

# GENERAL AGREEMENT ON TARIFFS AND TRADE

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## Committee on Trade in Industrial Products

### REPORT OF WORKING GROUP 1 ON NON-TARIFF BARRIERS

#### Examination of Items in Part I of the Illustrative List (Government Participation in Trade)

1. Working Group 1 was established by the Committee on Trade in Industrial Products in December 1969 to examine the following subjects in the Illustrative List (Annex 1 to document L/3298): trade-diverting investment, export subsidies, countervailing duties, government procurement and State-trading enterprises in market economy countries. The task of the Group was to explore, on the basis of the information in the Inventory and any information that might be subsequently furnished, possibilities for concrete action, both with regard to reducing or removing notified barriers within its competence, and to developing possible rules of conduct. The work was to be conducted on the understanding that it was exploratory and preparatory in nature, and involved no commitment on the part of any member of the Working Group to take or join in any action under discussion. Special attention was to be given to the interests of the developing countries, which had submitted a number of notifications on subjects within the competence of the Group.
2. The Working Group met from 12 to 21 January and from 2 to 9 November 1970 under the chairmanship of Mr. R.E. Latimer (Canada). In formulating views on suitable solutions the Group took into account the question whether particular problems appeared to be pervasive in their occurrence or whether, even if difficulty arose only in a few instances, the effects were yet of concern to many countries. A third possibility was that both the causes and the effects were confined to a few countries only. It was considered that these characteristics could have a bearing on the type of solution.
3. An effort was made to define in each case the main headings or topics to be covered, especially if some form of multilateral arrangement appeared to some or most members to be indicated. The Group not only had in mind the general terms of reference in regard to the exploratory nature of its work, but wished to emphasize in this connexion that in many cases the views recorded are only tentative at this stage, and that all delegations would have full latitude to supplement and clarify them when the report was brought for discussion by the Committee on Trade in Industrial Products.
4. The Group also discussed the notifications included in the Inventory under the section "restrictive practices tolerated by governments" and certain proposals were made which are recorded in Section VI of this document.

I. Trade-diverting aids other than export subsidies

5. Type of solution: Most members of the Group tended to favour, as explained below, a wider concept for consideration of the Illustrative List item "Trade-diverting investment" as reflected in the heading above. Some felt that the problem of serious trade-diverting effects of government aids to production and investment was general both in occurrence and in effects on other countries as most countries grant some sort of assistance or other aid to economic development of a general or regional character. Others, basing their information on the Inventory, doubted at this stage whether the present and prospective cases of difficulty arising out of such aids were so important or numerous. One member doubted, moreover, that incentives had been shown in any case as decisive in creating a problem of serious trade diversion.

6. There was, however, rather general agreement that the essential element which would justify GATT attention to domestic aids was serious prejudice to trade interests through trade diversion. Some delegations felt that particular situations such as research and development requirements, the need for assistance to depressed regions, reconversion of an industry or possibly other considerations were elements which could be taken into account by the contracting parties in the consideration of a particular case. Some of these delegations considered that the existing notification procedures might be completed by including information on aids granted by local and regional authorities, and that provision for specific notification on request would be useful. Some other delegations emphasized the desirability of specific procedures for consultation, as well as notification, at the request of interested governments. However, a number of other delegations took the view that the existing provisions of Article XXII were sufficient to meet the case.

7. Those members which considered trade-diverting aids to be a problem of general concern favoured a set of rules, whether in the form of an Interpretative Note to Article XVI, or a code of good conduct. Among those which doubted the need for such an approach, the question was raised whether a code would contribute to solution of the specific problem notified, to which it was after all the first obligation of the Group to address itself. Inquiry into reasons why existing consultation procedures on subsidies had not been used might, for example, offer a more useful approach.

8. Main headings: As a working hypothesis it was proposed by some delegations that a set of rules might contain the following main headings:

- (i) The Note would build on the existing provisions of the GATT. It would not envisage new GATT commitments although this possibility should not be precluded if further discussion among the contracting parties indicated that additional obligations would be appropriate.

- (ii) Improved notification of domestic aids having trade-diversionary effects was considered to be desirable, since relatively few contracting parties report, and most of those reporting do so less frequently than required and tend to omit domestic production and investment aids. To deal with the situation where a country applying certain measures does not itself consider that such measures fall within the notification requirements of Article XVI:1, it was further suggested that opening the way to requests by interested countries, through the secretariat, for prompt special reports by countries giving domestic aids would improve the coverage of aids of real international concern.
- (iii) Specific provision for consultations upon request, either among interested parties or with the CONTRACTING PARTIES as a whole, along the lines of Article XXII or, if no satisfactory solution is found, as provided for in Article XXIII, to determine whether serious prejudice to a contracting party's trade interests had occurred or was likely to occur through trade diversion caused by such aids.
- (iv) Adjustment, in the event of a decision by the CONTRACTING PARTIES finding such serious prejudice
  - (a) preferably by elimination or reduction of the aid to the point where prejudicial effects were eliminated;
  - (b) failing that, the grant of compensatory new concessions to the injured party or parties; and
  - (c) if neither solution proved feasible, authorization by the CONTRACTING PARTIES for the suspension of the application of concessions or other obligations by the injured party or parties toward that party.

## II. Export subsidies

9. Type of solution: Most members of the Group considered that the problem of export subsidies was general in nature, in that many countries appeared to maintain aids of various kinds which had been mentioned in one context or another as export subsidies, whereas only the major developed countries had agreed in paragraph 4 of Article XVI to limitations on use of export subsidies in regard to non-primary products. Others, considering the information contained in the Inventory, were not in a position to conclude therefrom that the problem was of a general nature. Some felt that the major element should be an effort to strengthen existing obligations through clarification of obligations and supplementary procedures. In the opinion of most members of the Group it was important that more countries, particularly those developed countries which have not accepted the prohibition of export subsidies on non-primary products, should accept it so as to ensure proper balance in the legal commitments in this field, all the more so because, for countries which had not accepted the Declaration, the standstill provisions of Article XVI:4 were no longer in effect. Some favoured consideration

of certain new obligations as well. Attention was drawn to paragraph 5 of Article XVI which calls for a review of the operation of the provisions of Article XVI.

10. The following proposals, which met with broad approval, were put forward as the main elements of an approach which might lead to a solution to the problem of export subsidies.

- (i) An important step would be for those contracting parties, particularly developed countries, not having accepted the Declaration Giving Effect to the provisions of Article XVI:4 to do so.
- (ii) It was recognized that there was a need for measures to ensure improved and continuing implementation of obligations of Article XVI:4. It was proposed that consideration be given to the following suggestions:
  - (a) A refinement and elaboration of a definition of measures that countries regard as constituting export subsidies which are forbidden by Article XVI:4.
  - (b) Reviving the standstill provisions of Article XVI:4.
  - (c) In relation to the above suggestions, revisions, where appropriate, of notification procedures, to ensure improved and continuing implementation of the obligations of paragraph 4.

11. In addition, a number of other suggestions were the following:

- (i) There may be need to include in the obligations of paragraph 4 all export subsidies even though they do not result in sale for export below the comparable domestic price.
- (ii) The same, or more comparable, treatment should be given to primary and non-primary products under Article XVI.
- (iii) It might be possible to provide that in case of infraction of the prohibition under Article XVI:4 the importing country be authorized to take all measures deemed necessary under the provisions of the General Agreement to offset the trade effects of that subsidy.

12. Some delegations recommended that all of the proposals included under paragraphs 10 and 11 above be considered in the context of an overall review of the operation of Article XVI, as provided for in paragraph 5. It was noted that there never had been such a review.

13. The view was expressed by several delegations that the distinction between primary and non-primary products was a fundamental one in that it had been a part of Article XVI from the outset and had been confirmed during the Review Session in 1955. Some others maintained that since that time there had been developments in international trade in agricultural products that called for a re-examination of such a distinction. It was also suggested by others that a more precise definition of what constituted a primary product might be useful.

### III. Countervailing duties

14. Type of solution: The predominant view was that the injury question was the main problem where the solution was to be sought in action by particular countries. It was suggested that the root of this problem lay in the fact that the Protocol of Provisional Application had been in force for over twenty years, thus permitting some contracting parties to be legally exempt in certain circumstances from obligations arising out of Part II of the General Agreement. The problem was aggravated in a particular case by the fact that prior existing mandatory requirements removed all discretion as to the imposition of countervailing duties.

15. As regards the general question of the application of countervailing duties, several representatives suggested that there was need for a code along the lines of the Anti-Dumping Code, although the adoption of such a code would be difficult until all contracting parties had accepted the same obligations. Any code might include, inter alia, determination of the subsidy and its amount, determination of injury and the trade effect for third countries. However, it was pointed out that countervailing duties, unlike anti-dumping action, were in some cases a response to measures that are prohibited under Article XVI:4.

16. The view was expressed that there should be a measure of consistency between any new code on countervailing duties and the Anti-Dumping Code since they would both be interpretations of Article VI. One delegation presented a note (Annex) which outlined those elements of the Anti-Dumping Code which would appear to be applicable to a code on countervailing duties. Some other delegations supported the approach outlined in this note. Other delegations, even though they gave support to the idea of preparing a code on countervailing duties, expressed the view that such a code should take into account the special position of developing countries, and they recalled the problems that their countries had raised in connexion with the preparation of the Anti-Dumping Code.

17. Some delegations suggested that a code on countervailing duties would presumably have to contain a definition of what constituted a subsidy and, hence, would involve Article XVI. With regard to the proposed code on countervailing duties, it was suggested by some delegations that more experience should be gained on the operation of the Anti-Dumping Code, which in their opinion had not to date been entirely satisfactory, before embarking upon the elaboration of a second code.

18. Some delegations expressed the view that export subsidies rather than countervailing duties were the real problem because it was the export subsidies themselves in the first instance, and not the countervailing duties, which resulted in uneconomic trade distortion. If there were no export subsidies there would be no need for countries to resort to countervailing duties, thus the elimination of export subsidies should be the first objective. It was further suggested by these delegations that any solution to the problem of countervailing duties could be considered only in the context of export subsidies such as the general review suggested in paragraph 12 above.

19. As for the suggestion that the problem was really one of export subsidies, the opinion was expressed that this argument would be valid only after all contracting parties had signed the Declaration giving effect to Article XVI:4, which itself covered only part of the field, a step which seemed unlikely in the case of some countries. Furthermore, certain differences of opinion exist, and will most likely continue to persist, as to what constitutes an export subsidy if no adjustment and development of the definition of a subsidy is undertaken.

20. It was further pointed out by some delegations that the present GATT rules relating to countervailing duties are unsatisfactory since third countries are not obliged to impose countervailing duties to offset export subsidization that causes or threatens injury to an export industry of another contracting party. It was suggested that the GATT be amended to permit the injured party, in such cases, specifically to suspend concessions on products of interest to the export-subsidizing country. One delegation said that this matter could appropriately be discussed in the work on the code it had suggested.

#### IV. Government procurement

21. Type of solution: Government procurement was a problem of a general nature and both the legal and practical aspects of the problem would have to be considered together. It was felt that the solution lay in the formulation of a code or set of guidelines that would apply to the contracting parties' government procurement operations. The Group agreed that in determining guidelines, the following elements should, inter alia, be considered.

#### 22. Main headings:

- (i) Objectives and principles
- (ii) Definitions
- (iii) Procurement entities
- (iv) Elimination of existing discrimination
- (v) Exceptions
- (vi) Purchasing procedures
- (vii) Publication of government procurement regulations
- (viii) Reporting, review, complaint and confrontation procedures.

Note was taken of the fact that the OECD is addressing itself to this problem and that all the suggested main headings were covered by the guidelines which are under preparation in OECD. The Group was informed of the status of the work in OECD and of the main contents of the envisaged guidelines. It was noted that the work in OECD would be pursued at a meeting in February 1971 and that the work there was in a fairly advanced stage. It was not considered useful to elaborate further at this stage on the main headings in the Group and it was agreed that the best way to proceed would be for the Group to follow developments in OECD.

V. State trading in market economy countries

23. Type of solution: It was generally agreed that the existing rules of Articles XVII and II:4, as well as the Interpretative Note ad Articles XI to XV, regarding non-discrimination and limitation of protection, seemed reasonably adequate as far as basic principles were concerned, and that the problems appeared to lie in the area of implementation, where some elaboration of procedures might be considered. Some countries suggested that specific solutions might be worked out, and the view was expressed that this might be on a case-by-case basis. In the opinion of certain delegations the procedures for consultations under Articles XXII and XXIII seemed, however, to be adequate. It was noted that the notifications named in this section of the Illustrative List related to State-trading enterprises in developed market economy countries and on that basis the developing countries had participated on their understanding that the Group would base its discussions on State-trading practices of developed market economy countries.

24. Main headings: The following ideas were expressed, inter alia, with regard to the principal elements towards a solution:

- (i) With a view to strengthening the effectiveness of Article XVII, consideration should be given to improving the quality, frequency and coverage of reports by contracting parties on State-trading enterprises. (It was noted that only a handful of contracting parties report with anything like the prescribed regularity and that reports were in some cases incomplete as to coverage or failed to respond in the detail envisaged by the questionnaire.) A possible device, which might be applicable here, would be to invite countries who consider their trade interest affected to obtain, through the secretariat, notifications on subjects not covered by regular notifications. The view was expressed that lack of information regarding the margin by which prices are increased (mark-ups) in State trading, including failure to state whether a country is meeting full demands for imported products in accordance with the Interpretative Note to Article II:4, made it difficult for foreign firms and trade partners to determine the extent of discrimination.
- (ii) Inclusion of specific reference to the possibility of bilateral and multilateral consultation along the lines of Articles XXII and XXIII might be useful on the understanding that, if no satisfaction were obtained through such consultation, the injured country could be granted compensatory concessions or, failing that, be authorized to suspend the application of equivalent concessions or obligations.
- (iii) The view was expressed that the effectiveness of the provisions on State trading might be enhanced if countries sought to negotiate to a greater extent than heretofore, concessions - including possible global purchase commitments - on State-traded products in which they have a trade interest.

25. It was suggested that the secretariat should make a review of the effectiveness of procedures in Article XVII:4 and make recommendations for improving them. Where concessions were in operation, the review might cover the question whether countries had observed the rules of Article II:4. Further light might be shed on the notifications by a study to determine to what degree the problems involved in the notifications had been caused by governmental restriction of quantity purchased rather than by the nature of State trading as such. This would narrow the problem somewhat by showing separately the degree to which, and ways in which, State trading as such created problems, as distinct from the effects of other objectives which might also be involved, such as the protection of particular sources of supply, revenue considerations or social policy.

#### VI. Other restrictive practices

26. It was agreed that the original title "restrictive practices tolerated by governments" should be changed to "other restrictive practices" because it was found that this section not only included practices tolerated by governments but, in addition, those imposed by governments. Notifications under this heading include miscellaneous items, some of which are in fact under direct governmental control (e.g. restrictions on advertising of certain spirits, or control of activities of branches of foreign companies) while others fall outside governments' direct responsibilities (e.g. import-restricting activities of trade unions). In the former case it was suggested by some delegations that solutions might lie in the acceptance by the governments concerned of the same practices as were found to be generally acceptable internationally.

27. As regards practices outside government control, it was pointed out that no provisions of the General Agreement were specifically applicable although such barriers could have damaging effects on imports and run counter to GATT's intentions. It was suggested that in cases where such practices were contrary to national legislation, that legislation should be applied and that in the case of practices not covered by legislation, governments should take appropriate action to solve the problems.

28. It was noted that the question of prohibitions on advertising of spirits (item 48.2) should continue to be discussed by Group 5 together with certain other non-tariff barriers on trade in alcoholic beverages.



Annex

ELEMENTS OF A CODE ON COUNTERVAILING MEASURES

Proposal by One Delegation

Because of the close relationship between anti-dumping and countervailing measures and the fact that Article VI of GATT deals with both, it seems desirable to introduce a measure of consistency between any new Code on countervailing duties and the existing Anti-Dumping Code. From the note it can be seen that a large part of the existing Code would be equally applicable to a new Code so that major problems in drawing up a new text might be minimized. Although, for the same reason, the adoption of such a Code would not be a major step forward, it would make the contractual position on countervailing duties somewhat clearer and would remove certain anomalies which exist at present.

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1. The Anti-Dumping Code interprets Article VI of the GATT and elaborates rules for its application in respect of anti-dumping duties. It would be useful to consider whether a similar Code could be applied to countervailing duties.
  2. In so far as it interprets concepts such as material injury which are quoted in Article VI as applying to both countervailing and anti-dumping action it would seem reasonable to hold that the interpretation given in the Anti-Dumping Code should apply equally to countervailing action.
  3. In relation to procedures laid down in the Anti-Dumping Code which are not specified in Article VI (e.g. on notifying the countries and firms concerned; what is an "industry"; the public announcement of decisions reached) signatories are formally committed to apply them in relation to anti-dumping duties only. Although many countries no doubt already apply these procedures in countervailing duty cases also, it would be useful to make this a formal obligation.

4. The following Articles in the Code would be relevant also in relation to subsidization, the only changes necessary being, in general, the substitution of the words subsidy, subsidies or subsidization for dumping:

- Article 1 - All countervailing action to be subject to Article VI.
- Article 3 - Determination of injury.
- Article 4 - Definition of industry for the purpose of an investigation (including the possibility of action on behalf of regional industries in certain circumstances).
- Article 5(a) - Initiation of cases on application only (normally).
  - (b) - Subsidization and injury to be considered simultaneously.
  - (c) - Application to be rejected, or the investigation stopped, if the effect of subsidization is found to be negligible.
  - (d) - Normal customs clearance of goods to continue.
- Article 6(h) - Notification of decisions to the countries and firms concerned.
  - (i) - If facts are withheld decisions may be taken on the information available.
- Article 8(a) - Action to be permissive. A countervailing duty less than the margin of subsidization to be imposed, if this would suffice to remove the material injury.
  - (c) - Duty not to exceed the subsidy element.
- Article 9(a) - Countervailing duties to remain in force only so long as is necessary to counter materially injurious subsidization.
  - (b) - Authorities to review cases at intervals and on request.
- Article 15 - Any changes in legislation, regulations etc. to be notified to the contracting parties.
- Article 16 - Annual Report to be made to the contracting parties on action taken.

It would be for consideration whether the Code provisions on provisional and retroactive duties (Articles 10 and 11) should be applied also in the case of countervailing duties. The question of machinery to review implementation would also arise.

6. Articles 2, 6(a) to (g), 7, 8(b), 8(d) and 8(e) of the Code could not be applied directly to countervailing action. But the following points might arise in this connexion:

- (a) The accused government to be given a proper opportunity to comment on the charges.
- (b) The investigating government to be given all reasonable information including the opportunity of personal discussions with the authorities directly concerned with the alleged subsidy.
- (c) How any necessary enquiries of firms as well as governments should be conducted.
- (d) The accused government to be given the opportunity of making suitable administrative changes as an alternative to countervailing duties, if the verdict goes against it.