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Committee on Trade in Industrial Products

Working Group 1

COUNTERVAILING DUTIES AND DOMESTIC SUBSIDIES THAT STIMULATE EXPORTS

Background Note by the Secretariat

1. It has been decided in the Committee on Trade in Industrial Products that, in addition to continuing its work on export subsidies, Working Group 1 should broaden its scope to include countervailing duties and domestic subsidies that stimulate exports.
2. This paper has been prepared in order to facilitate delegations' consideration of the additional subjects. It contains a summary of the GATT provisions with references to relevant sources of background information, as well as a brief description of the pertinent notifications in the non-tariff barrier exercise, and a reproduction of the solutions proposed in the Working Group during the earlier stages of its work. As the earlier background note dealing with export subsidies prepared for Working Group 1 (COM.IND/W/73) contains a considerable amount of information on article XVI and subsidies in general, this paper is mainly devoted to countervailing duties.

GATT PROVISIONS

3. The provisions of the GATT governing the imposition of countervailing duties are contained in Article VI which is also concerned with Anti-dumping duties. Paragraphs 1 and 2 of the Article relate exclusively to dumping.
4. Article VI:3 defines the term "countervailing duty" as "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".
5. Article VI establishes two basic criteria for the imposition of a countervailing duty. The first, contained in Article VI:3 provides that the countervailing duty should not be levied "in excess of an amount equal to the estimated bounty or subsidy ...". The second, in Article VI:6(a) prohibits the levying of any countervailing duty by a contracting party "unless it determines that the effect of ... the 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".

6. Article VI does not describe how the imposition of countervailing duties should be carried out, apart from Article VI:5 where it is prohibited to subject an imported product to both anti-dumping and countervailing duties "to compensate for the same situation of dumping or export subsidization" - and the first interpretative note to paragraphs 2 and 3 which permits the collecting of a security deposit pending final determination.

7. The interest of third countries are covered by sub-paragraph 6(b) of Article VI which provides that the CONTRACTING PARTIES "may waive the requirements" of Article VI:6(a) "so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party". This sub-paragraph goes on to state that, in order to permit the levying of a countervailing duty, the CONTRACTING PARTIES "shall waive the requirements" of Article VI:6(a) in cases in which, "they find that a subsidy is causing or threatening material injury" to an industry in an exporting contracting party in the situation described above. Article VI:6(c) provides that "in exceptional circumstances ... where delay might cause damage which would be difficult to repair" a contracting party may levy a countervailing duty on behalf of a third country without approval by the CONTRACTING PARTIES "provided that such action shall be reported immediately to the CONTRACTING PARTIES" and be "withdrawn promptly if the CONTRACTING PARTIES disapprove". The interpretative note to sub-paragraph 6(b) states that waivers under that sub-paragraph "shall be granted only on application by the contracting party proposing to levy a countervailing duty". In any case, this waiver has never been sought.

8. Article VI does not contain a definition of the concepts of "injury" and "subsidy". Article VI:4, however, states that contracting parties shall not levy countervailing duties "by reason of the exemption of such (imported) products from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes" i.e., that such exemption does not constitute a subsidy - as is confirmed by the general interpretative note to Article XVI. The second interpretative note to Article VI:2 and 3 provides that "multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3".¹

9. The only further reference to injury in Article VI is in paragraph 7 where it is provided that domestic price stabilization schemes for primary commodities, operated independently of the movement of export prices which result "at times"

¹ Multiple currency practices are included in the illustrative list of export subsidies drawn up by the Working Party on Subsidies (1960) BISD, 9th Supplement, page 186.

in the export price being less than the domestic price "shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned" that the system has also resulted in export prices higher than domestic prices and that it is not operated "to stimulate exports unduly or otherwise seriously prejudice the interest of other contracting parties".

10. The provisions of Article VI were reviewed by the Working Party on Other Barriers to Trade in 1955¹ and later by a Group of Experts on Anti-Dumping and Countervailing Duties in 1959 and 1960. The Group of Experts met with the purpose of exchanging information regarding the technical requirements of existing legislation on anti-dumping and countervailing duties. Most of the discussion in this Group related to anti-dumping duties, countervailing duties were dealt with only in the last ten paragraphs of the second (1960) report.² The Group considered "that the remarks formulated earlier with respect to anti-dumping duties applied to a large extent to countervailing duties".

11. The report briefly touched upon the problem of the definition of a "subsidy". There was a majority (but not unanimous) view that Article VI only covered subsidies granted by governmental or semi-governmental, as opposed to private bodies. It was agreed that the term subsidies covered not only actual payments but also measures having an equivalent effect. It was also recognized that the fact that certain subsidies were permitted under Article XVI "clearly did not debar importing countries from imposing a countervailing duty on the products on which subsidies had been paid".³

12. The report suggested that in order to arrive at the estimated amount of the subsidy it would be desirable for the country imposing the duty to enter into direct contact with the subsidizing country and for the latter country to provide the information without delay, as failing this information, the countervailing duty might be fixed at too high a level. The report also noted that, where the exemption or the reimbursement of domestic taxes exceeded the real charge which the product would have to pay in the importing country, the difference could be considered as constituting a subsidy.⁴

¹BISD, 3rd Supplement, page 222.

²BISD, 9th Supplement, pages 200,201.

³This fact was also noted in connexion with the addition of Part B to Article XVI. BISD, 3rd Supplement, page 226.

⁴This measure is also contained in the illustrative list in BISD, 9th Supplement, page 186.

13. With regard to injury, a large majority of the Group considered that the criterion of material injury should be "an equally fundamental prerequisite for the imposition of countervailing duties as for the imposition of anti-dumping duties". One expert, however, pointed out that his country's legislation did not contain the injury criterion.

14. A further suggestion by the Group was that contracting parties should notify the GATT secretariat of the introduction, alteration or removal of anti-dumping and countervailing duties. This notification provision has since been incorporated into the Anti-Dumping Code, but no equivalent provisions exist in regard to countervailing duties.

15. The records show no case involving the imposition of countervailing duty being brought to the CONTRACTING PARTIES under Article XXII or XXIII.¹

16. Article XVI makes a distinction between the export subsidies covered by Part B of the Article (some of which are prohibited, others discouraged) and subsidies which "operate directly or indirectly to increase exports" (which are permitted under Article XVI:1).² Article XVI:1 obliges any contracting party granting such a subsidy with an export stimulating effect to notify the CONTRACTING PARTIES of the extent and nature of the subsidy, its estimated trade effect, and the circumstances making it necessary. Under a procedure drawn up in 1960, contracting parties notify in full every three years and bring their notifications up to date in the intervening two years. The latest series of complete notifications was made in 1972 under L/3655.

17. Article XVI:1 also requires that, in cases where it is determined that "serious prejudice" is caused or threatened to the interests of any contracting party by subsidization, the contracting party granting the subsidy shall discuss with interested contracting parties or with the CONTRACTING PARTIES themselves the possibility of limiting the subsidization. The results of the six consultations held under Article XVI:1 are summarized in the 1961 report of the Panel on Subsidies.³

¹It was the general view of the Sub-Committee dealing with the relevant part of the Havana Charter that Article XXII or XXIII (41 and 93 of the Charter) adequately covered any concerns regarding the possibility of abuses through the unnecessary levying of countervailing duties (Havana Reports, page 74).

²See COM.IND/W/73 for background information on the GATT provisions of export subsidies.

³BISD, 10th Supplement, page 207.

18. Article XVI:2 to 5 were added as a result of the Review Session in 1955. Paragraph 5 provides for a periodic review of the operation of Article XVI. The Panel set up to undertake the preparatory work for such a review met during 1959-61 and presented two reports to the CONTRACTING PARTIES.¹ The Panel examined the question of a definition of a subsidy but decided that "it was neither necessary nor feasible to seek an agreed interpretation of what constitutes a subsidy".

19. The Panel considered it fair to assume that a subsidy which provided an incentive to increased production would, in the absence of offsetting measures, e.g. a consumption subsidy, either increase exports or reduce imports.²

20. During the preparation of the Anti-Dumping Code, there was considerable support for a proposal to draw up rules to govern the imposition of countervailing duties. At the twenty-fourth session of the CONTRACTING PARTIES, it was agreed that a working party should be set up to study "countervailing duties, subsidies and other export incentives". This working party, however, was never established.

Inventory of Non-Tariff Barriers

21. The three notifications in the Illustrative List in regard to countervailing duties (23.1, 23.2 and 23.3) involve legislation predating the GATT and covered by the Protocol of Provisional Application.³ The complaints focussed on the lack of an injury criterion equivalent to that contained in Article VI:6(a). Another objectionable characteristic was the automaticity and mandatory nature of certain legislation governing the imposition of countervailing duties.⁴

22. The subsidy notifications contained in the Inventory mainly relate either to measures involving differential treatment in favour of exports, which have been discussed in COM.IND/W/73, or seem to be more concerned with the import replacement effect. Measures notified which would seem to fall into the category of "domestic subsidies which stimulate exports" involve mainly shipbuilding and motion-picture films.

¹BISD, 9th Supplement, page 188, 10th Supplement, page 201.

²BISD, 9th Supplement, page 191.

³See Annex II.

⁴The legislation of certain contracting parties in regard to countervailing duties has been notified in the Annexes to Spec(69)60. In cases where such legislation is included as part of anti-dumping legislation it can be found in the 1970 GATT Publication - Anti-Dumping Legislation 1970.

Proposed solutions

23. The following solutions were proposed in Working Group 1 with regard to countervailing duties.¹

(a) 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.

(b) 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.

(c) 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 note² 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.

(d) 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.

¹Reproduced from L/3496, Appendix 2.

²Annex III.

(e) 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 of L/3496, Appendix 2.

(f) 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.

(g) 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.¹

24. In addition, Working Group 1 also received a number of proposed solutions to the problem of "trade diverting aids other than export subsidies". While these solutions were aimed at both the export and import aspects of government aids, it would seem to warrant further examination to determine the extent to which they are applicable to domestic subsidies which stimulate exports.²

¹See Annex III.

²See Annex IV and L/3496, Appendix 2.

ANNEX I

Article VI

Anti-Dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or
- (b) in the absence of such domestic price, is less than either
 - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood 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.

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, 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.

(b) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find 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.

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; provided that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

- (b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Article VI

Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

Paragraph 6(b)

Waivers under the provisions of this sub-paragraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

ANNEX II

The general comments on countervailing duties made in the context of the examination of the non-tariff barrier notifications are reproduced below.

AA. COUNTERVAILING DUTIES

General

Reference was made to the decision taken at the twenty-fourth session of the CONTRACTING PARTIES to establish a working party on countervailing duties, subsidies and other export incentives. The representative of Japan said that the fact that such working party had been created but had not yet begun its activities, should not be an excuse for not taking up in the Industrial Committee questions concerning the imposition by some countries of countervailing duties in a manner that was not consistent with the provisions of Article VI of GATT.

The representative of the European Economic Community recalled that in the EEC notification it had been stated that the policies pursued in this regard by the various contracting parties showed the same lack of uniformity that had been characteristic of anti-dumping policies prior to the Code signed on this subject at the end of the Kennedy Round. The Protocol of Provisional Application of the General Agreement deprived the relevant GATT provisions (Article VI) of much of their binding force. One result of this was that when introducing a countervailing duty, some countries did not take account of the element of injury, although Article VI of GATT, and also the Community legislation, made this an essential condition for any defensive measure.

Furthermore, there was no generally recognized interpretation of the GATT rules which in many respects were vague and imprecise, the representative of the EEC said. The Communities would therefore wish a confrontation to take place on the procedures followed in this respect by the various contracting parties, with a view to arriving at a uniform and mandatory interpretation of Article VI of the General Agreement, based on the general guidelines set forth in the Anti-Dumping Code.

The representative of Canada said that his Government had supported the establishment of a group on countervailing duties and subsidies. He was not quite certain at the present stage if the best approach would be to aim at the creation of a uniform and mandatory interpretation of the countervailing provisions of GATT. It seemed that the countervailing practices caused concern with respect to a few countries only and major concern in one country - the United States. It might not be necessary to establish a Code in order to influence these countries to adjust their legislation to conform to the requirements of Article VI.

The representative of Poland said that, although there had been embodied in paragraph 4 of the Protocol for the Accession of Poland ample safeguard clauses and although Poland had been a full contracting party for more than a year, several contracting parties nevertheless continued imposing countervailing duties on imports from Poland in a manner that was not in conformity with Article VI of GATT.

The Committee agreed to ask governments represented in the Committee to communicate to the secretariat the text of their legislation and, where appropriate, regulations on countervailing duties.

ANNEX III

The proposal in regard to elements of a code on countervailing duties referred to in paragraph 23(c).

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.

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.