Monday, 28 February 2011

NEGOTIATING GROUP ON RULES: ANTI-DUMPING & SUBSIDIES & COUNTERVAILING MEASURES

TRANSPARENCY SESSION

Good afternoon, and welcome to this open-ended informal meeting of the Negotiating Group on Rules. Last week I held plurilateral consultations on issues relating to anti-dumping and to subsidies and countervailing measures. The consultations, which were attended by some 20 delegations (for anti-dumping) and by 14 delegations (for subsidies and countervailing measures), representing a broad range of perspectives, are the continuation of a process pursuant to which we are systematically reviewing all bracketed issues and un-bracketed text appearing in the most recent Chair text, found in document TN/RL/W/236.

As you know, the purpose of this transparency session is to provide Members as a whole with an account of the consultations as I see them. My statement, while detailed, does not purport to represent comprehensive minutes, but rather seeks to give an overview of the issues identified and the range of views expressed. If you want to draw the Group's attention to any element that you believe has been overlooked, please feel free to put up your flag at the end of my statement and supplement it.

I would however like to emphasize that while oral supplements are welcome, I do not intend to revise the written version of my own statement. Otherwise, these statements would become negotiated documents, in which case all delegations would feel obliged to weigh in, and this transparency process would collapse under its own weight. And that is a result I cannot accept.

Similarly, this session is *not* a session with an open-ended agenda to debate any and all issues before the Group. It is simply an

opportunity to *inform* Members who were not in the plurilaterals of what took place.

Turning now to the substance, the first bracketed item discussed on Monday morning was **sunset reviews**. It think it is fair to say that a broad cross-section of the Membership continues to believe that this is an important area of the negotiations. However, it was clear from the consultations that there are sharp differences of view about the principles and purpose underlying the existing provisions on sunset and the nature and extent of any problems regarding their implementation, and consequently, the nature of the possible approaches to improving these provisions of the AD Agreement.

Certain delegations observed that anti-dumping measures had in some cases remained in place for inappropriately long periods of time, or were indeed almost permanent in nature (data submitted by one delegation is attached). In the view of some of these delegations, the intention of the Uruguay Round provisions on sunset was that measures should be terminated after five years in almost all cases, and that the extension of measures should be exceptional. That measures were remaining in place for much longer periods in the view of these delegations revealed that there was a serious problem with implementation of the AD Agreement.

Delegations holding the above views tended to consider that the existing situation was inherent in the disciplines of the current AD Agreement. In their view, those disciplines were grounded in a standard that requires the forecasting of future events, based upon speculation about a hypothetical situation in the absence of an anti-dumping measure, and is thus subjective. Accordingly, these delegations considered that mandatory termination of anti-dumping measures after some period of time was necessary, whether as the exclusive solution or in conjunction with strengthened disciplines. In the view of these delegations, if injurious dumping recurred after the anti-dumping measure was revoked, the domestic industry could always seek initiation of a new investigation.

The precise positions of these proponents of mandatory termination varied. Some advocated mandatory termination after five years, thus vitiating the need for any other strengthened disciplines. These delegations considered that the 2007 Chair text was inadequate. Other delegations could accept mandatory termination after some longer period (8 and 10 years were periods mentioned), thus implying the need for at least one review and consequently for strengthened disciplines, both substantive and procedural. Several of these delegations noted that the maximum duration should depend upon the strength of the disciplines. These delegations generally thought the 2007 Chair text was a good starting point, although some of them referred to earlier proposals to improve the text by, *inter alia*, including additional substantive and evidentiary criteria governing the determination, toughening procedural requirements, and eliminating the possibility for "expeditious action" envisioned by the Chair text.

Another group of delegations held a sharply different view. Their starting point was that anti-dumping measures are intended to remedy the situation of injurious dumping, whenever this takes place. Such measures were thus about remedying distortions, not allowing a period for adjustment. Thus, the fact that measures remained in place for more than five years was not inappropriate if dumping and injury were likely to continue or recur. For the same reasons, it was not correct to suggest that the premise of the Uruguay Round was that the current AD Agreement was intended to result in termination after five years in all or nearly all cases. One delegation observed that in any event its authorities terminated nearly half its measures after five years.

Delegations holding this view rejected the proposition that there should be any mandatory termination of an anti-dumping measure after some specified period of time. Requiring termination where injurious dumping is likely to continue or recur would significantly curtail, if not completely re-define, the right to take anti-dumping action that is enshrined in Article VI of the GATT and the AD Agreement. One delegation noted in this regard that if applied in the countervail context this would require termination even where

subsidization continued. These delegations considered that to be required to resort to a new investigation where injurious dumping continued or recurred after termination was not a solution, especially given the lengthy period that would be required for data to be accumulated and collected and for the investigation to conclude. It was also observed that if there were mandatory termination after some period longer than five years, that longer period would in practice become the norm.

Thus, while these delegations were prepared to discuss strengthening the existing sunset disciplines, they considered mandatory termination to be unacceptable. Accordingly, the considered that the 2007 Chair text, which had adopted a mandatory termination, was the wrong approach.

While the strong divergence of views on the issue of mandatory termination was no surprise, the strength with which delegations expressed their views was nevertheless notable. Certain delegations insisted on the need to improve on the 2007 Chair text and to combine mandatory termination with strengthened disciplines, with one delegation observing that sunset was an important deliverable in the negotiations. Other delegations however expressed surprise about the nature of the discussion, suggesting that philosophy was replacing pragmatism and that the discussion was going backwards. One advocate of strengthened disciplines suggested that it might abandon its criteria-based proposal if others continued to insist on mandatory termination.

Aside from the critical divisive issue of mandatory termination, delegations discussed approaches to the possible strengthening of substantive sunset disciplines. While, as noted above, some delegations considered that a likelihood test was too subjective and could never be fixed, some other delegations referred to a list of criteria that they had proposed, to *supplement* a mandatory termination, in a proposal after the issuance of the 2007 Chair text. Other delegations noted various proposals to further elaborate relevant criteria, *instead of* automatic termination, with one

emphasising the need for decisions to be made based on new data and others observing the need to preserve the prospective nature of the analysis. One delegation supported strengthened disciplines but cautioned about the resource constraints of small users.

The consultations also touched on various proposals for procedural changes in the 2007 Chair text. Some delegations expressed support for a standing requirement and for self-initiations only in limited circumstances, although they would have preferred no *ex officio* initiations, with one of these delegations suggesting that the special circumstances that would justify self-initiation be further clarified. Other delegations however questioned whether a standing requirement was necessary or even reasonable, while observing that although interest from a domestic industry was necessary in order to conduct a sunset review there was no reason to preclude *ex officio* initiations. Delegations addressing timelines in the 2007 Chair text expressed support, while one delegation noted its opposition to a requirement to pay interest. There were also varying views expressed on the issue of possible transition rules.

In short, it is evident that there is a sharp divergence of views on the issue of mandatory termination. This divergence is not only the source of considerable tension in the Group, but it prevented us from entering into an engaged technical discussion of the various approaches being advocated. I would strongly urge delegations to engage technically on alternative approaches, without prejudice to their underlying positions, so that we can have technically feasible alternatives in order to advance our progress in these negotiations.

The next (and final) bracketed anti-dumping issue taken up this week was **anti-dumping action on behalf of a third country.** As you will all recall, the 2007 Chair text proposed changes to Article 14 of the AD Agreement, such that rather than needing to seek approval from the Council for Trade in Goods before taking such action, the importing Member would be required merely to notify the Council before initiating an investigation. The item proved controversial and was moved to brackets in the 2008 Chair text.

In broad terms, delegations took one of three general approaches to this issue. Certain delegations considered that the existing provisions were unworkable in practice, because action required the consensus approval of the Council for Trade in Goods, which included the exporting Member. This reality was demonstrated by the fact that actions on behalf of a third country were not occurring in practice. In the view of these delegations, all provisions of the Anti-Dumping Agreement, including those on action on behalf of a third country, should be operational, and this would require eliminating the requirement for approval by the Council for Trade in Goods. These delegations were prepared to explore other issues that might emerge in this context, which differed from a normal anti-dumping investigation in various respects, and did not intend to deprive an importing Member of its sovereign right to take or not take action in these cases.

A second group of delegations considered that the requirement for approval of action by the Council for Trade in Goods should be retained. These delegations considered that action on behalf of a third country was a narrow exception from the rule that anti-dumping measures cannot be imposed in the absence of injury to the domestic industry in the importing Member, so Council approval should be required. Further, it was argued that third country dumping cases involved competition between two third countries in the importing Member. Allowing importing Members to pick and choose in taking such action could allow discrimination in favour of PTA partners, and generate political pressure on investigating authorities. It was further suggested that this issue related to Article VI, which was outside the Group's mandate, and that the reference to "waiver" in Article VI meant that approval of action ultimately was a matter for the Ministerial Conference. Finally, these delegations evoked practical issues and difficulties regarding such action. In light of these considerations, some delegations suggested that rather than operationalizing such action, the relevant provisions could be deleted altogether.

A third group of delegations took a cautious intermediate position. These delegations did not necessarily reject a change in the rules regarding anti-dumping action on behalf of a third country. They did however have numerous questions about how anti-dumping action on behalf of a third country would work in practice, and these delegations considered that the questions would have to be answered – and relevant provisions of the AD Agreement developed – before they could take a view on whether anti-dumping action on behalf of a third country should be operationalized.

Among the questions raised by these delegations were the respective roles of the authorities of the importing Member and of the third country; whether a standing requirement would apply; how the authorities could gather the necessary information regarding the domestic industry in a third country, including how to ensure cooperation; how to address the issue of confidentiality; how to take into account the interests of the domestic industry and consumers in the importing Member; and whether under the existing AD Agreement approval was required to initiate the case or to impose measures. It was also asked whether, where companies in the importing Member sourced their goods from abroad, such action might in effect become protection for investment rather than production.

My perception is that the delegations present in these consultations generally recognized that the existing provisions on anti-dumping on behalf of a third country are not currently operational. However, many of the delegations present either believed that operationalization was not desirable or in any event considered that a great deal of work on other aspects of this issue would be necessary before a judgement could be made about whether or not they could support such operationalization.

The consultations next turned to the un-bracketed issue of **limited examination**. Many delegations stated that they could support the entirety or parts of the proposed modifications in the 2008 Chair text. However, the concern was raised that requiring mandatory

consultations with all known exporters might be overly burdensome on investigating authorities and could negatively impact the timeliness of investigations. Thus, a number of delegations thought it would be useful to clarify that where an investigation covers a large number of producers and exporters, an investigating authority would be entitled to consult trade associations. Other delegations suggested that the obligation to consult could be softened by making it only necessary to consult "wherever possible" or "practicable".

The obligation to explain the reasons for limited examination decisions in public notices was also questioned by one delegation, which contended that the cost of making such notifications in its system would strain the already limited resources available to conduct investigations. Another delegation not in favour of mandatory consultations proposed that an additional element of transparency could be added to Article 6.10 by requiring an exchange of views between the investigating authority and interested parties on the particular limited examination technique to be adopted.

Several delegations also suggested that the Chair text could be improved by setting forth guidance on the two limited examination methods described in Article 6.10, namely statistically valid sampling and the identification of the largest percentage of volume of exports that can be reasonably examined. Another delegation submitted that considerations similar to those underlying the conduct of limited examinations in original investigations were present in the context of duty assessment proceedings. This delegation suggested extending the possibility of conducting a limited examination to Article 9.3.

The next un-bracketed issue addressed was **assistance to interested parties** requesting clarification to questionnaires. The proposed modification to Article 6.13 of the Agreement was supported by most delegations, with one delegation suggesting that its effectiveness could be improved by requiring that questionnaires contain the contact details of one or more relevant case handlers in the investigating authority. It was also suggested that, for transparency purposes, it would be useful if the details of any requests for

assistance, and an investigating authority's responses thereto, were placed on the file of the investigation.

A few delegations expressed the concern that requiring investigating authorities to respond to requests for assistance in a timely manner could be overly burdensome and might hinder the expeditious conduct of investigations where, for example, an investigation involves many exporters or where an exporter has made a request for assistance close to the deadline for the submission of a questionnaire. It was suggested that requiring exporters to make any requests for clarification in a timely manner might address this concern.

The revisions to Article 7.1 of the Chair text regarding the conditions for the application of **provisional measures** were taken up next. In general, there was broad agreement with the thrust of the proposed changes. However, some delegations considered the proposed obligation to take any responses to questionnaires into account when making preliminary determinations could undermine the right to impose provisional measures 60 days after initiation. Other delegations noted that although they would usually rely on questionnaire responses when imposing provisional measures, there might be exceptional situations where this was not the case. One delegation suggested that this concern might be addressed by requiring investigating authorities to take account of responses to questionnaires only where possible or where practicable. Another delegation suggested limiting what needed to be taken into account to only those responses to questionnaires that have been received.

A number of delegations considered that the proposed obligation to make a "detailed" preliminary determination required clarification and could, in any case, cause confusion given that Article 12.2.1 of the Agreement already sets forth a comprehensive description of the types of information that preliminary affirmative determinations must disclose.

Questions were also asked about whether the reference to "any" responses to questionnaires meant "all" responses. In this regard, one delegation noted that paragraph 3 of Annex II suggests that it should be understood to mean "all". Moreover, the same Member observed that the Spanish language text of Article 7.1 in the 2008 Chair text uses the word "todas", which in English means "all".

We next examined **price undertakings,** in respect of which the 2008 Chair text proposed changes to Articles 8.2, 8.3 and 8.6. Most delegations welcomed the transparency and procedural fairness aspects of the proposed modifications, with one delegation seeing, in particular, the proposed change concerning the timing of opportunities to offer price undertakings as an aspect of the Chair text that might be useful to consider in the context of the special treatment of developing countries envisaged in Article 15 of the Agreement.

Several delegations raised concerns about the proposed requirement on investigating authorities to give reasons for, and allow exporters to comment upon, any decision not to accept price undertakings. These delegations considered this obligation to need further clarification, particularly as regards when such an exchange of views should take place and its impact on the timeliness of investigations. In this regard, one delegation suggested that it might be useful to revert to the existing language which requires an exchange of views only "to the extent possible". Another delegation proposed the insertion of a footnote to ensure that Members which do not accept price undertakings as a matter of policy would not have to explain or justify their actions in every investigation.

A number of delegations welcomed the introduction of language specifying that a "material" violation of a price undertaking must exist before an investigating authority may take expeditious actions in the form of, for example, the application of provisional anti-dumping duties on the basis of best information available. Several delegations submitted that this clarification would go a long way to avoiding the imposition of an anti-dumping duty, following the acceptance of a

price undertaking, due to a minor or inconsequential breach of that price undertaking.

However, other delegations noted that there was as yet no common understanding of what the word "material" means. Moreover, a number of delegations also expressed the view that several apparently minor violations might, under certain circumstances, result in a breach of a price undertaking that is serious enough to warrant the expeditious imposition of anti-dumping duties. Thus, it was proposed that the word "material" be deleted, with one Member suggesting that the inclusion of a non-exhaustive list of situations considered to amount to a violation might be a more useful option.

Finally, one delegation considered that investigating authorities should be permitted to temporarily suspend any price undertaking when investigating any alleged breach.

The next item discussed was the proposed changes in the area of **duty assessment**. Delegations present generally were supportive of the core element of the proposals in the Chair text, to clarify that there is an obligation of Members to establish procedures to ensure a refund where there was an over-collection, and that this entitlement to a refund should be established based upon the actual margin of dumping, as opposed to the estimated margin of dumping based upon a past period. Issues were however raised about various specific elements of the 2008 Chair text.

To begin with, a number of delegations suggested that the word "duty" be inserted into the second sentence of Article 9.3 in order to clarify that what is at issue under this provision is the collection of anti-dumping duties. However, one delegation explained that such a modification would mean that it would have to modify its system, which currently applies securities. This delegation therefore proposed referring to both anti-dumping duties and securities in the second sentence. This suggestion was not however acceptable to another

delegation, which stated that it would have problems with any reference to "security" in this context.

A number of delegations identified the requirement to establish procedures that would ensure a "prompt" refund as an area that needed further attention, particularly as regards the meaning of the word "prompt". In this regard, one delegation considered that the requirement for a "prompt" refund duplicates what already existed in Article 9.3.2 and wondered whether more consideration needed to be given to what this repetition might imply.

Several delegations recalled that it is importers that pay anti-dumping duties, and in this light, considered it was necessary to clarify what was meant in the Chair text by the possibility of having an exporter apply for a duty refund on behalf of an importer. One delegation observed that it did not reject this possibility as a request by an importer would in any event depend upon an exporter's cooperation, but it should be clarified that the importer's agreement was required.

One delegation suggested that the provisions on duty assessment needed to make clear that anti-dumping duty liability should be determined based on an exporter's margin of dumping over a certain period of time. However, another delegation explained that not allowing for importer-specific collection of duties would mean that some companies would have to pay anti-dumping duties even if they did not import dumped products. On the other hand, companies that imported dumped products would be asked to pay less than the dumping actually associated with the goods they had imported. This delegation therefore submitted that importer-specific duty collection should be permitted. Another delegation noted that the issue of exporter-specific or importer-specific duty collection was intimately linked with the question of "zeroing" and suggested that it could be debated in that context.

One delegation raised a number of questions about the operation of duty assessment proceedings that it considered should be explored

in order to address the disparities it perceived to currently exist between different systems. These questions included whether duty assessment must necessarily take place with respect to transactions entering over a certain period of time, and how any such requirement was viewed by Members operating prospective normal value systems. This delegation also wondered whether the results of duty assessment proceedings, to the extent they provide an updated picture of an exporter's pricing behaviour, should not also be relied upon to set a revised duty rate for imports made after the conclusion of such proceedings.

One delegation, with no experience in the area of duty refunds, suggested that before requiring the establishment of such procedures, delegations needed to make sure that they all understood how duty refund proceedings are supposed to operate. Another delegation stated that developing countries may face particular problems in conducting such proceedings as their systems of customs administration may not be sophisticated enough to permit proper implementation.

Other suggested modifications to Article 9.3 included the addition of language that would allow for limited examination in the context of duty refund proceedings, and would permit new shippers to participate. The insertion of a cross reference to the procedural disciplines in Articles 6 and 12 of the Agreement was also called for. Several delegations also submitted that footnote 30 duplicated what was already called for under Article 18.5 of the Agreement.

Finally, several delegations stated, for various reasons including the way their national systems of revenue collection operate, that they could not accept a requirement to pay a reasonable amount of interest on refunded monies. Another delegation that considered such an obligation to be desirable, nevertheless questioned how the notion of a "reasonable" amount of interest could be interpreted. Yet another delegation that currently pays interest on refunded monies suggested that it may need to consider modifying its own practice in this regard if the proposal proved to be problematic to other Members.

The next un-bracketed issue taken up was **New Shipper Reviews**. I explained my understanding that the 2008 Chair text sought to address the conundrum faced by new shippers: the existence of a residual rate based on the margins for existing exporters could prevent a new exporter from selling into the market and thus prevent it from obtaining its own individual rate. The Chair text would let a new exporter seek an individual rate based upon one or more *bona fide* sales in commercial quantities, where shipments had occurred or would occur within six months of the contract date. Time frames for initiation of a review would ensure that the calculation of an individual rate for that new shipper would be based upon those sales, and that the results would apply to those sales. Thus, if the sales were not dumped, the exporter would not pay anti-dumping duties on those sales, and would obtain an individual rate reflecting that. At the same time, the requirement that the sales be *bona fide* and in commercial quantities sought to ensure that the new rate was based upon commercial reality and was not manipulated.

All delegations present in the consultations were generally supportive of the idea that an anti-dumping measure should not hinder new entrants who would not be dumping. There was however more diversity of views regarding the specific approaches taken in the 2008 Chair text. While some delegations supported the Chair text as is, other delegations would prefer to see changes to various aspects of the text, and others were concerned that the text might be going in the wrong direction. Caution was expressed about the need to avoid abuse of new shipper reviews and about the trade-off between resources for new shipper reviews and for choosing how many exporters or producers to investigate in an investigation.

There was significant discussion regarding what some delegations referred to as conditionality, i.e., the requirement that exporters seeking a review show that they have engaged in "one or more *bona fide* sales in commercial quantities.....". Some delegations considered that this could be a burdensome requirement, with one suggesting that in the absence of sales into the importing Member

sales to a third country should be used to determine the duty rate for potential new shippers. Other delegations noted that it would in any event be useful to clarify the concepts of *bona fide* and commercial quantities. Yet other delegations considered that the requirements were useful and that the text should not be too prescriptive as the judgement would need to be case-by-case.

Some delegations noted that the language in the 2008 Chair text referring to "one or more" sales was too constraining, as one sale might not be a sufficient basis to determine a duty rate, and should be deleted. Other delegations welcomed this language, as one sale could well be sufficient, particularly if that sale was in commercial quantities. One delegation then responded that it might be able to live with "one or more" if there were more clarity about the information that needed to be supplied.

There was also discussion regarding the possibility for a new exporter to seek a review on the basis of a "contract for sale pursuant to which ... shipments will occur within six months from the date upon which the contract was concluded." Some delegations were concerned that a contract for sale was not a reliable basis to determine actual pricing behaviour, as the contract could subsequently be cancelled, and that a request for a review should be allowed only where there were actual shipments. Another delegation shared this concern, but considered that it could be hard to achieve actual shipments unless the buyer was confident that it would receive a refund if the goods were not dumped. This delegation suggested that abuse could be avoided if the text referred to an "irrevocable" contract, a suggestion seconded by various delegations. Another delegation observed that while a letter of credit might be irrevocable, a contract could not be. Finally, one delegation noted that if a contract were the basis for the request its authorities would verify that the goods were actually shipped during the course of the proceeding.

There was significant discussion regarding timeframes. Some delegations considered that both the timeframes for initiation (3 months) and for completion (9 months from initiation) were too short,

with 15 months being advanced as a minimum acceptable alternative. It was suggested that there might be large numbers of requests, that it might be necessary to group or align these requests, and that it would be necessary to check on, and verify, issues such as relationship prior to initiation. It was specifically suggested that the period for completion could be lengthened to 12 months, and that extensions be allowed. While some delegations could accept longer periods or the possibility of extensions, others argued that new shipper reviews were supposed to be "prompt" and be conducted on an accelerated basis compared to regular duty assessment, not aligned with it, and noted that extensions would undermine certainty. One delegation suggested that the 9 month limit in fact should run from the date of receipt of a request, not from initiation, while another suggested that if more time were taken for initiation then the subsequent period should be shortened.

Some delegations argued that the time period for initiation should run from the date of receipt of a "duly substantiated request", as reflected in the 2007 Chair text, rather than from the lodging of "a written request" as provided in the 2008 text. However, another delegation queried whether a three-month period for initiation was necessary if the time period ran from the date of receipt of a duly substantiated request. This delegation preferred to remain with the 2008 Chair text on this point.

Finally some delegations suggested that the text should specify the application of Articles 2 and 6 to new shipper reviews. Another delegation suggested that where it was determined that a request was being made by an exporter or producer who was in fact related to an exporter or producer already subject to the AD order, both the requester and the related entity should be punished through the application to them of the highest duty rate under the order.

On balance, I was encouraged by the discussion on this issue. While differences of view remain, it is my impression that all delegations in the consultations shared the view that improvements

could be made here, and also saw elements of interest to them in the 2008 Chair text.

The topic of **changed circumstance reviews** under Article 11.2 was the last un-bracketed anti-dumping item taken up. Overall, the principle introduced by the Chair text to clarify that duty levels may be modified as a result of a changed circumstance review was well received. However, various drafting and technical issues were raised.

Perhaps the key issue discussed was the relationship between duty assessment under Article 9.3 and the modification of duty levels under Article 11.2 of the Chair text. One delegation noted that modifying duty levels through an Article 11.2 review might cause confusion in systems where duty levels are typically updated as a result of duty assessment proceedings. It was therefore suggested that language comparable to that found in Article 11.2 could be inserted into Article 9.3 in order to avoid exporters having to participate in two proceedings that apply two different thresholds for essentially the same purpose. Other delegations noted that combining duty assessment and Article 11.2 reviews might not be feasible in all jurisdictions, and particularly not in the context of prospective anti-dumping systems. More generally, it was observed that further technical work would be useful on the relationship between Article 9.3 and Article 11.2 reviews in the context of Members' differing systems. I encouraged interested delegations to pursue such discussions among themselves.

Several Members considered that the reference to change in circumstances of a "lasting nature" was too vague and needed to be clarified. Others suggested that the concept was so ambiguous that it would be best to delete it. It was suggested that one way to render the concept more workable could be to draft the provision in the negative, that is, to require investigating authorities to determine that the change in circumstances was *not* of a "lasting nature". Similarly, one delegation proposed that the relevant text could be reformulated to focus on changes in circumstances that are "not of a temporary nature". On the other hand, some delegations welcomed the "lasting

nature" language, finding that it provided investigating authorities with the degree of flexibility necessary to deal with the different fact patterns they would no doubt encounter when conducting reviews.

Several delegations noted that Article 11.2 reviews are not limited to examining alleged changes in the margin of dumping that may result in a modification of duty levels. These delegations noted that they may also cover other events, including changes concerning injury to the domestic industry, corporate succession issues and modification of product scope. These delegations suggested that Article 11.2 was a multipurpose tool that should not be limited to changes in the *level* of the duty.

It was suggested that the Chair text could be improved by inserting a specific timeframe for the conduct of reviews. Specifically, it was proposed that a decision to initiate a changed circumstance review should be made within a period of 60 days from the date of receipt of a request from an interested party, and that a total period of 12 months be allowed for the conduct of the review. Another delegation proposed that elements of any new provision on sunset reviews clarifying the rules for determining the likelihood of continued or recurring dumping and injury could be inserted.

One delegation questioned whether the modifications introduced into the last sentence of the Chair text created confusion in connection with what is said in the first sentence about when a changed circumstance review may be initiated. To avoid this possibility, this delegation suggested specifying in the last sentence that the changed circumstances should be determined with reference to the "conclusion" of the original investigation or the "conclusion" of the last review. More fundamentally, another delegation suggested that the Chair text could be redrafted so that its different functions, i.e. the review of the continued imposition of a duty, on the one hand, and of the level of the duty, on the other, could be more easily understood.

The first ASCM issue that we took up, during our session last Monday was the un-bracketed language on **benefit pass-through** contained in Article 14.2 and footnote 46 of the Chair text.

A number of delegations expressed support in principle for a provision that would specifically address the pass-through of benefits from upstream subsidies on inputs to the product under consideration, in a manner reflecting existing GATT/WTO jurisprudence on the subject. Some indicated that their domestic legislation contains pass-through provisions. That said, many delegations voiced concerns with various aspects of Article 14.2 of the Chair text, and many more with footnote 46.

Several delegations noted that the provisions address only the situation where an input producer and a producer of the product under consideration are unrelated, and questioned how the issue would be addressed where they were related. One view expressed was that there should be no possibility to determine a pass-through where the two parties were unrelated, and further, that where the parties were related clear criteria, including market conditions, competition, and availability, would need to be considered before benefit pass-through could be found. In this regard it was questioned how the lack of a relationship could be proven, and whether the provisions of footnote 54 might be relevant. The suggestion also was made that only if an investigation had been initiated on the basis of a substantiated allegation of an upstream subsidy could the issue of pass-through be investigated, as otherwise the scope of an investigation could be broadened to encompass fixed assets, raw materials, and other inputs. One delegation considered that the burden of proof in Article 14.2 posed difficulties, particularly as regards processed agricultural and fisheries products, and suggested a reversed burden of proof in Article 14.2, whereby the subsidizing Member would have to demonstrate that there was no pass-through of benefits. The further suggestion was made that the term "arms'-length" be introduced, to cover situations in which parties are not related but there is nonetheless no genuine market price between them, for example due to differential market power.

Several delegations expressed the view that to require a counterfactual analysis of the terms that would "otherwise" have been commercially available to the producer of the product under consideration would require an investigating authority to engage in a speculative exercise that would give rise to practical difficulties, and it was suggested to strike the phrase "otherwise would have been". Another term questioned was "commercially available", with one delegation suggesting that the standard of prevailing market conditions in Article 14.1(d) was preferable and that the "market" in question should be the domestic market for the input, and another suggesting that the language "in the market" should be harmonized with other similar references in the Agreement. A specific drafting suggestion was made that the term "in respect of an input used" be replaced with "to an upstream producer of an input that is used...", so as not to exclude transactions involving middlemen. Several delegations expressed the concern that the drafting in the Chair text would afford excessive discretion to investigating authorities.

Concerning footnote 46, a number of issues were raised. Among these were that the footnote would require investigating authorities to undertake an economic analysis of the effect of the subsidy as well as a difficult counterfactual analysis of the prices that would prevail in the absence of subsidization. Many delegations considered that terms such as "substantial", and "distorted" were subjective, unfamiliar concepts, and that it could be difficult in any particular situation to determine a "world market price". Several delegations suggested that the footnote be deleted altogether, on the grounds that it unnecessarily complicates the draft provisions on pass-through, that it creates uncertainty, and that it would afford a potential for abuse by investigating authorities.

Other delegations considered that footnote 46 could be clarified, by identifying the appropriate market benchmark to be used in the situations it addresses, including by clarifying the situations in which an out-of-country benchmark could be used. Some delegations, however, considered that such benchmarks should not be used at all,

as they would tend to raise the level of subsidization in an arbitrary and unpredictable way over what would be determined if in-country benchmarks were used. One suggestion was that instead of an out-of-country benchmark, the footnote should refer to an estimated benchmark based on in-country prices, so as to preserve any comparative advantages of Members based on resource endowments.

Several delegations raised the potential relevance of pass-through beyond the context of countervail investigations. One suggestion here was to refer in footnote 2 to Article 14.2 (in addition to Article 14.1) as conceptual guidance for determining whether a benefit exists, so as not to allow upstream subsidies to escape from multilateral disciplines. The necessity for such an additional reference was questioned, on the grounds that it is not necessary to quantify the amount of a benefit in order to determine that a benefit exists. One delegation recalled its suggestions that certain principles regarding the basis on which to identify benchmarks might be appropriate for inclusion in a general chapeau to Article 14.

Concerning the unbracketed language on **guidelines on attribution of subsidy benefits to particular time periods**, in Article 14.3 of the Chair text, many delegations welcomed establishing guidelines in this area. A number of specific concerns and questions were raised, regarding general issues and drafting.

As for general comments, one delegation noted that questionnaires tend to be burdensome because only once several years of historical information has been gathered do investigating authorities determine whether a subsidy will be expensed or allocated over time, and that it thus would be preferable for investigating authorities to make this determination prior to issuing questionnaires. Another delegation, while generally supporting Article 14.3 of the Chair text, stated that it did not support extending Article 14 to apply to Parts II and III of the Agreement, because the effects of subsidies do not necessarily equate to the attribution of their benefits.

Concerning the drafting, a number of delegations suggested that the term "shall" be replaced with "should" in various places throughout sub-paragraphs (b), (c) and (d) of Article 14.3 in order to allow investigating authorities to retain discretion to choose the most appropriate methodology in any given case. The opposite view also was expressed, with "shall" being preferred due to the greater predictability it would provide. It was noted in this context that the "shalls" in the provision as drafted in any case were softened by a number of built-in flexibilities. One delegation considered that it should be clarified that the list in Article 14.3 does not purport to be exhaustive.

Regarding subsidies from loans, one suggestion was that these should be able to be allocated over the life of assets acquired by the loan proceeds as an alternative to the life of the loan. Several delegations questioned the utility of footnote 50 and the subjective nature of any determination that a subsidy is "large" or "small" in the context of Article 14.3(d). In the view of some of these delegations, the decision to allocate or expense a subsidy should be based on the nature of the subsidy rather than its size or amount.

In relation to Article 14.3(e), several delegations suggested that there be a hierarchy of data sources for determining the average useful life of assets, with a number considering that the first option should be the average useful life of the assets of the firm in question, followed by that of the industry in question. It was noted that there can be differences in the average useful life of the assets between the importing and exporting country.

With respect to Article 14.3(f), several delegations suggested that clearer guidelines as to the appropriate discount rate are required, in recognition of the differences in accounting treatment of the time value of money among Members. The question also was raised as to what is meant by a "reasonable measure of the time value of money" One delegation questioned the placement of subparagraph (f) in Article 14.3, given that Article 14.3 deals with attribution as opposed to quantification of benefits.

Several delegations also questioned the placement of Article 14.3(g), with one suggesting the Article 22.4 is perhaps a more appropriate place for a transparency provision of this nature.

No delegations had any comments on Article 26 of the Chair text, regarding **periodicity of required new and full notifications to the SCM Committee**, or on **footnote 63** of the Chair text.

Concerning the proposed insertion of the term "and/or acting under the authority of" in **item (j) of the Illustrative List**, one delegation expressed the view that and/or was contradictory in this context and suggested that "and/" be deleted. Other delegations asked whether this delegation was proposing that the same deletion be made to item (k). The first delegation indicated that the context of item (j) and item (k) were slightly different and advised that it would need to revert to delegations on this point. Another delegation indicated that it supported item (j) of the Chair text as currently drafted.

Regarding the revisions to **Annex VII** in the Chair text, one delegation noted that certain developing countries had now exceeded GNP per capita of $1,000 per annum and asked whether they should consequently be removed from the list in paragraph (b) of Annex VII. Another delegation noted an apparent inconsistency between the references to "constant 1990 dollars" and "current dollars" in footnote 74. Two other delegations indicated more generally that they are consulting on the need for further clarity regarding Article 27.2 of the SCM Agreement, in terms of how much time is available for phase-out once a Member graduates from Annex VII, with one indicating that it is working on a proposal on this issue.

That is as far as we got this week. I had hoped that we would complete our plurilateral review of all bracketed and un-bracketed AD and ASCM issues in TN/RL/W/236 at this cluster. However, we have not quite achieved this goal. It remains for us to discuss the following un-bracketed AD issues: Article 10.8*bis* (refunds of provisional measures), Article 12 (public notices), Article 16.4 (semi-annual

reports), Article 18.3 (transition), Article 18.6 and Annex III (Review of Members' AD Policies & Practices), Annex I (on-the-spot investigations) and Annex II (facts available). We will complete this discussion at our next cluster.

I also note that the Technical Group met on Friday 25 and Saturday 26 February and discussed the problems encountered by newly-established investigating authorities in the early stages of an anti-dumping proceeding. Because this meeting was open to all interested delegations, I do not propose to summarize those discussions here.

Before closing, I would like to say a few words about the Contact Groups and Friends of the Chair. You have all seen my fax of 21 February and thus know that I have created three additional such Groups, on sunset reviews, zeroing and certain financing for loss-making enterprises. There are thus now five AD Contact Groups and four ASCM Contact Groups, as well six AD Friends of the Chair and three ASCM Friends of the Chair.

On 23 February, I met with all of the Friends of the Chair and Contact Group participants to discuss how best to ensure the efficacy of these processes, given the expanded range of issues assigned to them, and I would now like to share my thoughts with the broader Group.

First, let me emphasize that the Contact Groups and Friends processes, and the expected contribution of those processes, are in my view essential to our work, as they offer the best chance to obtain focused guidance from Members on the most difficult issues before us, which will be critical should there be a call for me to produce texts.

For my part, I view my role as creating processes with rigorous internal integrity, which provide reassurance to all Members that they have the full opportunity to pursue their interests to the maximum extent possible, in a non-prejudicial manner. I note in this regard that Contact Groups are both meeting with interested other delegations

and working internally on their issues, and to assist the Contact Groups the Secretariat has begun to coordinate the schedules of their meetings with other delegations, so as to unburden them of this logistical encumbrance.

Ultimately, the results of the Contact Group and Friends of the Chair processes are in the hands of Members, not the Chair. That said, I am committed to giving them my full support, and will be taking an active interest in the evolution of their work.

In terms of outputs, I consider that, given the late stage of the negotiations, Contact Groups and Friends should as far as possible produce texts, either of possible compromises or of technically credible options. Of course, given that divergences in views inevitably will remain, the Reports by Friends and Contact Groups must of necessity reflect those divergences, although conceivably with some narrowing of the existing gaps.

In order to be able to produce these sorts of outputs, all delegations will need to be prepared to work seriously on the issues, and perhaps most importantly on the approaches, of other delegations, even where they disagree with them. I emphasize that there should be no preconditions to discussing any possible approach or solution suggested by others, of course on the clear understanding that this sort of engagement is without prejudice to any delegation's position.

Given the shortness of time, it is very important that Contact Groups and Friends begin their substantive engagement on their issues immediately, and keep going continuously. Given that texts are to be bottom-up, it is in the hands of Members to develop the necessary options and/or compromises to inform such texts. While time is short, it is not insufficient, if we all engage with discipline and dedication.

To conclude, I'd like to say a few words about our schedule going forward. I had previously indicated that we would hold a cluster on AD and ASCM to hear reports from Contact Groups and

Friends in the week of 14 March. However, taking stock of the current situation, I have concluded that more time is needed. Accordingly, I have set the week of 14 March aside exclusively for work of the Contact Groups and Friends. During this period, time will be set aside for the Contact Groups to further meet with third delegations. We will hear their Reports in the week of 21 March. An agenda will be forthcoming shortly.
