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TRADE REMEDY POSSIBILITIES FOR ZAMBIA

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Introduction

During my visit to Zambia and work with ZAMTIE in March, a major subject of concern expressed on the part of the Ministry and of the Zambian private sector (principally the Zambian Association of Manufacturers or "ZAM") was the impact of increased imports into Zambia from Zimbabwe and their negative effects of Zambian manufacturers' competitiveness in Zambian markets. These imports allegedly are being "dumped" by Zimbabwean producers and exporters into Zambia's market predominantly because of the artificially low export prices chargeable by Zimbabwean producers as a result of the so-called "dual exchange rate" said to exist in Zimbabwe. As a result of the existence of a significant difference between the Zimbabwean official exchange rate, on the one hand, and the "commercial rate" available through non-governmental but legitimate commercial exchange sources or "street" or "parallel rate" available through the informal economy, it is charged that most Zimbabwean exports into Zambia enter at artificially lower prices that are below the cost of production in Zimbabwe figured at the *official* exchange rate.

A number of sectors are involved as well as the nature of "unfair" imports. These include: Building Materials - Asbestos, Cement, & Roofing Sheets (dumping); Cigarettes (smuggling); Consumer Beverages - Beer & Soft Drinks (dumping); Dairy Products - Long-Life Milk (dumping); Edible Oils - primarily Palm Oil (fraudulent certificates of [COMESA] origin & fraudulent labelling of product); Fertilizers (subsidized exports); Fuels (subsidized exports); Metal Products (dumping); Paints (smuggling); Plastics (smuggling); Soy Products - Soybeans, Soya Cake (dumping); Textiles - Blankets & Nappies (dumping?); Timber and Wood Products (dumping); and Wheat (dumping);

Zambian private sector representatives (especially from ZAM) allege that all or most of the above-enumerated commodities are arriving in Zambia and underselling domestic producers' products because of "unfair" trading practices practised by Zimbabwe's government or its manufacturers. Although some documentation has been marshaled to document such allegations, for the most part there has been little documentation elicited of a nature that would justify dumping complaints against Zimbabwean producers or a subsidies case against the Government of Zimbabwe under the unfair trade remedy provisions of the GATT/WTO Agreements on Dumping (AD Agreement) and/or Subsidies/Countervailing Measures (SCM Agreement). Accordingly, the private sector is urging the Government, and the Ministry in particular, to take action to restrict such imports under one or more "Safeguards" rubrics, either of the WTO, the COMESA, or the SADC.

To this end, ZAMTIE and the Ministry together with ZAM and other representatives of various private sector organizations or producers have initiated a study of a few products to determine and adduce the documentary information required to justify import restrictions under Safeguards or other trade remedy provisions with the goal of being able to present a defensible case for such restrictions whenever WTO Safeguards-implementing legislation is enacted by the Zambian Parliament or otherwise made available by the Zambian Government. For this purpose, five products have been selected: (1) Cement; (2) Building Materials - Roofing Sheets; (3) Dairy Products - Long-Life Milk; (4) Textiles - Blankets & Nappies; and (5) Consumer Beverages - Beer & Soft Drinks.

The purpose of this memorandum is to describe the spectrum of possible trade remedies through which to address Zambian concerns regarding "unfair imports" or "import surges" or other practices that

have the effect of injuring Zambian producers or otherwise distorting competition within the Zambian market and certain considerations affecting the choice of the more viable, effective ones among them.

The Spectrum of Possible Import Remedies or Other Resolutions

A primordial consideration regarding possible import "remedies" for the concerns of Zambian producers relates to the number of international trade arrangements to which the Government of Zambia is a party, regional as well as multilateral.

WTO - Zambia was an original Member of the World Trade Organization, effective from 01 January 1995. Zimbabwe acceded to Membership in the WTO on 05 March 1995. As such, Zambia has a right to invoke a number of potential trade remedies available within the GATT/WTO/Uruguay Round framework of rules for global trade. These could include:

- The Agreement on Implementation of Article VI of the GATT 1994 (better known as the Anti-Dumping Agreement);
- The Agreement on Implementation of Article XVI of the GATT 1994 (better known as the Agreement on Subsidies/Countervailing Measures);
- GATT Article XIX - Emergency Action on Imports of Particular Products & the Agreement on Safeguards;
- GATT Article XVIII: B & Uruguay Round "Understanding on Balance-of-Payments Provisions of the GATT 1994;
- GATT Article XVIII:A & C Safeguards for Industry Establishment;
- GATT Article XX - General Exception
- GATT Uruguay Round Agreement on Agriculture: Special Safeguards; and
- GATT Uruguay Round Agreement on Textiles & Clothing: Transitional Safeguards Mechanism.

Not included in the above enumeration of possible GATT/WTO/Uruguay Round framework remedies is the Safeguards provision under the General Agreement on Trade in Services (GATS) since none of the representations or documents relating to the impact of imports from Zimbabwe asserted negative impacts relating to importation of Services.

In addition to the trade remedies enumerated above, at least two other GATT/WTO provisions could apply to the concerns related relating to imports from Zimbabwe, e.g., the Uruguay Round Customs Valuation Agreement and the GATT's Articles XXII and XXIII relating to Dispute Settlement and the Uruguay Round Understanding on Dispute Settlement.

COMESA - Zambia and Zimbabwe are also original Contracting Parties of the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) which entered into effect on 31 October 2000, so that Zambia may have certain trade "remedies" available to it under that arrangement, which could include:

- Article 49.2 relating to Protection of Infant Industries
- Article 50 relating to Security & Other Restrictions to Trade
- Article 51 relating to Dumping;
- Articles 52, 53, & 54 relating to Subsidies Granted by Member States; and
- Article 61 relating to Safeguards.

The Treaty establishing COMESA also contains provisions relating to "Prevention, Investigation and Suppression of Customs Offenses (Article 66) and Dispute Settlement (Chapter V of the Treaty and specifically Articles 24, 25, and 26).

SADC - Zambia and Zimbabwe are also Signatories to the Trade Protocol of the Treaty Establishing the Southern African Development Community (SADC) which entered into effect on 01 September 2000. That Protocol, intended to establish a regional free trade agreement among SADC signatories, also includes certain trade "remedy" provisions that Zambia might be in a position to invoke to deal with Zimbabwean imports. Relevant ones include:

- Article 9 relating to General Exceptions [permitting import restrictions];
- Article 18 relating to Anti-Dumping Measures;
- Article 19 relating to Subsidies & Countervailing Measures;
- Article 20 relating to Safeguards; and
- Article 21 relating to Protection of Infant Industries.

In addition, the Protocol contains provisions relating to "cooperation in addressing impediments to intra-SADC trade (Article 33) and for Settlement of Disputes (Article 32).

WTO Recourses

Anti-Dumping - The basic allegation advanced is that imports of the five products selected for study are being "dumped" by Zimbabwean producer/exporters into the Zambian market, primarily by reason of the dynamics of the so-called "dual exchange rate" in Zimbabwe. Under GATT Article VI and the Uruguay Round Agreement on Anti-Dumping (AD Agreement), "dumping" of goods has the general meaning of sales of an exported product (in this case, from Zimbabwe) into a foreign market (Zambia) at a price *below* the price at which the same product is usually sold in its *home* (Zimbabwe) market.

More specifically, "dumping" is defined in Article VI:1 of the GATT 94 as an activity . . . "by which products of one country are introduced into the commerce of another country at *less than the normal value* of [such] products . . ." That article establishes certain tests for "dumping", e.g.,

> a product is considered as being [dumped] if the price of the product exported from one country to another:
>
> (a) is *less* than the comparable price, *in the ordinary course of trade*, for the like product when destined for consumption in the exporting country, or
>
> (b) in the absence of such domestic price, is *less* than *either*
> (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
> (ii) the *cost of production* of the product in the country of origin plus a reasonable addition for selling cost and profit.

The difference between a price reflecting "normal value" and the import price is called the "margin of dumping." Article VI of the GATT 94 treats dumping as an "unfair" international trade practice and permits the importing country (e.g., Zambia) to respond to such a practice *if* the dumping causes, or threatens to cause, *material injury* to an established domestic industry in a Member country producing a *like* or *directly competitive* product, or *materially retards* establishment of a domestic industry therefore. The remedy permitted under Article VI is imposition of *additional duties* equal to, but not greater than, the margin of dumping.

Under Article VI of the GATT 94, as interpreted and applied by the AD Agreement, an anti-dumping duty may *only* be applied pursuant to an investigation initiated and conducted in accordance with the many substantive and procedural rules of the AD Agreement (See outline, Appendix "A. Anti-Dumping (Art. VI - GATT & UR Anti-Dumping Agreement for requirements). These rules govern: (a) *how* to establish whether imported goods are being dumped (criteria, methodology, evidentiary requirements); (b) how to establish *whether* the dumped imports are causing or threatening to cause injury or material retardation of domestic industry (causality, evidentiary basis therefore); (c) the existence or fact of *injury* or *material retardation* (criteria, documentary evidence, relative impacts of other causes); and (d) the *procedures* for investigations, collection of information, determinations (initial, provisional, final), review (administrative, judicial), termination, and *transparency* requirements thereof.

With regard to injury, or threat thereof, the AD Agreement requires that it must be determined on the basis of *positive evidence*, and involve examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market, and (b) the impact of those imports on domestic producers of the like product. The entity adjudicating dumping must also look at *other* factors that may

be causing injury, including non-dumped imports (whether from Zimbabwe or *other* countries), falling demand, changing consumption patterns, and technological developments and must not attribute to imports the negative impacts of these. When imports are alleged to "threaten" material injury, the determination must again be based on "facts and not merely on allegation, conjecture, or remote possibility."

The AD Agreement imposes intensive procedural requirements intended to ensure the *transparency* of application of the substantive criteria for determining dumping and injury. They govern the *stages* of a dumping case, e.g., initiation, investigation, provisional measures, price undertakings, imposition of duties, administrative and/or judicial review, and final termination, the so-called "sunset" requirement. Public notice must be given of all stages of the process and all *interested parties* given the opportunity to submit evidence, review evidence submitted by others, and/or express their views.

While *provisional measures* are permitted to be applied in *critical circumstances* to prevent or remedy injury, they may not be applied *earlier* than 60 days after initiation of the investigation *nor* be applied over more than *four* months.

So, resort to the GATT/UR Anti-Dumping remedy entails a lot of considerations that - while it might be the most effective and preferred remedy given the characterization of imports - makes it difficult for Zambians to document, provide satisfactory documentary evidence of actual *dumping*, *injury* and the *causality* therefore, requires complicated and time-consuming procedural requirements, and limits provisional measures to respond immediately. One purpose of the study would be to elicit and present a convincing evidentiary basis for dumping, injury, and causality.

A primary benefit of recourse to Anti-Dumping is that the case and the remedy - additional duties - can be targeted at specific *products* of specific *producers* in specific *countries.* But there are obvious problems. As described in documents submitted, most of the trading activity complained of occurs as a result of the so-called "dual exchange rate" existing in Zimbabwe. As described, this consists of (1) the *official* exchange rate maintained by the Government of Zimbabwe, (2) the *commercial* rate available through legally-constituted commercial exchange bureaus, and (3) the *parallel* rate that obtains in the growing informal economy. The existence of this system of formal and informal exchange rates and the preponderance of transactions alleged as occurring in the informal economy, the fact many, perhaps most transactions occur as the result of *Zambian* trader activities taking place within Zimbabwe (purchase) and Zambia (sale), suggest it might be difficult to establish the requisite *causality* links to Zimbabwean producer *exports* sufficient to establish "dumping". Moreover, several allegations relating to the impact on Zambian industry of the imports characterizes them as occurring as a result of *smuggling* by *Zambian* actors, making it difficult to document them as occurring in the "*ordinary course of trade*." These substantive problems, taken together with the complicated and time-consuming procedural requirements, apparently underlie Zambian industry's demands that the Government respond via the remedy of *Safeguards*.

Subsidies/Countervailing Measures - Article XVI of the GATT 94 provides, in relevant part, that "contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for *export* at a price *lower* than the comparable price charged for the like product to buyers in the *domestic*

market. Article VI:3 of the GATT 94 authorizes the imposition of a "countervailing duty" by the importing country to deal with export subsidies, but requires that such duty may not be imposed "in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation . . ."

The Uruguay Round Agreement on Subsidies & Countervailing Measures (SCM Agreement) interprets and applies the provisions of Articles XVI and VI of the GATT 94.
competitive product. The SCM Agreement, with its 11 "parts" and seven "annexes" is the single longest WTO agreement. In terms of remedies for subsidized exports, it operates substantively and procedurally very similar to the AD Agreement, and the two, together, constitute the most detailed and procedurally-intensive of all the GATT/WTO rules for global trade. It should be noted that the SCM Agreement does *not* apply to *agricultural* subsidies, which are governed instead by provisions of the Uruguay Round Agreement on
Agriculture (see later).

Subsidies are considered "actionable" if they produce effects adverse to the interests of other Member countries. One of the adverse effects is *injury* to an importing country's domestic industry. Like the AD Agreement, the SCM's provisions state that so-called "actionable" subsidies may only incur imposition of the trade remedy of countervailing duties if they are found to have resulted in "injury" or "threat of injury" to a domestic industry in the importing country producing a like or directly competitive product.

Under the SCM Agreement, a "subsidy" is deemed to exist *if*: (a)(1) there is a financial contribution by a Member government which (I) involves a direct transfer of funds or assumption of liabilities, (ii) government revenue otherwise due is not collected or foregone, (iii) a government provides goods or services or purchases production, and/or (iv) underwrites a payment mechanism or entrusts or directs a private body to do one of the foregoing - or (2)(a) provides any form of income or price support, and (b) a *benefit* is thereby conferred.

A countervailing duty is an additional duty levied for the purpose of offsetting any subsidy bestowed by a foreign country to support or promote exports. While the investigation under the SCM Agreement differs somewhat from an anti-dumping investigation in terms of the substantive criteria and methodology for determining the *existence*, *actionability*, and *amount* of a subsidy (equivalent to a dumping "margin"), the rules governing determination of injury or threat thereof and causality are virtually the same as under the AD Agreement.
And, unlike the AD Agreement, the SCM Agreement has certain provisions modifying its applicability to *developing* nations. While developed Members are given three years within which to phase-out export subsidies, developing nations are allowed *eight* years to do so, or until the end of 2003. Least-developed Member nations are not required to phase-out export subsidies nor are certain developing countries listed in Annex VII to the SCM Agreement, which specifically includes *Zimbabwe*, unless its GNP *per capita* has reached US$ 1,000 *per annum*.

Like the AD Agreement, the SCM Agreement could, if the facts justify, assist in resolving the injury asserted to Zambian producers of like or directly competitive products through imposition of additional or "countervailing" duties on imports from Zimbabwe. It would be beneficial as a remedy in

that it allows *targeting* of imports from a *specific* country, e.g., Zimbabwe and, so, would not give rise to concerns of other countries. But also like the AD Agreement, the SCM Agreement is problematical for Zambian producers because it would require a tortuous interpretation of the Agreement to find the operation of the dual exchange rate - e.g., one official, two "unofficial" (and uncontrolled by the Government of Zimbabwe) - would amount to an export "subsidy" in the absence of an otherwise specific form of export subsidy. And even if such an export subsidy could rationally be interpreted into existence, it would not be available against Zimbabwe (a) at least until the end of 2003 (if classifiable as a "developing" country), and/or (b) as long as it can be classified as a "least-developed" country.

WTO Safeguards [Article XIX] - Most of the statements and papers presented by Zambian private sector representatives urge the Government of Zambia - in lieu of timely imposition of anti-dumping duties under the AD Agreement - to invoke Zambia's rights to impose "*Safeguards*" under the provisions of GATT 94 Article XIX.

GATT 94 Article XIX provides a remedy (entitled "emergency action on imports of particular products") to deal with "increased quantities" of imports that occur "as a result of *unforeseen* developments and as the effect of obligations incurred by a contracting party under this Agreement, including tariff concessions . . ." "in such quantities and under such conditions as to cause or threaten *serious* injury to domestic producers . . . of like or directly competitive products."

The Uruguay Round Agreement on Safeguards interprets and applies Article XIX (it relates *only* to Article XIX and *not* to any other safeguard-type remedy available under *other* articles of the GATT 94). Unlike Anti-Dumping and Subsidies/Countervailing Duties, which are considered remedies for "*unfair trade practices*: and which involve similar concepts and procedures, Article XIX does not focus on "unfairness" - rather its central focus is on dramatic increases or "*surges*" in imports resulting from tariff or other concessions given under Article II of the GATT 94, although like the AD and SCM Agreements, it establishes an injury requirement. The injury requirement - "*serious*" injury or threat thereof - is *greater* than for either anti-dumping or subsidies/ countervailing duties which require only "material" injury, with a consequent tightening of the logical elements of causality between the increased imports and serious injury. And, unlike GATT 94 Article XIX:II/2, the Safeguards Agreement does *not* require that such increased imports have been "unforeseen". More importantly, unlike the AD and SCM Agreements, the Safeguards *remedy* is farther reaching in that it isn't *limited* to imposition of additional *duties* (except for *provisional* relief). Since it is premised on increased imports occurring as a result of tariff or other concessions, it permits - as the remedy - the *withdrawal* of such concessions which are, in turn, realized *either* by imposition of additional duties *or* by imposition of *quantitative restrictions* (*quotas* or *tariff rate quotas*).

The substantive legal basis for applying Article XIX safeguards requires: (a) a determination of increased quantities of imports (absolute or relative to domestic production), (b) which are causing or threatening to cause, (c) *serious* injury, (d) to the domestic industry that is (e) producing a like or directly competitive product. "Serious injury" is defined to mean "*significant overall impairment*" of the domestic industry while the "threat of serious injury" requires an evaluation of "all relevant factors of an objective and *quantifiable* nature having a bearing on the situation of the industry." Unless the investigation demonstrates positive evidence of a causal link between the increased imports and the injury or threat thereof, no affirmative determination may be made since injury caused by *other* factors may not be blamed on imports.

As with the AD and SCM Agreements, there must be some overall transparency to the process, but it is not as complicated. The determination must result from a proper investigation by authorities to establish the five elements enumerated above. The investigation must be based on a *published* procedure, provide reasonable notice to all affected parties, afford public hearings or other means for such parties to present evidence and/or views, and to respond to those of other parties, with confidential treatment of proprietary information. The determination decision must be published and present findings and conclusions of law on all issues of fact and law.

I understand that the Zambian Government has presented a draft Safeguards Law to the Parliament for its consideration although I have not had the opportunity to review such draft. Ministry officials have also indicated that it is the Government's view that safeguard proceedings could be undertaken without a specifically-enacted statute, based on the authority of the Ministry and utilizing a procedure incorporated into a Ministerial decree or equivalent.

Under the SFG Agreement, safeguards may be used *only* to the extent needed to prevent or remedy serious injury and to facilitate industry *adjustment*. Quantitative restrictions ("quotas") may be used but not to restrict imports of the product *below* the *average* level of the last three years, unless there is clear justification that a lower level is needed to prevent or remedy the injury. The SFG Agreement provides that such quotas are to be applied regardless of the *source* country of supply (e.g., cannot be targeted on a single country) and that, if they are allocated among supply countries, they must reflect the past market share of each supplier country. The Agreement does permit, however, quotas to be allocated on a basis other than actual share history (quota modulation) so as to target some suppliers more than others but only to remedy *actual* documented injury, not *threat* of injury. But, even here, such action must be *approved in advance* by the WTO Committee on Subsidies & Counter-vailing Measures.

The SFG Agreement permits safeguard measures to be imposed *provisionally* "in *critical circumstances* where delay would cause damage which would be difficult to repair", but provisional measures *may not* extend for more than *200 days* during which the investigation must move forward.

The SFG Agreement provides that safeguards should be maintained only for as long as necessary to prevent or remedy serious injury and facilitate adjustment. The standard allowable limit is *four* years, which may be extended in no more restrictive form, to a maximum of *eight* years *if* it has been determined that continuation is *necessary* *<u>and</u>* that the industry is, in fact, *adjusting* to such competition. After the first year, the restrictions must be progressively liberalized. Once a measure is terminated or removed, no *new* safeguard may be applied to the same product until after an interval of at least as long as the duration of the original measure, but, in no even, more than two years.

There are certain provisions of the SFG Agreement that relate specifically to *developing* countries. Developing countries are given a wider latitude in the maintenance of safeguards - including a maximum duration of two years longer than permitted to developed nations. More importantly perhaps, a safeguard measure may not be applied to exports originating in any developing country Member whose share of the relevant imports is less than 3%, except that such exemption does not apply if the collective import share of developing country Members is more than 9%.

The ability of Zambia to "target" imports from Zimbabwe incident to a safeguards remedy is less clear than with anti-dumping and subsidies/countervailing duties. An even more uncomfortable feature

of safeguards is that, under Article 8 of the Safeguards Agreement, when a Member (Zambia) applies a safeguard measure, it must endeavor to maintain a *substantially equivalent level of concessions* between it and the exporting Member affected (Zimbabwe). The Agreement requires Zambia and Zimbabwe to agree on some adequate means of trade compensation or, in the event of failure to do so, permits Zimbabwe to *suspend the application of substantially equivalent concessions or other obligations*. Given the number of bilateral problems of Zambian access to Zimbabwe markets, Zambian officials would need to tread carefully in this area.

<u>Balance-of-Payments Safeguards</u> - The GATT 94 recognizes that Member nations that have made tariff and non-tariff concessions to other WTO Members resulting in increased imports may experience *balance-of-payments* problems from time-to-time that necessitate the temporary suspension of such concessions in order to restore monetary reserves or improve their current account situation. In this regard, GATT 94 Article XVIII:B provides specific authority for *developing nation* Members to take action to address balance-of-payments problems. That article (as well as Article XII relating to *developed* nations) is interpreted and applied by the Uruguay Round's "Understanding on the Balance-of-Payments Provisions of the [GATT 94]". So, Article XVIII:4(a) provides that " . . . a contracting party, the economy of which can only support low standards of living and is in the early stages of development, shall be free to *deviate temporarily* from the provisions of the other Articles of this Agreement." Paragraph 9 of Article XVIII provides that:

> 9. In order to safeguard its external financial position and to ensure a level of reserves adequate for implementation of its program of economic development, a contracting party may, subject to the provisions of paragraphs 20 to 12, *control* the *general level* of its imports by restricting the *quantity* or *value* of merchandise permitted to be imported; *Provided* that the import restrictions instituted, maintained, or intensified shall *not exceed* those *necessary*:
>
> (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or
>
> (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its services.

I understand that Zambia currently has significant problems regarding its balance-of-payments position, its current account, and external reserves but I have not had the opportunity to review this situation.

In any case, the above-quoted authority for B/P-based import restrictions is accompanied by a number of rules that may reduce the desirability of invoking such a remedy. For example, Paragraph 10 of Article XVIII states that a contracting party, in applying B/P restrictions on imports, *may* determine their incidence on imports of different products in such a way as to give priority to importation of those which are more *essential* to it in the context of its policy of economic development, *but* its restrictions must be so applied as to avoid *unnecessary damage* to the commercial or economic interests of any other contracting party and *not to prevent unreasonably* the importation of any goods in *minimum* commercial quantities the exclusion of which would impair *regular* channels of trade. Also, B/P restrictions may be applied only to control the *general level* of imports (e.g., may not be *country targeted*), opening Zambia up to potential retaliation by countries other than

Zimbabwe, and, of course, such restrictions may not exceed what is necessary to resolve the B/P situation. Restrictions must be implemented that have the "*least disruptive effects*" on trade. Restrictions must be progressively relaxed as the nation's B/P situation improves. Countries resorting to B/P restrictions must announce publicly time-schedules for their removal.

The Understanding establishes a number of notification, consultation, and reporting requirements with the WTO's Committee on Balance-of-Payments Restrictions, including a simplified consultation requirement applicable to least-developed countries. What is unusual in this context, compared to other WTO trade remedies, is that the International Monetary Fund (IMF) gets involved in assessing the legitimacy of B/P-based import restrictions. In addition to the portion of Article XVIII:9 quoted earlier, it also provides that:

> Due regard shall be paid to any special factors which may be affecting the reserves of such contracting party or its needs for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

In this area of monetary reserves, the IMF plays an important coordinative and advisory role with the WTO and its Committee on Balance-of-Payments Restrictions. The IMF is directly involved with the relationship between trade and monetary affairs. Article XV of the GATT 94 - relating to "Exchange Arrangements" states that:

> The Contracting Parties shall seek co-operation with the [IMF] to the end that [they] and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures . . .[1]

Under Article XV, in cases involving trade or trade-related measures designed to address the B/P problems of WTO Members, the WTO is obliged to consult with the IMF (as of course is the Member country involved). The result is that the IMF becomes directly involved in WTO Committee on Balance-of-Payments Restrictions reviews of the appropriateness of B/P-based import restrictions of Member countries. The extent and significance of the IMF's involvement can be seen in Paragraph 2 of Article XV which provides that:

> The [WTO] in reaching their final decision in cases involving [Article XVIII:B], *shall Accept the determination of the fund as to what constitutes a serious decline in the Contracting Party's reserves . . .*

So there are significant problems of clarity as to whether and how a WTO Member country can invoke Article XVIII:B to impose restrictions on imports for B/P reasons such that the availability of other WTO or other remedies or recourses to deal with imports from Zimbabwe are probably more attractive and feasible.

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[1] It has been argued, for example, that if a country has *borrowing rights* under an IMF structural adjustment or other financing program, it must avail itself of such right *before* it can invoke the GATT Article XVIII:B remedy.

Infant Industry Protection - Article XVIII:A & C of the GATT 94 provide a form of safeguards remedy keyed to balance-of-payments (external reserves) situations under which developing Member countries may resort to restrictions on increased imports "in order to implement development of new [e.g., so-called 'infant'] industries. Such countries must be (a) in the early stages of development and (b) able to support only a low standard of living. In addition, they must be able to document to the WTO that they are either (a) inhibited in providing sufficient governmental assistance to promote the establishment of a particular industry with a view of raising the general standard of living of its people, by reason of their external reserve situation [XVIII:A] *or* that (b) no other measure consistent with other provisions of the GATT 94 is *practicable* to achieve that objective [XVIII:C].

Under either scenario [XVIII: A or C], the Member country desiring to take such action (withdrawal of tariff or other concessions) must *consult* with *affected* Members and the WTO and seek agreement on compensation equivalent to the value of the concessions withdrawn. Even if no agreement can be reached after 60 days of initial consultation, the Member country can proceed with the imposition of import restrictions but will be subject to WTO-allowed retaliation. No specific country targeting is allowed, thus opening up the Member to complaints by all WTO Member countries affected.

None of the documents provided by representatives of the Zambian private sector nor statements of their representatives in the meetings sustained during my visit to Zambia raised the concern that establishment of "infant" industries was at stake in the effects of Zimbabwean imports into Zambia. For this remedy to be considered, convincing documentation would have to be submitted to enable the Government of Zambia credibly to invoke this form of remedy. Moreover, this remedy, like Article XVIII:B, is based upon a threshold demonstration of external reserves problems under the Uruguay Round Understanding on Implementation of Balance-of-Payments Restrictions under the GATT 94. Such a situation would have to be credibly demonstrated, which could involve the IMF. For these reasons, unless a clearly convincing infant industry case can be asserted, this remedy is probably not viable.

General Exception-Other - Article XX of the GATT 94 is entitled simply "General Exceptions", meaning exceptions from the various principles and rules of the GATT. It is a kind of residual safeguard though not acknowledged as such. Presuming that a Member country can credibly demonstrate the need to deal with one of the various situations described in Article XX, it provides the least complicated or "second guessable" remedy for imports available in the entire spectrum of GATT/WTO trade remedies (except for Article XXI relating to "National Security").

Article XX authorizes a Member country to implement measures to deal with a number of situations described therein so long as the measures adopted thereunder (a) are not applied in a manner which would constitute a means of *arbitrary* or *unjustifiable* discrimination between countries where the same conditions prevail, or (b) a *disguised* restriction on international trade. Under the Article, Members may employ such measures, in relevant part, to (a) protect public morals; (b) protect human, animal or plant life or health; or

> (d) necessary to *secure compliance* with laws or regulations which are not inconsistent with the provisions of [the GATT], *including* those relating to *customs enforcement*, . . . the protection of patents, trade marks, and copyrights, and the prevention of

deceptive practices.

It should be noted that, among the concerns asserted by Zambian producers and others, are problems related to customs determination of the country of *origin* of certain products entered into Zambia from Zimbabwe, the failure of customs to *assess* and *collect* appropriate duties thereon, especially in terms of their proper *valuation*, indeed, the failure of customs adequately to police Zambia's border from *smuggling*, and the failure of proper assessment of conformity to required *health or safety standards* or to protect intellectual property rights relating to *trademarks*, or to prevent *deceptive practices* incident to imports, although all of these actions presumably are provided for in Zambian law.

So, presuming that Zambian laws relating to these situations could be held to be consistent with other applicable provisions of the GATT/WTO/Uruguay Round framework, it would appear Zambia might be able to make a cogent, credible case that measures needed to be taken to ensure compliance with relevant laws relating to or affecting imports, importing, or importers.

It is also interesting to note that Article XX sets forth no requirements as to the "measures" a Member country may undertake for purposes described therein, whether or not they can be "targeted" against particular countries, nor does it establish any rules for procedures, notification, or consultation. Moreover, there is no Uruguay Round or subsequent agreement, understanding, or other instrument relating to implementation of Article XX. Thus, it would appear that "measures" could include a total restriction on imports from a targeted country, or quotas or tariff rate quotas, or simply additional duties - *as long as* they were directly connected to laws or regulations not inconsistent with (e.g., consistent with) the GATT 94.

Although actions taken under Article XX would almost inevitably lead to complaints from Zimbabwe, possibly other countries, and perhaps even dispute settlement procedures, the Article itself does not contain any requirement for "compensation" to countries aggrieved by actions taken under it. Also there appears to be no post-Uruguay Round cases interpreting or applying that article either in the context of the GATT itself or of the Uruguay Round and subsequent agreements.

Two areas mentioned above would probably be eliminated, however, e.g., standards (which would now be covered under either the Sanitary & Phytosanitary Standards Agreement or the Agreement on Technical Barriers to Trade) and trademarks (which would now be covered under the UR Agreement on Trade-Related Intellectual Property or TRIPS).
Nevertheless, since most of the complaints heard about Zimbabwean imports into Zambia relate to perceived inadequacies of administration and implementation of Zambian customs laws, it would appear that Article XX might be utilized to justify measures to restrict such imports within the constraints required in that Article.

<u>Uruguay Round Agreement on Agriculture</u> - The UR Agreement on Agriculture was the first ever multilateral regulatory regime for Agricultural products. I include it in this spectrum of possible import remedies because one of the study products or commodities is "Dairy Products - Long-Life Milk".

The Agriculture Agreement commits all WTO Members to long-term reform of agricultural policies to make trade therein more open and fair. Reform is premised both on the terms of the Agreement itself which are subjected to the individual commitments of Members incorporated into the national schedules of each attached to the Marrakesh Protocol. Significant provisions of the Agreement govern Market Access, Domestic Support, and Export Subsidies. A key aspect of the Market Access provisions is establishment of a tariff-only regime through the process of "tariffication", tariff reduction, and binding of all agricultural tariffs. The Agreement requires that all quantitative restrictions (quotas), variable levies, import bans, or other non-tariff measures must be replaced by an import duty set at a level that provides substantially equivalent protection in tariff terms as the combination of former tariffs and non-tariff barriers applicable to the affected imported products.

But these general obligations applicable to all Members are substantially qualified by specific tariff reduction and other commitments agreed to by each Member and incorporated in its national schedules referred to above. It is these specific commitments that constitute a Member's effective obligations under the Agreement. Failure to implement a Member's effective obligations may subject it to claims for nullification or impairment adjudicable through the WTO's dispute settlement process. But these commitments are further qualified by the Agreement's provision (Article 5) authorizing "special safeguard action" to remedy a surge of imports resulting from implementation of its commitments under the Agricultural Agreement.

There are two threshold issues that must be resolved before Zambia could invoke the Agriculture Agreement's "special safeguard action". First, whether the product included in the study, e.g., "Long-Life Milk" qualifies as an "agricultural" product under the agreement and, second, whether Zambia has properly reserved its right to invoke special safeguards under the Agreement.

The first issue is whether "long-life milk" qualifies as a product covered under the UR Agreement on Agriculture or whether, because of processing of raw milk to achieve "long-life", it may be considered a product covered under the GATT/Uruguay Round Agreements on Trade in Goods. Annex 1 of the UR Agreement on Agriculture states that the Agreement shall cover "the following products" and sets forth a list of Harmonized System of Tariff (HS)[2] headings enumerating the chapters thereof covered under the Agreement. This listing includes "(i) HS Chapters 1 to 24 less fish and fish products . . .". HS Chapter 4's description recites only "Dairy produce" together with other covered products in that chapter. A review of five and seven digit HS items in Chapter 4 does not specifically elicit the term "Long-Life Milk", but it's clear that products like "milk and cream", "Skim Milk Powder", "Butter", and "Fats & Oils Derived from Milk" are. In view of the time constraints affecting the need for this memorandum, I'm not able to get involved with extensive, deep research of this issue. But, for the moment, I believe "Long-Life Milk" most probably would qualify as a product subject to the UR Agreement on Agriculture.

The second issue is whether Zambia has taken the action necessary to authorize it to invoke the UR Agriculture Agreement's Special Safeguards remedy. Article 5:1 of the Agriculture Agreement provides, in pertinent part, that:

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[2] The Contracting Parties to the Harmonized System of Tariffs Convention include Zambia and Zimbabwe, for both of which the date of entry into effect of the HS is 01 January 1988.

> . . . any Member may take recourse to [special safeguards] in connection with the importation of an agricultural product, in respect of which measures [non-tariff measures such as quantitative restrictions, variable import levies, minimum import prices, discretionary import licensing, import bans etc.] . . . have been converted into an ordinary customs duty *and* which is designated in its Schedule with the symbol 'SSG' as being the subject of a concession in respect of which [Special Safeguards] may be invoked.

What this means is that Special Safeguards may only be invoked with regard to imports of agricultural products (a) to which Zambia applied *non-tariff measures* of the kind described above *prior* to 01 January 1995 *and* (b) which it *designated* as having been or being "tariffied" (designation "SSG") in its agricultural tariff schedules submitted as part of its schedules of tariff commitments annexed to the Marrakesh Protocol the entry into effect of the WTO in 1995. It appears that Zambia may not have notified SSG items nor taken a reservation of the Special Safeguards remedy. But that is a determination perhaps best made by the Ministry.

If Zambia qualifies, however, Article 5 Special Safeguards would permit the imposition of additional customs duties if the Government makes a determination of market disruption resulting either from increased imports (surges) of such a product *or* entry of such imports at abnormally low prices (e.g., below a certain stated reference price). Its ability to impose additional duties depends upon relating the volume of imports to certain "trigger" levels on the share of imports or their entry at import prices below certain "trigger" or "reference" prices. With regard to comparison of *volume* of imports, such volume is assessed in terms of its percentage of the corresponding domestic consumption during the three preceding years for which data is available, e.g.,

- where such market access share is less than or equal to 10% of domestic consumption, the base trigger level is 125%;

- where such share is greater than 10% but less than or equal to 30%, the base trigger level is 110%; and

- where such share is greater than 30%, the base trigger level is 105%.

If the comparison is made on *entry price* of the imported product, then the "Trigger" or "Reference" Price is the average 1986 through 1988 price, e.g., the average C.I.F. unit value of the product upon entry.

A determination to invoke the Special Safeguard requires *advance* notification to the WTO Committee on Agriculture of a Member country's intent to impose additional duties and consultation with interested, e.g., affected, Member governments. Imports of the product under current and/or minimum access commitments established in a Member nation's tariff schedules may be counted in determining import volume or price, but such imports may not be affected by any additional duty imposed for safeguard purposes. Moreover, any additional duties imposed under Special Safeguards may be levied only at a level *not exceeding* one third of the level of ordinary customs duties in effect for the year in which the action is taken, and may be maintained only until the *end* of the year in which

imposed. Perhaps most important is that it is not necessary to demonstrate that *serious* injury is being caused to the domestic industry.

The UR Agreement on Agriculture contains no specific provision governing whether the import remedy may be targeted against an individual exporting country so that the remedy operates on a product-by-product rather than a country-specific basis. There is no provision for provisional relief. Nor is there provision for undertaking such a remedy upon petition so that it is up to the Member government to determine whether there exists a basis for invoking the remedy.

Uruguay Round Agreement on Textiles & Clothing - This Agreement essentially is intended to facilitate the "reintegration" of global trade in textiles and clothing into the GATT/WTO framework of multilateral rules for international trade and out of the special arrangements between importing and exporting countries establishing a system of bilateral quotas governing such trade. However, since there are no textile/clothing products included in the study, we have not explored the possibilities and requirements of the Agreement's "Transitional Safeguards" mechanism.

Uruguay Round Agreement on Trade in Services - This Agreement represents the first multilateral arrangement governing global trade in Services and contains its own Safeguards provisions. However, since the concerns expressed by Zambian private sector representatives or the Zambian Government have not included Services, we have not researched this possibility.

Uruguay Round Agreement on Customs Valuation - The Customs Valuation Agreement (CVA), while not containing any provisions relating to import remedies as such, nonetheless may be relevant in addressing increased imports of study products that may have entered into Zambia either without any declarations of product value (smuggled?) or on the basis of faulty assessments of value by Zambian Customs authorities by reason of the problems alleged in the operation of the Zimbabwean dual exchange rate.

"Customs Valuation" is a customs procedure applied to determine the value of imported goods for purposes of then applying and liquidating the customs duties applicable to the product within its HS classification. GATT 94 Article VII laid down the general principles of the GATT for an international system of valuation, e.g., (1) that the "value" for Customs purposes of imported merchandise should be based (to the extent possible) on the *actual value* of the goods against which a duty is assessed - or if the specific value of such goods was not determinable, then the value of like merchandise, but, in any case, value should *not* be based by reference to the value of merchandise of national origin or upon fictitious values; and (2) although Article VII contained a definition of "actual value", it permitted use of widely differing methods of valuation. The Uruguay Round Agreement on Customs Valuation requires the *transaction* or *invoice* value of imported goods to be applied when (a) there are no special restrictions as to disposal or use of the goods, (b) the buyer and seller are not related, or (c) no proceeds of the subsequent sales will accrue to the exporter. But *if Customs authorities have reason to believe that the transaction value* (as manifested in letter of credit or other transaction documents) *is inaccurate,* then the value may be determined by proceeding *sequentially* through five valuing options, e.g.,

- the value of *identical* goods
- the value of *similar* goods

- the *deductive* method (sale price of identical or similar imported goods to *unrelated* persons)
- the *computed* value method (production cost plus "normal" profit & expenses
- an "if all else fails" method decided by the Customs authorities.

The Agreement foresees situations could arise in which Customs authorities could have *reasonable doubts* that the asserted transaction value found in customs documents (commercial invoice, letter of credit, contract of sale, purchase order, etc.) presented to them actually represents a fair value for the goods. But, if they have such doubts, they must afford the importer the opportunity to *demonstrate* that the price is, indeed, *fair*, for example, by comparing it to a previously-accepted price for identical or similar goods. If, and only if, the Customs authorities determine that the transaction price as represented in the documents submitted is *not* an accurate basis for valuation, they may then employ the *second* test (determination of value on the basis of the transaction value of identical goods), or if identical goods are not available for comparison, moving on to the *third* test (transaction value of similar goods), and so on. Only if *none* of the foregoing tests can reasonably be applied may the Customs authorities use any *other* means of establishing the value of the goods, and even then, the Agreement requires them to use means "consistent with" the Agreement. In this regard, the CVA prohibits certain methods whose use in the past led to exaggerated valuations, including valuation on the basis of the selling price of *competing domestic* goods or use of an *arbitrary* minimum value.

Note, however, that the CVA does *not* restrict the right of Customs officials to *confirm* that statements or documents presented relating to value are *true* and *accurate*. And, under a Ministerial Decision adopted after conclusion of the Agreement itself, if customs authorities have reason to *doubt* the accuracy or truth of documentation produced in support of a declared transaction value, they may ask the importer to provide *further* explanation or *evidence* demonstrating that the declared value corresponds to the *actual* value. If convincing evidence is not provided, authorities may conclude the goods cannot be valued by the *first* test. Transparency rules include requirements for the written notification to an importer of the reasons for a given valuation decision, confidentiality for proprietary information submitted to Customs, and publication of regulations. Procedurally, the CVA provides a right for an importer to withdraw goods from Customs under bond if valuation is delayed and a right to judicial review against administrative valuation decisions.

There are special provisions responding to the concerns of developing countries like Zambia. They have a right to delay the obligation to employ the fifth valuation test (computed value) until eight years after their accession to the WTO (in Zambia's case, 01 January 2003) *if* they specifically *reserved* that right upon their accession. Similarly, developing countries that currently value goods on the basis of officially-established *minimum values*, may, subject to certain conditions, retain these values "on a limited and transitional basis", e.g., through their allotted transitional period.

So, if Zambia finds that, for one reason or another, no trade remedy available under the GATT/WTO or the COMESA or SADC can feasibly address their concerns regarding the entry of imported goods from Zimbabwe under what are believed to be inaccurate declarations of value by importers related to Zimbabwe's dual exchange rate, it might want to consider taking advantage of valuation provisions of the CVA.

COMESA Recourses

The Treaty Establishing the Common Market for Eastern and Southern Africa, popularly referred to as "COMESA", of which both Zambia and Zimbabwe are members, provides its member states with a spectrum of import remedies similar to, and largely derived from, those available under the GATT/WTO framework.. My understanding is that, generally, most, if not all, trade between Zambia and Zimbabwe (other than that conducted within the informal economy by smuggling) is conducted within the context and provisions of the COMESA, thus suggesting that it is the COMESA Treaty that may be most relevant to Zambia's trade remedy considerations.

Anti-Dumping - Article 51:1 of the COMESA Treaty provides that ". . . dumping . . . is to be prohibited if it causes or threatens material injury to an established industry in the territory of the other member State or materially retards the establishment of a domestic industry." It defines "dumping" as an activity " . . . by which products of a Member State are introduced into the commerce of another Member State at less than the normal value of the products . . .".In both this definition of "dumping" and in describing how price enters into the determination of "dumping", the COMESA provisions essentially restate the concepts set forth in Article VI of the GATT 94. Article 51:3 also provides that a Member State may, for the purposes of offsetting or preventing dumping . . . levy on any dumped product an anti-dumping duty not greater in amount that the margin of dumping in respect of such product." Again, like GATT 94 Article VI, it defines "margin of dumping" as the price difference between import price and "normal value" of the product. And like GATT Article VI, it provides that "No Member State shall levy an anti-dumping duty on the importation of any product of another Member State unless it is determined that the effect of the alleged dumping is such as to cause or threaten material injury to an established domestic industry or such as to retard materially the establishment of a domestic industry."

The COMESA Article 51 tracks the basic provisions of GATT Article VI rather than the more extensive requirements of the Uruguay Round Agreement on Anti-Dumping and states only that "proceedings initiated pursuant to the provisions of this Article shall be carried out in accordance with anti-dumping regulations made by the Council" [COMESA Council of Ministers]. For purposes of this memorandum, I have not had the opportunity to review such regulations, if, indeed, they exist.

It should be noted that Article 54:1 of the COMESA Treaty provides that "Member States shall *co-operate* in the *detection* and *investigation* of dumping . . . practices and in imposing agreed measures to curb such practises."

Subsidies/Countervailing Duties - The COMESA Treaty also makes provision for trade remedy in the case of subsidized exports by one Member State to another. In this case, Article 52:1 of the Treaty provides that:

> . . . any subsidy granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member states, be incompatible with the Common Market.

Article 52:2 then provides that "A Member State may, for the purposes of offsetting the effects of subsidies and subject to regulations made by the Council, levy countervailing duty on any product of

any Member State imported into another Member State equal to the amount of the estimated subsidy determined to have been granted directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation." In this, the COMESA Treaty also tracks the basic concepts of GATT Article XVI. Article 52:3 & 4 also provide countervailing duties as a remedy for impacts of third country subsidization of exports. Again, for purposes of this memorandum have not had the opportunity review any Council regulations, if indeed they exist.

It should also be noted that, while Article 52:1 & 3 mention countervailing duties as a remedy to subsidies that "distort or threaten to distort competition", Article 53 specifically provides that no Member State may levy a countervailing duty on importation of any product "unless it determines that the effect of the subsidisation is such as to cause or threaten material injury to an established domestic industry or is such as to materially retard the establishment of a domestic industry."

Safeguards - Like GATT 94 Article XIX, the COMESA Treaty also provides for the trade remedy of "Safeguards". But its provisions are much more generalized and not nearly as demanding as the requirements of GATT Article XIX or the Uruguay Round Agreement on Safeguards.

Article 61:1 of the Treaty states only that "In the event of *serious disturbances* in the economy of a Member State following the application of the provisions of this Chapter, the Member State concerned shall, *after* informing the Secretary-General and the other Member States, take necessary safeguard measures." The article does not require a showing of either *increased imports* or *serious injury* (or indeed, any injury). The only major condition for the invocation of Safeguards under Article 61 is that "Safeguard measures taken under the provisions of paragraph 1 of this Article, shall remain in force for a period of *one* year and may be *extended* by the decision of the Council provided that the Member State concerned shall furnish to the Council proof that it has taken the necessary and reasonable steps to overcome or correct imbalances for which safeguard measures are being applied and that the measures applied are on the basis of non-discrimination" - presumably meaning that they may not be targeted on any specific Member State. Beyond this very generalized statement of cause and remedial response, the COMESA Treaty says very little other than in Paragraph 3 which provides that "The Council shall examine the method and effect of the application of existing safeguard measures and take a decision thereon."

As pointed out in the introduction to this memorandum, the rhetoric of Zambian private sector representatives has been to discount the possibility of anti-dumping actions as insufficient to deal with imports from Zimbabwe and have nearly uniformly stressed the need for the Government of Zambia to employ a version of "Safeguards" as the remedy of choice. As between the Safeguards remedy incorporated into the GATT 94 Article XIX and its accompanying Agreement on Safeguards and the Safeguards remedy authorized in Article 61 of the COMESA Treaty, it seems clear that the latter accommodates a much more general and less demanding or constraining form of the Safeguards remedy. And, in this regard, since both of the countries are Member States of the COMESA, it would seem that this would be the more appropriate forum for a trade remedy. Moreover, since the existence of the COMESA - as a regional trade arrangement - is exempted from the requirements of the GATT 94 under some combination of GATT 94 Article XXIV and the GATT "Enabling Clause", action under COMESA Article 61 is not subordinated as a remedy to the GATT provisions and, as such, would be the *preferred* response.

Security and Other Restrictions to Trade - Article 50 of the COMESA Treaty, entitled "Security and Other Restrictions to Trade" provides a remedy somewhat similar to the GATT 94's Article XX (and also its Article XXI relating to a form of Safeguards for National Security). Article 50:1 provides that "A Member State may, after having given notice to the Secretary-General of its intention to do so, introduce or continue or execute restrictions or prohibitions" [on imports] for purposes of application of security laws and regulations, control of arms trade, protection of human, animal or plant health or life, or protection of public morality, transfer of gold etc., maintenance of food security in the event of war or famine, and then, in a catchall item for:

> . . . the protection of any item deemed to be of national importance provided that the Member State concerned shall furnish proof to the Council that the item is of national importance . . .

Interestingly enough, this catchall safeguards provision does *not* include the provision noted above for GATT Article XX relating to utilization of the remedy as necessary to:

> . . . secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT], including those relating to *customs enforcement* . . .

It may be a Member State could argue that compliance with customs laws and enforcement thereof fits within the scope of "any item deemed to be of national importance" so as to incorporate that goal into coverage by Article 50. That the article might be subject to such interpretation is suggested by Article 50:2 which states that "A Member State shall not so exercise the right to introduce or continue to execute the restrictions or prohibitions conferred by this Article so as to stultify the free movement of goods envisaged in this Chapter." Nevertheless, Article 50:3 also provides that:

> Security and other restrictions imposed in accordance with paragraph 1 of this Article shall not extend for *more than is necessary* to achieve security aims and *other risks* intended to be eliminated and shall be applied on the basis of non-discrimination.

Balance-of-Payments Safeguards - The COMESA Treaty also reflects the GATT 94's provisions for imposition of import restrictions to deal with balance-of-payments concerns of Member countries under GATT Article XVIII:B. COMESA Treaty Article 49:5 provides an exception to the mandate of Article 49:1 that each Member State undertakes to remove immediate all existing non-tariff barriers to imports from other Member States by providing that:

> Notwithstanding the provisions of paragraph 1 of this Article, if a Member State encounters balance-of-payments difficulties arising from the application of the provisions of this Chapter, that Member State may, provided that it has taken all reasonable steps to overcome the difficulties, impose for the purpose only of over-coming such difficulties for a specified period to be determined by the Council, quantitative or the like restrictions or prohibitions, on goods originating from other Member States.

In this regard, however, the COMESA provisions are clearly much more generalized and flexible in terms of the conditions for invoking such a remedy and do not involve the IMF.

Establishment of Infant Industries - Finally, COMESA Treaty Article 49:2 tracks the GATT 94 Article XVIII:A & C by providing that:

> For the purposes of protecting an infant industry, a Member State may, provided it has taken all reasonable steps to overcome the difficulties related to such infant industry, impose for the purposes only of protecting such industry for a specified period to be determined by Council, quantitative or like restrictions or prohibitions on similar goods originating from the other Member States: *Provided* that the measures are applied on a *non-discriminatory basis* [non-targeted] and that the Member State shall furnish to Council proof that it has taken all reasonable steps to overcome the difficulties faced by such an infant industry.

As with Safeguards, this remedy is considerably more flexible than the infant industry provisions of GATT Article XVIII:A & C. If any of the study products emanate from an industry in start-up in Zambia then it would appear to be yet another useful form of remedy to consider.

SADC Trade Protocol Recourses

As indicated, both Zambia and Zimbabwe are signatories to the SADC Trade Protocol (the Protocol) that entered into effect in September 2000. My understanding, however, is that current trade between Zambia and Zimbabwe is conducted more under the terms of COMESA than SADC, although it is useful to describe and consider the trade remedy provisions of the SADC Trade Protocol. The Protocol provisions for trade remedies tend to follow, or even incorporate by reference, the basic concepts and requirements of the GATT/WTO/Uruguay Round Agreements, much more so than does the COMESA Treaty.

Anti-Dumping - The Protocol's sole reference to Anti-Dumping is found in Article 18 entitled "Anti-Dumping Measures", which provides simply that "Nothing in this Protocol shall prevent any Member State from applying anti-dumping measures which are in *conformity* with WTO provisions." This, in effect, incorporates into the SADC regime, the entirety of the requirements of GATT Article VI and the Uruguay Round Agreement on [Anti-Dumping]. As a result it would appear to be no more responsive to the Zimbabwe exports problem than the GATT/WTO framework described above.

Subsidies & Countervailing Measures - Article 19 of the Protocol governs "Subsidies and Countervailing Measures". Although Article 19:1 provides that "Member States shall not grant subsidies which distort or threaten to distort competition in the Region", while Article 19:3 provides that "A Member State may, for the purposes of *offsetting the effects* of subsidies and *subject to WTO provisions*, levy countervailing duties on a product of another Member State. This again provides no SADC-specific rules for CVDs, but, in effect, essentially incorporates the GATT Articles XVI/VI and UR Agreement on [Subsidies & Countervailing Measures] as the only discipline on use of this trade

remedy within the context of the SADC Trade Protocol. As a result, SADC offers little flexibility from the provisions of the GATT/UR regime.[3]

Safeguard Measures - The SADC Trade Protocol's Article 20 authorizes general "Safeguard Measures". Article 20:1essentially paraphrases the basic requirements of the Uruguay Round Agreement on Safeguards (increased imports, serious injury or threat of injury) and provides that "serious injury" shall be as defined in that Agreement. It also tracks the UR Agreement by providing that safeguard measures shall be applied to imports "irrespective of its source within the [SADC] region" and with regard to the allowable duration of such measures. Only with regard to "serious injury" does the Protocol actually incorporate the provisions of the GATT/WTO/UR framework , and, in that sense, may be somewhat less flexible than either the GATT/WTO/UR or COMESA regime for Safeguards.

Establishment/Protection of Infant Industries - Again, as with both GATT Article XVIII:A & C and COMESA, the SADC Protocol provides for import restrictions for the "Protection of Infant Industries". Article 21 of the Protocol states that ". . . upon application by a Member State, the [Council of Trade Ministers] may as a temporary measure to promote an infant industry, and *subject to WTO provisions*, authorise a Member State to suspend certain obligations . . . in respect of like goods imported from other Member States." So, in essence, this version of trade remedy incorporates by reference the conditions and requirements of GATT 94 Article XVIII:A & C (including, apparently, even tying the ability to invoke it to balance of payments (external reserves) considerations). Article 21:2 provides that the CMT may impose terms and conditions to which its authorisation is subject for the proposes of preventing or minimizing excessive disadvantages to exporting nations resulting in "trade imbalances".

General Exceptions - Article 9 of the SADC Protocol authorizes certain trade remedies intended to deal with particular problem areas and, in this regard, essentially paraphrases the provisions of GATT Article XX described above. Unlike the COMESA provisions, it *does* include the phrase "necessary to secure compliance with laws and regulations which are consistent with the provisions of the WTO". As with the GATT requirement, it provides that such measures may not be ". . . applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States, or a disguised restriction on *intra-SADC trade* . . ." Since the COMESA Treaty does *not* provide a GATT Article XX remedy relating to this area, the SADC version of the remedy (even though it does not *specifically* mention "customs enforcement") may be the only viable alternative to invoking GATT Article XX.

Finally, with regard to the SADC Protocol, it should be noted that Article 33:2 thereof provides that:

> Member States shall co-operate in addressing any impediments to intra-SADC trade that may arise as a result of any action or lack of action by any Member State on issues having material bearing on such trade and which are not covered

[3] But note, it might be argued that Article 19 is somewhat *less* definitive in incorporating the GATT/UR requirements for CVDs than the Article 18 requirements for Anti-Dumping, in that Article 18 states "measures which are *in conformity* with WTO provisions", while Article 19 says "in *accordance* with WTO provisions", suggesting the latter allows for more "interpretation" of those provisions.

elsewhere in this Protocol.

Conclusions

This memorandum has attempted to describe the spectrum of potential trade remedies and other possible recourses to deal with Zimbabwean imports. On the basis of the positives, negatives, and other considerations, I conclude as follows:

(a) *Whatever* remedy or other recourse is decided upon, it will be necessary for the Zambian private sector and the Government of Zambian to understand and carefully *document* the substantive conditions for invoking and imposing such remedy or recourse - whether or not a full-scale, multi-party investigation is required. In this regard, neither appear to date to have developed enough convincing *documentary* evidence or argument upon which to base most of the remedies described herein - hopefully the study will assist the parties to do so.

(c) It would appear that nearly all of Zambian/Zimbabwean trade is conducted within the context of their affiliation with COMESA and that therefore COMESA-based remedies/recourses are more relevant and should be assessed first rather than those described herein provided for either by the GATT/WTO framework or that of the SADC Trade Protocol.

(d) Because of the number of highly arguable facts alleged by the Zambian side, concerns about causality, the asserted need for prompt action, it would appear that the COMESA Safeguards remedy (Article 61) would be most viable, with its Balance-of-Payments safeguards (Article 49) the next most viable.

(e) If, for certain policy reasons, the Government of Zambia decided to deal with Zimbabwean imports in the context of the GATT/WTO rather than COMESA, then it would appear the most viable trade remedy in terms of least-restrictive constraints and time considerations would be Article XX.

(f) However all of the above conclusions should be considered in the light of the recent communiqué issued by the Presidents of Zambia and Zimbabwe at the end of President Mwanawasa's state visit to Zimbabwe in which it is said they called for "the removal of all obstacles to trade . . ." and also called for "the speedy finalisation of the bilateral agreement to increase the volume of trade between the two countries" as well as "directed their relevant ministers to work toward the agreement's speedy finalisation."[4] Certainly, any *real* commitment to this end between the two nations would require considerable bilateral negotiation or at least discussion between them to diffuse current bilateral trade issues of the kind discussed in this memorandum *before* proceeding to invoke any one or more of the remedies described herein.

[4] ZAMNET quoting the Daily Mail, Monday, April 29, 2002.

ANNEX 1

Outline of GATT/WTO/Uruguay Round Trade Remedies

A. WTO Anti-Dumping (GATT Art. VI & UR Agreement)

1. **Focus/ Gravamen/ Justification**

   Unfair Trade:
   Dumping/ Injury to Domestic Procedures

2. **Legal Basis**

   GATT Art. VI, UR Agreement on Anti-Dumping

3. Remedy Possible

Additional [Anti-Dumping] duties

4. Summary of Process/ Sequence

1) Submission/ Receipt of petition
2) Initial review & acceptance/ rejection of petition
3) Initiation of Investigation
   a) Substantive review of petition information/ data
   b) Verification of data submitted or other available data
   c) On-site verification (as needed, possible)

4) Initial Decision on:
   a) Dumping
   b) Material injury/ threat of material injury or material retardation of established of a domestic industry
   c) Necessary circumstances (if required for provisional relief)

5) Provisional Relief- Imposition of Duties
6) Hearing/ Final Review of Submissions/Case Information
7) Final Decision(s) on:
   a) Dumping
   b) Margin of dumping/ additional duties required
   c) Material injury/ threat of injury/ injury causality/ retardation of industry

8) Imposition of Dumping Duties
9) Review of Remedy
10) Termination, Extension, or Renewal of Duties
11) Notification to WTO

5. Country Targeting Permitted?

Yes (Country & Exporters)

6. Basic Requirements for Remedy: Summary

1) A significant absolute or relative increase in dumped products
   a) Presence of "Dumping" (e.g. sales by exporter or less than "Fair value")
   b) Significant price undercutting by dumped imports

2) Such sales are causing
   a) Actual material injury to an established domestic industry producing a like or directly competitive product or threat thereof
   b) Actual or threatened Material Retardation or the establishment of a domestic industry

3) Causal relationship between dumped products &
   a) Material injury or threat of injury to an established domestic industry

or

b) Material Retardation of Establishment of a domestic industry or threat thereof

4) Conduct of an investigation to determine above requirements.
5) Compliance with WTO notification requirements (Arts. 18.5, 16)

7. Relevant Definitions

1) "Dumping":
   Introduction of a product into the commerce of another country at less than its normal value
2) "Normal Value":
   A product is considered sold at less than normal value, if its price
   a) is less than the comparable price, in the ordinary course of business, for the like product when destined for consumption in the exporting country or
   b) in the absence of such domestic price, is less than either
      - the highest comparable price for the like product for export to any 3rd country in the ordinary course of trade or
      - the cost of production of the product in the country of origin plus reasonable additions for administration, selling & general costs plus profit.
3) "Margin of Dumping" is
   The price difference between normal value of an exported product and the price at which it is entered into commerce of the importing country, subject to allowance or differences in conditions & terms of sale.
4) "Domestic Industry" is
   The domestic producers as a whole of the like product or those of them whose collective output constitutes a major proportion of total domestic production thereof, except when importer & exporter are related.
5) "Like Product" is
   A product which is identical (alike in all respects) to the product under investigation, or in the absence of such a product, another product which, although not identical, has characteristics resembling those of the product under investigation.
6) "Material Injury" means
   a) Material injury to the domestic industry producing like products
   b) Threat thereof to the domestic industry producing like products or
   c) Material retardation of the establishment of a domestic industry (that, presumably, would produce a like or directly competitive product).

8. Initiation of Relief Process

b) Who can initiate
   - Representatives of Domestic Industry (art, 5.1)
     (e.g. Firms, Industry Associations) or
   - Member government on its own initiative [if, in special circumstances, it has sufficient evidence of the existence of dumping, injury & a causal link to justify an investigation]

b) How initiated

- Receipt of a petition on behalf of domestic industry or
- Initiation of investigation by member government on its own.

9. Basis for Acceptance/ Rejection of Petition- Information Requirements

A. (1) Information regarding petitioner regarding:

a) identity
b) volume of a value of domestic production of like product by petitioner
c) identification of the domestic industry & of all known procedures of the like product or associations thereof
d) volume/ value of like product produced by each.

(2) Information regarding the product:

a) complete description of allegedly- dumped product
b) country or countries of origin or export thereof
c) identity of each known exporter or foreign producer thereof
d) list of known importers of the product

(3) Information regarding dumping:

a) description of existence of dumping
b) amount thereof
c) nature of dumping
d) price at which product is sold for consumption in the domestic markets of country(s) of origin or export prices or [if appropriate] prices at which product is first resold to an independent buyer in importing company

(4) Regarding material injury

a) evolution of the volume of allegedly- dumped imports
b) effects of such imports on prices of the like product in market of the importing member country.
c) consequent impact on its (importing member's) market.

(5) Determination by Government of Importing Country of the Adequacy & Accuracy of information contained in petition as sufficient to justify opening of an investigation.

(6) No investigation may be initiated unless domestic producers supporting the petition account for 15% or more of domestic production of product.

10. Provisional Relief

(a) Type of Provisional Relief Available

- Anti- dumping (additional) duties
- Security by cash deposit or bond equal to provisional duties

(b) Bases for Provisional Relief

1. Investigation has been initiated but provisional remedies may not be applied sooner than 60 days from initiation of investigation. [Art. 7.1,3,4]

2. Public notice given for pendency of provisional remedies
3. Interested Member countries and other parties given adequate opportunities to submit information views on provisional relief,
4. A preliminary affirmative finding of dumping and material injury has been made, and
5. Competent authorities judge such relief is necessary to prevent injury or further injury during the investigation

(c) Maximum Duration of Provisional Relief
1. Maximum duration of four months or
2. Six months if requested by a significant percentage of affected exporters
3. If provisional duties imposed are less than margin of dumping but are sufficient to remove injury, they may be applied for six months or nine months if requested by a significant percentage of exporters.

11. Investigation Requirements or Evidentiary Basis for Final Relief

(a) Nature of Investigation
Adjudication of dumping margin, material injury, and causality by a competent administrative body

(b) Scope/ Subject Areas for Investigation/ Justification Determinations

1. Volume of Allegedly Dumped Imports ("ADI"), e.g. occurrence of an increase a) in absolute terms or b) relative to domestic production or consumption.

2. Fact of Dumping, e.g. whether ADI were introduced into domestic market at less than normal value, e.g.
   a) If the export price of the ADI is less than the comparable price, in the ordinary course of trade, for the like exported (ADI) product when destined for consumption in the exporting country, or
      - Less than the cost of its production
      - Less than comparable export price to a third country
   b) For this comparison, tribunal must consider:
      - proper allocation of costs, capital expenditures, etc.
      - comparison must be made:
        - ♦ at same level of trade
        - ♦ sales made at the same time
        - ♦ any differences affecting price comparability (differences in conditions/ terms of sale, taxation, quantities sold, physical characteris tics, rates of exchange on day of sale, etc.)

3. Effect of ADI on domestic market prices for like product, e.g. significant price undercutting as compared to domestic market price of like product either
   a) depressing prices to a significant degree or [Art: 3.2]
   b) preventing increases that would otherwise have occurred.

4. Impact (causality) of ADI on domestic producers (material injury) , including

a) Evaluation of All Relevant Economic Factors and Indices describing the domestic industry including actual potential declines in and negative effects of ADI thereon:

- Sales	- Factor affecting domestic prices
- Profits	- Magnitude of margin of dumping
- Outputs	- Cash flow
- Market share	- Inventories
- Productivity	- Employment
- Utilization of capacity	- Wages
- Return of investment	- Growth
	- Ability to raise capital

b) Any known factors other than the ADI which are, at the same time injuring the domestic industry which are not attributable to the ADI

c) Effect of ADI on domestic production of like products relating to:
   - production processes
   - producer sales & profits

5. Threat of material injury whether the following possibilities are likely to create the effects and impacts described above, e.g.
   a) Changes in circumstances which would cause injury are:
      - foreseeable
      - imminent
   b) Rate of increase of ADI
   c) Exporter's disposable capacity
   d) Probable effects of ADI on import prices
   e) Extent of domestic inventories of like product

6. Material Retardation of Establishment of a Domestic Industry (no details given but see D. Industry Establishment)

B. WTO Subsidies/ CVD (Art. XVI, VI), UR Agreement

1. Focus/ Gravamen/ Justification

Unfair Trade:
Subsidies/ Injury to Domestic Producers
[Note: Limitations on remedy found in the UR Agriculture Agreement]

2. Legal Basis

GATT Art. XVI & VI, UR Agreement on Subsidies and Countervailing Measures

3. Remedy Possible

Additional Countervailing Duties or Dispute Settlement

4. Summary of Process/ Sequence

1. Submission/ Receipt of Petition
2. Initial Review Adequacy of Petition and Acceptance/ Rejection of Petition
3. Initiation of Investigation
   a) Substantive Review of Petition Information/ Data
   b) Verification of Data submitted or other available data
4. Initial Decision on:
   a) Existence/ nature of subsidy
   b) Material injury/ Threat of material injury or
   c) Necessary circumstances (if request for provisional relief)
5. Provisional Relief - Imposition of Duties
6. Hearing/ Final Review of Case Information
7. Final Decisions on:
   a) Existence of subsidy
   b) Quantification of CVDs
   c) Material injury/ Threat of injury/ Retardation of industry
8. Imposition of CVDs
9. Review of remedy
10. Termination, extension, renewal of CVDs
11. Notifications to WTO

5. Country Targeting Permitted?

Yes

6. Basic Requirements for Remedy: Summary

1. Precedence of subsidized imports, either resulting from
   a) "Prohibited" (red) subsidies, e.g.
      - subsidies contingent upon export performance (export subsidies)
      - subsidies contingent on use of domestic over imported inputs into goods ultimately exported or
   b) "Actionable" subsidies that result in either
      - material injury to an existing domestic industry,
      - threat of material injury to an existing domestic industry, or
      - material retardation of establishment of a domestic industry
2. Existence of:
   a) Material Injury to an existing domestic industry
   b) Threat of Material Injury to an existing industry
   c) Material Retardation of establishment of a domestic industry
3. Causal Relationship between subsidized imports and injury or retardation
4. Conduct of an investigation to determine above requirements.
5. Consultation with affected members after acceptance of a petition but before initiation of this investigation.

7. Relevant Definitions

1. "Subsidy" is:

A financial contribution or any form of income or price support by a government or any other public body, which confers a benefit, e.g. financial contributions, e.g.

a) Direct transfer of funds (grants, below-market or not fully repayable loans, equity, loan guarantees).
b) Government revenue otherwise due is foregone or forgiven or not collected (tax incentives, credits)
c) Provision by government of goods and services without cost or at non-market prices (other than infrastructure) or guaranteed purchase of goods
d) Any form of income or price support.

2. Subsidies susceptible of countervailing duties:
   a) subsidies contingent on exports performance, ("export subsidy")
   b) Subsidies contingent on the use of domestic products in preference to imported products ("import substitution subsidies")
   c) subsidies that cause injury to the domestic industry producing like products in the importing country ("actionable subsidies")

3. "Countervailing Duty"
   An additional duty levied by a member country for the purpose of offsetting "export subsidies", "import substitution subsidies" or "actionable" subsidies
4. "Material Injury"
   See definition under Anti-Dumping/ Art. VI, (No. 7,6).
5. "Domestic Industry"
   See definition under Anti-Dumping/ Art. VI, (No. 7,4).
6. "Like Product"
   See definition under Anti-Dumping/ Art. VI, (No. 7,5).

8. Initiation of Relief Process

A. Who can initiate
   - Representatives of domestic industry (e.g. firms, industry associations) or
   - Member government on its own initiative [if in special circumstances, it has sufficient evidence of the existence of subsidy, injury, and causal link to justify an investigation]

B. How initiated
   - Receipt of a petition on behalf of domestic industry
   - Initiation of investigation by member government on it owns.

C. If by petition, basis for acceptance/ rejection

9. Basis for Acceptance/ Rejection of Petition

(1) Information regarding Petitioner (same as for anti-dumping)
(2) Information regarding product (same as for anti-dumping)
(3) Information regarding subsidy:
   a) existence of subsidy
   b) amount thereof
   c) nature thereof
(4) Information regarding ,material injury (same as for anti-dumping)

(5) No investigation may be initiated unless domestic producer supporting petition account for 25% or more domestic production of product.

10. Provisional Relief

(a) Type of provisional relief available
  1. Same as Anti-dumping (additional duties)

(b) Bases for provisional relief
  1. Same as Anti-dumping
  2. Same as Anti-dumping
  3. Preliminary affirmative finding of subsidy and material injury
  4. Same as Anti-dumping
  5. Same as Anti-dumping

(c) Maximum duration of four months only. [Art. 17.4]

11. Investigation Requirements or other Evidentiary Basis for Final Relief

(a) Nature of investigation
Adjudication of subsidy, margin, material injury, and causality by a competent administrative body

(b) Scope/ subject area for investigation/ justification determinations
  1. Presence of subsidy e.g. [see definitions]
     a) A financial contribution (realized by exporters) or producers for import substitution
     b) From a government or any public body (including state-owned enterprises)
     c) That confers a benefit

     [Note: Agricultural export subsidies that comply with the UR Agreement on Agriculture are not prohibited by the UR SCM Agreement]
  2. Volume- see Anti-dumping
  3. Effects on prices- see Anti-dumping
  4. Fact of subsidized exports- see Anti-dumping
  5. Impact of subsidized exports- see Anti-dumping (injury, causality)
  6. Threat of material injury- see Anti-dumping
  7. Material retardation of establishment of domestic industry (no details in SCM Agreement but see D. Industry Establishment)

C. WTO Safeguards (Art. XIX), UR Agreement

1. Focus/ Gravamen/ Justification

Emergency Situation: Import Surges from GATT Art. II commitments causing injury or threat thereof to domestic producers

2. Legal Basis

GATT Art. XIX UR Agreement on Safeguards [but, see also UR Agreement on Agriculture for Agricultural Products].

3. Remedy Possible

Suspension of concessions of commitments via import quotas, additional duties

4. Summary of Process/ Sequence

(1) Submission/ receipt of petition
(2) Initial review of adequacy of petition and acceptance/ rejection of petition
(3) a) Publication of notice of investigation
b) Initiation of investigation
- substantive review of petition information/ data
- verification of data submitted or other available data
(4) Initial decision on:
a) increase in imports due to GATT Art. II commitments
b) serious injury/ threat of serious injury
c) existence of critical circumstances (for provisional measures)
d) required causality
(5) Provisional relief – additional tariffs only
(6) Hearing/ final review of case information
(7) Final decision(s) on:
a) increased imports due to GATT Art. II commitments
b) serious injury/ threat of serious injury
c) causality
d) relief required- quotas, additional duties
(8) Imposition of quotas, additional duties
(9) Consultation/ Negotiation of compensation for other Member countries affected
(10) Notifications to WTO

5. Country Targeting Permitted?

No (in most cases- some exceptions)

6. Basic Requirements for Remedy: Summary

(1) Presence of increased imports (absolute or relative to domestic production) resulting from WTO tariff concessions
(2) a) Serious injury (e.g. significant overall impairment of) to a domestic injury producing like or directly competitive product – or
b) Threat thereof
c) Prior consultation with affected members before applying remedy
(3) Progressive liberalization of safeguard measures
(4) Generally – not targeted to specific members. Some exceptions
(5) Compensation to affected Members
(6) Notification to WTO Safeguards Committee
(7) May not exceed four years in duration except LDC which may extend up to 8 years

(8) Measures may only be applied to control the general level of imports, not to exceed what is necessary to rectify the situation.

(9) May not apply safeguards against products of a developing country as long as its share of imports into the domestic market does not exceed 3%, provided the developing country members with less than 3% of import share collectively account for not more than 9% of total imports of the product.

7. Relevant Definitions

(1) "Safeguard measures" are
"Emergency" actions with respect to increased imports of particular products that have caused or threatened to cause serious injury to the importing member's domestic industry producing a like or directly competitive product.

(2) "Serious Injury"
A significant, overall impairment in the position of a domestic industry. [Stronger requirement than "material" injury under AD or CVD in terms of impact on industry and more direct causality.]

(3) "Increased Imports"
Sharp, sudden enough imports- both quantitatively and qualitatively as to cause or threaten serious injury.

(4) "Threat of Serious Injury"
Serious injury that is clearly imminent.

(5) "Domestic Industry"
See definition under Anti-dumping /Art. VI

(6) "Like Product"
See definition under Anti-dumping /Art. VI

(7) "Critical Circumstances" (Justification for provisional measures) circumstances in which delay would cause damage [serious injury?] that would be difficult to repair (Art.6)

8. Initiation of Relief Process

(a) Who can initiate

- Member government on its own initiative (no petition required)

(b) How initiated

- Initiation of an investigation by member government on its own initiative

9. If by Petition, Basis for Acceptance/ Rejection

Petition not required

10. Provisional Relief

(a) Type of Provisional Relief available

- Increased (additional) duties only [SFG P3 (a), 4]
  [Refundable if no injury found]

(b) Bases for Provisional Relief

- Critical circumstances where delay would cause damage that would be difficult to repair

(c) Maximum Duration of Provisional Relief
- Maximum duration of 200 days
(Note: the period of provisional relief must be included in the aggregate total application of CVDs, which, for developing countries may not exceed 6 years subject to a 2-year extension)

11. Investigation Requirements or Other Evidentiary Basis for Final Relief

(a) Nature of Investigation
Determination of: a) Increased quantitative of imports resulting from member's Article II tariff concessions and commitments.
b) that have caused or threaten to cause serious injury to domestic industry producing like product, and
c) requisite causality of 1 to 2 by competent government body. [Art. 2.1] e.g. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

(b) Scope/ Subject Areas for Investigation/ Justification Determinations
With regard to injury causality, must evaluate all relevant factors of an objective, quantitative nature having a bearing on the domestic industry, including
a) rate and amount of increase in imports of the products in absolute and relative terms,
b) share of the domestic market taken by increased imports and
c) changes in the level of
  - sales
  - production
  - productivity
  - capacity utilization
  - profit and losses
  - employment

D. GATT Safeguards: Industry Establishment Art. XVIII: A&C

1. Focus/ Gravamen/ Justification

Economic Development: Reduction of imports to safeguard reserves in order to implement development of new or "infant" industries from increased imports

2. Legal Basis

GATT Article XVIII: A, C (For developing countries)

3. Remedy Possible

"Measures – unspecified presumably could involve:
- import quotas
- additional duties

4. Summary of Process/ Sequence

(1) Government Determination of:
  a) need to promote establishment of a particular industry
  b) level of external foreign exchange reserves necessary to enable budget needed for establishment of such industry
  c) products to be subject to industry establishment measures or to be exempted there-from
(2) Prior notification of intended import reducing measures (to WTO) and request for WTO concurrence
(3) Application of measures (following WTO concurrence or if no WTO concurrence, after 90 days)
(4) Consultation with countries affected re alternative remedies, reduced quotas/ tariffs, compensation; If negotiation fail to reach cigmt on compensation, the member may proceed to modify/ withdraw concession but only if:
  a) WTO finds it made every effort to reach agreement there and
  b) Actually implements such compensation at the same time
  c) In government assistance

5. Country Targeting Permitted

No

6. Basic Requirements for Remedy: Summary

A. <u>May modify or withdraw a Concession if:</u>
  (1) It is a country that a) is in the early stages of development and b) can only support a low standard of living
  (2) In order to promote establishment of a particular industry
  (3) External reserve (B/P) situation prevent government funding of such establishment
  (4) Must notify members and enter into negotiations with any member with a substantial interest therein
    a) If agreement reached with other affected members, member may withdraw or modify concessions subject to such compensatory adjustments agreed to.
    b) If no agreement reached in 60days, must refer matter to WTO
    c) If WTO finds Member has made every effort to reach agreement with affected Members and that the compensation it has offered is adequate, it may withdraw/modify the concession.
    d) If WTO finds compensation is in adequate, but the member has made every effort to offer adequate compensation; the member may proceed with modification/ withdrawal of concession, subject to retaliation by affected members. (XVIII:7(a))

B. <u>Notification/ Consultation:</u>
  (1) Must notify WTO: a) of the special difficulties it meets in achieving establishment of the industry and b) of the measures it proposes to remedy such difficulties.
  (2) May not introduce any measure affecting imports of a product that is the subject of a concession unless it has entered into consultations with affected Members and secured

concurrence of the WTO except that, if the industry has already started production, the Member may

(3) Take such measures as may be necessary to prevent, during that period, imports of the product from increasing substantially above four normal levels.

(4) If requested by the WTO, Member shall consult with WTO on alternative measures and effects on the Members

7. Relevant Definitions

(1) "Economies which can only support a low standard of living" (not defined)

(2) "Economies which are in the early stages of development"

Economies which:

a) are just starting their economic development and
b) are undergoing a process of industrialization to correct an excessive dependence on primary production. (interpretive not to Annex I, pp.2)

(3) "Establishment of a particular industry"

a) establishment of a 'new' industry ,
b) establishment of a new branch of production in an existing industry,
c) substantial transformation of an existing industry,
d) substantial expansion of an existing industry supplying a relatively small proportion of the domestic demand, or
e) reconstruction of an industry destroyed or substantially damaged is a result of hostilities or natural disasters.

8. Initiation of Relief Process

(a) Who can initiate

- Member government (no petition required)

(b) How initiated

- Determination by member government of need to take action.

9. If by Petition, Basis for Acceptance/ Rejection

- Petition not required

10. Provisional Relief

(a) Type of provisional relief available

- No provision for provisional relief

(b) Bases for provisional relief

- No provision

(c) Maximum duration of provisional relief

- No provision

11. Investigation Requirements or Other Evidentiary Basis for Final Relief

(a) Nature of investigation

- Government must prepare an analysis justifying actions to restrict imports. (for submission to WTO as notification and incident to consultation with affected exporting members):

(b) Scope/ subject areas for investigation/ justification determinations

The analysis should demonstrate that the member:

a) can only support low standard of living and
b) is in the early stages of development and
c) it is necessary to take protective or other measures affecting imports in order to enable it to
d) implement policies and programs for economic development through supporting establishment of a particular industry and
e) that it has inadequate monetary reserves to do so
f) products affected (at the tariff-line level)
g) the type of measures to be applied, and
h) the criteria used for their administration,
i) time schedules for removal of such measures
j) trade flows affected

(2) That the restrictions applied (or to be applied) will be applied in such a manner as to
   a) avoid unnecessary damage to the commercial interests of any other member and
   b) not to prevent unreasonably the importation of goods in minimum commercial in quantities the exclusion of which would impair regular channels of trade [XVIII: 10]

(3) That the restrictions applied will trade [XVIII: 11]
   a) be progressively relaxed as conditions improve, and
   b) be eliminated when conditions longer justify them.

(4) That the government will give preference to the least disruptive measures [BPU ip2]

(5) That such measures will only be used to control the general level of imports (not targeted)

(6) The criteria applied as to
   a) which products will be subject to restriction and
   b) used to determine the volume or value of imports there of allowed.

E. General Exceptions (Art. XX)

1. Focus/ Gravamen/ Justification

Protection of morals, health, precious metals, compliance with GATT- consistent regulations relative to customs enforcement, IPR protection, fraud, etc.

2. Legal Basis

GATT Art. XX

3. Remedy Possible

“Measures” – (not specified) Presumably- import prohibitions

- interdiction
- criminal penalties

4. Summary of Process/ Sequence

(1) Government determination of need to invoke Art. XX – (grounds)
(2) No other procedures specified.

5. Country Targeting Permitted?

(3) Not specified but apparently to deal with specific problems.

6. Basic Requirements for Remedy: Summary

(1) Existence of one of the situations described in Art. XX, e.g. necessary or relating to
- Public morals
- Human, criminal, or plant like
- Exportation of gold/ silver
- Secure compliance with laws or regulations not inconsistent with the GATT, including those related to:
  - ♦ Customs enforcement
  - ♦ Enforcement of monopolies
  - ♦ Protection of intellectual property
  - ♦ Prevention of deceptive practices
- Relating to prison labor
- Protection of artistic, historic, or archeological treasures
- Conservation of exhaustible natural resources
- Inter-governmental commodity agreements (exports)
- Short supply situations (exports)

(2) May not be either
  a) a means of arbitrary or unjustified discrimination
  b) disguised restriction on International Trade.

(3) Notification to WTO
(4) Consultation as required/ requested after imposition of remedies

7. Relevant definitions

None

8. Initiation of relief process

(a) <u>Who can initiate</u>
- Member government (no petition)

(b) <u>How initiated</u>
- Determination by member government of need to take action.

9. If by Petition, Basis for Acceptance/ Rejection

- Petition not required

10. Provisional Relief

(a) Type of provisional relief available
- No provision for provisional relief

(b) Bases for provisional relief
- No provision

(c) Maximum duration of provisional relief
- No provision

11. Investigation Requirements or Other Evidentiary Basis for Final Relief

(a) Nature of investigation
1) Government must prepare an analysis justifying imposition of safeguards under article XX for submission to WTO and incident to any consultation with affected exporting members.

(b) Scope/ subject areas for investigation/ justification determinations
1) Measures imposed are necessary to:
   - protect public morals
   - protect human, animal, and plant life or health
   - govern trade is gold and silver
   - comply with GATT/ WTO- consistent to national laws/ requirements including
     - ♦ customs enforcement
     - ♦ protection of Intellectual Property Rights
     - ♦ prevention of fraud/ deceptive practices
   - relate to prison labor
   - protect natural artistic, historic, archeological treasures
   - conservation of exhaustible natural resources
   - fulfill inter-governmental commodity agreements
   - deal with short supply situations,
2) Measures will not be applied in an arbitrary manner or constitute unjustified discrimination among countries where same condition prevail.
3) Measures are not a disguised restriction on international trade.

F. Safeguards: Balance of Payments – Art. XVIII: B

1. Focus/ Gravamen/ Justification

Balance of payment difficulties/ safeguarding external financial position and ensure adequate foreign exchange reserves for economic development [applicable only to developing countries]

2. Legal Basis

GATT Art. XVIII: B & WTO Understanding on Balance of Payments.

3. Remedy Possible

Unspecified "measures" that control the general level of imports by restricting the quantity or value thereof by price based measures such as:

- import deposit schemes
- import surcharges (essentially additional duties in excess of bound tariffs)
- quantitative restrictions (quotas)

4. Summary of Process/ Sequence

(1) Government determination of:
  a) existence of a serious decline in monetary reserves
  b) need to arrest and reverse such decline
  c) products to be controlled
  d) quotas based on either volume and/or value
(2) Notification to WTO [of institution of quotas]
(3) Consultations with countries affected within four months
(4) Imposition of import quotas
(5) Continuing consultations for reduction/ removal
(6) Annual notifications

5. Country Targeting Permitted?

No

6. Basic Requirements for Remedy: Summary

(1) Must be: a) "Low standard of living" countries and
  b) In early stages of development (Art. XVIII)
(2) In order to safeguard external level of foreign exchange reserves- so they are
(3) Adequate for implementing program for economic development assures an economic employment of production resources. Member may impose restriction on the quantity or value of merchandise to be imported, but only
(4) Import restrictions do not exceed those necessary
  a) to forestall threat of, or to stop, a serious decline in its monetary reserves or

b) to achieve a reasonable rate of increase in reserves (if member already has inadequate reserves) and

(5) Due regard is given to special factors affecting its reserves or need therefore, including any special credits or other resources available that would obviate the need for import restrictions and

(6) The products chosen for restriction do not

a) cause unnecessary damage to the commercial or economic interest of others WTO members and

b) unreasonably prevent importation of any goods in minimum commercial quantities, exclusion of which would impair regular channels of trade and

(7) Do not deviate from MFN (not specifically targeted on any other member) and

(8) Do not violate non-discrimination requirements of Art. XIII (re: quantitative restrictions) and

(9) Restrictions must be progressively relaxed as B/P and reserves improve and

(10) Restrictions must be eliminated when conditions no longer justify them.

(11) In targeting imports for restriction, members may exclude or limit application of import surcharges with

7. Rele vant Definitions

"Essential Products"

- Products which meet basic consumption needs which contribute to the member's effort to improve its balance of payments situation, such as capital goods or production inputs.

8. Initiation of Relief Process

(a) Who can initiate

- Member government (no petition required)

(b) How initiated

- Determination by member governments of need to take action.

9. If by Petition, Basis for Acceptance/ Rejection

- Petition not required

10. Provisional Relief

(a) Type of Provisional relief available

- No provision for provisional relief

(b) Bases for provisional relief

- No provision

(c) Maximum duration of provisional relief

- No provision

11. Investigation Requirements or Other Evidentiary Basis for Final Relief

(a) Nature of Investigation

1) Government must prepare an analysis justifying imposition of safeguards under article XVIII: B for submission to WTO and incident to any consultations with affected reporting members.

(b) Scope/ Subject areas for Investigation/ justification determinations

2) Major points in justification:
   (Essentially the same as in GATT Safeguards: Industry Establishment 1, except that:
   a) it is necessary to take protective measures affecting imports in order to
      - safeguard its balance of payments and/or to
      - forestall the threat of or to stop a serious decline in monetary reserves or to
      - achieve a reasonable rate of increase in its monetary reserves,
   b) existence/ availability (or not) of special external credits or other resources available to it to deal with its reserve problem. [XVIII: 9].

3) Member has/ will consulted with the IMF and is in compliance with the IMF Articles of Agreement [Art. XV]

4) Description of: [for WTO]
   a) overview of B/P situation/ prospects
   b) internal/ external factors affecting B/P situations
   c) domestic policy measures to achieve equilibriums
   d) full description of restrictions and legal bases
   e) plan for progressive relaxation/ elimination of restrictions

G. Special Safeguards: Agriculture

UR Agreement on Agriculture

1. Focus/ Gravamen/ Justification

Domestic Market Disruption occasioned by:

a) import surges resulting from tariff reduction commitments
   Apply to "SSG" products only in tariff schedules (tariffied products only)
b) abnormally low commodity prices

2. Legal Basis

UR Agreement on Agriculture Art. 5

3. Remedy Possible

Additional customs duties

4. Summary of Process/ Sequence

(1) Reservation of right to invoke special safeguards per product
(2) Government determination of:
  a) market disruption resulting from
(5) imports surges or
(6) abnormally low prices (below stated reference price)
(3) Advance notification to WTO of invocation of special safeguards
(4) Consultation with interested (affected) member governments
(5) Imposition of additional, customs duties
(6) Annual notifications to WTO

5. Country Targeting Permitted?

No provision

6. Basic Requirements for Remedy: Summary

(1) Applies only to "Tariffied" products only.
(2) Must be to prevent disruption in domestic market resulting from:
  a) import surges above or certain "trigger" levels on the share of imports or
  b) imports prices below certain "trigger" or "reference" price
(3) Consultation requirements (see)
(4) Notification Requirements

7. Relevant Definitions

(1) <u>Special Safeguards "Trigger"/ import volume</u>
  - Imports as a percentage of the corresponding domestic consumption during the three preceding years for which data are available:
  a) where such market access opportunities for a product are less than or equal to 10%, the base trigger level is 125%;
  b) where opportunities are greater than 10%, but less than or equal to 30%, the base trigger level is 110%; and
  c) where opportunities are greater than 30%, the base trigger level is 105%.

(2) <u>Special Safeguards "Trigger"/ reference price</u>
  - The average 1986 to 1988 price, e.g. the average c.i.f. unit value of the product concerned. (Art. 5:4 pt.nt.2)

8. Initiation of Relief Process

(a) <u>Who can initiate</u>
- Member government on its own initiative (no petition required)

(b) <u>How initiated</u>
- Determination by member government of need to take action

9. If by Petition, Basis for Acceptance/ Rejection
Petition not required

10. Provisional Relief

(a) Type of Provisional relief available
No provision for provisional relief

(b) Bases for Provisional relief
No provision

(c) Maximum duration of provisional relief
No provision

11. Investigation requirements or Other Evidentiary Basis for Final Relief

(a) Nature of investigation
Government must prepare an analysis justifying imposition of special safeguards (for submission to WTO and incident to consultation with affected exporting members.

(b) Scope/ Subject areas for Investigation/ Justification Determinations
a) import volume surges above certain "trigger" levels – or
b) import prices are below certain reference price "triggers". [Art. 4.2]
c) increased imports
d) serious damage or threat thereof to domestic reduces products like or directly competitive products

H. Transitional Safeguard Mechanism- Agreement on Textiles and Clothing
(Expires on 01 Jan., 2005)

1. Focus/ Gravamen/ Justification

Domestic Market Disruption occasioned by surges in textile/clothing imports during the transition period of reintegration of trade/ clothing and phase our of MFA quota system.

2. Legal Basis

UR Agreement on Textiles/ Clothing – Art. 6

3. Remedy Possible

Unspecified at (presumably additional duties and quotas)

4. Summary of Process/ Sequence

(1) Reservation of right to invoke transitional safeguards by June, 1995. [Zambia?]
(2) Government determination of:
a) Product being imported from all sources in such quantities as to cause serious damages or threat thereof to domestic industry.

b) Specify to which exporting Members such damage is attributable (e.g. resulting from "sharp and substantial increase in imports, actual or imminent, from such Members individually).

(3) Prior consultation to taking action members affected. Sixty days to arrive at agreement on restraint.

(4) Provisional relief applied in unusual and critical circumstances

(5) Notification to WTO TMB of (i) Provisional relief to be applied within 5days or (ii) at time of imposing restraints.

5. Country Targeting Permitted?

Yes

6. Basic Requirements for Remedy: Summary

(1) Required to have notified the WTO/ textiles monitoring body if they reserved right to use the transitional safeguard mechanism (6 months e.g. 01 June 1995)

(2) Existence of surges (during the ATC transition period – ends 01 January, 2005) in imports of products

a) not still under MFA quotas

Nor

b) not yet integrated into the GATT into framework. (Other products e.g. those integrated into GATT/WTO subject to regular WTO remedies, e.g. AD, CVD, Safeguards, etc.)

(3) Requires 2 – tiered approach e.g., importing member must:

a) Determine that a particular product is being imported in such increased quantities from all sources as to cause serious damage or actual threat thereof, to its domestic industry. (Art. 6.2, 6.3)

b) Determine to which specific exporting member country or countries the damage is attributable (e.g. that there is a "sharp and substantial increase in imports, actual or imminent, from such member(s).

(4) "Under highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair", member can impose provisional restraint but must consult with WTO textile monitoring body within 5 days of taking such action. (Art. 6.11)

(5) Importing member must consult with such specific member or members and a) demonstrate presence of such serious damage, b) arrive at an agreed restraint level (which may not be lower than the actual level of imports from that member during a recent 12 month period (Art. 6.17) c) action may continue for no more than 3 years, and d) if over one year, must allow for 6% growth over each remaining year.

(6) In non provisional relief cases, and consultations with exporting members produce no agreement within 60 days, member may impose restrictions unilaterally but must be promptly submitted WTO/TMB for review. TMB may make "recommendations" to the parties.

(7) Importing member may not apply any new restrictions to an exporting member if it already has a restraint on the same product.

7. Relevant Definitions

"Integration of Textiles/ Clothing"
Bringing T/C under the rules of the GATT/WTO framework.

"Multifiber Agreement" (MFA)
Prior international treaty governing international trade in textiles and clothing under which such trade was governed by MFA rules and not GATT rules.

8. Initiation of Relief Process

(a) Who can initiate
- Member government on its own initiative (no petition required)

(b) How initiated
- Determination by member government of need to take action

9. If by Petition, Basis for Acceptance/ Rejection

- Petition not required

10. Provisional Relief

(a) Type of Provisional Relief available
No provisional relief

(b) Bases for Provisional Relief
No provision

(c) Maximum duration of Provisional Relief
No provision

11. Investigation Requirements or Other Evidentiary Basis for Final Relief

(a) Nature of Investigation
Government must prepare an analysis justifying imposition or transitional safeguards (for submission to WTO TMB and incident to consultations with affected exporting members.

(b) Scope/Subject areas for Investigation/ Justification Determinations
1) Existence of surges during the ATC transition period in imports of products
   a) not still under MFA quotas nor
   b) not yet integrated unto one GATT/WTO framework.
2) See "Requirements" [H.2]

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