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GENERAL AGREEMENT ON TARIFFS AND TRADE

Multilateral Trade Negotiations

Group "Non-Tariff Measures"
Sub-Group "Subsidies and Countervailing Duties"

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SUBSIDIES AND COUNTERVAILING DUTIES

Addendum

1. At its meeting in June 1975, the Sub-Group "Subsidies and Countervailing Duties" agreed "that participants should submit in writing by a target date of 15 October 1975 to the secretariat, for distribution to members of the Sub-Group, their comments on problems encountered in the areas of subsidies and countervailing duties as well as any specific proposal for appropriate solutions to these problems including, where feasible, draft texts or suggestions". (MTN/NTM/5, paragraph 4 and GATT/AIR/1184).

2. The following communications have been received from Canada and the European Communities.

3. Delegations which have not yet submitted their comments or proposals are invited to do so without delay.

CANADA

At the last meeting of the Sub-Group "Subsidies and Countervailing Duties", delegations were invited to submit in writing their comments on problems regarding subsidies and countervailing duties, as well as specific proposals for solutions to these problems. During the preparatory period the Canadian representatives set out some views on these matters, reproduced in GATT documents MTN/3B/W/5 and MTN/3B/W/6. This note outlines, as a summary of the views set out in these documents, fourteen considerations which the Canadian Delegation believes should be taken into account in examining the effectiveness of the existing GATT provisions and in considering any proposals for new agreements, interpretative notes or codes respecting these provisions. The following considerations are inter-related and should be read as a whole.

1. The Canadian Delegation is of the view that any examination should start with the General Agreement proper, that is, that the existing rights of contracting parties under the Agreement should not be reduced and indeed those rights and obligations which are not now being respected should be. The Protocol of Provisional Application is not, of course, one of the rights of contracting parties under the Agreement.

2. The Canadian Delegation is of the view that any action contemplated in the MTN should avoid sanctioning new barriers to trade, i.e. contracting parties should not acquire rights to impose barriers to trade that they do not now have under the Agreement.

3. Any new instruments embodying agreements between contracting parties should seek to maintain the balance of rights and obligations in the General Agreement; it should be noted that given that countries differ in economic size and in their dependence on foreign trade, any addition to the rights of contracting parties will be, as a practical matter, an addition to the rights of only some contracting parties.

4. The relationship between subsidies and countervailing duties cannot be symmetrical. The latter are designed as a sanction against certain subsidies, e.g. subsidies causing injury to producers of like goods in the importing country paid specifically in respect of exported goods. Countervailing duties by definition cannot be used to offset the impact of subsidies to production that simply replaces imports. The provisions of Articles XXII and XXIII are relevant in this connexion.

5. Any system of obligations, and sanctions for any breach of such obligations, which would allow the authorities of one contracting party to determine unilaterally that its rights or the obligations of another contracting party have been breached and then to apply a sanction unilaterally, would be entirely contrary to the GATT. Such a proposal would not be acceptable to the Canadian authorities.

6. Greater precision should be given to the definition of export subsidies. Such subsidies usually involve the transfer to producers of funds from the general fiscal resources (or the foregoing of revenue) for the purpose of stimulating increased exports or of maintaining exports at levels higher than would otherwise be attained. Greater precision might be given to the concept by trying to draft a general definition and/or by the enumeration of practices which are export subsidies.

7. Export subsidies, as such and as defined, should be prohibited. However, it would be for consideration whether the two-price criterion and the requirement concerning non-primary products which are now incorporated in Article XVI:4 should

remain in place or be deleted. It would be important to keep in mind that subsidized exports, if exported at prices lower than comparable prices for which they sold in the domestic market, may, if injurious to producers of like goods in the importing country, be dealt with under anti-dumping systems.

8. Rules on domestic subsidies should aim at minimizing their trade-distorting effects without reducing the freedom of action of contracting parties to use subsidies, direct or indirect, to reduce disparities in income and employment between different regions within their jurisdictions and for other broad socio-economic objectives. Domestic subsidies might thus be defined as any subsidy which is designed primarily to stimulate investment, employment or production in disadvantaged regions or to achieve other socio-economic purposes, and which is unrelated to the export performance of the producers receiving such subsidies.

It should be noted that the degree to which goods subsidized for socio-economic reasons enter into international trade varies significantly according to the relative importance of international trade to the subsidizing country. For a country such as Canada, which has a small domestic market and in which for certain industries economies of scale can be achieved only by exporting a significant portion of production, domestic subsidies may, for these products, incidentally influence the level of exports. For the United States, for example, which has a large domestic market or markets and which exports a relatively small share of its national production, the impact of domestic subsidies need not necessarily affect exports but may be to displace imports or to relocate productive facilities within its customs territory. Any international rules regarding domestic subsidies must take this into consideration.

9. It is now required in Article VI that there be material injury (or threat thereof) before countervailing duties may be levied against goods benefiting from subsidies. This provision should be examined in order to ensure that the concept "injury" is clearly defined, that the concept "material" is so defined as to ensure that material injury is not determined to exist unless it is clear that the degree of injury is substantially and significantly more than de minimis and that there is a meaningful examination or test of whether or not material injury (or threat thereof) has in fact occurred. (The Canadian Delegation notes that experience since the adoption of the Anti-Dumping Code demonstrates that important differences exist between contracting parties with respect to the application of the requirement concerning material injury or threat of material injury.)

10. The Canadian Delegation sees no reason why any contracting party should not subscribe to such provisions regarding material injury.

11. There must be an effective framework of rights and obligations regarding impact on the exporting industries of a contrating party of subsidy that replaces imports in its export market. This framework of rights and obligations should be as effective as any such framework regarding export subsidies.

12. Export subsidies, (and the use of countervailing duties) domestic subsidies, subsidies that replace imports and all proposed sanctions should be subject to effective international discipline. As noted in (5), contracting parties should not be allowed to decide unilaterally whether their rights or the obligations of another contracting party have been breached, and unilaterally to apply a sanction. There should be provisions for reporting and notification procedures, for bilateral consultations, for multilateral surveillance and for dispute settlement.

13. In contrast to rules about dumping, which involves the pricing policies of private enterprises, rules about subsidies, and about sanctions designed to offset the trade distorting effects of subsidies, are rules about the actions of contracting parties and the offsetting actions that other contracting parties may take. Procedural rules, rules regarding international scrutiny and rules regarding sanctions must all give due weight to this important consideration.

14. Full account must be taken of the special interests of developing countries. The final determination of what differential measures might be appropriate should take place in the light of general solutions evolved in these negotiations. It might well be that adequate provisions for international scrutiny of subsidies and the working out of adequate understandings regarding material injury, would make unnecessary any special provisions regarding the exports of developing countries and would not inhibit them in providing necessary subsidies to achieve their legitimate development objectives.

EUROPEAN COMMUNITIES

I. GENERAL APPROACH

Since they were formulated, the GATT rules on countervailing duties have not been applied in their entirety by all the contracting parties nor have they led to a real harmonization of legilsation and practice by them. The problems thus raised have been aggravated considerably by the recent upsurge in anti-subsidy procedures in certain countries. It is important, therefore, to solve these problems in order to ensure efficient, general and equitable application of the provisions of Article VI regarding the imposition of countervailing duties. The Community proposes, therefore, to its partners that they should seek in the negotiations to formulate a Code for the application of the said provisions.

In order to ensure the efficacity of the provisions of Article VI on countervailing duties, this Code must contain definitions of certain essential ideas, make available certain criteria and provide for the establishment of certain procedures.

It is the view of the Community that the rules agreed should be of a general nature and should ensure that all Signatory Parties be bound by the new provisions and that all the provisions should be applied in their entirety without exception or reserve. They would thus guarantee an equality and a balance between the rights and obligations of adhering countries. In order to achieve this, the Signatory Parties would need to make some amendments to their national legislation. For its part, the Community is prepared to do so.

II. LEGAL BASIS

The provisions of Article VI of the General Agreement constitute the only existing elements of positive law. Apart from their intrinsic merits they have the advantage of resting on an equitable basic conception: compensation for the injurious effects of subsidy and a prohibition of all unfounded protectionist measures. The Community considers, therefore, that Article VI must remain the basic legal instrument from which the necessary rules for application must be formulated. These rules must concern three principal subjects which are found within the general context of Article VI: the notion of subsidy, that of material injury resulting therefrom and procedures. These notions must be defined, care being taken, however, to maintain a balance between their inter-relationships and interactions. In this respect, particular attention must be given to the idea of material injury which brings to bear on the entire system organised by Article VI, a factor of moderation and of flexibility.

III. DEFINITION OF SUBSIDY

It is difficult to find a satisfactory definition, other than a general one, since the term subsidy covers a great and widely varying number of practices, the nature and importance of which vary, in particular, according to the manner, the degree and the extent of state or public sector intervention in the functioning of the economy and even of society. In addition, the definition changes depending on whether one looks at it from the point of view of political economy, of financial or fiscal legislation, of international economic relations or of social and development policy.

It is well to remember that what is involved also in the context of Article VI is not so much the subsidy as the possible injurious effects which it could have, directly or indirectly on a third country.

The Community is of the opinion, therefore, that a satisfactory definition of a subsidy within the meaning of Article VI of GATT would be difficult and that it would be better to adhere to the elements contained in Article VI which constitute, if not a definition, at least a description of a subsidy, and to rely, also, on the conclusion of the report of the Experts Group in 1960.

These elements, which could be restated, are the following:

- aid granted from public funds (Experts report)

- concerning the export, manufacture, production or transport of a product (Art. VI(3))

- licit or illicit in the terms of Article XVI (Experts report)

- other than fiscal exemption within the meaning of Article VI(4).

IV. INJURY

1. Criteria

Injury is one of the basic concepts contained in Article VI. It is, therefore, in the interests of the Contracting Parties to establish uniform criteria for a determination of injury.

A first effort in this direction was made by the Anti-Dumping Code and the Arrangement Regarding International Trade in Textiles. It is necessary, however, to go further and to seek criteria which are less susceptible to subjective interpretation.

A solution could be found by setting out a certain number of criteria of an objective character which would require the presence of statistically verifiable factors. It seems to the Community that the concept of market penetration lends itself particularly well to such an objective analysis and could permit an initial sifting before passing on to an examination of the difficulties which such penetration was causing for the affected industry. This examination would, however, have to remain the determining point before any concrete action could be envisaged.

These objective criteria could be the following:

(1) A substantial increase in imports, whether in absolute value or in relative value by comparison with production in the importing country.

(2) A substantial price under-cutting by the subsidised product as compared with the price of a similar product made in the importing country.

(3) A rapid increase in the market share held by the subsidised product.

Whatever the exact content of the criteria which are finally adopted it would be advisable to give them more weight by providing that they should apply cumulatively, in such a way that the absence of any one of the criteria would lead to a negative determination. While it would not provide an absolute guarantee against unjustified decisions this method could, however, avoid the most aberrant decisions.

However, one problem remains to be considered, which would be all the greater if quantified thresholds were to be fixed for the application of the criteria. A consequence of the meeting of the conditions could be a certain automaticity in the determination of injury (trigger effect). In other words, the authorities charged with the task of determining injury must not see their decisions irrevocably dictated by a finding of the presence of the above-mentioned criteria. Such a finding would merely allow them to conclude that it was necessary to proceed to a deeper examination of injury.

With a view to ensuring that a determination that these criteria were met would not prejudge the injury finding it could be advantageous to divide the injury examination into two clearly distinct phases:

- a first phase relating to market penetration according to the criteria described above;

- a second phase referring to the situation of the industry affected; this situation should be analysed in accordance with criteria, to be refined eventually, but in effect, corresponding to all the other criteria mentioned in Article 3(b) and (c) of the Anti-Dumping Code, that is, on the one hand, the development of turnover, profits, prices, employment, etc., and, on the other hand, the intensity of competition between the producers in the importing country, the development of demand, etc.

It would be important that the result of the first phase should be a condition for passing on to the second phase, without in any way prejudging its result.

Under these conditions, a procedure which could lead to the imposition of a countervailing duty would proceed in accordance with the following scheme:

1. Examination of the existence of a subsidy and of its extent

2. Examination of injury:

(a) First Phase: Market penetration

(b) Second Phase: Situation of the industry

2. Causality

In this area it is essential to establish a close link between the subsidy and its injurious effect. The Community proposes, therefore, that the principles of Article 3(a) of the Anti-Dumping Code, requiring that the dumping should be manifestly the principal cause of material injury, should be adhered to.

V. THREAT OF INJURY

In order to ensure that the criteria adopted for an examination of injury are not made ineffective by too easy a recourse to the idea of threat of injury it is equally essential to provide a more rigid definition of it.

This objective could be achieved by establishing the principle that the objective criteria of market penetration must be met in any event, the presence of threat thus referring only to the criteria relating to the situation of the industry which was affected by a certain degree of market penetration.

VI. INTERNAL PROCEDURES

Since a determination of injury is the necessary condition for the imposition of a countervailing duty it would appear logical that the initiative in opening a procedure in the importing country should be reserved to the industry affected and that a complaint from such industry, supported by sufficient evidence both on the subsidy and on the resultant injury should be a precondition for the initiating of any action regarding subsidies.

Furthermore, the examination of the injury element and the determination of the existence and extent of a subsidy would have to be carried out simultaneously in order to ensure that an inquiry regarding a subsidy should not be undertaken unless the existence and importance of resulting injury were determined at the same time. A compromise solution analogous to that set out in Article 5(b) of the Anti-Dumping Code might eventually be adopted, on condition however, that the examination of injury which is therein provided for both before the opening of a procedure and at various other stages of the procedure should be subject to the criteria already set out (verification at least of the market penetration criterion).

Finally, the imposition of a countervailing duty should be optional, the responsible authorities being empowered to judge the opportuneness of such a decision, bearing in mind other interests which might be involved. Retroactive application of such duties should be excluded.

VII. INTERNATIONAL PROCEDURE

Two approaches could be envisaged in this area. One would be a bilateral approach in which the procedures would lead to contacts between the countries directly involved, that is, the subsidizing country or countries and the country or countries importing the subsidized product. The other approach would be multilateral in which the problem would be put before the forum of the CONTRACTING PARTIES.

A combination of the two approaches and their respective advantages (the discretion of bilateralism and the guarantees afforded by multilateralism) could be found.

In the first stage bilateral consultations would take place. In case of failure of these consultations, the question would be brought before the Contracting Parties or before a more restricted body whose composition and rules would have to be defined having regard to the experience gained in the Anti-Dumping Committee and the Textiles Surveillance Body.

VIII. DEVELOPING COUNTRIES

In the opinion of the Community the general solutions proposed in the above considerations, contain elements which are capable of responding to the particular problem of developing countries and would allow the developed countries to show the greatest possible flexibility in the application of countervailing duties to imports from developing countries.

OUTLINE OF A CODE ON COUNTERVAILING DUTIES

I. BASIS

Article VI of GATT: On this basis the creation of equal rights and obligations for all the signatory parties.

II. DEFINITION OF SUBSIDY

Reaffirmation of basic elements contained in Article VI(3) and the insertion of certain ideas contained in the Report of the Group of Experts:

- aids from public funds
- concerning the export, manufacture, production or transport of a product
- licit or illicit in the terms of Article XVI GATT
- other than fiscal exemptions within the meaning of Article VI(4) GATT

III. DETERMINATION OF INJURY

A. Evaluation

Separation of the examination of injury into two phases: the result of the first stage being a condition for passing onto the second stage without, however, prejudging it in any way.

(a) First phase: objective criteria; market penetration

1. Substantial increase in imports, either in absolute value or in relative value by comparison with the production of the importing country.

2. Substantial price undercutting by the subsidized product as compared with the price of like products made in the importing country.

3. A rapid increase in the market share held by the subsidized product.

(b) Second phase: situation of the affected industry
(Article 3(b) and (c) of the Anti-Dumping Code)
(Annex A of the MFA)

1. The development of turnover, profits and internal prices, employment etc.

2. Other factors not connected to the effects of the subsidy, such as the intensity of competition between the producers in the importing country, contraction of demand, substitution of other products, etc.

The evaluation must refer to the production of strictly similar products. (Article 3 of the Anti-Dumping Code.)

Threat of injury

Minimum definition

- the objective criteria (market penetration) must be met
- the threat of injury would only concern the situation of the affected industry

that is: market penetration whose existence has been established, threatens injury to the industry concerned.

B. Causality

The subsidy must be the principal cause of material injury, that is, a cause more important than all other causes together.

IV. DEFINITION OF THE TERM "INDUSTRY"

The expression "domestic industry" means the domestic producers as a whole of like products or those of them whose collective production constitutes a major proportion of the total domestic production of those products.

Simplification of the rules on "regional protection" in an isolated market.

V. INTERNAL ENQUIRIES

(a) Opening of the procedure

The procedure should only be opened as a result of a formal complaint by the industry affected and the complaint should be supported by sufficient evidence regarding both the existence of a subsidy and of material injury.

(b) Simultaneity

Strictly simultaneous examination of "subsidy" and "material injury" at all stages of the procedure. Consequently, a complaint should be immediately rejected and the enquiry closed as soon as the absence or the negligible impact of a subsidy or of injury resulting therefrom, are established.

(c) Normal customs clearance

No obstacles should be placed in the way of normal customs clearance. Up to the time of imposition of a possible countervailing duty no change should take place in customs clearance procedures.

VI. CONSULTATIONS AND OTHER PROCEDURES ON THE INTERNATIONAL LEVEL

(a) Bilateral procedure

Consultations would have to take place before the institution of any defensive measures by the importing country. All requests for consultation should be supported by a detailed factual justification regarding both the subsidy and material injury.

In the course of this consultation, the countries involved should give their mutual collaboration.

(b) Multilateral procedure

In the case of failure of bilateral consultations, the question would be brought before the Signatory Parties or before a more restricted body whose powers, composition and rules would require to be defined.

VII. THE IMPOSITION OF COUNTERVAILING DUTIES

(a) The imposition of countervailing duties could only take place sixty days after the request for bilateral consultations referred to at VI(a) above and thirty days after the international authority referred to at VI(b) had been seized of the matter.

(b) Discretionary power

The decision to impose the countervailing duty should be optional in all the signatory countries.

(c) The amount of the duty

This should not exceed the amount of the subsidy granted by the exporting country and could be less if a lesser duty would suffice to remove the injury.

(d) Duration

A countervailing duty should only be levied to products entered for consumption after the date of the institution of the duty. It should only remain in force as long as is necessary to neutralize the subsidy or eliminate the injury.

Its maintenance in effect should be reconsidered periodically and at the request of the exporting country.

VIII. EFFECTIVE ADAPTATION OF NATIONAL LAW TO THE PROVISIONS OF THE CODE

Every one of the Parties shall take all necessary measures to ensure that its laws, regulations and procedures conform to the Code.

The benefit of the discipline imposed by the Code should be reserved to signatory countries only.

IX. DEVELOPING COUNTRIES

The developed countries should show the greatest flexibility in the application of countervailing duties to imports from developing countries.