

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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Multilateral Trade Negotiations

Group "Non-Tariff Measures"

Sub-Group "Subsidies and Countervailing Duties"

LEGISLATIVE HISTORY OF THE PROVISIONS IN PART IV RELATING TO COUNTERVAILING DUTIES

Introduction

1. At its June meeting, the Sub-Group "Subsidies and Countervailing Duties" requested the secretariat to prepare a note setting out the legislative history of the relevant provisions in Part IV relating to countervailing duties and to summarize the experience of the operation of these provisions, so that their adequacy and the possibilities of improving them could be assessed. It was also agreed that, for this purpose, delegations should submit relevant information relating to the use of countervailing duties with which they were directly concerned (MTN/NTM/5, paragraph 3).

2. This note is divided into three sections. For background purposes, Section I refers to the main provisions in the General Agreement relating to countervailing duties and subsidies. In Section II, an attempt has been made to summarize briefly the main points made in the discussion on these issues during the preparatory work relating to the drafting of Part IV. Section III summarizes the available information in regard to specific cases in which countervailing duties were either imposed or threatened to be imposed on imports from developing countries.

I

Countervailing duties

3. The General Agreement permits, subject to the fulfilment of certain conditions, the levying by an importing country of a countervailing duty on subsidized products. The term "countervailing duty" has been defined in Article VI to mean "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or

indirectly, upon the manufacture, production or export of any merchandise".¹ The conditions relating to the levying of such a duty are firstly that the amount of countervailing duty should in no case exceed "an amount equal to the estimated bounty or subsidy determined to have been granted --- including any special subsidy to the transportation of a particular product".² The second condition, which is contained in paragraph 6(a) of the Article, requires that no such countervailing duty should be levied unless the effect of subsidization "is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry".

4. The Article also permits the levying of a countervailing duty to protect the interests of third countries, particularly in situations where subsidized imports are causing material injury to an industry in another exporting country. In this respect, it states that the CONTRACTING PARTIES shall waive the requirements of paragraph 6(a) so as to permit the levying of a countervailing duty in cases in which it is found that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.³

The essential prerequisites for the levying of a countervailing duty are thus:

- (a) The goods in question should have received a bounty or subsidy, and
- (b) It is established that such subsidized exports have caused or threatened to cause "material injury" to the "domestic industry".

¹An interpretative note to the Article states that "multiple currency practices can in certain circumstances constitute a subsidy to export which may be met by countervailing duties".

²An interpretative note to the Article states that a contracting party may require, as in other cases of customs administration, "reasonable security (bond or cash deposit) for the payment of an anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization".

³The Article further states that in order to protect the interests of third countries in exceptional circumstances, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty without the prior approval of the CONTRACTING PARTIES provided that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove (paragraph 6(c)).

The provisions in the General Agreement relating to subsidies are contained in Article XVI and are discussed in the following paragraphs. The General Agreement does not contain any definition of the terms "material injury" and "domestic industry". It is, however, relevant to note that the Anti-Dumping Code which was negotiated during the Kennedy Round, enumerates the various factors that should be taken into account in determining material injury to domestic industry when cases of alleged dumping are under examination.¹

Subsidies

5. Article XVI makes a distinction between subsidies which "operate directly or indirectly to increase exports --- or to reduce imports" of any products, and "export subsidies". As regards the former, Section A of Article XVI imposes an obligation to notify such measures and, in cases of complaints, consult with the other contracting parties concerned and discuss "the possibility of limiting the subsidization" where it is determined that such subsidization measures cause "serious prejudice to the interests of other countries". As regards export subsidies, paragraph 2 of Section B contains the recognition by the CONTRACTING PARTIES that the granting of a "subsidy on exports" of any product may have harmful effects for other contracting parties, both importing and exporting, and thus may cause undue disturbance to their normal commercial interests. Paragraph 3 of the Article further states that CONTRACTING PARTIES should "accordingly seek to avoid the use of subsidies on their exports of primary products"², and that in cases where a country grants a subsidy it should not be applied in a manner which results in that country "having more than an equitable share of world export in that product". As regards "non-primary products", paragraph 4 visualizes that contracting parties should cease to grant, either directly or indirectly, any form of export subsidy "which 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". This paragraph, however, did not contain any firm date for the implementation of the provisions, and in order to provide for a definite target date, the CONTRACTING PARTIES in 1960 adopted a Declaration on the Prohibition of Export Subsidies on products other than primary products. This Declaration has become effective in

¹ Document MTN/3B/21 gives details of the relevant provisions in the Code on Anti-Dumping Duties.

² An interpretative note to Article XVI states that "for the purpose of Section B, a primary product is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade".

respect of sixteen developed countries which have so far accepted it.¹ The developing countries have not accepted the Declaration under paragraph 4 of Article XVI and are thus not at present bound by requirements not to grant subsidies on their exports of manufactured products.² However, they are bound by other provisions in Article XVI, including the obligation to notify to the GATT secretariat particulars of export subsidies and other similar measures maintained by them which operate "directly or indirectly to increase exports or to reduce imports" and to discuss on request with the other contracting party or parties or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

II

6. It would appear from the discussions that in the negotiations relating to Part IV of the General Agreement, a number of developing countries sought to secure recognition of the principle that countervailing duties should not be levied on imports from developing countries simply on the ground that the manufactured or semi-manufactured products exported by them had received a subsidy or bounty. In exceptional cases where countervailing action was being considered, it should be clearly established that subsidized imports from developing countries were causing or threatened to cause material injury to the domestic industry in the country contemplating such action. Some of these countries had also proposed that, where anti-dumping or countervailing action was being contemplated, which was permissible under the General Agreement, developed countries should take into account the special situation of developing countries, including the need to

¹The countries which have accepted the Declaration are Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Switzerland, United Kingdom and the United States.

It may be mentioned that the United States has accepted the Declaration with the understanding that it shall not prevent the United States, as part of its subsidization of exports of a primary product, from making a payment on an exported processed product (not itself a primary product), which has been produced from such primary products, if such payment is essentially limited to the amount of the subsidy which would have been payable on the quantity of such primary products, if exported in primary form, consumed in the production of the processed product.

²When the Declaration was being adopted, these countries had explained that because of their stage of economic and industrial development, they would not be in a position to accept any commitment which would restrain their freedom to resort to subsidization, in cases where this was considered economically justifiable and necessary for promotion of exports. They had also pointed out that it would be unfair for developing countries which exported mainly primary products to bind themselves in the non-primary goods area, while developed countries continued their use of subsidies for primary goods.

increase their export earnings through diversification of their exports into manufactured products. The Model Chapter¹ for Part IV which was prepared on the basis of the various proposals made in the discussions, thus contained the following provisions:

"To give effect to the foregoing principles, the CONTRACTING PARTIES might undertake commitments on the following lines:

* * * *

- (d) to examine sympathetically the adoption of domestic measures designed to provide greater scope for the development of imports from less-developed countries;
- (e) to have special regard to the trade interests of less-developed countries when considering the application of special measures permitted under the General Agreement to meet particular problems."

It was also proposed that paragraph (e) should have the following explanatory note:

"A note to (e) might indicate that the highly developed countries in particular would exhaust the possibilities of constructive remedies before resorting to the use of measures such as anti-dumping and countervailing duties, escape clause action or export assistance measures, which could have adverse effects on the trade interests of the less-developed countries."

In the discussions on the Model Chapter in December 1963, some delegations from developing countries considered that paragraph (e) was somewhat vague as it relied too heavily on the interpretative note. One of these delegations had proposed that the following words should be added at the end of paragraph (e): "and to refrain from applying such measures if they affect the essential interests of those countries".

7. From the discussions it would appear that this and other similar proposals to make the provisions eventually adopted in paragraph 3(c) of Article XXXVII more specific were not acceptable to the representatives of developed countries who considered that indiscriminate use of subsidies for the promotion of exports of manufactured products would not, in all cases, be in the interests of developing countries themselves. They had also maintained that in cases where such subsidized imports caused or threatened to cause material injury to the domestic industry in importing countries, they should be in a position to be able to take countervailing action.

¹Spec(63)316/Rev.1

8. Paragraph 3(c) of Article XXXVII in Part IV of the General Agreement as finally adopted reads as follows:

"The developed contracting parties shall --- have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect the essential interests of those contracting parties."

III

9. There has been one recent instance where a developing country has brought to the notice of the GATT a case of countervailing action being taken against its exports by a developed country. In the meeting of the GATT Council in October 1974 the delegation of Brazil stated that the Government of the United States had imposed countervailing duties on imports of non-rubber footwear from Brazil. It was the view of the Brazilian Government that the countervailing action adopted by the United States was unjustified on economic and legal grounds, as the action was taken under United States domestic law which was at variance with GATT provisions and required that countervailing duties should be imposed on goods receiving subsidies, without having to determine whether such subsidized imports were causing or threatening to cause material injury to the United States domestic industry. The delegation of Brazil had further stated their view that the United States authorities had failed to take into account the provisions of Article XXXVII:3. In reply, the United States delegation informed the Council that the United States authorities considered that they had met the requirements of Part IV, particularly that of Article XXXVII:3. They also explained that, since United States legislation was mandatory, their authorities were required to take countervailing action where export subsidization had been demonstrated.

10. A notification made by the delegation of Brazil relating to non-rubber footwear, in pursuance of the decision at the June 1975 meeting of the Sub-Group "Subsidies and Countervailing Duties" that delegations should submit relevant information relating to their experience regarding the use of countervailing duties, has been circulated in document MTN/NTM/W/26.¹ In addition to the points referred to in paragraph 9 above, the delegation of Brazil has stated that the imposition of countervailing duties on Brazilian non-rubber footwear by the United States has affected 176 Brazilian firms, whose exports to the United States market in 1974 were of the order of US\$87 million. This delegation has also mentioned that the United States Government is at present investigating alleged subsidization by the Brazilian Government of exports of other products, namely, leather handbags and castor oil products. For more comprehensive information on these points and

¹Other notifications, as and when received, will be circulated as Addenda to MTN/NTM/W/26.

proposals made by Brazil on multilateral treatment of the question of subsidies and countervailing duties in respect of the interests of developing countries, reference may be made to the Brazilian notification.

11. In the absence of other specific notifications by interested developing countries regarding their experience as to how far the provisions of Article XXVII have been taken into account by importing countries when considering requests for countervailing action, it is difficult for the secretariat to assess the extent to which these provisions have been taken into account by developed countries when levying countervailing duties on imports from developing countries.