COMMISSION DECISION No 1889/98/ECSC

of 3 September 1998

on protection against subsidised imports from countries not members of the European Coal and Steel Community

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 74 thereof,

(1) Whereas, the Commission, by Decision No 2424/88/ECSC [1], adopted common rules for protection against dumped or subsidised imports from countries which are not members of the European Coal and Steel Community;

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

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

(4) Whereas Annex 1A to the Agreement establishing the WTO approved by Council Decision 94/800/EC [2] ('the WTO Agreement') contains, *inter alia*, the General Agreement on Tariffs and Trade 1994 ('the GATT 1994'), a new Agreement on implementation of Article VI of the GATT 1994 ('the 1994 Anti-Dumping Agreement'), and a new Agreement on Subsidies and Countervailing Measures ('the Subsidies Agreement');

(5) Whereas it is therefore appropriate to amend the Community rules in the light of those new Agreements; whereas it is also desirable, in the light of the different nature of the new rules for dumping and subsidies respectively, to have a separate body of Community rules in each of those two areas; whereas, consequently, new rules on protection against dumped imports were laid down in Commission Decision No 2277/96/ECSC [3] which removed those imports from the scope of Decision No 2424/88/ECSC;

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

(7) Whereas, in view of the extent of the changes brought about by the new Agreements and to ensure a proper and transparent application of the new rules, the language of the new Agreements should be brought into Community legislation as far as possible;

(8) Whereas the Subsidies Agreement has been implemented by the European Community through Council Regulation (EC) No 2026/97 [4]; whereas it is therefore appropriate to make similar provision for the application by the European Coal and Steel Community of the principles and definitions contained in Regulation (EC) No 2026/97 to ensure the homogeneity of the external trade legislation of the European Communities, whilst taking account of the decision-making processes of the European Coal and Steel Community;

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

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

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

[1] OJ L 209, 2. 8. 1988, p. 18.
[2] OJ L 336, 23. 12. 1994, p. 1.
[3] OJ L 308, 29. 11. 1996, p. 11.
[4] OJ L 288, 21. 10. 1997, p. 1.

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

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

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

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

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

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

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

(19) Whereas it is necessary to provide that the termination of cases should, irrespective of whether definitive measures are adopted or not, normally take place within 12 months, and in no case later than 13 months, from the initiation of the investigation;

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

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

(22) Whereas it is necessary to provide that measures are to lapse after five years unless a review indicates that they should be maintained; whereas it is also necessary to provide, in cases where sufficient

evidence is submitted of changed circumstances, for interim reviews or for investigations to determine whether refunds of countervailing duties are warranted;

(23) Whereas, even though the Subsidies Agreement does not contain provisions concerning circumvention of countervailing measures, the possibility of such circumvention exists, in terms similar, albeit not identical, to the circumvention of anti-dumping measures; whereas, it therefore appears appropriate to enact an anti-circumvention provision in this Decision;

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

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

(26) Whereas, in order to ensure proper enforcement of measures, it is necessary that Member States monitor, and report to the Commission, the import trade of products subject to investigation or subject to measures and also the amount of duties collected pursuant to this Decision;

(27) Whereas it is necessary to provide for consultation of an Advisory Committee at regular and specified stages of the investigation; whereas the Committee should consist of representatives of Member States with a representative of the Commission as chairman;

(28) Whereas it is expedient to provide for verification visits to check information submitted on countervailable subsidies and injury, such visits being, however, conditional on proper replies to questionnaires being received;

(29) Whereas it is essential to provide for sampling in cases where the number of parties or transactions is large in order to permit completion of investigations within the appointed time limits;

(30) Whereas it is necessary to provide that, where parties do not cooperate satisfactorily, other information may be used to establish findings and that such information may be less favourable to the parties than if they had cooperated;

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

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

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

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

(35) Whereas Decision No 2424/88/ECSC should accordingly be repealed,

HAS ADOPTED THIS DECISION:

Article 1

Principles

1. A countervailing duty may be imposed for the purpose of offsetting any subsidy granted, directly or indirectly, for the manufacture, production, export or transport of any product whose release for free circulation in the Community causes injury.

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

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

The term 'government' is defined, for the purposes of this Decision as a government or any public body within the territory of the country of origin or export.

4. Notwithstanding paragraphs 1, 2 and 3, where products are not directly imported from the country of origin but are exported to the Community from an intermediate country, the provisions of this Decision shall be fully applicable and the transaction or transactions shall, where appropriate, be regarded as having taken place between the country of origin and the Community.

5. For the purpose of this Decision, the term 'like product' shall be interpreted to mean a product which is identical, that is to say, alike in all respects, to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration.

Article 2

Definition of a subsidy

A subsidy shall be deemed to exist if:

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

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

(ii) government revenue that is otherwise due is forgone or not collected (for example, fiscal incentives such as tax credits); in this regard, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have been accrued, shall not be deemed to be a subsidy, provided that such an exemption is granted in accordance with the provisions of Annexes I to III;

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government:

— makes payments to a funding mechanism, or

— entrusts or directs a private body to carry out one or more of the type of functions illustrated in points (i) (ii) and (iii) which would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments;

or

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

2. a benefit is thereby conferred.

Article 3

Countervailable subsidies

1. Subsidies shall be subject to countervailing measures only if they are specific, as defined in paragraphs 2, 3 and 4.

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

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

(b) where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to.

For the purpose of this Article, objective criteria or conditions mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

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

(c) if, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In this regard, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall, in particular, be considered.

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

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

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

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

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

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

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

Article 4

Non-countervailable subsidies

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

(a) subsidies which are not specific within the meaning of Article 3(2) and (3);

(b) subsidies which are specific within the meaning of Article 3(2) and (3), but which meet the conditions provided for in paragraphs 2, 3 or 4 of this Article.

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

(a) personnel costs (researchers, technicians and other supporting staff employed exclusively in the research activity);

(b) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(c) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;

(d) additional overhead costs incurred directly as a result of the research activity;

(e) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

For the purpose of the first subparagraph:

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

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

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

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

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

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

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

(c) the criteria mentioned under (b) include a measurement of economic development which shall be based on at least one of the following factors:

— either income per capita or household income per capita, or GDP per capita, which must not be above 85 % of the average for the territory of the country of origin or export concerned,

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

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

For the purpose of the first subparagraph:

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

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

This provision shall be applied in the light of the criteria set out in Article 3(2) and (3).

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

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

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

(c) does not cover the cost of replacing and operating the subsidised investment, which must be fully borne by firms; and

(d) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(e) is available to all firms which can adopt the new equipment and/or production processes.

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

Article 5

Calculation of the amount of the countervailable subsidy

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

Article 6

Calculation of benefit to the recipient

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

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

(b) a loan by a government shall not be considered to confer a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount that the firm would pay for a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered to confer a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government

and the amount that the firm would pay for a comparable commercial loan in the absence of the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered to confer a benefit, unless the provision is made for less than adequate remuneration or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the product or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Article 7

General provisions on calculation

1. The amount of the countervailable subsidies shall be determined per unit of the subsidised product exported to the Community.

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

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

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

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

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

3. Where the subsidy can be linked to the acquisition or future acquisition of fixed assets, the amount of the countervailable subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned. The amount so calculated which is attributable to the investigation period, including that which derives from fixed assets acquired before this period, shall be allocated as described in paragraph 2.

Where the assets are non-depreciating, the subsidy shall be valued as an interest-free loan, and be treated in accordance with Article 6(b).

4. Where a subsidy cannot be linked to the acquisition of fixed assets, the amount of the benefit received during the investigation period shall in principle be attributed to this period, and allocated as described in paragraph 2, unless special circumstances arise justifying attribution over a different period.

Article 8

Determination of injury

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

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

(a) the volume of the subsidised imports and the effect of the subsidised imports on prices in the Community market for like products; and

(b) the consequent impact of those imports on the Community industry.

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

4. Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the effects of such imports shall be cumulatively assessed only if it is determined that:

(a) the amount of countervailable subsidies established in relation to the imports from each country is more than *de minimis* as defined in Article 14(5) and that the volume of imports from each country is not negligible; and

(b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product.

5. The examination of the impact of the subsidised imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including: the fact that an industry is still in the process of recovering from the effects of past subsidisation or dumping, the magnitude of the amount of countervailable subsidies, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth and ability to raise capital or investments. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

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

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

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

9. A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent.

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

(a) the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(b) a significant rate of increase of subsidised imports into the Community market indicating the likelihood of substantially increased imports;

(c) sufficient freely disposable capacity of the exporter or an imminent substantial increase in such capacity indicating the likelihood of substantially increased subsidised exports to the Community, account being taken of the availability of other export markets to absorb any additional exports;

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

(e) inventories of the product being investigated.

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

Article 9

Definition of Community industry

1. For the purposes of this Decision, the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 10(7), of the total Community production of those products, except that:

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

(b) in exceptional circumstances the territory of the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if:

(i) the producers within such a market sell all or almost all of their production of the product in question in that market; and

(ii) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community.

In such circumstances, injury may be found to exist even where a major portion of the total Community industry is not injured, provided there is a concentration of subsidised imports into such an isolated market and provided further that the subsidised imports are causing injury to the producers of all or almost all of the production within such a market.

2. For the purpose of paragraph 1, producers shall be considered to be related to exporters or importers only if:

(a) one of them directly or indirectly controls the other; or

(b) both of them are directly or indirectly controlled by a third person; or

(c) together they directly or indirectly control a third person provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.

For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

3. Where the Community industry has been interpreted as referring to the producers in a certain region, the exporters or the government granting countervailable subsidies shall be given an opportunity to offer undertakings pursuant to Article 13 in respect of the region concerned. In such cases, when evaluating the Community interest of the measures, special account shall be taken of the interest of the region. If an adequate undertaking is not offered promptly or if the situations set out in Article 13(9) and (10) apply, a provisional or definitive countervailing duty may be imposed in respect of the Community as a whole. In such cases the duties may, if practicable, be limited to specific producers or exporters.

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

Article 10

Initiation of proceedings

1. Except as provided for in paragraph 9, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.

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

Where, in the absence of any complaint, a Member State is in possession of sufficient evidence of subsidisation and of resultant injury to the Community industry, it shall immediately communicate such evidence to the Commission.

2. A complaint as referred to in paragraph 1 shall include sufficient evidence of the existence of countervailable subsidies (including, if possible, of their amount), injury and a causal link between the allegedly subsidised imports and the alleged injury. The complaint shall contain such information as is reasonably available to the complainant on the following:

(a) identity of the complainant and a description of the volume and value of the Community production of the like product by the complainant. Where a written complaint is made on behalf of the Community industry, the complaint shall identify the industry on behalf of which the complaint is made by a list of all known Community producers of the like product (or associations of Community producers of the like product) and, to the extent possible, a description of the volume and value of Community production of the like product accounted for by such producers;

(b) a complete description of the allegedly subsidised product, the names of the country or countries of origin and/or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(c) evidence with regard to the existence, amount, nature and countervailability of the subsidies in question;

(d) information on changes in the volume of the allegedly subsidised imports, the effect of those imports on prices of the like product in the Community market and the consequent impact of the imports on the Community industry, as demonstrated by relevant factors and indices having a bearing on the state of the Community industry, such as those listed in Article 8(3) and (5).

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

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

5. An investigation may also be initiated in respect of subsidies which are non-countervailable according to Article 4(2), (3) or (4) in order to determine whether or not the conditions laid down in those paragraphs have been met.

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

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

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

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

10. The evidence of both subsidies and injury shall be considered simultaneously in the decision on whether or not to initiate an investigation. A complaint shall be rejected where there is insufficient evidence of either countervailable subsidies or of injury to justify proceeding with the case. Proceedings shall not be initiated against countries whose imports represent a market share of below 1 %, unless such countries collectively account for 3 % or more of Community consumption.

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

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

13. The notice of initiation of the proceedings shall announce the initiation of an investigation, indicate the product and countries concerned, give a summary of the information received and provide that all relevant information is to be communicated to the Commission; it shall state the periods within which interested parties may make themselves known, present their views in writing and submit information, if such views and information are to be taken into account during the investigation; it shall also state the period within which interested parties may apply to be heard by the Commission in accordance with Article 11(5).

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

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

Article 11

The investigation

1. Following the initiation of the proceeding, the Commission, acting in cooperation with the Member States, shall commence an investigation at Community level. Such investigation shall cover both subsidisation

and injury and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of subsidisation shall, normally, cover the investigation period provided for in Article 5. Information relating to a period subsequent to the investigation period shall, normally, not be taken into account.

2. Parties receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days to reply. The time limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the day on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the country of origin and/or export. An extension to the 30-day period may be granted, due account being taken of the time limits of the investigation, provided that the party shows due cause for such extension, in terms of its particular circumstances.

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

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

5. The interested parties which have made themselves known in accordance with Article 10(13), shall be heard if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard.

6. Opportunities shall, on request, be provided for the importers, exporters and the complainants, which have made themselves known in accordance with Article 10(13), and the government of the country of origin and/or export, to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Oral information provided under this paragraph shall be taken into account by the Commission in so far as it is subsequently confirmed in writing.

7. The complainants, the government of the country of origin and/or export, importers and exporters and their representative associations, users and consumer organisations, which have made themselves known in accordance with Article 10(13), may, upon written request, inspect all information made available to the Commission by any party to an investigation, as distinct from internal documents prepared by the authorities of the Community or its Member States, which is relevant to the presentation of their cases and not confidential within the meaning of Article 29, and that it is used in the investigation. Such parties may respond to such information and their comments shall be taken into consideration, wherever they are sufficiently substantiated in the response.

8. Except in circumstances provided for in Article 28, the information which is supplied by interested parties and upon which findings are based shall be examined for accuracy as far as possible.

9. For proceedings initiated pursuant to Article 10(12), an investigation shall, whenever possible, be concluded within one year. In any event, such investigations shall in all cases be concluded within 13 months of initiation, in accordance with the findings made pursuant to Article 13 for undertakings or the findings made pursuant to Article 15 for definitive action.

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

Article 12

Provisional measures

1. Provisional duties may be imposed if:

(a) proceedings have been initiated in accordance with Article 10;

(b) a notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments in accordance with Article 10(13);

(c) a provisional affirmative determination has been made that the imported product benefits from countervailable subsidies and of consequent injury to the Community industry; and

(d) the Community interest calls for intervention to prevent such injury.

The provisional duties shall be imposed no earlier than 60 days from the initiation of the proceedings but no later than nine months from the initiation of the proceedings.

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

2. Provisional duties shall be secured by a guarantee and the release of the products concerned for free circulation in the Community shall be conditional upon the provision of such guarantee.

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

4. Where a Member State requests immediate intervention by the Commission and where the conditions of the first and second subparagraphs of paragraph 1 are met, the Commission shall, within a maximum of five working days of receipt of the request, decide whether a provisional countervailing duty shall be imposed.

5. The Commission shall forthwith inform the Member States of any decision taken under paragraphs 1 to 4.

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

Article 13

Undertakings

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

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

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

2. Undertakings may be suggested by the Commission, but no country or exporter shall be obliged to enter into such an undertaking. The fact that countries or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice consideration of the case. However, it may be determined that a threat of injury is more likely to be realised if the subsidised imports continue. Undertakings shall not be sought or accepted from countries or exporters unless a provisional affirmative determination of subsidisation and injury caused by such subsidisation has been made. Save in exceptional circumstances, undertakings may not be offered later than the end of the period during which representations may be made pursuant to Article 30(5).

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

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

5. Where undertakings are, after consultation, accepted, the investigation shall be terminated by the Commission.

6. If the undertakings are accepted, the investigation of subsidisation and injury shall normally be completed. In such a case, if a negative determination of subsidisation or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, it may be required that an undertaking be maintained for a reasonable period. In the event that an affirmative determination of subsidisation and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Decision.

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

8. Where undertakings are accepted from certain exporters during the course of an investigation, they shall, for the purpose of Articles 18, 19, 20 and 22, be deemed to take effect from the date on which the investigation is concluded for the country of origin and/or export.

9. In case of breach or withdrawal of undertakings by any party, a definitive duty shall be imposed in accordance with Article 15, on the basis of the facts established within the context of the investigation which led to the undertaking, provided that such investigation was concluded with a final determination as to subsidisation and injury, and that the exporter concerned, or the country of origin and/or export, has, except in the case of withdrawal of the undertaking by the exporter or such country, been given an opportunity to comment.

10. A provisional duty may, after consultation, be imposed in accordance with Article 12 on the basis of the best information available, where there is reason to believe that an undertaking is being breached, or in case of breach or withdrawal of an undertaking where the investigation which led to the undertaking has not been concluded.

Article 14

Termination without measures

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

2. Where, after consultation, protective measures are unnecessary the investigation or proceeding shall be terminated by the Commission.

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

4. For a proceeding initiated pursuant to Article 10(12), injury shall normally be regarded as negligible where the market share of the imports is less than the amounts set out in Article 10(10). With regard to investigations concerning imports from developing countries, the volume of subsidised imports shall also be considered negligible if it represents less than 4 % of the total imports of the like product in the Community, unless imports from developing countries whose individual shares of total imports represent less than 4 % collectively account for more than 9 % of the total imports of the like product in the Community.

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

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

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

provided that it is only the investigation that shall be terminated where the amount of the countervailable subsidies is below the relevant *de minimis* level for individual exporters, who shall remain subject to the proceedings and may be re-investigated in any subsequent review carried out for the country concerned pursuant to Articles 18 and 19.

Article 15

Imposition of definitive duties

1. Where the facts as finally established show the existence of countervailable subsidies and injury caused thereby, and the Community interest calls for intervention in accordance with Article 31 a definitive countervailing duty shall be imposed by the Commission after consultation of the Advisory Committee, unless the subsidy or subsidies are withdrawn or it has been demonstrated that the subsidies no longer confer any benefit on the exporters involved. The amount of the countervailing duty shall not exceed the amount of countervailable subsidies from which the exporters have been found to benefit, established pursuant to this Decision, but should be less than the total amount of countervailable subsidies, if such lesser duty would be adequate to remove the injury to the Community industry.

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

3. When the Commission has limited its examination in accordance with Article 27, any countervailing duty applied to imports from exporters or producers which have made themselves known in accordance with Article 27 but were not included in the examination shall not exceed the weighted average amount of countervailable subsidies established for the parties in the sample. For the purpose of this paragraph, the Commission shall disregard any zero and *de minimis* amounts of countervailable subsidies and amounts of countervailable subsidies established in the circumstances referred to in Article 28. Individual duties shall be applied to imports from any exporter or producer for which an individual amount of subsidisation has been calculated as provided for in Article 27.

Article 16

Retroactivity

1. Provisional measures and definitive countervailing duties shall only be applied to products which enter free circulation after the time when the measure taken pursuant to Article 12(1) or 15(1), as the case may be, enters into force, subject to the exceptions set out in this Decision.

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

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

4. A definitive countervailing duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures but not prior to the initiation of the investigation, provided that the imports have been registered in accordance with Article 24(5), the importers concerned have been given an opportunity to comment by the Commission, and:

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

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

5. In cases of breach or withdrawal of undertakings, definitive duties may be levied on goods entered for free circulation not more than 90 days before the application of provisional measures, provided that the imports have been registered in accordance with Article 24(5) and that any such retroactive assessment shall not apply to imports entered before the breach or withdrawal of the undertaking.

Article 17

Duration

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

Article 18

Expiry reviews

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

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

3. In carrying out investigations pursuant to this Article, the exporters, importers, the country of origin and/or export and the Community producers shall be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request, and conclusions shall be reached with due account taken of all relevant and duly documented evidence presented in relation to the question as to whether the expiry of measures would be likely, or unlikely, to lead to the continuation or recurrence of subsidisation and injury.

4. A notice of impending expiry shall be published in the *Official Journal of the European Communities* at an appropriate time in the final year of the period of application of the measures as defined in this Article. Thereafter, the Community producers shall, no later than three months before the end of the five-year period, be entitled to lodge a review request in accordance with paragraph 2. A notice announcing the actual expiry of measures pursuant to this Article shall also be published.

Article 19

Interim reviews

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

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

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

4. In carrying out investigations pursuant to this Article, the Commission may, *inter alia*, consider whether the circumstances with regard to subsidisation and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established pursuant to Article 8. In these respects, account shall be taken in the final determination of all relevant and duly documented evidence.

Article 20

Accelerated reviews

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

Article 21

Refunds

1. Notwithstanding Article 18, an importer may request reimbursement of duties collected where it is shown that the amount of countervailable subsidies, on the basis of which duties were paid, has been eliminated or reduced to a level which is below the level of the duty in force.

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

3. An application for refund shall be considered to be duly supported by evidence only where it contains precise information on the amount of refund of countervailing duties claimed and all customs documentation relating to

the calculation and payment of such amount. It shall also include evidence, for a representative period, of the amount of countervailable subsidies for the exporter or producer to which the duty applies. In cases where the importer is not associated with the exporter or producer concerned and such information is not immediately available, or where the exporter or producer is unwilling to release it to the importer, the application shall contain a statement from the exporter or producer that the amount of countervailable subsidies has been reduced or eliminated, as specified in this Article, and that the relevant supporting evidence will be provided to the Commission. Where such evidence is not forthcoming from the exporter or producer within a reasonable period of time the application shall be rejected.

4. The Commission shall, after consultation of the Advisory Committee, decide whether and to what extent the application should be granted, or it may decide at any time to initiate an interim review, whereupon the information and findings from such review, carried out in accordance with the provisions applicable for such reviews, shall be used to determine whether and to what extent a refund is justified. Refunds of duties shall normally take place within 12 months, and in no circumstances more than 18 months after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the countervailing duty. The payment of any refund authorised should normally be made by Member States within 90 days of the abovementioned decision.

Article 22

General provisions on reviews and refunds

1. The relevant provisions of Articles 10 and 11, excluding those relating to time limits, shall apply to any review carried out pursuant to Articles 18, 19 and 20. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

2. Reviews pursuant to Articles 18, 19 and 20 shall be initiated by the Commission after consultation of the Advisory Committee. Where warranted by reviews, measures shall be repealed or maintained pursuant to Article 18, or repealed, maintained or amended pursuant to Articles 19 and 20 by the Commission. Where measures are repealed for individual exporters, but not for the country as a whole, such exporters shall remain subject to the proceeding and may be re-investigated in any subsequent review carried out for that country pursuant to Articles 18 and 19.

3. Where a review of measures pursuant to Article 19 is in progress at the end of the period of application of measures as defined in Article 18, the measures shall also be investigated under the provisions of Article 18.

4. In all review or refund investigations carried out pursuant to Articles 18 to 21, the Commission shall, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty, with due account being taken of Articles 5, 6, 7 and 27.

Article 23

Circumvention

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

2. Investigations shall be initiated pursuant to this Article where the request contains sufficient evidence regarding the factors set out in paragraph 1. Initiations shall be made, after consultation of the Advisory Committee, by Commission decision which shall also instruct the customs authorities to make imports subject to registration in accordance with Article 24(5) or to request guarantees. Investigations shall be carried out by the Commission, which may be assisted by customs authorities, and shall be concluded within nine months. When the facts as finally ascertained justify the extension of measures, this shall be done by the Commission, after consultation of the Advisory Committee, from the date on which registration was imposed pursuant to Article 24(5) or on which guarantees were requested. The relevant procedural provisions of this Decision with regard to initiations and the conduct of investigations shall apply pursuant to this Article.

3. Products shall not be subject to registration pursuant to Article 24(5) or measures where they are accompanied by a customs certificate declaring that the importation of the goods does not constitute circumvention. These certificates may be issued to importers, upon written application following authorization by decision of the Commis-

sion after consultation of the Advisory Committee, and they shall remain valid for the period, and under the conditions, set down therein.

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

Article 24

General provisions

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

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

3. Special provisions, in particular with regard to the common definition of the concept of origin, as contained in Council Regulation (EEC) No 2913/92 [1] may be adopted pursuant to this Decision.

4. In the Community interest, measures imposed pursuant to this Decision may, after consultation of the Advisory Committee, be suspended by a decision of the Commission for a period of nine months. The suspension may be extended for a further period, not exceeding one year, if the Commission, after consultation, so decides. Measures may only be suspended where market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension, and provided that the Community industry has been given an opportunity to comment and these comments have been taken into account. Measures may, at any time and after consultation, be reinstated if the reason for suspension is no longer applicable.

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

6. Member States shall report to the Commission every month on the import trade of products subject to investigation and to measures, and on the amount of duties collected pursuant to this Decision.

Article 25

Consultations

1. Any consultations provided for in this Decision, except those referred to in Articles 10(8) and 11(10), shall take place within an Advisory Committee, which shall consist of representatives of each Member State, with a representative of the Commission as chairman. Consultations shall be held immediately on request by a Member State or on the initiative of the Commission, and in any event within a period of time which allows the time limits set by this Decision to be adhered to.

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

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

4. Consultation shall cover, in particular:

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

(b) the existence and extent of injury;

(c) the causal link between the subsidised imports and injury;

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

[1] OJ L 302, 19. 10. 1992, p. 1.

Article 26

Verification visits

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

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

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

4. In investigations carried out pursuant to paragraphs l, 2 and 3, the Commission shall be assisted by officials of those Member States who so request.

Article 27

Sampling

1. In cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to:

(a) a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available at the time of the selection; or

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

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

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

4. Where it is decided to sample and there is a degree of non-cooperation by some or all of the parties selected which is likely to materially affect the outcome of the investigation, a new sample may be selected. However, if a material degree of non-cooperation persists or there is insufficient time to select a new sample, the relevant provisions of Article 28 shall apply.

Article 28

Non-cooperation

1. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits provided in this Decision, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available.

Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of the facts available.

Interested parties should be made aware of the consequences of non-cooperation.

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

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

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

5. If determinations, including those regarding the amount of countervailable subsidies, are based on the provisions of paragraph 1, including the information supplied in the complaint, it shall, where practicable and with due regard to the time limits of the investigation, be

checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation.

6. If an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result may be less favourable to the party than if it had cooperated.

Article 29

Confidentiality

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

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

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

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

5. The Commission and the Member States, or the officials of any of them, shall not reveal any information received pursuant to this Decision for which confidential treatment has been requested by its supplier, without specific permission from the supplier. Exchanges of information between the Commission and Member States, or any information relating to consultations made pursuant to Article 25, or consultations described in Articles 10(8) and 11(10), or any internal documents prepared by the authorities of the Community or its Member States, shall not be divulged except as specifically provided for in this Decision.

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

Article 30

Disclosure

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

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

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

4. Final disclosure shall be given in writing. It shall be made, due regard being had to the protection of confidential information, as soon as possible and, normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Articles 14 and 15. Where the Commission is not in a position to disclose certain facts or considerations at that time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible.

5. Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which

shall be at least 10 days, due consideration being given to the urgency of the matter.

Article 31

Community interest

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

2. In order to provide a sound basis on which the authorities can take account of all views and information in the decision as to whether or not the imposition of measures is in the Community interest, the complainants, importers and their representative associations, representative users and representative consumer organisations may, within the time limits specified in the notice of initiation of the countervailing duty investigation, make themselves known and provide information to the Commission. Such information, or appropriate summaries thereof, shall be made available to the other parties specified in this paragraph, and they shall be entitled to respond to such information.

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

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

5. The Commission shall examine the information which is properly submitted and the extent to which it is representative, and the results of such analysis, together with an opinion on its merits, shall be transmitted to the Advisory Committee.

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

7. Information shall only be taken into account where it is supported by actual evidence which substantiates its validity.

Article 32

Relationships between countervailing duty measures and multilateral remedies

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

Article 33

Final provisions

This Decision shall not preclude the application of:

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

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

Article 34

Repeal of existing legislation

Decision No 2424/88/ECSC is hereby repealed.

References to the provisions of Decision No 2424/88/ECSC as regards protection against subsidised imports from countries not members of the European Coal and Steel Community shall be construed as references to this Decision.

Article 35

Entry into force

This Decision shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

It shall apply to proceedings initiated on or after that date.

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

Done at Brussels, 3 September 1998.

For the Commission
Leon BRITTAN
Vice-President

ANNEX I

Illustrative list of export subsidies

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available ([1]) on world markets to their exporters.

(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes ([2]) or social welfare charges paid or payable by industrial or commercial enterprises ([3]).

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

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes ([2]) in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes ([2]) on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste) ([4]). This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges ([2]) in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from

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

([2]) For the purpose of this Decision:
— the term 'direct taxes' shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property,
— the term 'import charges' shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports,
— the term 'indirect taxes' shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges,
— 'prior stage' indirect taxes are those levied on goods or services used directly or indirectly in making the product,
— 'cumulative' indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding state of production,
— 'remission' of taxes includes the refund or rebate of taxes,
— 'remission or drawback' includes the full or partial exemption or deferral of import charges.

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

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

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

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member of the WTO is a party to an international undertaking on official export credits to which at least 12 original such Members are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member of the WTO applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy.

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

ANNEX II

Guidelines on consumption of inputs in the production process [1]

I

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

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

II

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

4. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the Commission must normally first determine whether the government of the exporting country has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the Commission must normally then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The Commission may deem it necessary to carry out, in accordance with Article 26(2), certain practical tests in order to verify information or to satisfy itself that the system or procedure is being effectively applied.

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

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

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

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

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

ANNEX III

Guidelines in the determination of substitution drawback systems as export subsidies

I

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

II

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

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

2. Where it is alleged that a substitution drawback system conveys a subsidy, the Commission must normally first proceed to determine whether the government of the exporting country has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the Commission shall normally then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy will be presumed to exist. It may be deemed necessary by the Commission to carry out, in accordance with Article 26(2), certain practical tests in order to verify information or to satisfy itself that the verification procedures are being effectively applied.

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

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

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