidumping Agreement, the authority concerned may initiate an investigation, for dumping or subsidies, without having received a written application submitted by or on behalf of a domestic industry for the initiation of such investigation, only if they have sufficient evidence that the domestic industry does not have the possibility of organizing itself and filing the petition in this respect before the competent authority.]

[5.3. An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authority concerned is satisfied that there is not sufficient evidence of dumping, subsidies, or injury to justify proceeding with the case [or when there is reasonable evidence to consider that the alleged subsidy is a governmental measure of assistance, whether direct or indirect, to promote rural development, upgrade productive capacity or diversify investment in FTAA smaller economies.]]

[5.4. For the purposes of Article 5.8 of the Antidumping Agreement, the margin of dumping shall be considered to be *de minimis* when this margin is lower than five (5) percent, expressed as a percentage of the export price. The volume of dumped or subsidized imports, real or potential, shall be regarded as negligible when it is established that those from or originating in a particular account for less than seven (7) percent of imports of the like product in the importing Party, unless the countries which individually account for less than seven (7) percent of imports of the like product in the importing Party collectively account for more than fifteen (15) percent of such imports. Injury shall be regarded as negligible if the volume of dumped imports accounts for less than [five (5)] [...] percent of the domestic market.]

[5.5. The final determination of the antidumping and subsidy investigations shall be announced, made public and, [if applicable,] enter into force within one year of the [date of the act of] initiation and, in special circumstances, which shall be made known to the interested parties, within a period of eighteen (18) months, beginning on the [date of the act of] initiation the investigation. [Should the above-mentioned time periods be exceeded, the investigation shall be terminated without antidumping or countervailing duties being imposed.] When the final determination is to not impose duties or the final

duty is less than the provisional one, any provisional duties levied in excess or cash deposits made to cover duties shall be refunded [with interest] [in accordance with the laws of each Party], or, where appropriate, any guarantees that have been delivered shall be released.]

[5.6. The Parties shall guarantee the right of applicant domestic producers to withdraw, at any time, from the antidumping or subsidy investigation. Should an abandonment take place once the investigation has been initiated, the investigating authority shall notify the remaining applicants. [Should only a part of the domestic industry withdraw, the remaining part shall comply with the requirements for representation needed to initiate an investigation; otherwise the investigation may not proceed.] [This shall not prevent the authority from deciding, *ex-officio*, to proceed with the investigation.]]

[5.7. The investigating authority shall examine with special care any application for the initiation of a dumping or subsidy investigation where an investigation of the same product from the same Member resulted in a negative finding within the three hundred sixty-five (365) days prior to the filing of the application, and, unless this pre-initiation examination indicates that circumstances have substantially changed, the investigation shall not proceed.]

[5.8. For the purposes of initiating an investigation, examinations of evidence of injury based on the use of statistics on the volume of imports covering aggregate groups of products that include the product under investigation shall be allowed only when the investigating authority does not have statistics on the volume of imports corresponding solely to the product under investigation.

In order to guarantee transparency in procedures, the investigating authority shall include, in the determination of the initiation of the investigation:

- a) the methodology used for the purpose of determining the volume of imports, indicating whether the statistical data considered refer to any products other than the product under investigation; and
- b) where the data refer to products other than the product under investigation, the reasons for which it was impossible to obtain the volume of imports corresponding solely to the product under investigation.]

Article 6. [Evidence]

[6.1. Once an antidumping or subsidy investigation has been initiated, the known interested parties shall receive the appropriate questionnaire to be used in the investigation. Requests for extensions shall be submitted at least five days prior to the expiry of the established period and the investigating authority shall answer the request within five days of receipt thereof.

The authority, in accepting or denying an extension of the period to provide information, shall take into account the following:

- a) The time available for conducting the investigation and making the necessary determinations, including the time periods established in national legislation, regulations, and schedules governing the conduct of the investigation at hand, and whether the information can be considered in a subsequent phase of the investigation;
- b) Previous extension(s) of time granted during the investigation;

- c) the ability of the party from whom information is sought to respond to the information questionnaire, in light of the nature and extent of the required information, including the party's available resources, personnel, and technological capability;
- d) any unusual burdens that will be incurred by the party being asked for information in searching for, identifying and/or compiling the required information;
- e) whether the party requesting the extension has provided a partial response to the questionnaire, or has previously provided information required in the same investigation, although the absence of a partial response alone is not an appropriate basis for denial of a request;
- f) any unforeseen circumstances affecting the ability of the party to provide the required information within the time limit established;
- g) whether other parties have been granted extensions of time for similar reasons during the same phase of the investigation.

These same elements shall be weighted for granting or denying time period extension requests made by one of the interested parties to submit arguments, information and supplementary or complementary evidence.

The authority, once the established time periods, and the extensions granted, if any, have expired, shall only admit information and evidence of a supervening nature, when this circumstance is demonstrated, provided that it is submitted prior to the closing of the hearing or the conclusion of the investigation.]

[6.2. During antidumping and countervailing duty investigations, interested parties shall be given the opportunity to participate in the final hearing convened by the investigating authority, in order to present opposing views and offer rebuttal arguments. The date of the hearing shall be notified to the interested parties at least twenty-one (21) days in advance.]

[6.3. Without prejudice to the previous paragraph, during antidumping and subsidies investigations, interested parties shall be given the opportunity to request hearings in order to present opposing views and offer rebuttal arguments. When requesting, in writing, a hearing, the party shall indicate the points that should be addressed. The investigating authority shall respond to the request within five days. It shall also notify the parties of the hearing and inform them of the points that will be addressed therein at least twenty-one (21) days in advance.

When reviewing the request and on the date of the consultation and corresponding notification, the investigating authority may take into account the deadlines for closing the investigation.]

[6.4. The Parties shall guarantee the interested parties immediate and complete access to the actions of other interested parties. Said actions shall be incorporated into the file of the investigation under way no later than five (5) working days following the submission thereof.

The file may be consulted once the investigation has been initiated and at any stage during the procedure, during regular working hours.

The Party conducting an investigation may demand that the interested Parties forward, to each of the interested parties, copies of the reports, documents, means of public evidence, and non-confidential summaries that they have submitted to the investigating authority.]

[6.5. For the purpose of investigations, the information indicated below shall be treated as confidential, if it is presented as such by the interested parties, because revealing or disseminating it to the public may be to the detriment of their competitive position:

- a) Production processes for the good in question;
- b) Production costs and identity of the components;
- c) Distribution costs;
- d) Terms and conditions of sale, except for those offered to the public;
- e) Price of sale per transaction or per product, except for components of prices such as dates of sales and distribution of the product, as well as transportation if it is based on public routes;
- f) The description of the kind of individual clients, distributors or suppliers;
- g) Where applicable, the exact amount of margin of dumping in individual sales;
- h) Amounts of the adjustments for terms and conditions of sale, volume or quantity, variable costs and taxes proposed by the interested party; and
- i) Any other specific information from the company in question, or such information as it provides from related companies, subsidiaries, suppliers, clients or distributors.]

[6.6. The authority may only use confidential information provided by the interested parties if such information is accompanied by non-confidential summaries. These summaries shall be sufficiently detailed to permit a reasonable understanding of the substance of the information submitted in confidence, so as not to compromise actions taken by other interested parties to protect their interests. In exceptional circumstances, the parties that provide confidential information may indicate that such information cannot be summarized. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.]

[6.7. Access will be denied to confidential commercial information or to any information whose dissemination could result in substantial or irreversible financial injury to the owner of such information, for example, secret formulas or processes with commercial value that are unpatented and are known only to an exclusive and limited group of persons who use it in the production of a commercial good, as well as government information found in the laws and other provisions governing public order, and the content of internal communications of the investigating authority, of the investigating authority with other governmental entities or confidential communications between governments.]

[6.8. To confer transparency to investigation procedures and guarantee ample and full opportunity for interested parties to defend their interests, the Parties shall reform their domestic legislation on unfair trade practices with a view to providing for the following mechanisms:

- a) A mechanism that provides prompt access, to all the information contained in the administrative file, to representatives of the interested parties during the procedure, including confidential information provided the requisites established in domestic legislation are complied with;
- b) A commitment to confidentiality to which the representatives of the interested parties shall be held, strictly prohibiting the use of information for personal benefit and dissemination thereof to individuals that are not authorized to receive such information; and
- c) Specific sanctions for breach of commitments made by representatives of interested parties.]

[6.9. In subsidy investigations, in cases in which any interested party or the Government of the exporting country refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. For this purpose, the following shall apply:

- a) As soon as possible after the initiation of the investigation, the investigating authority must specify in detail the information required from any interested party or the Government of the exporting country and the manner in which that information should be structured by an interested party in its response. The authority should also ensure that the interested party or the Government of the exporting country is aware that if information is not supplied within a reasonable time, the investigating authority will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.
- b) The authority may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authority should consider the reasonable ability of the interested party or the Government of the exporting country to respond in the preferred medium or computer language, and should not request the interested party or the Government of the exporting country to use for its response a computer system other than that used by the party or government. The authority should not maintain a request for a computerized response if the interested party or the Government of the exporting country does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party or the Government of the exporting country, e.g. it would entail unreasonable additional cost and trouble. The authority should not maintain a request for a response in a particular medium or computer language if the interested party or the Government of the exporting country does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party or the Government of the exporting country, e.g. it would entail unreasonable additional cost and trouble.
- c) All information that is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authority, should be taken into account when determinations are made. If an interested party or the Government of the exporting country does not respond in the preferred medium or computer language, but the authority finds that the circumstances set out in paragraph 2 above have

- been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.
- d) Where the authority does not have the ability to process information if provided in a particular medium (e.g. computer tape), the information shall be supplied in the form of written material or any other form acceptable to the authority.
 - e) Even though the information provided may not be optimal in all respects, this should not justify the authority from disregarding it, provided the interested party or the Government of the exporting country has acted to the best of its ability.
 - f) If evidence or information is not accepted, the interested party or the Government of the exporting country supplying said evidence or information should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. If the explanations are considered by the authority as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.
 - g) If the authority has to base its findings, including those with respect to the calculation of the amount of subsidy, on information from a secondary source, including the information included in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authority should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party or the Government of the exporting country does not cooperate and thus relevant information is being withheld from the authority, this situation could lead to a result which is less favorable to the party than if the party did cooperate.]

[6.10. The authority shall, before a final determination is made, and once the information and evidence added to the file by the end of the evidentiary phase of the investigation, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.

The essential facts [shall refer] [shall strive to refer], *inter alia*, to the following matters:

- a) The information and methodology used to determine the margin of dumping (normal value, export price and adjustments) or the amount of the subsidy;
- b) The information and methodology or criteria used in the data presented, related to the analysis of injury and the causal link;
- c) The arguments of the interested parties.

In the disclosure of the essential facts, the authorities shall protect the information that is, by its very nature, confidential or has been provided by the interested parties as such.]

[6.11. In an investigation where a preliminary or final determination is made on facts available the Authority shall explain how it has taken into account reported difficulties experienced by small

companies in providing information requested. For the purposes of this Agreement, small companies shall be defined according to the legislation of the importing country.]

[6.12 When the investigating authority is required to formulate preliminary or final determinations on the basis of facts of which it is aware, it shall provide, in the separate report, the reasons justifying such determinations. When more than one piece of information is available, said authority shall provide a detailed explanation of the reasons for choosing the information.]

[6.13. In regard to paragraph 5 of Annex IV to the Antidumping Agreement and paragraph 5 of the Annex of the Agreement on Subsidies and Countervailing Measures, the investigating authority shall forward to the company, in advance, a verification schedule indicating the different types of documents that are to be made available to them. In the case of a subsidy investigation and when the authority requests meetings to obtain explanations or information on the subsidies under investigation, said authority shall notify the government of the exporting country, in advance, of the issues that it wishes to address.]

[6.14. The investigating authority shall carry out investigations *in situ* on the premises of the producers that make up the domestic industry, with a view to verifying the information presented by them. Should the number of producers be very high, and, as a result thereof, the investigation procedure would not be viable, the *in situ* investigation may be carried out on a reasonable number of producers that represent a statistically valid sample or correspond to the maximum percentage of the domestic industry's production volume that can reasonably be investigated.]

Article 7. [Provisional Measures]

[7.1. With regard to Article 7.1 of the WTO Antidumping Agreement, a preliminary affirmative determination shall be based on evidence establishing a strong prima facie case and that there is a substantial issue to be investigated.

In principle preliminary measures shall not be imposed unless the authority judges that the consequent injury to a domestic industry is not adequately compensable unless interim relief is granted, and that the balance of interests favors the granting of relief sought. In exceptional cases where the threat of consequent injury affects a critical growth industry in an FTAA small economy special flexibility shall be accorded.]

[7.2. The review provided for in Article 7.4 of the WTO Antidumping Agreement [shall] [may] include, *inter alia*, the price of the domestic product, the prices at which the imported product from other countries not under investigation is sold in the domestic market, and the international prices of the product in question [on the basis of the information available to the investigating authority].]

[7.3. The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authority concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six (6) months. When the authority, in the course of an investigation, applies a duty lower than the margin of dumping, these periods may be six and nine months, respectively.]

[7.4. The provisional measures shall consist solely of a guarantee, through a cash deposit or bond]

Article 8. [Price Undertakings]

[8.1. Price increases under price undertakings [shall] [may] be less than the margin of dumping or the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.] [Only offers that provide the information required by the investigating authority and give authorization to perform the verifications needed to establish compliance with commitments shall be considered. Offers of quantitative restrictions shall not be accepted]]

[8.2. In case the authority decides to refuse a price undertaking offered by an exporter, they shall provide to it the reasons which have led them to consider acceptance of an undertaking as inadequate, and shall give this exporter an opportunity to make comments thereon. In case the time limit of the investigation does not allow it, the authority shall inform the reasons for their refusal in the public notice or in a separate report related to the final determination.]

[8.3. A price undertaking offer submitted by an exporter may not be rejected based on the fact that other exporters under investigation did not present offers.]

Article 9. [Imposition and Collection of Duties]

[9.1. The authority shall impose a definitive antidumping duty that is less than the margin of dumping if such lesser duty would suffice to remove the injury, or threat of injury, to the domestic industry.

[The amount of the injury shall be assessed, taking into account, *inter alia*, the price of the domestic product, the prices at which the imported product from other countries not under investigation is sold in the domestic market, as well as the international prices of the product in question.]]

[9.1. Each Party's domestic law shall allow for the imposition of a provisional or definitive antidumping or countervailing duty that is less than the full margin of dumping or full amount of subsidy but sufficient to eliminate material injury, the threat of material injury, or retardation in the establishment of the domestic industry. [In making such a determination, consideration shall be given to [all the relevant factors, including], [*inter alia*—to the extent that the information is reasonably available—the prices of domestically produced goods, the prices at which the imported product from countries not under investigation are being sold, and the prices in international markets.]

[9.2. In those cases where the margin of dumping is not greater than the duty that allows eliminating injury, the duty to be applied to enterprises not investigated, may be, at its maximum level, equivalent to the weighted average of the margins of dumping of the sample of the companies investigated, without excluding negative, zero or *de minimis* margins.]

[9.3. Antidumping or countervailing duties shall not be collected in prospective and retrospective basis systems when the margin of dumping or the amount of subsidy is *de minimis*.]

[9.4. The amount of the countervailing duty shall not exceed the amount of the subsidy, in observance of the *de minimis* criteria.

When the amount of the countervailing duty is assessed on a retrospective basis, the determination of the final liability for payment of countervailing duties shall take place as soon as possible, normally within twelve (12) months, and in no case more than eighteen (18) months, after the date on which a request for a final assessment of the amount of the duty has been made. Any refund shall be made promptly and

normally in not more than ninety (90) days following the determination of final liability made pursuant to this subparagraph. In any case, where a refund is not made within ninety (90) days, the authorities shall provide an explanation if so requested.

When the amount of the countervailing duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the amount of the subsidy. A refund of any such duty paid in excess of the actual amount of the subsidy shall normally take place within twelve (12) months, and in no case more than eighteen (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 refund authorized should normally be made within ninety (90) days of the above-noted decision.]

[9.5. Provisional duties, duty deposits and final antidumping and countervailing duties collected shall not be distributed among domestic industry producers, producer associations, or employee associations.]

[9.6. No countervailing duties shall be levied retroactively on products entered for consumption prior to the date of initiation of the investigation.]

Article 10. [Procedure for a New Exporter]

[10.1. If a product is subject to definitive antidumping or countervailing duties in the territory of an importing Party, the exporters or producers of the exporting country who have not exported the product to the importing Party during the period of investigation and show that they are not related to any of the exporters or producers who are subject to the antidumping duties, or who are subject to countervailing duties for reasons other than having refused to cooperate, may request that the investigating authority carry out reviews of new exporters in order to determine individual margins of dumping or the amount of subsidy for them.

10.2. The procedure for a new exporter shall be initiated at the request of a party and must be completed within a period no longer than six (6) months from the date of publication of the public notice of initiation. During the review, no antidumping or countervailing duties shall be levied on imports from those exporters or producers. The authority may withhold appraisement and/or request guarantees to ensure that, should such a review result in a positive determination of dumping or of the amount of the subsidy and that the exporter benefited from the subsidy, antidumping or countervailing duties can be levied retroactively to the date of the initiation of the review.

10.3. The investigating authority shall issue only an initial and a final determination. The review shall comprise only an analysis of the relevant individual margin of *dumping*, or of the amount of the subsidy that corresponds to the exporter who benefited therefrom. The information submitted by the new exporter or producer shall refer to exports to the market of the importing Party that, in the judgment of the investigating authority, are representative of the product subject to antidumping or countervailing duties. The information submitted by the new exporter or producer may be subject to verification by the investigating authority.]

Article 11. [Duration and Review of Duties and Undertakings]

[11.1. If, as a result of a review conducted in accordance with Article 11.2 of the WTO Antidumping Agreement, the authority determines that the margin of dumping is *de minimis*, or that the volume of

dumped imports, actual or potential, or the injury, is negligible, as defined in Article 5.8, the antidumping duty shall be terminated immediately.]

[11.2. In respect of the duration of the measures established consistent with this chapter, the members renounce the application of antidumping duties for more than [three (3)] [...] years [including any extensions] [without any possibility for extension].]

[11.3. The investigating authority may initiate a review requested by domestic producers only if the application is supported by the domestic industry and shall notify the government of the exporting Party on the existence of a properly documented application for the initiation of the review before its initiation. In case of countervailing duty reviews, the investigating authority shall provide opportunities for the government of the exporting Party to hold consultations prior to initiating such review and during the review.]

[11.4 Reviews of rights and obligations shall be concluded within twelve (12) months of the date of commencement of the review.]

Article 12. [Public Interest]

[12.1. The domestic law of a Party shall allow for the conduct of a public interest inquiry to determine whether the imposition of an antidumping or countervailing duty or the imposition of such a duty in the full amount may not be in the public interest. The procedures for such inquiries shall allow the investigating authority to take due account of the representations made by any domestic person whose interest might be affected by the imposition of the antidumping or countervailing duty, including industrial users of the product under investigation and representative consumer organizations. The procedures shall also allow the investigating authority to take due account of representations made by the domestic competition law authority.]

[12.1. The Parties shall consider the interest of other economic agents in the market for the like product, other than those in the domestic industry affected. For this purpose, prior to the application of an antidumping or countervailing measure, an evaluation may be conducted on the impacts on the public interest of the potential application of the measure, based on arguments and information submitted by the interested parties. Said evaluation shall be taken into account when deciding whether to apply a measure. In addition, the Parties may also allow the analysis conducted by the authority responsible for competition law to be duly taken into account.]

[12.1. After all the prerequisites for the imposition of provisional antidumping or countervailing duties have been fulfilled, the investigating authority shall, on its own initiative or at the request of any directly affected part of the domestic industry, give industrial users of the product under investigation and representative consumer organizations, in those cases where the product is sold retail, the opportunity to furnish any information that may be relevant to the investigation on dumping, injury, and the causal link between one and the other. The procedures shall also allow the investigating authority to take due account of representations made by national competition law authority.]

The procedures set forth in the preceding paragraph shall not be considered as requirements for the authority to proceed with the investigation]

Article 13. [Elimination of Antidumping Measures]

[13.1. When the free trade area is established and goods circulate among countries of the FTAA fundamentally free of restrictions, the countries shall renounce the use of antidumping measures for reciprocal trade.]

Article 14. [Public Notice and Explanation of Determinations]

[14.1. The investigating authority shall notify the government of the exporting Party that they have received a properly documented application prior to the declaration that an investigation is formally initiated. That notification shall be forwarded to the addressee directly or through the diplomatic representation of the exporting Party and shall contain information to identify the product subject to the application investigation, the period of investigation proposed in the application, the targeted country or countries, the date of submission of the application, information identifying the applicant domestic producers, known importers and producers and/or foreign exporters.

The investigating authority shall avoid any publicizing of the application for the initiation of an investigation. More specifically, no investigating authority may engage in any preliminary hearings prior to formally initiating a dumping investigation.]

[14.2. In order to ensure the transparency of the proceedings, the periods of investigation for the determination of the margin of dumping or the period of calculation of the amount of the subsidy and the injury shall be recorded in the act opening the investigation and/or in the separate report.]

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

- a) the name of the exporting country or countries and the description of the product involved;
- b) the date of initiation of the investigation;
- c) the analysis undertaken to determine the petitioner's representativeness;
- d) the analysis undertaken to verify the accuracy and adequacy of the information and evidence submitted to prove the possible existence of dumping or subsidization, injury, and the causal link;
- e) the basis for the dumping allegation made in the request and a description of the subsidy practice or practices to be investigated;
- f) the determinations and conclusions indicating sufficient elements of evidence to justify the initiation of the investigation;
- g) a summary of the factors on which the allegation of injury is based;
- h) the address to which representations by interested parties should be directed;
- i) the time limits allowed to interested parties for making their views known.]

[14.4. For the purpose of preliminary or final determinations or the presentation of essential facts, the investigating authority shall hold technical information meetings at the request of any of the interested parties to explain the methodology used in determining the margins of *dumping* and the calculation of the subsidies, [when appropriate, on the basis of information provided by the interested party] as well as the injury and the arguments for causality, and shall duly protect confidential information provided by other parties.]

Upon receiving a request to hold technical meetings, the authority shall issue a decision within five (5) days of receipt of the request. Where the meeting cannot be held on the date requested, the authority may set a new date for the meeting, which shall be scheduled within no more than five (5) days after the date requested by the party.]

[14.4. For the purpose of preliminary or final determinations, the investigating authority shall hold technical information meetings at the request of any of the interested parties to explain the methodology used in determining the margins of dumping—where appropriate, on the basis of information provided by the interested party—and/or the calculation of the subsidies, as well as the injury and the causal link, for which purpose the investigating authority shall duly protect confidential information.

The time period for requesting the convening of such meetings will be within eight (8) days following publication of the public notice of the preliminary or definitive determination.

The technical meeting shall be held within a period of no more than thirty (30) days from the receipt of the request, except when the high number of requests renders compliance with the deadline unviable.]

[14.5. The public announcement, or the separate report, of the preliminary and final determinations shall contain the following:

- a) The name(s) of the domestic producer(s) of the like product who submitted the application, the names of other domestic producers of the like product, and the name(s) of the importer(s), exporter(s), and the foreign producer(s) of the product under investigation who became parties after initiation of the investigation.
- b) Information concerning the procedural background of the investigation, including the date that the application was received, the date that the application was accepted as properly documented, and the date of initiation, as appropriate under each Party's practice.
- c) The description of the product under investigation to which the determination applies, including the tariff classification for Customs purposes of the product, and the name of the country(ies) of origin or export.
- d) Information concerning the like product and domestic industry, including information regarding any exclusion of producers for the purposes of defining the domestic industry.
- e) The period of investigation into the existence of dumping or the calculation of the amount of the subsidy and the period of investigation into the existence of injury, and an explanation of the selection of such periods, where appropriate.
- f) In the case of antidumping investigations, information regarding the calculation of the dumping margin, including information on:

- i) calculation of the normal value (basis of the determination thereof, the results of the “sufficient quantity” and “sales below cost” tests, including the methodology to determine production cost, and, as appropriate, the methodology to calculate the determined normal value);
- ii) the export price (including, as appropriate, the reasons, methodology, and adjustments related to the determination of the export price);
- iii) the methodology used to compare normal values to export prices (including the adjustments made and, as appropriate, the reasons for not accepting requested adjustments and for altering the methodology normally used by the investigating authority); and, if appropriate,
- iv) justification and information on the use of available data, including an explanation for the selection of the information adopted and on sampling.

In the case of subsidy investigations, information related to the calculation of the amount of the subsidy, in terms of benefit to the recipient, including detailed information on the methodology adopted and, if appropriate, justification and information on the use of available data, including an explanation for the selection of the information adopted and on sampling.

- g) Information related to the examination of injury to the domestic industry and to the existence of a causal link between the dumping found initially and the injury, including elements related to
 - i) the volume and prices of dumped imports;
 - ii) the situation of the domestic industry;
 - iii) the examination of the impact of dumped imports on the domestic industry, including the examination of any factors other than dumped imports that simultaneously injure the domestic industry; and, if appropriate,
 - iv) information related to the examination to determine accumulation for imports of varying origins and additional elements for analyzing the existence of a threat of material injury; and
 - v) justification and information on the use of available facts, including an explanation for the selection of the information adopted.
- h) Information concerning verification, if undertaken;
- i) In the case of a preliminary determination, information concerning the continuation of the investigation, including such matters as time frames for the presentation of further submissions, information, arguments and evidence, hearings, the requirements for undertakings, if offered, and name, address, telephone and telefax numbers and email address of the official responsible for the investigating authority.]

Article 15. [Developing Countries]

[15.1. The developed country Party that decides to apply a definitive measure to products originating in developing country Parties, shall impose an antidumping or countervailing duty that is less than the margin of dumping or the amount of the subsidy, if this lesser duty is sufficient to remove the injury to the domestic industry.]

[15.2. The developed Party shall:

- a) consider the acceptance of the price undertaking offers favorably. This favorable approach shall also be applied to proposals to increase prices to levels lower than dumping margins, provided that these increases are sufficient to eliminate the injury caused to domestic industry;
- b) actively engage in the discussion of an undertaking and, when so requested by the exporters, assist in its formulation. The developed Party shall give the exporters of the developing Party, upon request, an opportunity to meet with the investigating authority and to explain the stipulations of any price undertaking offer and the need for the same;
- c) publish or make known to all the exporters subject to antidumping or countervailing duties investigations, preferably through universally applicable provisions, the procedures that must be observed with respect to applications for the consideration of price-related undertakings. Similarly, in the course of each specific investigation, the investigating authority shall inform the exporters of the developing Party, no later than five (5) days after a positive preliminary determination, that the option for a price undertaking exists;
- d) grant a period of at least four weeks after the publication of the preliminary determination for the exporters of the developing Party to formulate a price undertaking offer. During this period no provisional measures shall be applied. Nevertheless, if no price undertaking is established, the corresponding duties may be collected retroactively. The establishment of this minimum period shall not prevent the exporter from submitting an offer after the expiration of the same.]

[15.3. The margin of dumping for exports from developing country Parties shall be considered to be de minimis when this margin is lower than five (5) percent, expressed as a percentage of the export price, and the volume of dumped or subsidized imports from developing country Parties shall be regarded as negligible when it is established that imports from, or originating in, a given developing country account for less than seven (7) percent of imports of the like product in the importing Party, unless the developing country Parties that individually account for less than seven (7) percent of imports of the like product in the importing Party collectively account for more than fifteen (15) percent of such imports. Injury shall be regarded as negligible if the volume of dumped imports from developing country Parties accounts for less than [...] percent of the domestic market of the importing country.]

Section C Procedures and Institutions

Article 16. [Technical Assistance]

[16.1 The Parties shall endeavor to provide technical assistance to other Parties, taking into consideration differing levels of development and size of the economies, in order to assist them in fulfilling their WTO [and FTAA] obligations with respect to the application of anti-dumping and countervailing duties.]

Article 17. [Consultation and Dispute Settlement]⁸

[17.1. Any dispute arising between the Parties in connection with the interpretation or implementation of this Chapter shall be settled in conformity with the procedures set forth in the Chapter on Dispute Settlement of the FTAA Agreement.]

[17.2. As soon as possible after an application under Article 5 of the WTO Antidumping Agreement is accepted, and in any event before the initiation of any investigation, FTAA Parties the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 5 of the WTO Antidumping Agreement and arriving at a mutually agreed solution.]

[17.3. Furthermore, throughout the period of investigation, the Parties whose products are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and arriving at a mutually agreed solution.]⁹

[17.4. Each FTAA Party undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Party concerning an application for antidumping measures on behalf of that Party in accordance with the provision of paragraphs 2 and 3 of this Article.]

[17.5. The Party that intends to carry out reforms of its domestic legislation on antidumping or subsidies shall hold, subject to written request of the other Party, consultations to discuss the questions set forth regarding said reforms in order to clarify whether or not these are contrary to the provisions of this Chapter. The consultations shall not be an obstacle to the approval of the legislative reforms.]

[17.6. When, in the context of an antidumping or subsidy investigation, the exporting Party considers that the investigating authority of the importing Party adopted provisional or definitive antidumping or countervailing measures contrary to the provisions of this Chapter, the importing Party shall provide adequate opportunities for consultations in this regard, prior request in writing from the exporting Party.]

[17.7. In the event that a mutually satisfactory solution is not reached in the consultations referred to in paragraphs 5 and 6 of this Article, the exporting Party may request that the disputes be resolved by the neutral panel or group established in accordance with this Agreement. Any disputes that may arise in connection with unfair practices in international trade can only be resolved, by request of the complainant, before one of the international dispute settlement mechanisms provided for in trade agreements and treaties to which both the importing and exporting State are Party. The selected dispute settlement mechanism shall be exclusive of the others.]

[17.8. When a dispute settlement mechanism provided for under this Agreement determines that an antidumping or countervailing measure is incompatible with this Chapter, it may recommend to the importing Party, the way and time in which it shall bring its measure into conformity with the Agreement.]

⁸ The Negotiating Group recognizes that the work being undertaken in the Negotiating Group on Dispute Settlement will be relevant to the ultimate need for, and content of, this Article.

⁹ [It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination, whether preliminary or final, be made without reasonable opportunity for consultation having been given.]

[17.9. When an antidumping or countervailing duty decreases or is removed in compliance with a decision of the challenge mechanism, the importing Party shall proceed promptly to return, restore, modify or cancel previously offered guarantees with their respective interests.]

Article 18. [Joint Committee]¹⁰

[18.1. A Joint Committee on antidumping or subsidies composed of a representative from each of the Parties is established. The Joint Committee shall elect its own Chairman, who will be assigned to the post for two (2) years. The Committee shall meet not less than twice a year, and when it is deemed necessary, to review the information and documentation provided by the Parties under this article. The Joint Committee shall be responsible for, inter alia, the receipt, control, and review of documents that the Parties submit in accordance with the following two paragraphs of this article. This information shall be available for the Parties' consultation. Also, if deemed necessary, it may create work groups or subgroups.]

[18.2. Each Party shall notify the following to the Joint Committee:

- a) information on the competent authority to initiate and carry out investigations concerning this Chapter, including, inter alia, the name of the authority and incumbent, address, telephone, fax and email, as well as any changes that may arise;
- b) domestic legislation applicable to the procedures that govern the initiation and development of antidumping and subsidies investigations; and,
- c) reforms to said legislation.]

[18.3. The Parties shall notify without delay to the Joint Committee all preliminary or definitive antidumping or countervailing measures adopted, elimination or revocation of measures; initiation of investigations and disclaim of said investigations; annual and five-year reviews; and procedures against the circumvention of antidumping or countervailing measures. In February and August of each year, the Parties shall submit semi-annual reports on the aforementioned measures or investigations carried out by the Parties during the preceding six (6) months. The semi-annual reports shall be submitted in accordance with the format that the Parties approve.]

Article 19. [Final Provisions]¹¹

[19.1. The provisions set forth in this Chapter shall apply to investigations and reviews of, and payment and restitution procedures for, existing measures initiated on the basis of a request submitted subsequent to the entry into force of this Agreement or, where an ex officio investigation is initiated, to those initiated subsequent to that date.]

[19.2. Each Party shall adopt all the actions and measures necessary of a general or particular nature to ensure that, by no later than the date of this Agreement's entry into force, the corresponding provisions of its laws, regulations, procedures and administrative practice applied to the other Parties, are in conformity with the provisions of this Agreement.]]

¹⁰ The Negotiating Group recognizes that the work being undertaken in the Technical Committee on Institutional Issues (TCI) will be relevant to the content of this Article.

¹¹ The Negotiating Group recognizes that the work being undertaken in the Technical Committee on Institutional Issues (TCI) will be relevant to the content of this Article.

[CHAPTER XV SUBSIDIES, ANTIDUMPING AND COUNTERVAILING DUTIES¹²

Section A General Aspects

Article 1. Definitions

1.1. For the purposes of this Chapter:

Agreement includes any successor agreement as well as any amendments to, or official interpretations of, its provisions;

Antidumping Agreement means the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* in Annex 1A to the WTO Agreement;

A **Party** means a signatory to the FTAA;

A **party** means an interested person, actual or juridical;

Relevant evidence reasonably available to the applicant means probative information going to the substantive merits of an application for an antidumping or countervailing duty investigation that is either in the legal possession of the applicant or that can be readily obtained by the applicant without having to incur unreasonable additional cost or trouble.¹³

Law means the body of official and enforceable rules in effect within the territory of a Party including such measures as statutes, regulations, decrees and official interpretations, and is deemed to include related administrative practices;

Subsidies Agreement means the *Agreement on Subsidies and Countervailing Measures* in Annex 1A to the WTO Agreement;

Subsidy means a subsidy within the meaning of Article 1 of the Subsidies Agreement;

Sub-regional trade agreement means a free trade agreement within the meaning of Article XXIV of the *General Agreement on Tariffs and Trade 1994*, between two or more Parties to the FTAA, which was already in existence when the FTAA entered into effect; and

WTO Agreement means the *Marrakesh Agreement Establishing the World Trade Organization*.¹⁴

Article 2. Priority of Agreements

2.1. Except as otherwise or additionally provided in this Chapter, the WTO Agreement governs the rights and obligations of the Parties in respect of subsidies and the application of antidumping and countervailing measures.

¹² The footnotes are explanatory and do not form part of the Chapter.

¹³ The phrase “*unreasonable additional cost and trouble*” has the same meaning as in Annex II:2 to the Antidumping Agreement.

¹⁴ By virtue of Article II: 2 of the WTO Agreement, the GATT 1994, the Antidumping Agreement and the Subsidies Agreement are integral parts thereof.

2.2. Where a provision in a successor agreement to the WTO Agreement provides treatment to products of a Party that is more favourable than that which is available under this Chapter, the provisions of that agreement shall apply.

2.3. Provisions on the settlement of disputes in relation to antidumping and countervailing duty matters that are contained in a sub-regional trade agreement are deemed to be compatible with the provisions of this Agreement and are of continuing applicability unless the Parties to that agreement have otherwise agreed as between themselves.

Section B Substantive Provisions

Article 3. Cooperation in Compliance on Subsidies

3.1. It is desirable¹⁵ that a Party consult with directly affected Parties and other Parties having a substantial trade interest¹⁶, on options for compliance with adverse dispute settlement rulings in respect of subsidies granted or maintained.¹⁷

Article 4. Initiation of Investigations

4.1. The investigating authority of a Party shall not consider an application for the initiation of an antidumping or countervailing duty investigation against products of another Party as being adequate if such application does not include all relevant evidence reasonably available to the applicant.

4.2. The investigating authority of a Party shall not initiate an antidumping duty investigation under the Antidumping Agreement or a countervailing duty investigation under the Subsidies Agreement against products of another Party if domestic producers expressly supporting the application for the initiation of the investigation account for less than the percentage of total production of the like product produced by the domestic industry specified in the Antidumping Agreement or the Subsidies Agreement, as the case may be, plus ten percent.

4.3. Where an association of domestic producers files or expresses support for an application for the initiation of an antidumping or countervailing duty investigation, it shall identify those of its members who actually supported the application as well as the percentage of the total production of the like product produced by the domestic industry, which is accounted for by those members.

4.4. A Party and its investigating authority shall refrain from implementing any measure or taking any action that would have a reasonably foreseeable effect on the outcome of an examination of the degree of domestic industry support for, or opposition to, an application for the initiation of an antidumping or countervailing duty investigation.

4.5. The investigating authority of a Party shall include the period of investigation in the public notice of the initiation of its investigation.

¹⁵ Refer to similar hortatory language in Article 19.2 of the Subsidies Agreement. The complying Party would, of course, retain complete discretion on the extent of any such consultations.

¹⁶ The term "substantial trade interest" has the same meaning as in Article 4.11 of the WTO Dispute Settlement Understanding.

¹⁷ To the extent to which such cooperation contributes to fewer compliance panels and leads to more timely implementation of dispute settlement rulings, it represents a practical response to the NGADCV mandate on the deepening of subsidy disciplines.

Article 5. Investigations

5.1. In an antidumping investigation, the normal value of a product may not be constructed on the basis of the cost of production, administrative, selling, general costs and profit, unless the investigating authority has determined that the normal value cannot be based on sales of like products in the domestic market of the exporting country. The investigating authority shall provide detailed reasons in support of such a determination.

5.2. In an antidumping investigation:

- a) the export price of products may not be constructed unless the investigating authority has determined either that there is no export price or that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party;
- b) the export price between related companies may only be disregarded if, based on an examination, it is determined that the relationship affects the export price;
- c) the investigating authority shall provide detailed reasons for accepting the export price;
- d) the investigating authority, where it rejects the export price, shall provide:
 - i) detailed reasons in support of its finding:
 - 1) that there is no export price; or
 - 2) that the export price is unreliable by reason of association or compensatory arrangement between the exporter and the importer or a third party; and
 - ii) a detailed explanation of the methodology used to construct the export price as well as of how such methodology conforms to the requirements of the Antidumping Agreement.

5.3. In calculating normal value, the investigating authority shall make appropriate adjustments for those non-recurring items of cost directly associated with a small enterprise's recovery from, and resumption of operations after, a natural disaster.¹⁸

5.4. In a countervailing duty investigation, the investigating authority shall take due account of any subsidies specifically benefiting its domestic industry.

Article 6. Transparency and Fairness

6.1. In the administration of its antidumping and countervailing duty law, a Party shall ensure that its investigating authority:

- a) publishes notices of initiation of investigations in its official journal, the legal authority under which proceedings are initiated, the nature of the proceedings, a description of the subject

¹⁸ "Natural disasters" would include such random events as hurricanes and floods. This provision builds upon the existing reference to "non-recurring items of cost" in Article 2.2.1 of the Antidumping Agreement.

products, the period of investigation and full particulars of the person to contact for further information;

- b) provides explicit notice to known interested parties of information required, the times for submission of information (including full particulars of a contact person for the investigation) and of decisions that the investigating authority is expressly required by law to make;
- c) protects confidential business proprietary information received by the competent investigating authority, from unauthorized disclosure;
- d) provides disclosure to known interested parties of relevant information, including an explanation of the calculation methodologies used to determine margins of dumping and amounts of subsidy;
- e) provides statements of reasons for: the initiation of investigations, preliminary and final determinations of dumping and subsidization; preliminary and final determinations of material injury or threat thereof to a domestic industry or material retardation to the establishment of such an industry; and for all administrative, expiry and changed circumstances review determinations;
- f) provides a statement of reasons as to why an undertaking offer was rejected; and
- g) provides statements of reasons for: decisions on whether to initiate a public interest inquiry; public interest determinations; and for determinations on whether to impose an antidumping or countervailing duty that is less than the full margin of dumping or full amount of subsidy.

6.2. Where a Party's legislation allows for disclosure under protective order of information submitted by a party on a confidential basis, the legislation shall, in addition to any other sanctions, provide for the imposition of appropriate monetary penalties¹⁹ for the unauthorized disclosure or misuse of such information by a person to whom the information was disclosed under a protective order, for the purpose of the investigation.

Article 7. Imposition and Collection of Duties

7.1. The domestic law of a Party shall allow for public interest procedures to determine whether the imposition of an antidumping or countervailing duty or the imposition of such a duty in the full amount may not be in the public interest. These procedures shall allow the authorities to take due account of representations made:

- a) by any domestic party whose interests may be affected by the imposition of the antidumping or countervailing duty, including industrial users of the product under investigation and representative consumer organizations; and
- b) by the domestic competition law authority.

7.2. In conducting an inquiry referred to in paragraph 7.1, the authority shall consider all relevant information, including, where relevant, those factors set out in Annex A to this Chapter.

¹⁹ Monetary penalties should be commensurate with the level of damage suffered by the party that submitted the information as a result of such wrongful disclosure or misuse.

7.3. Each Party's domestic law shall allow for the imposition of an antidumping or countervailing duty that is less than the full margin of dumping or full amount of subsidy but sufficient to eliminate injury to the domestic industry.

7.4. Provisional and definitive antidumping and countervailing duties collected shall not be distributed among domestic industry producers, producer associations or employee associations.

Article 8. Reviews

8.1. In determining whether the expiry of an antidumping or countervailing duty measure is likely to result in a continuation or recurrence of dumping or subsidization of products, the reviewing authority shall consider all relevant information including, where relevant, those factors set out in Annex B to this Chapter.

Article 9. Special and Differential Treatment

9.1. A Party shall accord sympathetic consideration to a request made by another Party for technical assistance in improving any aspect of its antidumping and countervailing duty laws, procedures or practices.

9.2. The public notice of a preliminary or final antidumping or countervailing duty determination shall specify:

- a) the difficulties experienced by small enterprises acting in good faith, in supplying information requested; and
- b) the manner in which the investigating authority took account of these difficulties, including any assistance provided.

Section C Procedures and Institutions²⁰

Article 10. Dispute Settlement

10.1. An antidumping or countervailing duty proceeding shall not be undertaken and a provisional duty, antidumping duty or countervailing duty shall not be imposed or continued against the products of a Party, in the absence of a sufficient explanation of determinations.

10.2. Where a Party, the products of which are the subject of:

- a) an antidumping or countervailing duty investigation,
- b) a preliminary determination,
- c) a final determination,
- d) a review, or

²⁰ The need for and nature of any chapter-specific institutional provisions will depend on developments in the Technical Committee on overarching framework issues.

e) a review determination,

claims that the public notice of the initiation of any such proceeding, or of any such determination, is substantively deficient, the Party responsible for providing such notice shall afford the complaining Party an opportunity for immediate consultations with a view to clarifying the situation and arriving at a mutually agreed solution.

10.3. If the matter is not resolved within [...] calendar days of the request for consultations, the complaining Party may request an expedited review of the public notice referred to in paragraph 10.2 by a designated [independent authority of the Party that provided the public notice] [member of the Appellate Body]²¹. The designated [independent authority] [member of the Appellate Body] shall determine whether the public notice sets forth or otherwise makes available in a separate report, in sufficient detail, the information required by a Party to properly defend its interests in the investigation or in any subsequent related proceedings.²²

10.4. The designated [independent authority] [member of the Appellate Body] shall render its findings within [...] calendar days after the filing of the request for review referred to in paragraph 10.3..

10.5. Where the public notice or report referred to in paragraph 10.3. is found to be deficient, the designated [independent authority] [member of the Appellate Body] shall identify the specific areas of deficiency and may provide specific recommendations on the nature of the information required to render the public notice sufficient.

10.6. The implementation by a Party of a WTO or FTAA dispute settlement recommendation or ruling shall extend to all importations of the subject products in respect of which a final assessment of antidumping or countervailing duties has not yet been made.

10.7. Each Party shall notify the Trade Rules Committee of the changes it has made to its domestic law to comply with an adverse FTAA or WTO dispute settlement recommendation or ruling.

Article 11. Trade Rules Committee

11.1. A Trade Rules Committee, composed of representatives of each of the Parties, is hereby established. The Committee shall elect its own Chair and meet twice a year, or in special session upon the request of a Party, to consult on any matter relating to the operation of this Chapter and the furtherance of its objectives.

11.2. The Committee may establish subsidiary bodies, as appropriate.

²¹ This, of course, presupposes the establishment of a standing Appellate Body in the FTAA Chapter on Dispute Settlement.

²² This expedited review mechanism recognizes that the ability of an affected Party to avail itself of its judicial review and dispute settlement rights depends directly on the transparency and sufficiency of the investigating authority's findings. This fast-track process would lessen the need to first request a panel on the adequacy of factual/legal findings and then request a second panel on any substantive claims of violation arising from proper findings once these have been rendered by the investigating authority in compliance with the first panel's findings.

Article 12. Conformity of Laws²³

12.1. Each Party shall take all necessary steps of a general and particular character to ensure, not later than the entry into force of this Agreement for it, that its law is in conformity with the Chapter.

12.2. Each Party shall notify all other Parties through the Trade Rules Committee, of:

- a) the competent authorities to initiate and conduct investigations under this Chapter; and
- b) any changes to its law relevant to this Chapter as far in advance as possible of the date on which such change is to enter into force.

12.3. Following the notification referred to in paragraph 2 b) of this Article, the Party intending to carry out the change to its law shall, on the written request of any other Party, consult with such other Party on any matter relating to the operation of the proposed changes in relation to the provisions of this Chapter.

²³ The need for and nature of any chapter-specific final provisions will depend on developments in the Technical Committee on over-arching framework issues.

Annex A Public Interest Factors

For the purposes of Article 7.2, of this Chapter, the following factors are prescribed:

- a) whether products of the same description are readily available from sources to which the measure does not apply;
- b) whether imposition of an antidumping or countervailing duty in the full amount
 - i) has eliminated or substantially lessened or is likely to eliminate or substantially lessen competition in the domestic market in respect of products,
 - ii) has caused or is likely to cause significant damage to domestic producers that use the products as inputs in the production of other products and in the provision of services,
 - iii) has significantly impaired or is likely to significantly impair competitiveness by
 - 1) limiting access to products that are used as inputs in the production of other products and in the provision of services, or
 - 2) limiting access to technology, or
 - iv) has significantly restricted or is likely to significantly restrict the choice or availability of products at competitive prices for consumers or has otherwise caused or is otherwise likely to cause them significant harm;
- c) whether non-imposition of an antidumping or countervailing duty or the non-imposition of such a duty in the full amount is likely to cause significant damage to domestic producers of inputs, including primary commodities, used in the domestic manufacture or production of like products; and
- d) any other factors that are relevant in the circumstances.

Annex B Expiry Review Factors

For the purposes of Article 8.1 of this Chapter, the following factors are prescribed:

1. With respect to the determination of the likelihood of a continuation or resumption of dumping or subsidizing:
 - a) whether there has been dumping of products while a measure in respect of the products is in effect and, if applicable,
 - i) the period during which the dumping occurred,
 - ii) the volume and prices of the dumped and non-dumped products,
 - iii) the margin of dumping, and
 - iv) for non-dumped products, the amount by which the export prices exceed the normal values of the products;
 - b) whether there has been subsidizing of products while a measure in respect of the products is in effect and, if applicable,
 - i) the nature and duration of the foreign subsidy program in respect of the products,
 - ii) the period during which the subsidizing occurred,
 - iii) the volume of the subsidized products, and
 - iv) the amount of subsidy;
 - c) the performance of the exporters, foreign producers, brokers and traders including, where applicable, in respect of production, capacity utilization, costs, sales volumes, prices, inventories, market share, exports and profits;
 - d) the likely future performance of the exporters, foreign producers, brokers and traders on the basis of factors, where applicable, such as production, capacity utilization, sales volumes, prices, inventories, market share, exports and profits;
 - e) the potential for the foreign producers to produce the products in facilities that are currently used to produce other products;
 - f) evidence of the imposition of antidumping or countervailing measures by the authorities of another country in respect of products of the same description or in respect of similar products;
 - g) whether measures taken by the authorities of another country are likely to cause a diversion of dumped or subsidized products into the domestic market;
 - h) any changes in market conditions domestically or internationally, including changes in the supply of and demand for the products, in sources of imports, and in prices, market share and inventories;
 - i) the imposition of antidumping or countervailing measures by the domestic authorities in respect of similar products while a measure in respect of the products was in effect; and

- j) any other factors that are relevant in the circumstances.

2. With respect to the determination on the likelihood of continued injury:

- a) the likely volume of the dumped or subsidized products if the measure is allowed to expire, and, in particular, whether there is likely to be a significant increase in the volume of imports of the dumped or subsidized products, either in absolute terms or relative to the production or consumption of like products;
- b) the likely prices of the dumped or subsidized products if the measure is allowed to expire and their effect on the prices of like products, and, in particular, whether the dumping or subsidizing of products is likely to significantly undercut the prices of like products, depress those prices, or suppress them by preventing increases in those prices that would likely have otherwise occurred;
- c) the likely performance of the domestic industry, taking into account that industry's recent performance, including trends in production, capacity utilization, employment levels, prices, sales, inventories, market share, exports and profits;
- d) the likely performance of the foreign industry, taking into account that industry's recent performance, including trends in production, capacity utilization, employment levels, prices, sales, inventories, market share, exports and profits;
- e) the likely impact of the dumped or subsidized products on domestic industry if the measure is allowed to expire, having regard to all relevant economic factors and indices, including any potential decline in output, sales, market share, profits, productivity, return on investments or utilization of production capacity, and any potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital;
- f) the potential for the foreign producers to produce the products in facilities that are currently used to produce other products;
- g) the potential negative effects of the dumped or subsidized products on existing development and production efforts, including efforts to produce a derivative or more advanced version of like products;
- h) evidence of the imposition of antidumping or countervailing measures by the authorities in another country in respect of products of the same description or in respect of similar products;
- i) whether measures taken by the authorities in another country are likely to cause a diversion of the dumped or subsidized products into the domestic market;
- j) any changes in market conditions domestically or internationally, including changes in the supply of and demand for the products, as well as any changes in trends and in sources of imports; and
- k) any other factors relevant in the circumstances.]