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GENERAL AGREEMENT ON TARIFFS AND TRADE

Multilateral Trade Negotiations

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DIFFERENTIATED TREATMENT IN THE FIELD OF SUBSIDIES AND COUNTERVAILING DUTIES

Working Paper Presented by the Brazilian Delegation

1. In the course of the discussion by Group 3(b), at its meeting on 29-31 May last, of the working paper presented by the Brazilian Delegation on Differentiated Treatment in the Field of Subsidies and Countervailing Duties (MTN/3B/W/3), several delegations stated that they would like to hear concrete proposals to this effect; moreover, there was widespread support for the idea that the discussion on general rules and on differentiated treatment for developing countries should be pursued in parallel (see note by the secretariat on the meeting, MTN/3B/19, paragraphs 24 and 26).

2. In order to stimulate further discussion, and on a preliminary basis, the Brazilian Delegation wishes to put forward the following elements of a possible negotiating approach for implementing differentiated treatment for developing countries in the field of subsidies and countervailing duties.

3. The legal situation in GATT, as far as we are concerned, is clear. Developing countries are not bound by the 1960 Declaration giving effect to the provisions of Article XVI:4, banning subsidies. It follows that no countervailing action should be taken against legitimately subsidized exports by developing countries.

4. In practice, however, developed countries' national legislations and application procedures are not in conformity with the exemption from countervailing action, which we envisage as a necessary, legal counterpart to the fact that the present subsidy ban in GATT remains inoperative for developing countries. Consequently, the commitments entered into by developed contracting parties in Part IV of the GATT - and in particular Article XXXVII:3(C), which is generally interpreted to also cover possible countervailing measures against exports of developing countries, have so far constituted in effect dead letter.

5. The Brazilian Delegation recognizes that the discrepancy between the legal situation in GATT, as we see it, and the actual practice of developed countries may derive, to a great extent, from the fact that practices under Article VI, on countervailing duties, are not explicitly linked to practices under Article XVI, on subsidies.

6. In order to remove any ambiguity on the subject, therefore, and in spite of the interpretation referred to in paragraph 3 above, the Brazilian Delegation is willing to explore with developed countries a further refining of the existing GATT rules, and is prepared to consider: (a) defining in more specific terms export incentive measures, which, through differentiated treatment, would be explicitly allowed to developing countries, and (b) the possibility of countervailing action against subsidized exports from developing countries, under exceptional and objectively defined circumstances.

7. The basic principle involved is that developing countries need to apply export subsidies to promote the expansion and diversification of their exports, particularly of manufactured goods, as a necessary compensatory measure to offset inherent handicaps in their production and marketing systems, as well as the structural deficiencies in the existing world trade system. As a corollary, developing countries should be exempted from the application of countervailing duties, to the furthest extent possible, within the framework of rights and obligations of GATT.

8. The question is, then, whether it is possible to work out a set of provisions which, on the one hand, would allow subsidization measures to be instituted or maintained by developing countries in the light of their special trade and development needs, and on the other hand, would envisage, in exceptional cases, multilaterally agreed procedures to prevent indiscriminate application of these subsidies and safeguard the legitimate interests of importing countries.

9. In the light of the objectives above, efforts should be made to identify, and include in a "positive" list, those subsidization practices which, in accordance with the principle of differentiated and more favourable treatment for developing countries, would be deemed to constitute licit and accepted measures under the GATT and which, therefore, would not be subject to any countervailing action by developed importing countries. Such a list would be drawn with the necessary flexibility to allow for the present trade and development needs of developing countries to be fully taken into account; its nature would take into account the fact that many developing countries are experimenting with several domestic policy measures designed to carry their ongoing development plans and therefore should not, lest these plans be seriously hindered, be asked to accept stringent commitments or limitations to resort to a static set of incentive measures. The list would, however, serve as an indication of those practices that normally would seem to be included under the general permission to subsidize.

10. In the case of other measures allegedly falling outside the scope of the "positive" list, the eventual application of countervailing duties, in accordance with Article VI and its underlying criteria relating to the test of material injury, would always be subject to specific procedures and criteria. These should include:

(I) previous consultations between the developed importing country and the developing exporting country, at the request of the former; such consultations might be envisaged to take place under the procedures normally followed under GATT Article XXII;

(II) the drawing up of objective criteria for determining whether such subsidization practice has caused effective injury to the importing country market (not simply to an importing firm, but to a whole industrial sector or branch). In any case, evidence would be required to demonstrate that such injury resulted from a substantial increase of imports of particular products as a result of the subsidy and of these products being offered at prices which are substantially below those that would prevail in the absence of the subsidy. The trade and development needs of developing countries concerned should be taken fully into account, as required under paragraph 3(C) of Article XXXVII, especially as regards such factors as their stage of development, the strategic importance of the subsidized exports to their economies or the need for increasing their export earnings;

(III) consideration of the harmful effects of the imposition of countervailing duties on the market and the economy of the developing exporting country; in other words, consideration of market disruption also in the exporting country, along the lines of the concept inserted in the arrangement regarding international trade in textiles (Annex A, paragraph III);

(IV) in the case of disagreement between the parties to the consultations, the developing country would have recourse to the contracting parties or any other body set up to administer any code or arrangement in this field that may be negotiated. Such multilateral consideration of the matter would also respond to the criteria referred to in (II) and (III) above. If the contracting parties find that material injury is being caused to the importing country's market, recommendations could be made to the developing country concerned to limit or withdraw the specific subsidization measure on the products in question; a grace period would be granted, however, for compliance with the recommendations, in order to allow the country concerned to make the indispensable domestic adjustments. If, then, it would fail to do so, the importing country would be free to impose a countervailing duty not exceeding an amount necessary to offset in part or in whole the extent of the subsidization.

11. The objectives referred to in paragraphs 9 and 10 above could be secured in the context of new trade rules or a possible code to be negotiated in the course of the multilateral trade negotiations, or, alternatively, through any procedure or agreement specifically designed to conform the present GATT provisions to the special trade and development problems of developing countries. In both procedures, the basic principle of differentiated treatment to developing countries would apply.

12. An integral part of the negotiating approach envisaged in this paper is a "standstill" agreement or understanding, among the countries involved in the multilateral trade negotiations, to the effect that, until the relevant normative negotiations are concluded, or until the existing GATT rules, as suggested above, are suitably interpreted, no countervailing action would be taken or threatened against exports from developing countries, or as a minimum no such action would be taken without previous consultations and the application of the test of material injury.