

GENERAL AGREEMENT ON TARIFFS AND TRADE

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Sub-Group "Subsidies and Countervailing Duties"

SUBSIDIES AND COUNTERVAILING DUTIES

Draft Code prepared by the Delegation of Canada

At the July 1976 meeting of the Sub-Group "Subsidies and Countervailing Duties", the Delegation of Canada offered to prepare a draft Code containing the elements of a Code on subsidies and countervailing measures (MTN/NTM/19, paragraph 5). The purpose of this proposal was to help move the discussions closer to substantive negotiations by providing the format of a possible agreement.

The present paper attempts to provide such a format. In drafting it, the Delegation of Canada has to the greatest extent possible taken into account the views on the various issues and solutions set forth in MTN/NTM/W/52. Because some of those views tend to diverge, it has not always been possible to draft a single set of provisions which could meet the concerns of all Sub-Group members. This explains why parts of the paper contain alternative provisions.

It should be emphasized that although this paper takes account of some of the views expressed by the Delegation of Canada, as it does of those of other delegations, it does not constitute a statement of the Canadian position on the various issues in the area of subsidies and countervailing measures.

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Purposes

The purposes of this Arrangement are:

- A. To elaborate the provisions of Article XVI of the General Agreement governing subsidies and to develop international rules for the effective application of those provisions with a view to eliminating or reducing the restricting or distorting effects of subsidies on international trade;
- B. to develop international rules governing the imposition of countervailing duties as provided for in Article VI of the General Agreement, and of other countervailing measures which may be imposed to deal with the trade distorting or restricting effects of subsidies, in order to ensure that such countervailing measures do not constitute an unjustifiable impediment to international trade, thus permitting relief to be made available to producers adversely affected by the use of subsidies within an agreed framework of rights and obligations;
- C. to elaborate international notification, consultation, surveillance and dispute settlement procedures, pursuant to the provisions of Articles XVI, XXII and XXIII of the General Agreement, with a view to bringing measures taken under Article XVI and Article VI of that Agreement under more effective international discipline; and
- D. to provide, pursuant to the provisions of Article X of the General Agreement, for prompt and open domestic administrative and judicial review and appeal procedures of countervailing measures.
- E. to provide a set of international rules governing subsidies and countervailing measures which take account of the particular trade and development needs of developing countries.

Article 1: Non-primary products

A. Export subsidies

The signatories agree that the rights and obligations set out in Article XVI of the General Agreement with regard to export subsidies on products other than primary products should be strengthened and given greater precision.

Note:

An effective prohibition of export subsidies on products other than primary products might be achieved either by incorporating in the Arrangement a general definition of export subsidies along the lines of Article 6 A of this Arrangement or by the enumeration of all practices deemed to be export subsidies; a combination of these two alternatives might be envisaged, i.e. an improved definition of export subsidies, coupled with a refinement and an extension of the illustrative list of prohibited measures contained in the 1960 Declaration giving effect to GATT Article XVI:4.

Alternative I: /Accordingly, the signatories agree that they shall not grant any export subsidy as defined in Article 6 A of this Arrangement on products other than primary products./

Alternative II: /Accordingly, the signatories agree that they shall not grant any export subsidy listed in Annex A to this Arrangement on products other than primary products./

Alternative III: /Accordingly, the signatories agree that they shall not grant any export subsidy as defined in Article 6 A of this Arrangement on products other than primary products.

The signatories further agree that subsidy practices such as those listed in Annex A to this Arrangement constitute export subsidies./

Note:

If the approach of a list of export subsidy practices were adopted, there would have to be a provision permitting additions to the list.

It would be for consideration whether the two-price criterion in Article XVI:4 of the General Agreement should be retained or deleted; in this regard, it is relevant that subsidized exports, if exported at prices lower than comparable prices for which they are sold in the domestic market of the exporter, and if injurious to producers of like products in the importing countries, may be dealt with under anti-dumping provisions.

B. Other subsidies / Domestic subsidies

The signatories recognize that many governments pay subsidies (other than export subsidies) to achieve a variety of national policy objectives, e.g. to stimulate employment, to reduce disparities in incomes and employment between different regions, to promote product research and development and to achieve other broad social and economic purposes. These Other subsidies / Domestic subsidies are, in contrast to export subsidies, not related to the degree or extent of export performance of the undertakings receiving such subsidies.

The obligations and rights of signatories set out in this Arrangement regarding such Other subsidies / Domestic subsidies are designed to minimize their trade restricting or distorting effects, consistent with the need to maintain the freedom of action of signatories necessary to achieve their policy objectives.

Note:

This objective might be achieved either by agreeing on levels of such /other subsidies/ /domestic subsidies/ below which it would be agreed they would not be subject to countervailing measures but over which there could be countervailing measures if the conditions of Article 4 were met; or by agreeing on normative provisions and elaborating the provisions of Article XVI:1; in this latter alternative, the imposition of countervailing measures would not be precluded in relation to any level of subsidization, but, of course, only after the more rigorous test of injury envisaged in Article 6 had been met.

- Alternative I: /Accordingly, the signatories agree that any /other subsidy/ /domestic subsidy/ consistent with paragraphs (a) to (c) below shall not be deemed to be a subsidy in relation to which the countervailing measures permitted under this Arrangement may be imposed:
- (a) a net government subsidy to the /underwriting/ /total capital cost/ of an undertaking which does not exceed (x) per cent of the /underwriting/ /total capital cost/ of the undertaking;
 - (b) direct participation by a government or an agency thereof in the ownership of an undertaking unless such equity participation is made not in the expectation of profit but for such purposes as the funding of losses incurred by an undertaking;
 - (c) governmental assistance in meeting the capital cost of such infrastructure as is normally required for the establishment of such an undertaking.

Note

There should be provisions setting out the conditions under which signatories may grant a subsidy to an undertaking to meet the cost of research and product development activities, for manpower training, for managerial restructuring and for any other purpose not provided for above.

Alternative II: /Accordingly, the signatories agree that:

- (a) they will take all necessary steps to minimize the trade diverting or trade distorting effects of such subsidization as may be deemed necessary in relation to such national policies;
- (b) they will endeavour to avoid creating injury to the industries of other signatories;
- (c) any measure of subsidization as may be deemed necessary should not result in the payment of subsidies greater than necessary to achieve the policy objectives concerned.7

Article 2: Primary industrial products

A. Export subsidies

The signatories recognize the need to give greater precision and effect to the provisions of Article XVI:2 of the General Agreement in which "the contracting parties recognize that the granting of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement".

The signatories also recognize the need to give greater precision and effect to the provisions of Article XVI:3 of the General Agreement in which contracting parties have agreed that they "should seek to avoid the use of subsidies on the export of primary products..." and shall not grant "directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory... in a manner which results in that contracting party having more than an equitable share of world export trade of that product...".

Accordingly, the signatories agree that the granting by any signatory of any export subsidy in the sense of Article 6 A on any industrial primary product (as defined in Ad. Article XVI, Section B, Note 2 of the General Agreement) shall be deemed to result in that signatory having more than an equitable share of world export trade in that product in the sense of Article XVI:3 of the General Agreement and shall be deemed to be governed by the provisions of Article 1 A.

B. ~~Other subsidies~~ / ~~Domestic subsidies~~

The signatories recognize that many governments pay subsidies (other than export subsidies) to achieve a variety of important national policy objectives, e.g. to stimulate employment, to facilitate resource exploration and development, to reduce disparities in incomes and employment between different regions and to achieve other broad social and economic purposes.

Note:

This objective might be achieved either by agreeing on levels of such ~~other subsidies~~ / ~~domestic subsidies~~ below which it would be agreed they would not be subject to countervailing measures but over which there could be countervailing measures if the conditions of Article 4 were met, or by agreeing on normative provisions and elaborating the provisions of Article XVI:1 of the General Agreement; in this alternative, the imposition of countervailing measures would not be precluded in relation to any particular level of subsidization, but, of course, only after the more rigorous test of injury envisaged in Article 6 had been met.

Alternative I: ~~Accordingly~~, the signatories agree that any ~~other subsidy~~ / ~~domestic subsidy~~ consistent with the paragraphs (a) to (d) below shall not be deemed to be a subsidy in relation to which the countervailing measures permitted under this Arrangement may be applied.

- (a) The underwriting of the costs of exploration for new sources of primary industrial products;
- (b) a net government subsidy to the ~~underwriting~~ / ~~total capital cost~~ of the development of new sources of primary industrial products which does not exceed (y) per cent of the ~~underwriting~~ / ~~total capital cost~~ of the undertaking;

- (c) governmental assistance in meeting the capital cost of such infrastructure as is normally required for the development of new resources;
- (d) direct participation by a government or an agency thereof in the ownership of an undertaking unless such equity participation is made not in the expectation of profit but for such purposes as the funding of losses incurred by an undertaking.7

Note:

There should be provisions setting out the conditions under which signatories may grant a subsidy to an undertaking to meet the cost of research and product development activities, for manpower training, for managerial re-structuring and any other purpose not provided for above.

Alternative II: Accordingly, the signatories agree that:

- (a) they will take all necessary steps to minimize the trade diverting and trade distorting effects of such subsidization as may be deemed necessary in relation to such national policies;
- (b) they will endeavour to avoid creating injury to the industries of other signatories;
- (c) any measure of subsidization as may be deemed necessary should not result in the payment of subsidies greater than necessary to achieve the policy objectives concerned.7

Article 3: Primary fishery and agricultural products

A. Export subsidies

The signatories recognize the need to give greater precision and effect to the provisions of Article XVI:2 of the General Agreement in which "the contracting parties recognize that the granting of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement".

The signatories recognize the need to give greater precision and effect to the provisions of Article XVI:3 of the General Agreement governing primary agricultural and fishery products (as defined in Ad. Article XVI, Section B, Note 2 of the General Agreement) in which contracting parties have agreed that they "should seek to avoid the use of subsidies on the export of primary products ..." and shall not grant "directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory ... in a manner which results in that contracting party having more than an equitable share of world export trade of that product ...".

Note:

The approach outlined below recognizes that, since the incidence of export subsidies on trade in primary agricultural and fishery products tends to vary considerably from product to product, it may be appropriate to differentiate between various product categories for the purposes of this Arrangement. It is of course for consideration whether or not the rules regarding export subsidies for one or the other of these products might be negotiated in the context of arrangements embodying comprehensive international rules and disciplines related to such commodities. Such rules regarding export subsidies need not be inconsistent with this Arrangement.

Accordingly, the signatories agree that:

- (a) the granting by any signatory of any export subsidy in the sense of Article 6 A on any primary fishery product or on any primary agricultural product not listed in either Annex B or Annex C of this Arrangement shall be deemed to result in that signatory having more than an equitable share of world export trade of that product and shall be deemed to be governed by the same provisions as those in Article 1 A of this Arrangement.
- (b) For those primary agricultural products specified in Annex B of this Arrangement:
 - (i) they will not introduce new export subsidies or increase the level of existing export subsidies;
 - (ii) they will eliminate existing export subsidies over a transitional period of (x) years in accordance with the following provisions (to be specified);
 - (iii) the provisions of paragraph (a) above shall apply to any export subsidy in excess of the level specified in (i) and (ii) above.
- (c) For those primary agricultural products specified in Annex C of this Arrangement:
 - (i) they may grant any export subsidy up to the following limits (to be specified);
 - (ii) the provisions of paragraph (a) above shall apply to any export subsidy in excess of the level specified in (i) above.

Note:

It is for consideration whether there should be a provision for review under which it might be agreed that every (x) years there would be an opportunity for the addition, deletion or modification to the lists of products and the details of the understandings reached regarding particular products.

B. /Other subsidies//Domestic subsidies/

The signatories recognize that many governments pay /other/
/domestic/ subsidies to achieve a variety of national policy objectives with respect to primary fishery and agricultural products.

Accordingly, the signatories agree that:

- (a) they will take all necessary steps to minimize the trade diverting or trade distorting effects of such subsidization as may be deemed necessary in relation to such national policies;
- (b) they will endeavour to avoid creating injury to the industries of other signatories;
- (c) any measure of subsidization as may be deemed necessary should not result in the payment of subsidies greater than necessary to achieve the policy objectives concerned.

Article 4: Countervailing measures

The signatories recognize that it is for the Contracting Parties to determine whether or not a signatory is in breach of its obligations or whether it is paying a subsidy inconsistent with the Arrangement. Signatories also recognize, however, that it is for the authorities of each signatory to determine whether its industry is being injured by such subsidies, but subject to the rules regarding injury in this Arrangement and to the appropriate international consultation, review and justification procedures.

Accordingly, the signatories agree that:

Note:

The first alternative below is based on the assumption that prohibited export subsidies are deemed to be injurious. Therefore when a signatory is found by the Multilateral Body to be in breach of its obligations with respect to export subsidies, the other signatory or signatories concerned are not required to apply a test of injury before imposing a countervailing measure. With respect to other subsidies domestic subsidies, however, any countervailing measure would require a test of injury.

The second alternative below is based on the assumption that export subsidies as defined may be injurious, but, because a countervailing measure is clearly so punitive as to be deemed a measure of last resort, such measure should not be imposed without a test of injury. Under this alternative, recourse to countervailing measures to offset the adverse effects of export subsidies would be subject to the same injury requirements as for other subsidies domestic subsidies.

A. Measures which may be taken in relation to export subsidies

Alternative I: When a signatory is of the opinion that a product imported into its customs territory or into the customs territory to which it exports a like product is receiving an export subsidy other than as permitted under Article 3, it may be authorized to impose a countervailing measure in

relation to that export subsidy pursuant to the provisions of Article 5 F or 5 I, subject to the following provisions:

- (i) the complainant signatory may request consultation, as provided for in Article 5 E with the signatory allegedly subsidizing the exported product, with a view to reaching agreement as to the facts, and where there is a factual agreement, as to how the matter might be resolved;
- (ii) when the matter has not been mutually resolved by the two signatories within (x) days, it may be referred by either signatory to the /Multilateral Body/ as provided for in Article 5 F, whereupon the provisions of Article 5 F to 5 I inclusive shall apply;
- (iii) when it has been determined that the product is in fact receiving an export subsidy other than as permitted under Article 3, the complainant signatory shall not impose any countervailing measure: (a) in the case of a countervailing duty, in excess of an amount equal to the export subsidy being granted; or (b) in any other case, in such manner as would have a greater impact than that required to offset the effect of the said export subsidy.]

Alternative II:

Note:

This second alternative, described in the note above, would require the addition of provisions regarding a test of injury analogous to those in Sections B and C below.

B. Measures which may be taken in relation to /domestic subsidies/ /other subsidies/

When a signatory is of the opinion that:

- (a) a product imported into its customs territory, or imported into the customs territory to which it exports a like product, or produced in the customs territory to which it exports, has exported or could

reasonably expect to export a like product and which has displaced that like product, is receiving an ~~/other subsidy/~~~~/domestic subsidy/~~ ~~/inconsistent/~~ with the provisions of Articles 1 B, 2 B and 3 B of this Arrangement;

(b) and that the said importation, exportation or displacement, as the case may be of the product allegedly receiving the said ~~/other subsidy/~~ ~~/domestic subsidy/~~ is causing or threatening injury to an established domestic industry or retards the establishment of a domestic industry*, it may be authorized to impose a countervailing measure in relation to that ~~/other subsidy/~~ ~~/domestic subsidy/~~ pursuant to the provisions of Article 5 F or 5 I of this Arrangement, subject to the following provisions:

(i) the complainant signatory may request consultation, as provided for in Article 5 E, with the signatory granting the ~~/other subsidy/~~ ~~/domestic subsidy/~~ allegedly inconsistent with the provisions of Article 1 B, 2 B or 3 B with a view to reaching agreement as to the facts, and where there is a factual agreement, as to how the matter might be resolved;

(ii) when the matter has not been mutually resolved by the two signatories within (x) days, it may be referred by either signatory to the ~~/Multilateral Body/~~ as provided for in Article 5 F, whereupon the provisions of Articles 5 F to 5 I inclusive shall apply;

(iii) when it has been determined that the product is in fact receiving an ~~/other subsidy/~~ ~~/domestic subsidy/~~ ~~/inconsistent/~~ with the provisions of Article 1 B, 2 B or 3 B and when the complainant signatory has determined that the sales of the said product are causing injury, the complainant

*When in this Arrangement the term "injury" is used, it shall, unless otherwise specified, be interpreted as covering injury to a domestic industry, threat of injury to a domestic industry and retardation of the establishment of such an industry.

signatory shall not impose any countervailing measure: (a) in the case of a countervailing duty, in excess of an amount by which the ~~other subsidy~~ ~~domestic subsidy~~ is ~~inconsistent~~ with the provisions of Article 1 B, 2 B or 3 B; or (b) in any other case, in such manner as would have a greater impact than that required to offset the effect of the amount of the said ~~other subsidy~~ ~~domestic subsidy~~;

(iv) when a countervailing measure is imposed consequent upon a determination of injury, the signatory in relation to whose subsidy the countervailing measure is imposed may request the ~~Multilateral Body~~ under the provisions of Article 5 F, G, H and J to examine whether that injury determination is consistent with the provisions of Article 6 F and whether the impact of the countervailing measure is greater than that required to offset the effect of the amount of the ~~other subsidy~~ ~~domestic subsidy~~ ~~inconsistent~~ with this arrangement. In any such examination the ~~Multilateral Body~~ shall take account of the provisions of Article 6 H(e) regarding confidential information.

- C. (a) When any countervailing measure has been imposed by any signatory, that signatory shall review the need for the continuation of that measure on its own initiative or at the request of the subsidizing signatory (accompanied by information substantiating the need for review). The reviewing signatory shall inform the ~~Multilateral Body~~ of the results of its review.
- (b) A countervailing measure may remain in force only as long as the export subsidy in relation to which it is being applied remains in effect or as long as the ~~other subsidy~~ ~~domestic subsidy~~ in relation to which it is being applied is causing injury.

Article 5: Notification, consultation, administration and enforcement

The signatories recognize that the effective operation of this Arrangement requires that the existing provisions of the General Agreement with regard to notification, reporting, administration and enforcement be significantly elaborated.

Accordingly, the signatories agree to:

- A. establish a Multilateral Body to administer the Arrangement, to be composed of representatives of all signatories to the Arrangement; this Multilateral Body shall meet at least once each year for the purpose of affording signatories the opportunity of consulting on matters relating to the implementation of the Arrangement;
- B. establish a Panel to carry out such responsibilities assigned to it under the Arrangement or by the Multilateral Body; the Panel shall be composed of [3] [5] non-governmental persons experienced in the fields of trade relations and other matters covered by the Arrangement, such persons to be appointed from time to time by the Director-General of the General Agreement, in consultation with the Chairman of the Multilateral Body; the Panel may consult, as necessary, with any signatory, with any contracting party to the General Agreement, or with any other competent body and, to the extent necessary and appropriate, request information from signatories;

and that:

- C. with respect to any subsidy in the sense of Article XVI of the General Agreement in force on the date on which this Arrangement comes into force, each signatory shall ensure that the information required

under Article XVI:1 of the General Agreement is made available to the Multilateral Body not later than (x) months after the Arrangement comes into force, and that thereafter a report regarding any changes or any new measures it has implemented shall be submitted at least every (y) months;

- D. any signatory which considers that any matter affecting the operation of the Arrangement has not been notified in accordance with the provisions of Article 5 above may make a request in writing to the Multilateral Body that such matter be notified by the signatory or signatories concerned and may itself notify the matter;
- E. each signatory shall promptly afford adequate opportunity for consultation with any other signatory with respect to any matter affecting the operation of this Arrangement, including any subsidy which may be an export subsidy prohibited by this Arrangement or an other subsidy domestic subsidy inconsistent with the provisions of Article 1 B, 2 B and 3 B, and any countervailing measure imposed in relation thereto; any signatory making a request of another signatory to enter into such consultation shall notify promptly the Multilateral Body that it has made such a request;
- F. if no mutually satisfactory solution has been reached in the bilateral consultations within (x) days of the request for consultation being notified to the Multilateral Body, the Multilateral Body shall, at the request of a signatory, consider the matter with a view to facilitating such a solution; in the case of a subsidy which it is agreed by the Multilateral Body is a subsidy inconsistent with the Arrangement the Multilateral Body shall authorize the

signatory concerned to impose a countervailing measure, consistent with Article 4;

- G. if no such solution is reached under (F) (x) days after the matter has been referred to the Multilateral Body, the Multilateral Body shall, upon request of a signatory concerned, refer the matter to the Panel;
- H. the Panel shall promptly investigate the matter, shall make a statement concerning the facts of the matter, and make such recommendations as the facts warrant;
- I. if the Panel finds that a subsidy at issue is inconsistent with this Arrangement, it shall recommend to the signatory or signatories concerned that the subsidy at issue be eliminated or modified to the extent necessary to make it consistent with the Arrangement; it shall also recommend action to be taken to compensate for damage caused by the subsidy at issue and it shall recommend to the Multilateral Body that it authorize the signatory concerned to impose a countervailing measure consistent with Article 4;
- J. if the Panel finds that a countervailing measure at issue is inconsistent with this Arrangement, it shall recommend to the signatory concerned that the measure be eliminated or modified to the extent necessary to make it consistent with the Arrangement; it shall also recommend action to be taken to compensate for damage caused by the measure at issue, to the extent that it is inconsistent with the Arrangement.

Article 6: Definitions and procedural provisions

The signatories agree that, for the purposes of this Arrangement, the following definitions and provisions regarding domestic procedures shall apply:

A. Definition of export subsidy

Note:

This definition may not be needed if it were decided to proceed through the enumeration of all practices deemed to be export subsidies, i.e. the second alternative approach in Article 1 A.

An export subsidy is any subsidy conveyed directly or indirectly by an expenditure, by a taxing provision or by any other means, by a government of a signatory or any agency thereof to any exporter, the subsidy being related to the degree or extent of export performance, or otherwise involving a differential treatment or benefit in favour of products sold for export over like products sold domestically other than such subsidies as are specifically permitted under the General Agreement or specifically excluded from countervailing action.

B. Definition of /other subsidy/ /domestic subsidy/

An /other subsidy/ /domestic subsidy/ is any subsidy conveyed directly or indirectly by an expenditure, by a taxing provision or by any other means, by any government or agency thereof to any producer in return for meeting certain conditions but unrelated to the degree or extent of export performance or not otherwise involving a differential treatment or benefit in favour of products sold for export over like products sold domestically.

C. /Possible rules regarding the calculation of subsidies/

D. Definition of countervailing measure

A countervailing measure is a special measure for the purpose of offsetting a subsidy granted by another signatory or of restoring the balance of advantage being nullified or impaired by such a subsidy and taken in accordance with the provisions of this Arrangement, e.g. an additional duty on imports concerned, the application of a quantitative restriction, the withdrawal of a binding of a tariff level.

E. Definition of industry

- (a) An "industry" means all of the producers of the like product within the customs territory of a signatory or those of them whose collective output of the product constitutes a major/substantial proportion of the total production of that product in that customs territory, except that when certain producers are also importers of the allegedly subsidized product, the industry may be taken to be the rest of the producers of the like product in that customs territory.
- (b) In determining injury caused by subsidized products displacing the exports of like products by another signatory to the customs territory of the importing signatory or to another customs territory, the "industry" in the exporting customs territory shall be interpreted as referring only to those producers in that customs territory which are, had been shipping or could reasonably expect to ship the product or products in question to the market in question or to those whose collective shipments constitute a major/substantial proportion of the total shipments of such products from that customs territory to that market.

- (c) Where two or more countries have reached such a level of integration that they are a unified market, the industry in that market shall be taken to be the industry.
- F. Indices of injury
- (a) In making a determination of injury the authorities of the signatory concerned shall consider the effect of the subsidization and all other factors which may be adversely affecting the industry or the establishment of a new industry.
- (b) The evaluation of injury shall be based on the examination of all factors having a bearing on the state of the industry such as: development and prospects with regard to turnover, market share, profits, prices, export performance, employment, volume of subsidized and other shipments, utilization of capacity and productivity of the industry affected and the existence of restrictive trade practices. All factors which, individually or in combination, may be adversely affecting the industry shall be examined, for example: the volume and prices of unsubsidized shipments of the product to the market in question, contraction in demand in the market in question due to substitution of other products or to changes in consumer tastes.
- (c) The effect of [transactions]/[sales] of the subsidized products shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of such production in terms of such criteria as: the production process, the producers' realizations, profits; when the domestic production of the like product has no separate identity in these terms, the effects of [transactions]/[sales] of the subsidized

products shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

G. Degree of injury

Note:

The Arrangement should provide that signatories ensure that injury is not determined by their authorities to exist unless the degree of injury involved is and is shown to be really much more than de minimis or negligible. The intent of this Arrangement is to afford recourse to countervailing measures where an injury test is required by this Arrangement only where these are clearly and demonstrably justified by a real degree of disruption or damage to domestic producers. This concept would be effectively undermined if such measures could be invoked where injury to an industry was minimal. Article VI of the General Agreement deals with injury situations warranting a remedy; that involves the assumption that the degree of injury is such that no signatory should be required to tolerate it. Article XXIII can be interpreted analogously.

H. Domestic administrative procedures

Domestic investigatory or administrative procedures put into place pursuant to this Arrangement shall be governed by the following guidelines and requirements:

- (a) Any investigation shall be terminated as soon as the authorities concerned are satisfied that there is not sufficient evidence either of subsidization or of injury as may be relevant to justify proceeding with the case; there should be immediate termination in cases where the margin of subsidization or the volume of subsidized shipments, actual or potential, or the degree of injury, is negligible.
- (b) Any investigation initiated pursuant to this Arrangement shall not hinder the procedures of customs clearance.
- (c) The signatories concerned, the producers and all other interested parties shall be given ample opportunity to present in writing all

evidence that they consider useful in respect to the investigation in question; they shall also have the right, on justification, to present evidence orally.

- (d) The authorities concerned shall provide opportunities for the complainant and the importers, exporters and all other producers known to be concerned and the governments of all signatories concerned, to see all information that is relevant to the presentation of their cases that is not confidential as defined in paragraph (e) below, and that is used by the authorities in the investigation, and to prepare presentations on the basis of this information.
- (e) All information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an investigation shall be treated as strictly confidential by the authorities concerned who shall not reveal it, without specific permission of the party submitting such information.
- (f) However, if the authorities concerned find that a request for confidentiality is not warranted and if the signatory or signatories concerned or the producer concerned are either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities would be free to disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

- (g) Once the authorities concerned are satisfied that there is sufficient evidence to justify initiating an investigation, representatives of the signatory or signatories concerned and the producers known to be concerned shall be notified and a public notice may be published.
- (h) Throughout the investigation all parties shall have a full opportunity for the defence of their interests. To this end, the authorities concerned shall, on request, provide opportunities for all directly interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.
- (i) The authorities concerned shall notify representatives of all interested signatories and the directly interested parties of their decisions regarding the imposition or non-imposition of countervailing measures, indicating the reasons for such decisions and the criteria applied, and shall make public the decision.
- (j) In cases in which any signatory to this Arrangement which is an interested party withholds the necessary information, a final finding, affirmative or negative, may in any event be made on the basis of the facts available.

- (k) The authorities concerned shall review the need for the continued imposition of the measure, where warranted, on their own initiative or if the signatory or signatories concerned so request and submit information substantiating the need for review.
- (l) The signatories recognize that the provisions of Article X:3(b) of the General Agreement apply fully to the imposition of countervailing measures; each signatory shall therefore maintain or institute as soon as possible, judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review and correction of the imposition of countervailing measures; such tribunals or procedures shall be independent of the agencies entrusted with the administrative enforcement of countervailing measures.

Note:

It is for consideration whether there should be provisions regarding the status of a complaint from a complainant who is found to be engaging in a cartel the operations of which are relevant to the complaint and regarding the status of complaint from a complainant which has affiliates whose operations in the customs territory where the subsidy is being paid may be relevant to the complaint.

Article 7: Developing countries

In accordance with the Tokyo Declaration, the signatories recognize that developing countries signatory to this Arrangement should not be required to undertake obligations inconsistent with their trade, development and financial needs.

Accordingly, the signatories agree that:

A. Export subsidies

Notwithstanding the provisions of Articles 1 A, 2 A and 3 A of this Arrangement, developing countries signatory may grant export subsidies in the sense of Article 6 A on the products listed in Annex D when exported from the customs territories of the particular signatories specified therein, for such period as may be determined by the Multilateral Body to be justified/necessary to make those products competitive internationally.

B. Countervailing measures

Developed countries signatory to the Arrangement undertake not to exercise their rights under Articles 4 and 5 except those related to bilateral consultations, with respect to:

- (a) any product listed in Annex D and receiving an export subsidy from a developing country signatory to the Arrangement, when that product is imported into the customs territory of such developed country, or into the customs territory of a country to which such developed country exports a like product, unless it is established, pursuant to the provisions of Articles 4 and 5, that transactions/sales of such subsidized product is causing injury to an industry in the customs territory of such developed country.

- (b) any product receiving an ~~other subsidy~~/~~domestic subsidy~~ from a developing country signatory to the Arrangement which product is not listed in the relevant tariff Schedules to the General Agreement and which product replaces a like product originating from their own customs territory in the market of the subsidizing developing country.

Note:

This Article is drafted in parallel with Alternative I of Article 4, i.e. it envisages that countervailing measures may be applied in relation to prohibited export subsidies without a test of injury. Specified developing countries would thus be permitted to pay certain specified export subsidies and would be subject to countervailing measures only after a test of injury. If the second alternative were adopted in Article 4, i.e. that even prohibited export subsidies could not be subject to countervailing measures unless there was a test of material injury, then paragraph B(a) above would become unnecessary.

Article 8: State-trading practices and non-market economies

Note:

There should be provisions in the Arrangement to deal with situations arising from subsidization by non-market economy countries or by State-trading arrangements. The signatories will wish to take account of the fact that the export pricing practices of non-market economy countries, or their national expenditure or taxing practices can amount to export subsidization or domestic subsidization. It should be open to the Multilateral Body to deem that such a practice is a subsidy to which a countervailing measure might be applied.

Article 9: General provisions

A. Nothing in this Arrangement shall be construed as affecting or limiting the right of a signatory to provide assistance, other than export subsidies, related to:

- (a) a temporary programme designed to facilitate structural adjustments by producers to different terms of access to their domestic or export markets as a result of an intergovernmental trade agreement;

Note:

The purpose of this provision is to make clear that adjustment assistance programmes made necessary by the Tokyo Round will not be considered to be subsidy programmes to which countervailing measures might be applied.

- (b) critical and unusual circumstances arising from supply shortages or depressed international market conditions which give rise to short-term dislocations in the trade and production of a particular industry, unrelated to the state of general economic activity.

Note:

The kind of programmes envisaged are those occasioned, for example, by the running down of fish stocks in the North Atlantic.

- (c) relief programmes made available in response to natural emergencies (e.g. earthquakes, floods, hurricanes) or other national emergencies.

B. Signatories agree that countervailing measures should not be imposed in relation to assistance provided pursuant to Article 9 A above. However, signatories providing such assistance undertake to consult, at the request of any other signatory, as to the nature and effects of such subsidization.

C. Subsidies paid or otherwise given effect before this Arrangement comes into effect in regard to products entering into commerce after this Arrangement comes into effect may be subject to countervailing measures as provided for in this Arrangement, and not otherwise.

Note:

It may be necessary to provide for a time period during which existing countervailing measures might be brought into conformity with this Arrangement.

Retroactivity

D. The signatories agree that countervailing measures shall not be imposed with retroactive effect. Such measures shall only be applied with effect from the date on which the decision taken under the domestic procedures provided for in Article 6 is published or the date on which such a measure is authorized under Article 4, whichever is the later.

Provisional measures in emergency situations

E. In critical circumstances when the authorities of the importing signatory determine that delay in imposing a countervailing measure in relation to imports receiving a subsidy prohibited under or inconsistent with this Arrangement would cause injury which it would be difficult to repair, a signatory may impose provisional measures with respect to such subsidized imports, subject to the requirements that: (i) both the appropriate international and domestic procedures be activated immediately; (ii) the provisional measures be promptly withdrawn as and if either of those procedures demonstrate them to be unwarranted or unjustified; and (iii) in no case, the provisional measures be imposed for a period of more than ninety days.

Note:

It is for consideration whether there would be a need for particular, additional provisions in the Arrangement governing both the types of such measures to be permitted and their imposition.

Article 10: Coming into force and applicability

- A. This Arrangement shall be open for signature after the Director-General has been notified that the following governments ... are authorized to ratify it.
- B. It shall enter into force on ...
- C. This Arrangement shall become effective for each signatory on the day it enters into force under (B) or on the thirtieth day after the signatory has deposited its signature, whichever is the later.
- D. It is for consideration whether, notwithstanding the provisions of Article I of the General Agreement, the rights and obligations set out in this Arrangement are deemed to apply only as between signatories.⁷

ANNEX A

List of Prohibited Export Subsidies

Note:

The list below was drawn up by Working Group I during the preparations for the Tokyo Round (Spec(73)44) and is reproduced for illustrative purposes only.

- (a) The provision by governments of direct subsidies to exporters.
- (b) Internal transport and freight subsidies on export shipments on terms more favourable than for domestic shipments.
- (c) The government bearing directly or indirectly all or part of the transport or freight charges incurred on export shipments beyond national frontiers.
- (d) The government bearing all or part of the costs incurred by exporters in obtaining transport and freight insurance cover.
- (e) The government bearing all or part of the costs incurred by exporters in obtaining credit for financing export shipments.
- (f) Government loans to exporters on concessional terms for working capital purposes, where such loans enable the exporter to offer concessional sales terms, including financing.
- (g) The grant by governments (or special institutions controlled by governments) of export credits at rates below those which they have to pay in order to obtain the funds so employed.
- (h) The provision by governments (or special institutions controlled by governments) of export credit insurance and guarantees, or insurance against increases in the costs of products at premium rates which are manifestly inadequate to cover the long-term operating costs and losses of the insurance institutions.
- (i) The accordancy by governments of preferred treatment to certain exporters based on their export performance, such as the extension of time for the re-payment of loans, easier access to credit, or more favourable terms in export insurance programmes.
- (j) Loans that minimize the risk involved in developing new markets abroad, (i.e. the obligation to repay the loan is forgiven if the firm is not successful in developing a substantial market abroad).
- (k) Currency retention schemes or any similar practices which involve a bonus on exports or re-exports.

- (l) Special government measures to offset, in whole or in part, the price disadvantages on exports that result from its own or other countries' exchange rate adjustments.
- (m) The remission (including credit allowances) or deferral of direct taxes or special welfare charges paid or payable by industrial or commercial enterprises when the criterion for remission or deferral is related to the export performance.
- (n) The exemption, in respect of exported goods, of charges or taxes, other than charges in connexion with importation or indirect taxes levied at one or several stages on the same goods if sold for internal consumption.
- (o) The allowance of special deductions related to exports, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged (e.g. accelerated depreciation allowances on capital goods used in the production of exports; deduction of special reserves set aside to cover risks connected with export sales).
- (p) Tax rebate allowed beyond that of actual costs incurred, in calculating income payable for expenses incurred in developing markets abroad.
- (q) Rebate of indirect taxes or charges on exports or components thereof, in excess of accrued indirect taxes or charges on the exported products.
- (r) Remission calculated in relation to exports of taxes not borne by the products (taxes occultes).
- (s) The reduction of the direct tax burden on producers and exporters of a product accompanied by an increase in the indirect taxes borne by the same product.
- (t) In respect of deliveries by governments or governmental agencies of imported raw materials for export business on different terms than for domestic business, the charging of prices below world prices; and for such deliveries of raw materials of domestic origin, the charging of prices for such materials destined for processing for export sales, below those charged for materials destined for processing for domestic sales.
- (u) Government payments to producers or exporters that vary with the value of domestic materials used in the manufacture of goods for export.

ANNEX B

List of Primary Agricultural Products for which
Existing Export Subsidies are to be Phased Out

(to be agreed)

ANNEX C

List of Primary Agricultural Products for which Export Subsidies
may be Granted within the Limits Specified in Article 3

(to be agreed)

ANNEX D

List of Products for which Export Subsidies may be Granted
when Exported from Developing Countries Specified therein

(to be agreed)