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World Trade Organization Subsidy Discipline: Is This the "Retrenchment Round"?

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More explicitly now than ever before, trade negotiations seek to establish rules for global economic governance. One of the most important, and difficult, topics is subsidy discipline and anti-subsidy remedies. When border measures have disappeared completely and trade-affecting domestic regulatory regimes have been substantially harmonized—a trade negotiator's nirvana—citizens of one jurisdiction will still be unable to influence (by voting) government fiscal decisions in another, and so mechanisms for addressing subsidy-induced trade distortions will remain hugely important.

The "cognitive dissonance" experienced by analysts of subsidy and anti-subsidy policies can be severe, as two inescapable truths pull in opposite directions. As long as there are governments, there will be subsidies. And yet the wasteful, wealth-reducing nature of subsidization—defeating the market-determined allocation of resources among economic sectors—is beyond serious debate.

Subsidies present a classic case, well known to students of political economy and public choice theory, of diffused costs and focused benefits. Resource constraints and political accountability, where these factors are present, can act as a partial brake. Beyond that, there are two major sources of discipline: domestic law and international agreements. Domestic legal arrangements aimed at controlling subsidization by state/provincial and local government units—such as the court-enforceable "negative commerce clause" of the US Constitution and the "State Aid" regime implemented in the EC under Articles 92–94 of the Treaty of Rome (now Articles 87–89 of the EC Treaty)—have achieved some successes. But these schemes are inapplicable to subsidization by the US government or by the organs of the EC itself, and they have only kept the problem of local government subsidization to what might be characterized as a "dull roar". Most observers agree that more discipline is needed, and that is where international agreements come into play. While international subsidy control mechanisms could in principle be negotiated on a bilateral, regional or multilateral basis, "free rider" considerations ensure that multilateral efforts count the most.

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And so we come to the subsidy control rules of the World Trade Organization (WTO), embodied mainly in the 1994 Agreement on Subsidies and Countervailing Measures (ASCM). This article takes a sideways look at the WTO anti-subsidy regime—where it stands today and, more importantly, where it seems to be headed in the ASCM reform discussions occurring within the current WTO negotiating round, the Doha Development Agenda (DDA). The tale is not an encouraging one for those who may have hoped that the WTO would provide a forum for governments to curb significantly, for mutual benefit, their worst habits and tendencies in this field. Section I describes the backdrop for the current ASCM reform talks—what happened in the last major negotiating round and what has happened since. Section II describes, with the aid of a table mapping out the ASCM reform ideas tabled so far, the dynamic of the current subsidy negotiations and the apparent intention of WTO Members to loosen existing disciplines. Section III presents some final observations aimed at stimulating debate about whether WTO Members will really enjoy living under the weaker anti-subsidy regime they seem bent on establishing.

I. Backdrop for the Current ASCM Reform Talks

A. What happened in the Uruguay Round

The Uruguay Round Final Act signed in 1994 was trumpeted as enshrining, among other benefits, a "major advance" in subsidy discipline. There was some truth in this characterization but much exaggeration. Each of the most-heralded achievements came with a significant caveat:

- WTO-wide coverage of the agreement, in contrast with the plurilateral Subsidies Code of the Tokyo Round, was an improvement. *But*—the significance of this achievement was dependent upon the quality of the newly negotiated substantive rules (good but not great, as explained below) and the extent of derogations extended to new adherents (which were substantial).
- Negotiators agreed for the first time, and codified in ASCM Article 1, a definition of the term "subsidy". *But*—the definition's odd, ungrammatical language contained the seeds of many future fights and was as much a roadmap for avoiding ASCM remedies as a confirmation of the ASCM regime's broad coverage.
- New presumptions were provisionally included in ASCM Article 6.1, aimed at making the "serious prejudice" remedy more readily usable during a five-year trial period. *But*—these provisions did not cure other, more serious defects in the serious prejudice scheme, and even where applicable, did not really absolve complainants of demonstrating actual trade effects. (They had to be prepared to prove trade effects at the initial panel stage in the not-unlikely event that the presumption of serious prejudice might be rebutted by a defendant, and of

course they had to be ready to back up their damage claims at the suspension-of-concessions stage as well.)

- Negotiators added new/expanded notification requirements (Articles 25-26) which, it was hoped, would contribute meaningfully to overall discipline. *But*—they did not make these requirements enforceable in any meaningful way, as has been demonstrated by extensive, and unpunished, noncompliance.
- Clarification (in Article 14) that national authorities prosecuting countervailing duty (CVD) cases could offset the full benefit to the recipient of a subsidy, rather than just the cost to the subsidizing government, was welcome. *But*—authorities already had that right before the ASCM took effect.

There is a similar *but* for virtually every other element of the ASCM cited in 1993–1994 as evidence of a "major advance" in discipline. Meanwhile, the negotiators had agreed to an ill-advised experiment with "green lighting" various types of subsidies (Articles 8–9), a significant affront to subsidy discipline at the level of principle even though the green categories were tightly drawn. They had also, in Articles 10–23, recorded a series of new rules that compromised the effectiveness of national CVD remedies, theretofore a significant (some would say the principal) source of subsidy discipline.[1] And, through provisions inside and outside the ASCM, negotiators had also insulated most agricultural subsidies from challenge.

So the reality was more mixed than the rhetoric. But if the result was not a significant advance, neither was it, on its face, a significant retreat. The Uruguay Round *appeared* to have produced an improved and reasonably robust anti-subsidy regime.[2]

B. What has happened since the Uruguay Round

Appearances proved to be deceiving, as the regime that negotiators sought to establish has been significantly weakened by dispute settlement decisions. To be sure, some decisions have vindicated (accurately enforced) the relatively high-discipline agreement signed in 1994; *Canada—Aircraft* and *Brazil—Aircraft* fall in this category, as does *Australia—Automotive Seat Leather*. But other decisions have, for example, narrowed the agreed definition of a subsidy (*US—Export Restraints*); added new constraints on the selection of commercial benchmarks used to measure subsidies

[1] The ASCM contains provisions disciplining subsidies and provisions disciplining the use of countervailing measures; different WTO Members tend to emphasize different parts of the package. There is a vast literature on the use, and alleged protectionist abuse, of countervailing measures. This article focuses on the subsidy discipline aspects of the ASCM, and addresses the CVD remedy from the standpoint of its utility as one source of subsidy discipline. See also the footnote at the beginning of the table in Appendix below.

[2] An exception is services, to which the ASCM rules do not apply. Bringing services trade into the WTO system through the General Agreement on Trade in Services ("GATS") was an immense accomplishment of the Uruguay Round, but agreed subsidy disciplines eluded the GATS negotiators. GATS Article XV provides for continued work on subsidy disciplines—a project being pursued separately from the ASCM reform talks, and with little detectable enthusiasm so far. See Marc Benitah, *Subsidies, Services and Sustainable Development*, Paper No. 1 (International Centre for Trade and Sustainable Development Issues, July 2004), available at <www.ictsd.org/pubs/ictsd_series/services/IP_services_01.pdf>. Services subsidies are not further considered in this article.

(*US—Softwood Lumber*); defeated the negotiators' effort to ensure, through a Ministerial Declaration included in the Uruguay Round Final Act, deferential WTO review of the legal interpretations and factual findings of national CVD authorities (*US—Lead Bar*); and inserted a "current benefit" test making it virtually impossible to reach allocated benefits arising from large non-recurring subsidies (*US—Countervailing Measures*).[3] While reasonably strong on their face, the ASCM rules *as interpreted* are distressingly permissive.

Meanwhile, a variety of once-latent structural problems in the ASCM have surfaced with unpredictable and sometimes highly stressful results. These problems include, for example, different treatment of direct and indirect taxes (much-discussed on the margins of the *US—FSC/ETI* litigation); an *Illustrative List of Export Subsidies* in Annex 1 whose legal and functional relationship to other ASCM provisions is unclear and vigorously disputed (prompting an unusually sharp exchange between the panel and the Appellate Body division convened to review the compliance measures taken in the *Brazil—Aircraft* case); and a set of provisions on remedies (with concepts such as "withdrawal" of a subsidy or its injurious effect) that are subject to a wide variety of conflicting interpretations.

Notifications during the post-Uruguay Round period have been disappointing. Perhaps it was never realistic to expect Members to confess to the provision of subsidies that might trigger ASCM remedies, but that is after all what they agreed to do. In any event, few Members are notifying on a timely basis, and those that do omit numerous measures with impunity.[4] That said, the work that goes into compiling these notifications is substantial and must seem, to officials charged with extracting sensitive data from coordinate and subordinate government agencies, largely thankless. Anecdotal reports are mixed as to how useful has been the process—not backed up by sanctions—by which delegates in the SCM Committee can probe, using information they have obtained independently, updated subsidy notifications as they arrive.

Another notable post-Uruguay Round development has been the expiration of the ASCM's green lighting provisions (Articles 8–9) and serious prejudice presumptions (Article 6.1). The former is a plus for subsidy discipline, the latter a minus but not a calamity—except that it has created, through the interplay with an ambiguously drafted cross-reference found in Article 27.9, some question about whether the serious prejudice remedy can be used at all in response to subsidies

[3] While these decisions directly involved CVD measures and methodologies, they included and relied upon interpretations of the basic definitional provisions in ASCM Part I, which apply to all ASCM-based disputes. Readers seeking additional information on this view of the cited cases are encouraged to begin by consulting the US Government's written submissions (at both the panel and Appellate Body levels) as well as US statements recorded in the minutes of the Dispute Settlement Body meetings where the individual decisions were adopted. These documents are available on the <www.wto.org> website.

[4] According to the EC: "This lack of transparency needs to be urgently addressed since without notifications it is difficult for the rules of the ASCM to be fully operational and effective. This failure is particularly damaging as regards 'less visible' subsidies, whatever their form. A workable and effective notification system would be hugely beneficial for enabling these subsidies to be identified." TN/RL/W/30, at 4 (November 2002).

provided by developing countries. The serious prejudice remedy has in any event gone mostly unused, both while the presumptions were in place and since, apart from *Indonesia—Autos*, where it wound up having little relevance and *US—Upland Cotton* and *EC/Korea—Shipbuilding*, whose results as of July 2004 are still pending.

A final important post-Uruguay Round development has been the accession of China, on terms that included a very thorough set of commitments to remove subsidies—commitments that have in several significant respects not been honoured.[5]

The big picture, then, is of a subsidy discipline regime that was decent (if over-hyped) when first approved, but has been plagued by pervasive non-compliance and dispute settlement tribunals unwilling to respect key elements of the negotiated bargain.

One might think that in such circumstances the WTO Members would seek in the new negotiating round to restore at least the level of discipline they seemingly tried to achieve last time. The evidence so far available suggests just the opposite—the ASCM regime appears likely to be further weakened rather than bolstered. For subsidy discipline, the DDA is looking very much like a "Retrenchment Round". The proposals tabled to date are overwhelmingly weighted toward loosening direct disciplines on subsidies and/or making it harder to use the CVD remedy (itself a key discipline on subsidies).

II. Proposals in the DDA—A Retrenchment Agenda

The non-agricultural subsidies issues within the DDA negotiating mandate have been discussed within a Rules Negotiating Group (RNG), also the forum for reviewing the existing rules on anti-dumping and regional integration. These other issues have together occupied most of the RNG's attention, but there have been many subsidies-related proposals tabled and a good deal of discussion of those proposals at RNG sessions.

The subsidies issues comprise three subcategories: general subsidy disciplines, rules for countervailing measures, and a sector-specific discussion of environmentally harmful fisheries subsidies. Only in the third subcategory, owing to the perseverance of a caucus of WTO Members aptly named the "Friends of Fish", does the trend so far indicate some promise of greater subsidy discipline—and even there opposition from

[5] See, e.g., *2004 Report to Congress of the US–China Economic and Security Review Commission*, p. 65 ("a number of key unaddressed compliance shortfalls continue to significantly impede US trade with China, such as … continued direct and indirect subsidies to Chinese producers, including preferred and sometimes unserviced loans from state-owned banks, and free or discounted utility services"), and p. 72 (referring to "China's extensive use of subsidies that give Chinese companies an unfair competitive advantage"); see also *2004 National Trade Estimate Report on Foreign Trade Barriers*, p. 72 ("Chinese subsidies … take a variety of forms, including mechanisms such as credit allocations or low-interest loans. … Of particular concern are China's subsidization practices in the textiles industry as well as in the steel, petrochemical, machinery and copper and other non-ferrous metals industries. US subsidy experts are currently seeking more information about several Chinese programs and policies that may confer export subsidies. Their efforts have been frustrated in part because China has failed to make any of its required subsidy notifications since becoming a member of the WTO. … US agriculture exporters have expressed concern that China continues to use export subsidies for corn.").

the principal subsidizers is fairly intense.[6] In the other subcategories, the tabled proposals—whether analysed by number or qualitatively—point unmistakably toward a deterioration of current disciplines.

The table in the Appendix below, which classifies all ASCM reform ideas tabled to date as "strengthening", "neutral" or "weakening" proposals, demonstrates the point numerically. Regarding general subsidy disciplines, 15 strengthening proposals have been tabled, as against 41 weakening proposals and 16 that are neutral. Meanwhile, the proposals on countervailing measures include two that would strengthen current subsidy discipline, 80 that would weaken it and 28 that are neutral.

These totals, while eye opening, admittedly provide only a very rough first cut in understanding the negotiating dynamic. The remainder of this section provides context and a more qualitative assessment. As an initial, cross cutting observation, many of the proposals respond rather directly to the submitters' own adverse experiences in ASCM-based disputes and may reflect the natural human impulse of trying to change the rules in cases one has lost. Indeed, of all the areas in which an adverse WTO judgment might be expected to provoke such a reaction, sovereign governments' spending decisions are arguably the most sensitive. National political exigencies may therefore help to explain the significant gap between pro-discipline rhetoric, on the one hand, and suggestions that would actually reduce discipline, on the other. Regardless, many of these are not so much carefully developed proposals with a solid intellectual base as they are "getting even" proposals.

A. Noteworthy developing country proposals

The proposals from developing countries consist almost exclusively of efforts to loosen the disciplines to which most of them subscribed for the first time in 1994. Underlying these proposals appears to be a belief that government financial intervention is an important means for these countries to get ahead in international trade, and that they must be free to use this tool without any possibility of triggering WTO-authorized offsetting action. Interestingly—given the severe resource constraints a great majority of them face and the significant derogations already built into the ASCM—freedom to subsidize has been one of the main focal points of the broader debate over "special and differential" treatment of developing countries and their products.

1. *Brazil*

Brazil's most consequential proposal—driven by industrial policy interests in the aircraft sector—appears aimed at loosening the current rules on official export credits, which would narrow the existing category of "prohibited" subsidies. On the one hand,

[6] Proposals involving disciplines on fisheries subsidies are not further considered in this article and are omitted from the accompanying table.

Brazil has raised a legitimate jurisdictional point about the "safe harbour" in the ASCM's Illustrative List of Export Subsidies for export credit practices that are subject to, and consistent with, the interest rates provisions of the Organization for Economic Co-operation and Development (OECD) Arrangement. Through their control over the terms of the Arrangement, developed country OECD members may, Brazil asserts, be able to "unilaterally" affect the scope of their own and everyone else's WTO obligations.[7] On the other hand, Brazil's more fundamental complaint appears to be with the fact that the market does not regard all governments as equally creditworthy and all government guarantees as equally solid; in Brazil's view the result is that countries with higher sovereign credit risks are treated unfairly. Brazil wants flexibility to offset this perceived disadvantage and accordingly argues for changes to the "break even" test in Illustrative List item (j), and especially the "material advantage" test in Illustrative List item (k), that would significantly reduce current discipline.[8] It is conceivable that an "equalizing" solution could be found with respect to official export credits which would satisfy Brazil without reducing current discipline—but that depends on input from developed countries which today appear not at all eager to take on additional constraints.

Brazil has also tabled a lengthy set of proposals to dilute the effectiveness of the CVD remedy—most notably, a mandatory "lesser duty rule" which would prevent authorities from offsetting the full calculated amount of subsidization.[9] The lesser duty rule is premised on the highly questionable notion that authorities can, in an economically meaningful way, identify an "injury margin," lower than the subsidy margin but still adequate to remove import-related material injury, and then limit offsetting duties to that amount. Such a new requirement would severely undermine the subsidy-deterring potential and performance of the CVD remedy.[10] Other impediments to effective CVD enforcement, proposed by Brazil, would alter the ASCM provisions defining the "product under investigation" to narrow the coverage of countervailing measures; raise the required level of domestic industry support for CVD petitions; proliferate new calculation rules in ASCM Article 14; reduce the scope for performing "cumulative" injury analyses; reduce authorities' discretion in responding to proposed price undertakings; and add various new rules for assessment reviews and *de minimis* subsidies.[11] These proposals are not only unwise but also seem to contravene the narrowly-drawn DDA negotiating mandate which contemplates "clarifying and improving" ASCM disciplines while "preserving the basic concepts, principles and effectiveness" of the ASCM and its "instruments and objectives".[12]

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[7] TN/RL/W/5, at 2 (April 2002).
[8] Id., at 1–2.
[9] TN/RL/W/19, at 8 (October 2002).
[10] Brazil even goes so far as to suggest that developing countries are uniquely burdened by the fact that some WTO Members do not apply the lesser duty rule and instead choose to offset the full amount of subsidies established in CVD investigations. Id. Quite apart from the general demerits of the lesser duty rule, it is not obvious why developing countries would be differentially affected by the failure to use it.
[11] Id., at 2–9.
[12] Doha Ministerial Declaration, para. 28 (November 2001).

2. *India*

India has taken perhaps the most explicit pro-subsidy/anti-discipline positions of all, both at the level of rhetoric[13] and in its specific proposals. Most noteworthy is India's demand that developing countries receive a complete and apparently permanent carve out from the ASCM's agreed prohibition on what is arguably the most trade-distorting category of subsidies, those contingent on the use of domestic over imported goods.[14] India also seeks to reduce discipline on export-contingent subsidies—likewise considered so pernicious that they are "prohibited" in the current ASCM scheme—by (1) proposing that developing countries' export subsidies be made non-actionable unless they exceed 5 percent *ad valorem*,[15] and (2) joining Brazil's effort to ease current constraints on official export credits.[16] India also co-sponsored a list of other subsidy-discipline-reducing proposals, initially raised in WTO discussion groups on "special and differential treatment" and "implementation"-related issues of concern to developing countries, many of which are now formally before the RNG.[17]

In tandem with this attack on general disciplines, India seeks to undermine the effectiveness and deterrent value of the CVD remedy. For example, India proposes: (1) that the special, elevated *de minimis* subsidy threshold applicable to developing countries be raised above the already-generous 3 percent *ad valorem* level, with the new, higher *de minimis* amount to be deducted from calculated subsidization before countervailing duties are applied;[18] (2) that an absurdly-high "negligibility" threshold be added under which a developing country's products would have to be excluded from any CVD action unless they individually accounted for at least 7 percent of total imports;[19] (3) that CVD authorities be required to use a permissive cost-to-government standard in analysing subsidies provided through export credits, rather than the more rigorous benefit-to-recipient standard codified in ASCM Article 14;[20] and (4) that a series of rules be added making it more difficult to countervail benefits provided through drawback schemes and through the remission of prior-stage indirect taxes (both important categories of subsidization in India).[21] These CVD-related proposals, like Brazil's, are both ill advised and outside the DDA negotiating mandate.

[13] "It has been recognized that the state has to assume a more active and positive role in assisting its industry." TN/RL/W/4, at 1 (April 2002).
[14] Id., at 2.
[15] Id.
[16] TN/RL/W/40, p. 1–3 (December 2002); TN/RL/W/120, at 3 (June 2003).
[17] For items referred to in the RNG under the "special and differential treatment" heading, see entries in the table in Appendix below. Other items raised under the "implementation" heading can be found in JOB(01)152/Rev.1, referenced in a footnote (2) to paragraph 13 of the Ministerial "Decision on Implementation" issued at Doha.
[18] TN/RL/W/4, at 2.
[19] Id.
[20] TN/RL/W/120, at 3.
[21] Id., at 1–3.

3. *Venezuela*

Venezuela, commenting jointly on several points with Cuba, has proposed what appears to be a new green light category which would encompass all subsidies bestowed by developing countries.[22] As with India, Venezuela openly acknowledges its underlying policy agenda: "Non-actionable subsidies might be one of the tools needed to implement certain development policies in the framework of the multilateral trading system, under which a country can promote transformation of its economic fabric".[23] And as with India's proposals, Venezuela's would drastically reduce current discipline.

B. Input from America's developed country trading partners

The illiberal approach of developing countries regarding subsidy discipline—their continued devotion to both the principle and the practice of using government fiscal interventions to improve trade performance—is unfortunate but hardly shocking. More surprising is the failure of developed countries, which ought to know better and which have at least one very compelling new reason (China) to favour a robust WTO anti-subsidy regime, to provide much of a pull in the other direction. ASCM-related submissions from developed countries have shown some superficial balance—including a certain amount of pro-discipline rhetoric and some actual strengthening proposals—but their most important elements and overall weight fall decisively on the weakening side.

1. *Australia*

Australia's most consequential proposals so far seek, first, to make it harder to demonstrate that a subsidy is *de facto* contingent on exportation, and second, to narrow the range of available remedies in "prohibited" subsidy cases.[24] These proposals reflect the fact that Australia was on the losing side of a prohibited subsidy case, *Australia—Automotive Seat Leather*, in which the WTO-authorized remedy came as something of a surprise, but the proposals nevertheless would reduce current discipline. Australia has also tabled some essentially neutral "housekeeping"-type proposals relating to notification procedures and the serious prejudice criteria in ASCM Article 6.7.[25] While Australia has largely refrained from joining in other Members' efforts to undermine the CVD remedy, it has proposed discussion of additional calculation rules[26] the need for which is not at all clear.

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[22] TN/RL/W/41, at 1–2 (December 2002).
[23] Id.
[24] TN/RL/W/85, at 1–2 (April 2003); TN/RL/W/139, at 1–3 (July 2003).
[25] TN/RL/W/85, at 2; TN/RL/W/139, at 3–4.
[26] TN/RL/W/85, at 2–3.

2. *Canada*

Canada's most significant, cross-cutting proposals also aim to reduce current discipline.

- First, and most importantly, Canada joins Australia in seeking to make it harder to demonstrate that a subsidy is *de facto* contingent on exportation[27]—a proposal aimed at overturning a series of adopted dispute settlement decisions viewed by Canada as prejudicial to small/trade-dependent economies that tend to have a lot of export-oriented industries. Whatever its motivations, this proposed change would narrow the currently recognized category of "prohibited" subsidies and thereby broadly reduce discipline.
- Second, Canada seeks to raise the bar for acting against indirect subsidies. The Canadian submission uses "pass-through" terminology to refer to the situation where the recipient of a financial contribution and the recipient of the resulting benefit are different entities.[28] While its main practical (and intended) impact would be to increase the burden of prosecuting particular CVD actions, this proposal would narrow the basic definition of a subsidy in ASCM Article 1 and thereby broadly reduce discipline.
- Third, Canada seeks to raise the bar for showing "specificity".[29] (Only "specific" subsidies are actionable under the ASCM.) Canada proposes, for example, to add new criteria limiting what may be held to qualify as a "group of enterprises or industries"; to reverse the present rule under which *de facto* specificity may be found to exist when any one of the relevant factors so indicates; and even to prevent offsetting action when a *de facto* specific pattern of benefits under a subsidy programme appears to have arisen accidentally or as a result of "situational circumstances".[30] Such changes would convert the specificity test from an initial screening mechanism, immunizing only the most generalized government-provided social services like public education, into an "economic distortion" test separate from and additional to the requirement that trade effects be shown in ASCM Part III cases and national CVD cases. These proposals would significantly narrow the range of actionable subsidies and, thereby, reduce current discipline.
- Fourth, Canada seeks to re-introduce the practice of according to certain normative categories of subsidies a "green light" status, thereby exempting all such subsidies from examination in both WTO and CVD cases regardless of

[27] TN/RL/W/1, at 1 (April 2002).
[28] TN/RL/W/112, at 2 (June 2003); TN/RL/GEN/7 (July 2004) (additional details).
[29] TN/RL/W/112, at 2; TN/RL/GEN/6 (July 2004).
[30] See TN/RL/GEN/6, at 2–5.

whether they can be shown to distort production and cause trade damage.[31] Canada has long taken an expansive view of what kinds of subsidies merit this special exempt status.

Canada's written submissions to the RNG do recognize a "need to consider a more viable serious prejudice remedy", and hold open the possibility of reinstating and perhaps even enhancing the "deemed serious prejudice" provisions of expired ASCM Article 6.1.[32] Canada has also usefully drawn attention to the issue of potentially conflicting timeframes that apply in WTO disputes where both "prohibited subsidy" claims and other types of alleged violations are joined in a single complaint.[33] The latter proposal is essentially a housekeeping item, however, while the former appears (based on anecdotal reports of the RNG discussions) to be a low priority for Canada and also linked to Canada's desire to reinstate "green lighting".

By far the main impact of Canada's input on subsidy rules lies with the other items discussed above and with Canada's no-holds-barred effort to reduce the scope for offsetting and deterring subsidies through the use of countervailing measures. Here, Canada proposes to raise current initiation standards and standing requirements; to add new calculation rules further constraining the methodologies usable by national investigating authorities; to alter the existing definitions of the "like product" and the "domestic industry" so as to reduce the likelihood of affirmative injury determinations; to add various burdensome new rules for both assessment reviews and sunset reviews of outstanding countervailing measures; and even to add special "duty refund" rules for WTO disputes over countervailing measures, abrogating the longstanding principle that WTO-authorized remedies are to be prospective only.[34]

3. *European Communities*

The EC proposals are somewhat more balanced but still weighted toward reducing current discipline.

The EC has commendably stated that "rules on multilateral subsidy disciplines should apply without exception" and that "tight disciplines on trade distorting subsidies are in fact in the interests of all participants in the world trading system".[35] Consistent with this statement of principle, the EC proposes to increase (or clarify) the scope for action against "disguised subsidies"—described by the EC as non-transparent and/or

[31] TN/RL/W/1, at 1–2; TN/RL/W/112, at 4.

[32] TN/RL/W/1, at 1; TN/RL/W/112, at 2–3. In an "informal" September 2004 submission to the RNG, Canada provided details of its suggestions for improving the serious prejudice remedy, which are far-reaching and exceptionally well formulated.

[33] TN/RL/W/112, at 3–4.

[34] TN/RL/W/1, at 2; TN/RL/W/47, at 2–7 (January 2003); TN/RL/W/112, at 4; TN/RL/GEN/3 (July 2004). Canada also proposes to introduce a new "clean hands" doctrine under which properly alleged subsidization of the complaining domestic industry would have to be accounted for in the conduct of CVD investigations. TN/RL/W/112, at 4. Although this proposal would reduce the CVD remedy's effectiveness with respect to subsidized imports and pose severe practical difficulties for investigating authorities, these discipline-reducing effects would be mitigated by the added deterrent to subsidization in the importing country.

[35] TN/RL/W/30, at 5 (November 2002).

ostensibly "general" aid, which in fact "benefits all of the commercial activities of the recipient rather than being in line with its stated 'general' purpose".[36] The EC also proposes clearer rules confirming the ability to act against subsidies bestowed through "state-controlled entities"—i.e., subsidies covertly engineered rather than openly bestowed by a government.[37] To be sure, these proposals can be characterized as an effort to make explicit what the "entrusts or directs" language in ASCM Article 1 already implies: that subsidies which a government through its own actions causes a private entity to bestow are reachable and—where other requirements such as specificity and trade effects are satisfied—fully actionable. To the extent that they do lead to removing some of the uncertainty associated with the cumbersome "entrusts or directs" language—thereby lifting one potential obstacle to addressing these types of practices—these proposals would improve current discipline.[38]

The EC also proposes to expand—or, depending on one's perspective, to restore—the category of prohibited subsidies by clarifying that "local content" or "local value-added" subsidies are to be treated as subsidies contingent on the use of domestic over imported goods. As a practical matter, domestic value-added conditions on subsidies normally will encourage the use of domestic over imported input products, and it seems logical to prohibit subsidies that are contingent on the use of inputs with a high percentage of domestic value-added if one is going to prohibit subsidies that are contingent on the use of wholly domestic-origin input products. Moreover, the phrase "contingent on the use of domestic over imported goods" could be read to encompass both scenarios, notwithstanding that one adopted dispute settlement decision may have cast some doubt in this area.[39] In any event, according to the EC, it is at present "very difficult to counteract subsidies linked to value added conditions under the ASCM prohibited subsidy disciplines".[40] A proposal to reduce this "difficulty" counts as a strengthening proposal.

A third strengthening proposal from the EC would make notification requirements more meaningful and enforceable by penalizing (in some fashion not yet specified) missing and incomplete notifications.[41] The erratic performance of WTO Members in the field of notifications, however, calls into question the likely impact of this proposal, as does the EC's suggestion that developing countries be exempted from the notification system's rigours.[42]

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[36] Id., at 2.

[37] Id.

[38] The proposals are also risky, of course, since their rejection would constitute "negotiating history" sure to be cited by some future defendant insisting that this type of circumstance does not satisfy the ASCM Article 1 definition.

[39] See *Canada—Certain Measures Affecting the Automotive Industry*, AB Report (DS139/142).

[40] TN/RL/W/30, at 3.

[41] Id., at 4.

[42] Id. The EC itself has introduced an internal "State Aid Scoreboard" which provides interesting year-on-year comparisons (both overall and by Member State and sector) but relies on some debatable methods for, e.g., quantifying and cumulating aid provided in various forms, and deciding when large capital subsidies (whose benefits last several years) will be counted in the published yearly totals. The EC has not, so far, pointed to its own internal transparency tools as an example of what a good WTO notification system would entail.

The EC apparently considers the existing serious prejudice remedy to be adequate in all respects; at least, it has not proposed to strengthen the rules in Articles 5–7.

On the weakening/likely weakening side of the ledger are the EC's positions on green lighting, derogations for developing countries, export credit rules, and (especially) new impediments to the use of countervailing measures in response to injurious subsidies.

The EC appears to be seeking the reintroduction of a green light category—at least for "environmental" subsidies,[43] where the EC's internal state aid rules allow wide varieties and large amounts of aid for which the EC will presumably seek complete WTO immunity. Moreover, based on its past negotiating positions, the EC will likely also seek (or support the efforts of other Members to obtain) several other green light categories, corresponding at least to the numerous normative categories that are exempt under the EC state aid regime. The EC also appears ready to sign off on additional derogations—going beyond the extensive set already provided in ASCM Article 27—for developing countries under the heading of "special and differential treatment".[44]

On export credit rules, the EC position is harder to classify. The EC is in the position of trying to blunt a Brazilian proposal to remove the ability of OECD members to alter "unilaterally" their WTO obligations by adjusting the terms of an OECD Arrangement that ties into a "safe harbour" provision in item (k) of the Illustrative List of Export Subsidies. Brazil's "jurisdictional" proposal would arguably increase subsidy discipline, and the EC opposes that proposal,[45] but that does not necessarily mean that the EC is seeking to weaken present discipline. However, to the extent that the EC actually seeks to expand—either by altering the language of item (k) or by supporting particular revisions to the OECD Arrangement—the existing safe harbour for export guarantees, risk premia and interest-rate matching, it will be working to reduce current discipline.

The most explicit discipline-weakening proposals from the EC, however, involve countervailing measures. The EC proposes to add onerous new requirements for keeping countervailing duties in force at the five-year sunset review stage,[46] as well as new substantive and procedural rules for assessment reviews, new injury standards aimed at "reducing the cost of investigations," and new "one-size-fits-all" criteria for CVD questionnaires and verifications.[47] The EC also proposes new, heightened initiation standards that would be coupled with a "swift control" mechanism making initiation of an investigation separately challengeable under WTO rules and enabling the WTO to intervene long before there is any indication that a countervailing measure will be put into place.[48] Acceptance of any, much less all, of these proposals would

[43] Id.
[44] Id., at 5.
[45] The EC has said it is prepared to address the "legitimate concerns" of developing countries in this regard, but without (so far) specifying how. See id., at 4.
[46] TN/RL/W/30, at 5.
[47] TN/RL/W/138, at 2–6 (July 2003)
[48] TN/RL/W/30, at 5; TN/RL/W/67, at 1–4 (March 2003).

drastically undercut the effectiveness and subsidy-deterring performance of the CVD remedy.

In sum, while certainly more balanced than some other Members' positions (and more balanced, as a result of tangible new interests that have emerged, than what the EC itself advocated during the Uruguay Round), the EC's positions in the current ASCM talks pull more toward weakening than toward strengthening discipline.

4. *Japan*

Japan has been quite active in the RNG's discussions of anti-dumping rules and of fish, but less so in the discussions of general subsidy rules, where its input has been limited to joining in proposals aimed at eviscerating the CVD remedy (a remedy which Japan, while rarely a target of CVD cases, regards with hostility because of its relationship to the anti-dumping remedy).

C. The US response

The "$10,000 question" in the new subsidy talks has been clear since well before the DDA itself was formally launched: Will the United States continue to play its historic role of championing *laissez faire* market economics, countering the pressure applied by its more interventionist (some would say subsidy-besotted) trading partners, and holding the line to ensure at least a minimally balanced result? With Republican control of both political branches of the US government, the answer to this question might seem obvious. It is not.

Rhetorically, the US position is clear: America seeks "the continuation of the progressive strengthening and expansion of disciplines that have marked nearly every round of trade negotiations since the beginning of a rules-based multilateral system".[49] Operationally, the picture is more muddled. The US proposals tabled so far are quite mixed in terms of their likely effect on subsidy discipline.

To its credit and in support of greater discipline, the United States has suggested:[50]

- that the category of prohibited subsidies be expanded, perhaps to include some or all of the types of subsidies once "presumed" to cause serious prejudice under the now-expired ASCM Article 6.1 (e.g., subsidies to cover operating losses, direct debt forgiveness, and subsidies exceeding a certain *ad valorem* threshold);
- that the serious prejudice remedy be strengthened and made more readily usable, in particular by adjusting the "causation" provisions in ASCM Article 6[51] and by improving the remedy provisions in ASCM Article 7;

[49] TN/RL/W/27, at 4 (October 2002).
[50] TN/RL/W/78, at 2–4 (March 2003); TN/RL/W/130, at 6–7 (June 2003).
[51] Note that US arguments in defending against the serious prejudice claims raised in the *US—Upland Cotton* case may have been—according to press reports, were—inconsistent with this proposal.

- that the ASCM's notification rules be expanded to require prior notification of all government provisions of equity capital, at least in developed countries;
- that the ability to act against pre-privatization subsidies, wrongly undermined by dispute settlement decisions, be restored; and
- that the CVD remedy, and the deterrent value of the existing prohibition on export subsidies and import-substitution subsidies, be strengthened by making such subsidies countervailable without any demonstration of material injury.

Accompanying these items is a series of weakening proposals. For example, the United States has suggested dropping the requirement to include an estimate of "trade effects" when notifying subsidies.[52] Rather than citing pervasive noncompliance as a reason to drop this requirement, it might be better to seek to invigorate this potentially useful (if presently underutilized) element of the notification scheme. Regarding the disciplines applicable to developing countries, the United States has already—both at Doha and in an "early harvest" package within the DDA—signed off on expanded derogations under the rubric of "special and differential" treatment, and it seems prepared to accept still more.[53] The United States has also tabled a lengthy series of CVD-related proposals many of which—while not requiring any weakening of the US regime—appear likely (if adopted) to encumber other governments' use of the CVD remedy and thereby on balance to reduce, rather than bolster, subsidy discipline.[54]

The United States has also proposed to revisit what currently amounts to a "prohibition" on payments to anti-dumping and CVD petitioners that are funded by collected trade remedy duties.[55] The *US—CDSOA* decision held that such payments constitute an impermissible action "against" dumping and subsidization and are therefore WTO-inconsistent irrespective of any showing of adverse trade effects. This proposal is harder to criticize, since the prohibition now in place was not the result of negotiations but rather was invented in the dispute settlement process—effectively adding a third category of prohibited subsidies alongside export-contingent and import-substitution subsidies. Nevertheless, taking today's situation as the baseline, the proposal to move this category of aid into the "amber" category (actionable if specificity and adverse trade effects can be shown, but not otherwise) would reduce current discipline.

Overshadowing all of these items is arguably the biggest discipline-reducing idea of all: a proposal for like (or more nearly equal) treatment of direct and indirect tax systems. This proposal stems from the recognition that different tax systems, "with regard to their subsidy-like effects, have only superficial differences".[56] (That is, economists no longer believe that the actual economic incidence of direct and indirect taxes differs meaningfully.) Thus, there is no reason, aside from the practicalities of tax

[52] TN/RL/W/78, at 6.
[53] See, e.g., TN/RL/W/33, (December 2002).
[54] See, e.g., TN/RL/W/35, (December 2002).
[55] TN/RL/W/153, at 2 (April 2004).
[56] TN/RL/W/78, at 4.

administration, why producers located in jurisdictions that rely mainly on income taxes to raise revenue should operate at a disadvantage in international trade compared to producers located in jurisdictions that have instead selected consumption or value-added taxes. While the premise seems unassailable, however, the implications of the US proposal are huge. Given the extreme unlikelihood that the "border adjustment" currently permitted for indirect taxes will be curtailed—the United States would not have enough trading stock to obtain that result even if it carried no other negotiating priorities into the DDA—the US proposal on "equalization in the treatment of various tax systems" is most sensibly interpreted as suggesting that some sort of comparable flexibility be introduced enabling exported products to be relieved of the burden resulting from income taxes borne by their producers. The mechanics of how this might work in practice are difficult to conceive, but the concept is nonetheless fairly clear. And a greater net reduction in current subsidy disciplines can scarcely be imagined.[57]

To be sure, the most important test of the US position in the ASCM talks will be the vigour with which it opposes the discipline-reducing proposals of other Members. As the negotiations are only now beginning to reach the stage of actual give-and-take on specific proposals, this remains an unknown; the "data base" is limited to what the United States has affirmatively proposed. Still, from an examination of those US proposals—and taking into account the broader context of the Rules negotiation (where the United States is largely playing defence) and the DDA as a whole (where the United States has numerous competing priorities)—there are many reasons for advocates of subsidy discipline to be nervous.

III. Implications of a Further-Weakened WTO Anti-Subsidy Regime

Public support for trade liberalization, tenuous in many countries, is everywhere crucially dependent on the perception that the rules and terms of international trade are fair. "Fair trade" means many things to many people, but one of its most widely held and easily accessible definitions is the principle that producers in one jurisdiction should not have to compete against producers funded by the deep-pocketed public Treasury of another.

Further weakening the WTO's already patchy subsidy control regime would therefore have both economic and political costs. Inability to hold the line even with respect to "prohibited" subsidies would be especially damaging and embarrassing. But "holding the line" is not much of an aspiration in any event; as noted at the outset of this article, the importance of remedies against subsidy-induced trade distortions

[57] The US Congress insisted, in the "negotiating objectives" section of the current Trade Promotion Authority legislation, that the Administration pursue "equalization" in the DDA talks. Undoubtedly the motivation included some considerable (and legitimate) dismay over what had happened to the FSC/ETI provisions constituting America's partial response to the anomalous WTO rules. But could a rebate of income taxes "borne" by exported products really be what the Congress had in mind? Such a rule would open the door not only to large (and perhaps currently unaffordable) payments to US exporters, but also to similar payments to EC exporters, whose corporate income taxes are also substantial.

increases as the impact of border measures and other trade-affecting measures is reduced in the trade liberalization process. WTO Members should be charting a course—as they claimed to have done in the Uruguay Round—toward a "major advance" in subsidy discipline. This, they are not even arguably doing, so far.

Raising the stakes still further is the seemingly inevitable collapse, sooner or later, of the cumbersome "box" and "aggregate measure of support" scheme for disciplining farm subsidies, and the likely eventuality that all subsidies will be subject to the general ASCM rules. Weakening the ASCM regime would ensure that it delivers less just when it matters more.

Once agriculture talks are unblocked with a negotiating "framework" and the DDA as a whole is again able to move forward, these ASCM-related questions will begin to receive greater public attention. Incumbent officials will need to be able to explain and defend the overall direction of the talks as well as the detailed (sometimes mind-numbingly detailed) proposals. It will be interesting to hear what they have to say, and to observe whether the above-described trends change as the RNG discussions intensify.

APPENDIX

ASCM REFORM PROPOSALS TABLED IN DDA RULES NEGOTIATING GROUP: INCREASING OR REDUCING SUBSIDY DISCIPLINE?

I. SUBSIDIES DISCIPLINES

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
ARTICLE 1— DEFINITION OF SUBSIDY			
Definition of Subsidy	– make subsidies rules for industrial products more operational in order to bring "disguised" subsidies for industrial products more clearly within the disciplines of the SCM Agreement. (TN/RL/W/30) (EC)	– clarify Article 1, so that entities which are effectively controlled by the state and acting on non-commercial terms are covered by this provision (an alternative would be to clarify the rules so as to cover situations where the public direction is less apparent but nevertheless leads to non-commercial behaviour in terms of the financial operation in question). (TN/RL/W/30) (EC)	– consider establishing appropriate guidelines to assist investigating authorities in conducting pass-through analyses (where the recipient of the original "financial contribution" and the recipient of the resulting "benefit" are alleged to be different entities, the investigating authorities cannot assume but, rather, must definitively establish, a subsidy pass-through from the former to the latter). (TN/RL/W/112) (Canada)
		– examine the "entrusts or directs" provision of Article 1.1(a)(1)(iv) to clarify the rules in cases where government action, though	– further develop the standard for determination of government control. (TN/RL/W/78) (United States)

* Ordering, separation into individual "items", and description of ASCM proposals is borrowed from a "compilation" issued by Rules NG chairman Tim Groser (Autumn 2003). Proposals are classified as "strengthening", "neutral" or "weakening" based on intended and/or likely impact both on direct ASCM disciplines and on the CVD remedy (itself a discipline on subsidies). In some cases the intent of a proposal is evident; in others, surrounding circumstances were consulted. Proposals whose actual results are likely to vary from the submitter's stated intent are classified according to the former.

Classification of ASCM Part V-related proposals reflects the fact that "more ASCM rules" generally means "more constraints" on the use of the CVD remedy to discipline subsidies. E.g., a suggestion for more detailed calculation rules within Article 14 would generally be classified as "weakening" unless it contemplated an ability to offset more than the full benefit to the recipient (which can already be calculated using any reasonable methodology and then fully offset). Proposals to "codify" CVD practices that are not currently prohibited by the ASCM are not "strengthening" proposals.

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
		very much influencing the course of events, may not be clear or explicitly documented. (TN/RL/W/78) (United States)	
		– establish more explicit rules as to royalty-based financing schemes (these schemes need to be judged against a market or commercial standard). (TN/RL/W/78) (United States)	– clarify the definition of "public body". (TN/RL/W/78) (United States)
ARTICLE 2—SPECIFICITY			
Specificity			– clarify certain aspects of the current provisions on "specificity" (e.g., the meaning of the phrase "enterprise or industry or group of enterprises or industries"). (TN/RL/W/112) (Canada)
ARTICLE 3—PROHIBITION			
Prohibited Subsidies	– expand the existing category of prohibited subsidies to include those instances of government intervention that have a similarly distortive impact on competitiveness or trade as do export and import substitution subsidies (e.g., include in this expanded category some of the practices listed in the "dark amber" provisions of Article 6.1 such as large domestic subsidies, subsidies to cover operating losses by a company and direct forgiveness of debt). (TN/RL/W/78) (United States)		– clarify prohibited subsidies disciplines to ensure the equitable application of SCM Agreement rules/disciplines among WTO Members (issue of assessment of contingency on export performance, in the case of small domestic markets). (TN/RL/W/1) (Canada)
			– consider whether more equitable and predictable rules in relation to prohibited export subsidies can be achieved; in this

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			regard, discuss whether the concept of levels of export competitiveness in a product, used in the SCM Agreement in relation to special and differential treatment, can help to address any confusion between a product which has been subsidized contingent on export performance, and a product which may be subsidized but, due to fluctuating domestic market conditions, is no longer solely for the domestic market. (TN/RL/W/85) (Australia)
			– establish clearer rules on the conditions or facts which give grounds for a conclusion that a subsidy is contingent "in fact" upon actual or anticipated export performance. (TN/RL/W/139) (Australia)
			– make clear, in considering a range of factors (for the determination that a subsidy is contingent in fact upon export performance), that export propensity should not be a factor taken in isolation; list a range of factors that should be taken into account for export contingency; establish that investigating authorities should ensure that consideration of the facts relating to contingency on export performance is clearly established in a countervail investigation. (TN/RL/W/139) (Australia)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
"Local Content" Subsidies	– clarify and make rules operational so that any subsidy linked to the use or purchase of domestic industrial products, and thus, in breach of Article III.4 of the GATT 1994, is covered by the prohibition (the fact that subsidies are available only to domestic producers would not, by itself, put them in the prohibited category—Article III:8 b of GATT 1994). (TN/RL/W/30) (EC)		– recognize that subsidies contingent upon use of domestic over imported goods are crucial to the process of industrialization and development of developing countries, and any prohibition on such use of these subsidies would further disadvantage these countries. (TN/RL/W/4) (India)
ARTICLE 3/ ANNEX I— ILLUSTRATIVE LIST OF EXPORT SUBSIDIES			
Export Credits (Items (j) and (k) of Annex I)	– address the issue of "evolutionary interpretation" of the reference to the OECD Arrangement in item (k) of the Illustrative List of Export Subsidies in Annex I. (TN/RL/W/5) (Brazil)	– establish clear and consistent rules for all types of export financing. (TN/RL/W/30) (EC)	– recognize that export credits can be provided for either in the currency of the exporting country or in foreign currency in accordance with the circumstances of each case. (TN/RL/W/120) (India)
		– address legitimate concerns of developing countries as far as the OECD regime on official support for export credits is concerned. (TN/RL/W/30) (EC)	– discuss and clarify the issue arising from certain investigating authorities disallowing the cost-to-government approach in determining the existence and extent of subsidy, when such an approach is implicit in item (k) of the Illustrative List. (TN/RL/W/120) (India)
			– review items (j) and (k) of the Illustrative List of Export Subsidies in Annex I, in order to ensure a "level playing field" among WTO Members in the area of export credits, i.e., with respect to the "break even" test in item (j) and to the "material advantage" issue in item (k). (TN/RL/W/5) (Brazil)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
ARTICLE 4—REMEDIES			
Remedies for Prohibited Subsidies/ Enforcement	– explore strengthening the remedies for prohibited subsidies (currently injury to a Member's domestic industry from these subsidies must still be shown in the context of a national countervailing duty proceeding). (TN/RL/W/78) (United States)		– clarify the remedy set down in Article 4, namely "withdrawal of the subsidy" where it has been established that a prohibited subsidy has been provided (questions to be considered include: should there be consistency in the application of a remedy and what is meant by "withdraw the subsidy"? If the subsidy agreement is based on the so-called traffic light test according to the effect a subsidy has on trade, would the replacement of a prohibited subsidy with an actionable subsidy "withdraw the subsidy"? Further, should a remedy involve retrospectivity? If the purpose of the remedy is to bring measures into conformity and balance rights and obligations, how is retrospectivity consistent with this? Where does enforcement go beyond any adverse trade effect?). (TN/RL/W/85) (Australia) – examine following issues to clarify provisions in Part III (Article 4.7) and Part V (Article 7.8): • Whether the context of Part III and V alters the meaning of "withdraw the subsidy", as has been suggested by some panels; • Whether replacement of a prohibited subsidy with an actionable subsidy constitutes an effective or suitable remedy;

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			• Whether "withdrawal of the subsidy" means removal of adverse trade effects; • Whether retrospectivity or repayment should normally only be countenanced to the extent that there are portions of a subsidy which are deemed allocated over future periods of time; • Given that there is a presumption of serious trade effects where it is established that there is a prohibited subsidy, whether there is nonethe less a need to quantify or establish the level of serious trade effects in "withdrawal of the subsidy"; • Whether "withdrawal of the subsidy" should not go beyond the adverse trade effects; • Whether SCM Articles 4.10 and 7.9 in relation to "appropriate counter-measures" provide context to the meaning of "withdraw the subsidy"; • Whether there should be a distinction between recurring and non-recurring subsidies; • Whether termination of a prohibited subsidy constitutes "withdrawal"; • Whether "withdrawal" must encompass a punitive remedy and have an "impact" and enforce-ment effect on the subsidizing Member. (TN/RL/W/139) (Australia)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
Accelerated Timeframes		– consider how the special timeframes for prohibited subsidies can be reconciled with the generally applicable timeframes in the DSU in situations where other claims of violation, in addition to those in respect of prohibited subsidies, are also at issue, having regard to parallel negotiations currently taking place in the Doha Round, to improve the efficiency and effectiveness of the DSU. (TN/RL/W/112) (Canada)	
Permanent Group of Experts		– examine the functioning of the Permanent Group of Experts to determine how its advisory and dispute settlement roles might be improved. (TN/RL/W/112) (Canada)	
ARTICLE 6— SERIOUS PREJUDICE			
Serious Prejudice Remedy/Actionable Subsidies	– consider a more viable serious prejudice remedy, especially in view of the importance of access to third country markets for Members with relatively small domestic markets and for certain specialized industries. (TN/RL/W/1) (Canada)	– consider building the recommendations on the calculation of the cost to government and *ad valorem* subsidization for different types of subsidies as well as on related issues contained in the Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures on Annex IV to the SCM Agreement into the Agreement, if and as appropriate, with a view to improving the clarity and effectiveness of Annex IV and, by extension, Article 6.1(a) of the SCM Agreement. (TN/RL/W/112) (Canada)	

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
	– strengthen and make the serious prejudice remedy more effective. (TN/RL/W/78) (United States)	– clarify the circumstances listed under SCM Article 6.7, in particular sub-paragraph (f); consider what standards or other regulatory requirements would be captured by this sub-paragraph. (TN/RL/W/139) (Australia)	
	– review the causation provisions. (TN/RL/W/78) (United States)		
	– consider reinstating and enhancing the deemed serious prejudice provision of Article 6.1. (TN/RL/W/112) (Canada)		
	– explore how current disciplines (paragraph 4 of Annex IV) in respect of start-up subsidy incentives, which can have obvious trade distorting effects, might be improved. (TN/RL/W/112) (Canada)		
	– explore how the current serious prejudice provisions might be usefully clarified and improved in order to render the multilateral discipline more effective; for example, consideration should be given to clarifying the subsidy "effects" requirement (including the identification of other factors that may be contributing to export or import displacement). (TN/RL/W/112). (Canada)		
ARTICLE 7—REMEDIES			
Remedies	– clarify the remedy "to remove the adverse effects", or eliminate it entirely and establish the withdrawal of the subsidy as the exclusive remedy. (TN/RL/W/78) (United States)		

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
ARTICLE 8—IDENTIFICATION OF NON-ACTIONABLE SUBSIDIES			
Non-actionable Subsidies			– consider whether a non-actionable subsidy category should be pursued. (TN/RL/W/1) (Canada) – address the issue of non-actionable subsidies and explore the possibility of re-introducing the concept into the SCM Agreement in such a way as to allow its application, as measures aimed at achieving legitimate development goals such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production; consider launching an exploratory process for which a relevant basis might be the categories specified in paragraph 8 of the SCM Agreement. (TN/RL/W/41) (Venezuela) – consider the following suggestions that would permit the application of non-actionable measures in the existing categories in Article 8 of the SCM Agreement: – to remove or lower the ceilings or benchmarks specified for each category of non-actionable subsidies in Article 8 of the SCM Agreement;

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– to amend the wording of some of the provisions of Article 8; for instance, the "assistance" provided in each of the three categories set out in the Article (direct allocation of funds) could be supplemented by other forms of financial contribution or support by a government body. (TN/RL/W/131) (Cuba/ Venezuela)
			– explore several avenues with a view to incorporating diversification of production, for example, in the existing categories in the SCM Agreement for the benefit of developing and least-developed country Members; a new category of non-actionable subsidies, considered as furthering legitimate development goals, might for instance be incorporated in the SCM Agreement together with an indicative list of non-actionable measures, in the form of a new Annex to the Agreement. (TN/RL/W/131) (Cuba/ Venezuela)
ARTICLE 25— NOTIFICATIONS			
Notifications	– explore the possibility of penalizing partial or non-notifications; devise a mechanism through which the quality and scope of notifications could be scrutinized and if failings were found or suspected a review procedure could be generated through an expedited WTO dispute settlement procedure	– consider reflecting in the SCM Agreement the approach developed by the Subsidies Committee to implementing Members' notification obligations. (TN/RL/W/78) (United States)	– consider eliminating or consolidating some of the information required under the current notification provisions (the requirement that the "trade effects" of the notified subsidy be described, for example, is difficult if not impossible to answer accurately and, thus,

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
	similar to the one envisaged for spurious initiations or by referring the matter to an empowered Permanent Group of Experts. (TN/RL/W/30) (EC)		is normally left unanswered by most Members). (TN/RL/W/78) (United States)
		– consider the SCM Committee's consensus on treatment of notifications at the May 2001 meeting; the work initiated within the Committee in relation to compliance and streamlining subsidy notifications could also be examined and considered in the context of clarification and improvement of the SCM Agreement. (TN/RL/W/85) (Australia)	– consider ways to lessen the burden on lesser developed countries, especially those in Annex VII of the SCM Agreement, with respect to notification obligations (TN/RL/W/78) (United States)
ARTICLE 27—SPECIAL AND DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRY MEMBERS			
Special and Differential Treatment for Developing Country Members		– review the existing Article 27 provisions in the light of any changes in the SCM Agreement, to make sure that effective remedies remain against injurious subsidies. (TN/RL/W/30) (EC)	– give positive consideration to a package of S&D treatment provisions for developing countries on the understanding that this would be for a strictly temporary period and would be drawn up only following an agreement on rules for non-exempted countries; S&D treatment could be considered in clearly defined circumstances for remedies, including countervailing duties, against certain prohibited and actionable subsidies given by developing countries. (TN/RL/W/30) (EC)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– to take account in the course of the negotiations of the situation of small economies more vulnerable to the harm caused by unfair trade practices, as well as the situation of developing country Members, bearing in mind that the scope of special and differential treatment should be confined to operations between developed countries and developing countries. (TN/RL/W/36) (Morocco)
			– consider relieving least-developed country Members (and perhaps other low income and small economies) of their notification obligation for specific subsidies under Article 25 (review could be conducted in the context of the Trade Policy Review Mechanism; in this process, the relevant parts of the review could be conducted in the Committee on Subsidies and Countervailing Measures). (TN/RL/W/30) (EC)
			– consider ways to lessen the burden on lesser developed countries, especially those in Annex VII of the SCM Agreement, with respect to notification obligations. (TN/RL/W/78) (United States)
			– add a new provision in Article 27.10 to provide for countervailing duties on imports from developing countries being restricted only to that amount by which the subsidy exceeds the *de minimis* level. (TN/RL/W/4) (India)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– amend Article 27.10 (b) to provide for countervailing duty not being imposed in the case of imports from developing countries where the total volume of imports is negligible, i.e. 7 percent of total imports. (TN/RL/W/4) (India) – amend Article 27.2 so that the prohibition in Article 3.1 (a) does not apply to export subsidies granted by developing countries where they account for less than 5 percent of the f.o.b. value of the product. (TN/RL/W/4) (India) – amend Article 27.11 to provide for the *de minimis* level of subsidization below which countervailing duty shall not be imposed in case of imports from developing countries being raised above 3 per cent. (TN/RL/W/4) (India) – amend Article 27.3 so that the prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members; delete the reference to expiry of this flexibility after five/eight years from the date of entry into force of the WTO Agreement; clarify that the provisions of the amended Article 27.3 shall be applicable notwithstanding the provisions of any other agreement in the WTO acquis. (TN/RL/W/4) (India) – introduce a provision to address the eventuality that after reaching export competitiveness in a particular product,

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			subsequently the export competitiveness is lost; the discussions held on this Implementation issue in the SCM Committee provide a useful basis for addressing this issue during the Rules Negotiations. (TN/RL/W/120) (India)
			– remove the seeming contradiction between time-bound derogation in paragraph 27.3 from the obligation in paragraph 1(b) of Article 3 of the SCM Agreement (prohibition of subsidies contingent upon the use of domestic over imported goods) and paragraph 1 of Article 2 of the Agreement on TRIMs which prohibits measures inconsistent with paragraph 4 of Article III of GATT 1994 (National Treatment); one way of removing this contradiction and thus providing the intended rights to LDCs in the unrestricted recourse to the use of local content is to provide in both Agreements for the right as long as a country remains in the LDC status. (Proposal referred to the NGR by the Chairman of the General Council, May 2003)
			– delete the word "may" from the text of Article 27.1; the provision, if amended, would read as follows: "Members recognize that subsidies play an important role in economic development programmes of developing country Members". (Proposal referred to the

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			NGR by the Chairman of the General Council, May 2003)
			– "inconsistent with its development needs" in Article 27.4 refers to where otherwise prohibited or actionable subsidies would clearly not benefit any domestic industry. (Proposal referred to the NGR by the Chairman of the General Council, May 2003)
			– it is understood that developing country Members shall not be prevented from seeking extensions on grounds of not strictly following the timeframes in Article 27.4 and the Decision on Procedures for Extensions Under Article 27.4 for Certain Developing Country Members (G/SCM/39). (Proposal referred to the NGR by the Chairman of the General Council, May 2003)
			– it is understood that in consultations and in any proceedings, there shall be no presumption of serious prejudice whatsoever including on the basis of any percentage or amount of subsidization where developing country Members grant subsidies; and that any serious prejudice shall be demonstrated exclusively by positive evidence. (Proposal referred to the NGR by the Chairman of the General Council, May 2003)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– it is understood that nullification and impairment in cases of actionable subsidies that developing country Members grant or maintain, shall be construed to mean only the displacement or impediment of imports of a like product into the market of the developing country Member or injury to a domestic industry in the market of the importing Member. (Proposal referred to the NGR by the Chairman of the General Council, May 2003)
			– it is understood that Article 27.13 covers any privatization programmes undertaken within the period from 1 January 1995 and that developing country Members may grant or maintain the subsidy programmes under Article 27.13 to ensure good adjustment of their economies; it is further understood that "limited period" refers to a period of not less than eight years. (Proposal referred to the NGR by the Chairman of the General Council, May 2003)
			– "interested developing country Member" in Article 27.15 shall be construed to refer to any developing country Member regardless of any subsidy programmes maintained, on the basis that developing country Members have an abiding interest in the use and operation of subsidies due to their importance in the rapid

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			economic development of developing country Members. (Proposal referred to the NGR by the Chairman of the General Council, May 2003)
OTHER SUBSIDY DISCIPLINE ISSUES			
Natural Resources and Energy Pricing		– further clarify and improve the rules and remedies in the area of natural resources and energy. (TN/RL/W/78) (United States)	
Taxation			– work toward greater equalization in the treatment of various tax systems (direct and indirect taxation systems) that, at least with regard to their subsidy-like effects, have only superficial differences. (TN/RL/W/78) (United States)
Codification of Analytical and Quantification Methodologies			– clarify a host of measurement-related concepts, such as when and how to allocate subsidy benefits over time, the determination of market-based interest rate benchmarks, and the attribution of subsidy benefits to specific categories of a company's sales and among related companies; use the work of the Informal Group of Experts on some of these topics as a useful starting-point for further discussions. (TN/RL/W/78) (United States)
Traffic Light Framework		– consider whether the traffic light framework remains viable. (TN/RL/W/1) (Canada)	

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
Provision of Equity Capital	– require governments to provide prior notification to the Subsidies Committee of any intended provision of equity capital (this notification might require that a Member explain how the government investment was consistent with the usual investment practice of private investors) (giving consideration to certain lesser developed countries with respect to these requirements, except perhaps, in those sectors which have been shown to be export competitive). (TN/RL/W/78) (United States)	– strengthen disciplines with respect to the actions of any government which go against a determination by the equity market that a company will not generate a market return. (TN/RL/W/78) (United States)	
Subsidies and the Environment			– address the environmental dimension of subsidies and consider further how to approach subsidies aimed at the protection of the environment, following the expiry of the "green box". (TN/RL/W/30) (EC)
Trade- and Market-Distorting Practices		– discuss and consider ideas and recommendations for addressing trade- and market-distorting practices in the steel sector, building upon discussions among the major steel-producing nations at the OECD. (TN/RL/W/24)	
Privatization	– examine whether the SCM Agreement should be clarified with respect to the impact of privatization on the benefit from prior subsidies in those circumstances in which Article 27.13 does not apply. (TN/RL/W/130) (United States)		
TOTAL PROPOSALS	15	16	41

II. FISHERIES SUBSIDIES

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III. COUNTERVAILING MEASURES

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
ARTICLE 11—INITIATION AND SUBSEQUENT INVESTIGATION			
Initiation Standards			– clarify the rules/disciplines pertaining to the initiation of investigations. (TN/RL/W/1) (Canada)
			– focus on the problem of initiation standards where, e.g., successive cases are opened in respect of subsidies which have been found to have already expired or that are no longer used. (TN/RL/W/30) (EC)
Definition of Product Under Investigation			– provide a more rational and disciplined framework to determine the scope of "product under investigation", so that countervailing measures are applied only to those products found to be subsidized and causing injury. (TN/RL/W/19) (Brazil)
			– define appropriate criteria for determining the "product under investigation" to limit arbitrary expansions of product scope. (TN/RL/W/19) (Brazil)
Standing Rules			– establish that applications should be supported by at least more than 50 percent of the total domestic production. (TN/RL/W/19) (Brazil)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– discuss the standing requirement for the initiation of an investigation to determine whether the concept of "standing" is appropriately defined to ensure that domestic producers representing a relatively small proportion of the domestic production of like products cannot successfully apply for an investigation. (TN/RL/W/47) (Canada)
			– consider requiring that, in cases where an application is made on behalf of a domestic industry by one or more industry associations, that the members of the industry association(s) be identified in the application, with a statement of support for the application. (TN/RL/W/47) (Canada)
Initiation and Publicization of the Application		– make clear how the obligation to notify the Government of the exporting Member (in Article 11.5) can be reconciled with the obligation to avoid publicizing the application concerned. (TN/RL/W/132) (Venezuela)	
ARTICLE 12—EVIDENCE			
Availability of Relevant Information from National Authorities			– enhance provisions concerning timely information and feedback (currently, there is no definition of what timely is and no specific guidance for national authorities). (TN/RL/W/35) (United States)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– give a definition of the term "timely", in order to clarify the period of time involved and establish a fixed interval, so as to guarantee due process for the parties involved and transparency throughout the proceeding, thereby avoiding different interpretations of the same provision by the competent authorities of each Member. (TN/RL/W/132) (Venezuela)
			– discuss the issue of providing access to non-confidential information; for example, consider ways in which interested parties could be granted access to all non-confidential information as soon as it is submitted to national authorities, regardless of whether the national authorities ultimately rely upon the information for purposes of their determina tion. (TN/RL/W/35) (United States)
Maintenance of a Public Record			– evaluate how a mechanism for providing access to non-confidential information used by national authorities in an investigation could operate (e.g. maintaining a public record of all non-confidential information submitted by the parties and all memoranda adopted or approved by the pertinent authority that explain the factual or legal bases for its determination or provide pertinent findings and conclusions in support of that determination). (TN/RL/W/35) (United States)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
Protection and Disclosure of Confidential Information			– discuss whether each Member should have in place a system to allow access for appropriate persons to confidential information; such a system must incorporate appropriate measures to ensure the proper protection of confidential information. (TN/RL/W/35) (United States) – consider establishing requirements for Members to maintain specific procedures to protect confidential information from unauthorised disclosure. (TN/RL/W/35) (United States)
Conduct of Verifications			– discuss steps to make verification procedures clearer (e.g. authorities could provide exporting Members and their firms with detailed outlines prior to verification specifying what topics will be covered and what type of supporting documentation will be required; a report on the verification findings should be issued to all interested parties as soon as possible). (TN/RL/W/35) (United States)
Facts Available			– establish symmetry between the provisions of the Anti-Dumping Agreement on facts available (Annex II of the Anti-Dumping Agreement) and the SCM Agreement, which does not elaborate on the matter. (TN/RL/W/19) (Brazil)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– agree that there should be analogous provisions within the SCM Agreement relating to countervailing duty measures to reflect corresponding provisions in the Anti-Dumping Agreement, for example, clarification of facts available under SCM Agreement Article 12.7. (TN/RL/W/85) (Australia)
			– apply the Anti-Dumping Agreement Annex II procedures to countervailing duty investigations with a few modifications in order to adapt it to the language and concepts of the SCM Agreement (For instance, where Annex II of the Anti-Dumping Agreement reads "interested parties", it should read "interested Members and/or interested parties"; where Annex II reads "normal value", it should read "amount of subsidy"; and, of course, where Annex II reads "Paragraph 8 of Article 6", it should read "Paragraph 12 of Article 7"; as "independent sources" are concerned, mention, for instance, Members' notifications to WTO and public reports of the agencies responsible for programmes). (TN/RL/W/19) (Brazil)
Disclosure/Evidence			– consider whether the SCM Agreement should be clarified as to what constitutes "sufficient time for parties to defend their interests" as well as to what constitutes adequate disclosure of the "essential

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			facts" in the context of Article 12.8 of the Agreement. (TN/RL/W/98) (United States)
			– address the lack of indication of the period of time necessary for the parties to make their comments in defence of their interests and the lack of an indicative list of the elements which the communication should contain, with a view to standardizing the criteria and avoiding significant differences between one investigation and another, depending on the Member concerned. (TN/RL/W/132) (Venezuela)
			– consider whether a requirement might be warranted for a disclosure meeting for the authorities to review with the interested parties, upon request, how the dumping margins and countervailing duty rates were calculated. (TN/RL/W/130) (United States)
Interested Parties			– consider taking industrial users and consumer organizations into account in the definition of "interested parties" in the SCM Agreement, with a view to securing them the opportunity, if they so wish, to fully participate in countervailing duty investigations since their initiation. (TN/RL/W/104) (Friends)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
ARTICLE 14— CALCULATION OF THE AMOUNT OF SUBSIDY IN TERMS OF THE BENEFIT TO THE RECIPIENT			
Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient		– amend the "chapeau" of Article 14, so that it mirrors the language of its title; provide that, for the purpose of Part V of the SCM Agreement, investigating authorities shall calculate the amount of the subsidy in terms of the benefit conferred to the recipient (producer/exporter) and do so on a product unit basis. (TN/RL/W/19) (Brazil)	– clarify the rules/disciplines pertaining to the calculation of amounts of subsidy. (TN/RL/W/1) (Canada)
		– establish that the obligation of transparency foreseen in the "chapeau" applies both to the method of calculation of the benefit and to the method of calculation of the amount of the subsidy. (TN/RL/W/19) (Brazil)	– establish further and more detailed guidelines concerning the quantification of amounts of subsidy (e.g., in respect of royalty-based financing). (TN/RL/W/112) (Canada)
			– use the work undertaken by the Informal Group of Experts on calculation of *ad valorem* subsidization as a basis for the examination and setting of further priorities for potential consensus and acceptable practice/guidelines, for the purposes of Part V of the SCM Agreement. (TN/RL/W/85) (Australia)
Additional Guidelines to Article 14			– include additional guidelines to Article 14 on: • deduction of expenses and export taxes • appropriate denominator for the calculation of subsidy amount

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			• subsidy tied to the acquisition of capital goods (amount of subsidy spread over the useful life of the assets). (TN/RL/W/19) (Brazil) – establish specific criteria, such as those mentioned in Article 6.10 of the Anti-Dumping Agreement, for the use of samples in the calculation of the amount of the subsidy. (TN/RL/W/19) (Brazil) – clarify, improve and further develop the specific terms of Article 14(b) regarding the provision of government loans with a view to facilitating determination of whether there has been inappropriate government intervention in such situations as those involving direct government intervention in bankruptcy or near bankruptcy proceedings, and industry restructuring (clarification and improvement in this regard could include certain notification/transparency requirements in those instances in which a government, government-owned or government-controlled entity, or "public body", becomes involved in assisting a financially troubled company). (TN/RL/W/78) (United States) – clarify and improve the specific provisions of Article 14(a) regarding the provision of equity capital; specifically, address practical issues that can arise in

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			analysing equity infusions—such as the role of independent studies, the specific factors that should be considered when examining the financial health and prospects of a company, and the use of initial and secondary stock prices. (TN/RL/W/78) (United States)
ARTICLE 15—DETERMINATION OF INJURY			
Like Product			– clarify the definition of like product to limit the scope of product types that can be considered as a single "like product". (TN/RL/W/47) (Canada)
Market Segmentation		– consider whether Article 15 of the SCM Agreement should be clarified to state expressly that investigating authorities have the discretion to engage in sectoral analysis of the impact of subsidized imports on the domestic industry in appropriate circumstances, as long as their analysis of impact encompasses the entire domestic industry. (TN/RL/W/130) (United States)	
Cumulative Assessment of Injury/Cumulation		– consider whether the Anti-Dumping Agreement and the SCM Agreement should be clarified to expressly provide for the cumulation of dumped imports with subsidized imports, in order to assess the effects of the unfair imports on the domestic industry. (TN/RL/W/98) (United States)	– establish which factors should be considered in the evaluation of "conditions of competition" between imported products from different origins and between them and the like domestic product. (TN/RL/W/19) (Brazil)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
Examination of Impact		– consider whether Article 15.4 of the SCM Agreement should be clarified to provide greater certainty both to investigating authorities and to the parties that appear before them concerning the scope of the authority's obligation to examine "relevant factors and indices" other than the ones explicitly listed in Article 15.4 of the SCM Agreement. (TN/RL/W/130) (United States)	
		– address whether there should be an express limitation on the authority's obligation with respect to such factors that were never brought to the authority's attention during the course of its investigation. (TN/RL/W/130) (United States)	
Causation	– consider clarifying Article 15.5 with respect to the issue of causation. (TN/RL/W/98) (United States)		
Condition of the Domestic Industry in any Threat of Material Injury Analysis		– consider whether the Agreement should be clarified to address investigating authorities' consideration of the current condition of the domestic industry in an analysis of the threat of material injury. (TN/RL/W/130) (United States)	

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
ARTICLE 16—DEFINITION OF DOMESTIC INDUSTRY			
Definition of Domestic Industry		– clarify Article 16 concerning the definition of the domestic industry to address the special circumstances raised when domestic and foreign producers have limited selling seasons. (TN/RL/W/72) (United States)	– provide more specific parameters as to what minimum percentage of the domestic production can be considered to be "a major proportion". (TN/RL/W/47) (Canada)
		– consider whether Article 16.1 of the SCM Agreement should be clarified to specifically prohibit the practice of limiting the injury analysis solely to those firms which supported the application. (TN/RL/W/98) (United States)	– consider establishing clearer criteria for the definition of the term "major proportion". (TN/RL/W/104) (Friends)
		– consider whether the SCM Agreement needs to be clarified to ensure that an investigating authority can satisfy its obligation to obtain reliable and objective data on a domestic industry containing an extremely large number of producers within the confines of an investigation of limited duration (issues that may be addressed in such a clarification include reliance by investigating authorities on information from industry groups or governmental statistical authorities). (TN/RL/W/98) (United States)	– consider establishing that the domestic industry shall be taken as a major proportion of the total domestic production only when it is not possible for the authority to obtain information regarding the "domestic producers as a whole of the like products". (TN/RL/W/104) (Friends)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– consider whether the asymmetry between the Anti-Dumping and the SCM Agreement with respect to excluding from the domestic industry domestic producers who are themselves importers of a like product from other countries should remain (Article 16.1 of the SCM Agreement allows for the exclusion of domestic producers who are themselves importers of a like product from other countries). (TN/RL/W/104) (Friends)
ARTICLE 17— PROVISIONAL MEASURES			
Provisional Measures			– consider harmonizing the provisions of the Anti-Dumping and SCM Agreement regarding the application of provisional measures, especially the prohibition of collecting provisional duties; consider whether the exporter should be allowed to request a two-month extension of the period of application in a countervailing duty investigation. (TN/RL/W/104) (Friends)
ARTICLE 18— UNDERTAKINGS			
Price Undertakings			– define what should constitute ''satisfactory voluntary undertakings''. (TN/RL/W/19) (Brazil) – define ''reasons of general policy'' in Article 18.3. (TN/RL/W/19) (Brazil)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
ARTICLE 19—IMPOSITION AND COLLECTION OF COUNTERVAILING DUTIES			
De minimis Rule in Article 11.9 and Its Relation With Article 19			– remedy the omission of a *de minimis* rule in Article 19. (TN/RL/W/19) (Brazil) – establish that no countervailing duties shall be collected when the amount of the subsidy is found to be *de minimis*, both on a prospective and on a retrospective basis. (TN/RL/W/19) (Brazil)
Accrual of Interest			– consider whether changes to the Agreement may be necessary to address the lack of a provision requiring payment of interest on any excess monies collected and held by the importing Member. (TN/RL/W/98) (United States)
"All-others" Rate			– consider what clarification could be appropriately made in the SCM Agreement in regard of all-others rate. (TN/RL/W/72) (United States)
Lesser Duty			– make the use of the "lesser duty" rule mandatory. (TN/RL/W/19) (Brazil)
Exclusion of Companies		– consider whether the Agreement needs to be clarified specifically to ensure that any examined exporter or producer found not to have received a countervailable subsidy during an investigation may not be covered by any measure which results from that investigation. (TN/RL/W/98) (United States)	

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
Refund or Reimbursement of the Duty Paid in Excess			– consider whether the Anti-Dumping and SCM Agreement should be equally precise in the provisions regarding reimbursement of duties paid in excess. (TN/RL/W/104) (Friends)
Favoured Exporter Treatment		– consider whether changes to the Agreement should be made to specifically prohibit the practice of excluding by name, *ab initio*, certain favoured exporters from any investigation and from coverage of any eventual countervailing measure, even though they produce merchandise like that which is under investigation. (TN/RL/W/98) (United States)	
ARTICLE 19 AND 21—REVIEWS			
Reviews (Article 19.3—CVD assessment) (Article 21.2—revocation reviews) (Article 21.3—sunset reviews)		– determine whether the SCM Agreement needs to be clarified in order to prevent misuse of the special provisions for new shippers. (TN/RL/W/72) (United States)	– clarify the rules/disciplines pertaining to the review of existing countervailing measures. (TN/RL/W/1) (Canada)
			– spell out more clearly the requirements for extending the life of a measure for a further five years. (TN/RL/W/30) (EC)
			– establish that the duration of reviews shall be limited to a maximum of 12 months. (TN/RL/W/19) (Brazil)
			– apply, in the case of reviews, the same rules as those used in the initial investigations. TN/RL/W/19) (Brazil)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– clarify the Agreement to stipulate which, if any, provisions that were originally intended to apply to initial investigations also apply to the various review provisions under the Agreement; in cases where, because of the fundamental differences between initial investigations and reviews, certain provisions of the Agreement cannot be reasonably applied to reviews, consideration should be given to providing rules that apply specifically to reviews. (TN/RL/W/47) (Canada) – clarify the circumstances that might lead to the continuation of a measure, and provide an indicative list of factors that authorities should consider in determining whether the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. (TN/RL/W/47) (Canada) – apply the procedures of notification and consultation as established by Article 13.1 to reviews. (TN/RL/W/19) (Brazil) – clarify that the expression "by or on behalf of the domestic industry" in Article 21.3 should be understood as in Article 11.4. (TN/RL/W/19) (Brazil) – consider whether there should be a greater symmetry between the provisions of Article 19.3 of

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			the SCM Agreement and Article 9.5 of the Anti-Dumping Agreement with regard to the basis on which such reviews must be carried out. (TN/RL/W/104) (Friends)
ARTICLE 20—RETROACTIVITY			
Retroactivity			– consider further developing the provisions of the SCM Agreement as far as retroactivity is concerned. (TN/RL/W/104) (Friends) – consider whether the SCM Agreement should mirror Article 10.8 of the Anti-Dumping Agreement in order to establish an important time-limit for the retroactive application of definitive duties. (TN/RL/W/104) (Friends) – consider whether the end result of the discussions on the issue of retroactivity should reflect a symmetry between the Anti-Dumping and the SCM Agreement. (TN/RL/W/104) (Friends)
Critical Circumstances		– consider clarifying what provisional steps are appropriate to preserve the right to impose duties retroactively (where there is a finding of critical circumstances); clarify and improve Article 20.6 in order to make it more effective (provide a sufficient remedy). (TN/RL/W/72) (United States)	

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
ARTICLE 22— PUBLIC NOTICE AND EXPLANATIONS OF DETERMINATIONS			
Public Notice and Explanation of Determinations/Transparency		– consider ways to promote greater disclosure of decisions and calculations performed; e.g., investigating authorities could be required to give detailed descriptions of decisions made, the facts on which those decisions were based and the calculation methodology applied to determine the countervailing duty rate. (TN/RL/W/35) (United States)	– lay down guidelines with respect to the level of detail required in determinations. (TN/RL/W/132) (Venezuela)
ARTICLE 23— JUDICIAL REVIEW			
Judicial Review		– discuss whether Members should provide additional information on procedures within their respective countries for pursuing legal recourse in a countervailing duty case (e.g. identify the court or other judicial system put in place and explain how that legal system operates). (TN/RL/W/35) (United States)	
ARTICLE 32— OTHER FINAL PROVISIONS			
Detailed National Legislation/Regulation		– provide the Negotiating Group on Rules with a comprehensive overview of how Members have applied the procedural fairness provisions of the Agreement in their	

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
		national laws, regulations and practices, as a starting point in the discussion on principles and procedures that could be adapted into the Agreement. (TN/RL/W/35) (United States)	
		– encourage Members to provide binding regulations or other administrative guidelines that give the necessary details about the procedures their authorities use to conduct investigations. (TN/RL/W/35) (United States)	
Verification System for Drawback and Substitution Drawback Schemes			– establish a presumption that a reasonable and effective verification system is in existence wherever standard input–output norms or similar averaging procedures are developed fairly and systematically for determining the average amount of various inputs required for the manufacture of one unit of the final product and are used to determine the amount payable to the exporter on account of remission of indirect taxes or import duties. (TN/RL/W/120) (India)
Capital Goods and Consumables to be Included in the Definition of Inputs Consumed			– amend footnote 61 of the SCM Agreement to include capital goods and consumables in the list of goods that are consumed in the process of production. (TN/RL/W/120) (India)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
No Obligation for the Exporter Concerned to Import the Inputs			– clarify Annex III to the SCM Agreement to the extent that sale of the entitlement to obtain the duty free imported inputs in substitution drawback schemes would not be considered a subsidy, provided such inputs are imported within two years and sale of such entitlement is not made at a premium. (TN/RL/W/120) (India)
OTHER CVD ISSUES			
Circumvention		– negotiate uniform procedures to address the circumvention of countervailing duty measures. (TN/RL/W/50) (United States)	
Duty Refund			– consider having special dispute settlement provisions for the SCM Agreement in cases where the imposition of duties under this agreement has been found to be inconsistent with the provisions of the agreement; these new provisions would require the return of countervailing duties or duty deposits in cases where a Member's compliance action with a DSB decision results in the measure being withdrawn, or a partial return of duties or duty deposits where the amount of duties/deposits that would have been collected under a WTO-compliant measure is less than the amounts actually collected. (TN/RL/W/47) (Canada)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
Harmonization of the Anti-Dumping Agreement and the SCM Agreement			– address divergences between similar provisions of the Anti-Dumping and the SCM Agreements, so that, where appropriate, differences in similar provisions of the two agreements are eliminated. (TN/RL/W/47) (Canada)
			– agree that there should be analogous provisions within the SCM Agreement relating to countervailing duty measures to reflect corresponding provisions in the Anti-Dumping Agreement, e.g., clarification of facts available under SCM Agreement Article 12.7. (TN/RL/W/85) (Australia)
			– harmonize, where possible and appropriate, the provisions of the SCM Agreement and Anti-Dumping Agreement (e.g., whereas the SCM Agreement provides expedited reviews for any exporter that was not actually investigated, the Anti-Dumping Agreement restricts expedited reviews to new shippers). (TN/RL/W/112) (Canada)
Reducing the Cost of Investigations		– identify areas where increased procedural fairness can reduce costs of investigations. (TN/RL/W/35) (United States)	– explore standardizing verification outlines and the structure of verification reports. (TN/RL/W/35) (United States)
			– explore the possibility of model/standard questionnaires which are to be applied by Members carrying out AD

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			investigations; examine whether or not it would be appropriate to have simplified questionnaires for SMEs. (TN/RL/W/138) (EC/Japan)
			– explore whether and to what extent standard procedures for on-spot verifications would help (the provisions of Annex I of the Anti-Dumping Agreement are a good starting-point for further clarifications in this respect). (TN/RL/W/138) (EC/Japan)
			– discuss whether the periods set out in Article 5.10 of the Anti-Dumping Agreement could be significantly shortened (this discussion would also have to reflect that shorter deadlines impose greater discipline on investigating authorities and interested parties). (TN/RL/W/138) (EC/Japan)
			– examine whether or not there should be mandatory deadlines for review investigations and whether these deadlines could be significantly shorter than the ones which are currently applicable for new investigations. (TN/RL/W/138) (EC/Japan)
			– discuss whether the current ADA should be clarified by explicitly forbidding the mandatory representation by lawyers of a cooperating party. (TN/RL/W/138) (EC/Japan)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– provide clear rules as to how non-confidential summaries should be prepared; give guidance with regard to all areas where non-confidential summaries have to be submitted including for transaction-by-transaction listings and information on cost of production; provide for the possibility of a review of such summary, e.g. by a "Permanent Group of Experts" type of body serviced by the WTO Secretariat; ask Members to establish domestic rules allowing for independent review of non-confidential summaries upon request by an interested party; built upon Article 13 of the Anti-Dumping Agreement as a basis for this option. (TN/RL/W/138) (EC/Japan) – clarify rules on disclosure (Article 6.9 of the Anti-Dumping Agreement); any rules on disclosure should aim at defining the minimum information to be given. (TN/RL/W/138) (EC/Japan) – provide a clear methodological framework for reviews. (TN/RL/W/138) (EC/Japan) – design new rules on injury analysis which give more precise guidance; examine whether one could find straightforward rules for a number of typical "extreme" cases (this could be achieved by providing

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			guidance to the application of the factors listed in Article 3.2 and Article 3.4 of the Anti-Dumping Agreement; such guidance could be obtained by introducing more quantitative elements where possible). (TN/RL/W/138) (EC/ Japan)
Swift Control Mechanism for Initiations			– consider establishing "fast track initiation panels", which, ideally, would issue their recommendations before the actual imposition of measures. Procedures for fast track panels could contain, e.g., the following elements: • The grounds on which initiations can be challenged could be limited to a few key elements of the initiation. For instance the following three aspects could be subject to review: standing of complainants (Article 11.4), formal requirements for the application (Article 11.2 (i) to (iv)), and accuracy and adequacy of evidence concerning subsidization, injury and causal link (Article 11.3) • Shortened period for consultation before the establishment of the fast-track panel • Only one written submission and one hearing • Shorter deadlines for submissions • No interim review stage • Shortened standard period for issuance of the report to the Parties and

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			for its circulation to the other Members • Obligation on the panel to issue suggestions on how to implement recommendations (alternatively, if a violation is found, a panel shall recommend the termination of the measure) • Short and standard "reasonable period of time" for implementation. (TN/RL/W/67) (EC) – consider providing for "binding arbitration", which could cover e.g. absence of evidence (i.e. any of the items listed in Article 11.2) or missing invitation for consultations of the exporting country concerned (Article 13.1). Arbitration should be requested quickly (perhaps within 10 days of initiation), be concluded in a short time (e.g. 30 days) and without appeal. Arbitration could be conducted on the basis of a "check-list" of the basic elements required for the initiation of an investigation and which fall within the scope of the arbitration. (TN/RL/W/67) (EC) – consider the creation of a "standing advisory body" (this body could be modelled upon the "Permanent Group of Experts" provided for in Article 24.3 of the SCM Agreement) to give a non-binding advisory opinion on the WTO legality of the initiation of a countervailing

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			duty investigation, this body would report to the WTO Committee on Subsidies and Countervailing Measures where Members could express their views on the report. (TN/RL/W/67) (EC)
Technical Assistance/ Capacity Building		– develop standardized training programmes; organize meetings of administrators to learn and discuss technical issues. (TN/RL/W/35) (United States)	
Codification of Decisions			– consider whether some or all of the Dispute Settlement Body's interpretations of the SCM Agreement should be incorporated into the Agreement. (TN/RL/W/47) (Canada)
Perishable, Seasonal, Cyclical Products		– clarify and improve the rules pertaining to issues particular to countervailing duty investigations of perishable, seasonal, and cyclical products (producers may be more vulnerable to dumped or subsidized imports that enter the domestic market during the limited portions of the year when their product is sold). (TN/RL/W/72) (United States)	
Procedural Issues/ Sampling			– develop a model questionnaire and verification outlines to be used in countervailing duty investigations. (TN/RL/W/78) (United States)

Article/Topic	Strengthening Proposals*	Neutral Proposals*	Weakening Proposals*
			– clarify the precise manner by which a statistically valid sample can be developed (e.g. what are the relevant characteristics of the underlying population, and what is the relationship between the available sampling units and the parameter value to be estimated?). (TN/RL/W/78) (United States)
Subsidized Domestic Like Product			– explore practical modalities to ensure that the countervail process takes account of the amount of subsidization specifically benefiting the domestic like product. (TN/RL/W/112) (Canada)
Consistent Use of Terminology		– review the use of terms within the Anti-Dumping and Subsidies Agreements as well as across the two agreements (such a review would reveal the inconsistent use of certain terms, which may have unintended consequences for the interpretation of the Agreements, for example, Article 6.7 of the Anti-Dumping Agreement provides for notifying "the representatives of the government of the Member" with respect to an in-country verification, by contrast, in elaborating on the same requirement, Annex I, paragraph 1 refers to notifying "the authorities of the exporting Member"; similarly, in what are otherwise equivalent provisions, Article 19.3 of the SCM Agreement uses the term "levied" where Article 9.2 of	

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		the Anti-Dumping Agreement uses the term "collected"). (TN/RL/W/130) (United States)	
Preliminary Determination		– consider whether the Agreement could be improved by requiring that Members issue a preliminary determination at a point in time prior to a final determination that would give parties sufficient time to defend their interests. (TN/RL/W/130) (United States)	
Standard of Review	– consider whether a provision similar to Article 17.6 of the Anti-Dumping Agreement should be included in the SCM Agreement. (TN/RL/W/130) (United States)		
Nature and Composition of Investigating Authorities		– consider whether the SCM Agreement should be clarified to expressly incorporate the concept that individual members should continue to have the flexibility to organize their authorities as they deem appropriate, particularly for Members that use authorities with multiple decision makers; matters that may be addressed in such a clarification could include, for example, a Member's ability: (a) to determine what constitutes the determination of the appropriate authority; and (b) to permit separate authorities to maintain distinct records. (TN/RL/W/130) (United States)	

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Small Economies: Regional Authority		– explore proposal for a regional trade authority (proposed in the context of the Work Programme on Small Economies), which would conduct trade remedy cases on behalf of individual Members. (TN/RL/W/35) (United States) – consider how a regional authority (designated by small economies that do not have the resources to maintain a "competent authority") might function, and any changes in the SCM Agreement which may be necessary. (TN/RL/W/72) (United States)	
TOTAL PROPOSALS	2	28	80