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THE URUGUAY ROUND**

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Negotiating Group on Subsidies
and Countervailing Measures

PROBLEMS IN THE AREA OF
SUBSIDIES AND COUNTERVAILING MEASURES

Note by the Secretariat

As requested and in order to facilitate the work of the Negotiating Group on Subsidies and Countervailing Measures, the secretariat has prepared the following note listing problems which have arisen in the operation of Articles VI and XVI of the General Agreement and the Agreement on Subsidies and Countervailing Measures.

I. DEFINITION AND MEASUREMENT OF THE AMOUNT OF A SUBSIDY FOR THE PURPOSE OF THE IMPOSITION OF COUNTERVAILING MEASURES

1. Criteria for determining the existence of a countervailable subsidy

In the discussions which have taken place in the Committee on Subsidies and Countervailing Measures (hereinafter called the "Committee") on general criteria to determine whether a practice constitutes a countervailable subsidy, three concepts play an important rôle: (a) financial contribution by a government, (b) specificity and (c) benefit to the recipient.

- (a) Divergent views have been expressed regarding the question as to whether a financial contribution by a government should be one of the criteria for determining the existence of a countervailable subsidy (see e.g. documents SCM/35 and 36).
- (b) The Committee has been considering Draft Guidelines for the Application of the Concept of Specificity on the Calculation of the Amount of a Subsidy other than Export Subsidies (SCM/W/89). These Draft Guidelines reflect the view that, as far as subsidies other than export subsidies are concerned, only those measures which are specific to an enterprise or industry, or group of enterprises or industries, can be countervailable (domestic) subsidies. However, these Guidelines have not yet been adopted by the Committee. Moreover, the Guidelines do not address the question whether measures limited to certain regions should be considered to be "specific".
- (c) Conflicting views have been put forward on the question whether a necessary condition for the existence of a countervailable (domestic) subsidy is that the practice in question confers a net benefit to the

recipient and adversely affects the conditions of normal competition. This issue is of particular importance in the context of regional programmes (see e.g. documents SCM/35 and 36).

2. Calculation of the Amount of a Subsidy

The fundamental problem which has prevented the signatories of the Agreement on Subsidies and Countervailing Measures (hereinafter called "the Agreement") from reaching agreement on the methodology to calculate the amount of a subsidy is the divergence of views on the question whether the measure of the amount of a subsidy is the cost to the government providing that subsidy or the benefit of the recipient of that subsidy (see SCM/35 and 36). One consequence of this lack of consensus on this issue is that no agreement exists among signatories on the use of "present value" methodology in case a subsidy is allocated over time. The Committee has adopted Guidelines on Amortization and Depreciation (SCM/64) but these Guidelines do not address the question of the use of "present value" methodology.

3. Certain types of subsidies

The Group of Experts on the Calculation of the Amount of a Subsidy, established by the Committee in 1981, has been discussing criteria to determine when certain practices may constitute countervailable subsidies and how the amount of a subsidy should be measured in such cases. The Group has considered the following issues in particular:

- "input" or "indirect" subsidies;
- equity;
- research and development assistance;
- export restrictions and related measures.

As a result of the lack of consensus with respect to general criteria for determining the existence of a countervailable subsidy and the calculation of the amount of a subsidy, the Group has been unable to submit draft guidelines to the Committee on any of these issues. Another issue which has arisen recently is whether pricing policies for natural resources can constitute countervailable subsidies (see e.g. C/M/200).

II. CONCEPT OF DOMESTIC INDUSTRY

In a number of countervailing duty cases involving processed agricultural goods, conflicting views have been expressed by signatories as to whether producers in the importing country of the agricultural raw material used in the production of the processed goods could be considered to be (part of) the domestic producers of the processed product. This question has been the subject of a Panel Report (SCM/71) which has not yet been adopted by the Committee. Another problem which has arisen concerning the concept of domestic industry concerns the procedures used by the investigating authorities in an importing country to verify whether a petition has been filed by or on behalf of the affected domestic industry.

III. ISSUES CONCERNING THE DETERMINATION OF MATERIAL INJURY

One problem which has arisen in this area concerns the definition of the concept of domestic industry (see Section II). Another problem is what is referred to as "cumulative injury assessment", i.e. the practice whereby the investigating authorities of the importing country assess the causal relationship between subsidized imports and material injury to a domestic industry by considering the combined effect of the allegedly subsidized imports from all countries investigated, or by considering the combined effect of allegedly subsidized imports from one or more countries investigated and allegedly dumped imports from one or more countries investigated (the latter form of cumulation is sometimes referred to as "cross-cumulation"). The Ad-Hoc Group on the Implementation of the Anti-Dumping Code has been trying to find an agreed approach to this issue but so far the efforts made by this Group have remained without any result. A further question relating to the determination of injury concerns the concept of "de minimis" subsidization. There is a consensus that countervailing measures should not be applied where the amount of subsidization has been found to be very low, but there is no agreed rule specifying the level below which the amount of a subsidy should be considered to be "de minimis".

IV. NOTIFICATIONS UNDER ARTICLE XVI:1 (notifiable measures, scope of notifications, questionnaire on subsidies)

The question of notifications under Article XVI:1 was discussed in the Committee and in the Committee on Trade in Agricultural on several occasions (SCM/M/4, 7, 9, 11, 12, 15, 16, 19, 20, 21, 24, 27, 30, 31 and 32). The main issues identified in the Committee on Subsidies and Countervailing Measures related to improved transparency and greater uniformity of notifications (in particular definition of a notifiable subsidy and the content of notifications), differences in the basis for notifications in the case of countries with a strong private sector and those with a strong state-owned sector, procedures under Article 7 of the Agreement, self-incriminating effect of notifications, timing and frequency of notifications and improving the questionnaire on subsidies (SCM/49). Some delegations made detailed comments on these issues (SCM/49 and addenda 1-4). These comments were compiled by the secretariat in a checklist circulated in SCM/W/85. The Committee discussed this checklist at its meeting of 4 December 1984 (SCM/M/24) and decided to establish a group of experts with the task to work out a set of guidelines on notifications. This Group reported to the Committee at its meeting of 22 April 1986 (SCM/M/31) that it was unable to make any progress on these issues.

V. SUBSIDIES OTHER THAN EXPORT SUBSIDIES (determination and assessment of serious prejudice, measures which do not have trade distorting effects, adverse effects arising in third country markets)

The reports by the panels on EEC Refunds on Export of Sugar, adopted by the Council on 6 November 1979 and 10 November 1980, respectively (BISD, 26th Supplement, page 319 and BISD, 27th Supplement, page 97), contain some indications as to what constitutes a "serious prejudice" or "a threat of serious prejudice".

Points raised in the Committee on Trade in Agriculture regarding the existing Article XVI:1 obligation to discuss the possibility of limiting subsidization which has caused or threaten serious prejudice and possible criteria to determine and assess serious prejudice are reproduced in document AG/W/9/Rev.3, in particular 15-19 and Annex C-V.

A proposal for an interpretative decision to clarify the scope an application of Article 8 of the Agreement has been submitted in document SCM/53, paragraph 1.

VI. EXPORT SUBSIDIES ON PRIMARY PRODUCTS (more than an equitable share, special factors, previous representative period, market displacement, newcomers, price undercutting, new framework for use of export subsidies)

The following reports containing issues related to the notion of "more than an equitable share" have been adopted by the CONTRACTING PARTIES:

- (a) Report adopted on 3 March 1955 (BISD, 3rd Supplement, page 226, paragraph 19).
- (b) Panel report adopted on 21 November 1958, concerning French assistance to Exports of Wheat and Wheat Flour (BISD, 7th Supplement, page 52, paragraphs 15, 19, 23 and 25).
- (c) Panel reports adopted on 6 November 1979 and on 10 November 1980 concerning EEC Refunds on Export of Sugar (BISD, 26th Supplement, page 307, paragraphs 4.9, 4.11 and 4.17 and BISD, 27th Supplement, page 97, paragraph (f) and (g)).

The report of the Panel concerning EEC Subsidies on Export of Wheat Flour has been submitted to the Committee in SCM/42. The Committee discussed this report on several occasions but was unable to adopt it.

A number of solutions regarding export subsidies on primary products were proposed in the Committee on Trade in Agriculture. These solutions can be divided into two groups.

- A. Improvements in the existing framework of rules and disciplines (AG/W/9/Rev.3, pages 16 and 18 and Annex B-I, B-II, B-III and B-IV).
- B. A new framework for limiting the use of export subsidies and their adverse effects (AG/W/9/Rev.3, pages 19-22 and Annex C-I, C-II, C-III, C-IV and C-V).

The Committee on Subsidies and Countervailing Measures had some discussion of a proposal put forward by its chairman on uniform interpretation and effective application of Article 10 of the Agreement. This proposal is reproduced in document SCM/53, paragraphs 11-20.

VII. EXPORT SUBSIDIES ON NON-PRIMARY PRODUCTS (illustrative list, processed products composed of primary components, delivery of goods and services by a government, export credits)

Paragraph 5 of the Report of the 1960 Working Party, adopted by the CONTRACTING PARTIES on 17 November 1960 (BISD, 9th Supplement, page 186), contains an illustrative list of export subsidies in the sense of Article XVI:4. Some issues related to the interpretation of this list are discussed in three 1976 Panel reports on Income Tax Practices maintained by France, Belgium and the Netherlands (BISD, 23rd Supplement, pages 114, 127 and 137 and 28th Supplement, page 114) as well as in the Panel report on Export Inflation Insurance Schemes (BISD, 26th Supplement, page 330).

The Agreement contains a revised illustrative list of export subsidies (Annex to the Agreement).

The report of the Panel on EEC Subsidies on Export of Pasta Products has been submitted to the Committee in document SCM/43. The Committee discussed this report on several occasions but was unable to adopt it.

Points raised and proposed solutions regarding application of export subsidy provisions in the case of processed products composed of primary components are contained in a proposal submitted by the chairman of the Committee (SCM/53, paragraphs 2-8) and in AG/W/9/Rev.3, page 21, Annex B-II, paragraphs 18-21 and Annex C-IV.

A proposal to deal with certain ambiguities resulting from paragraph (d) of the Illustrative List of Export Subsidies in the Agreement has been submitted in SCM/53, paragraph 9.

The Committee discussed on several occasions some questions related to certain export credit practices (SCM/M/11 and SCM/M/13). In particular, there have been divergent views as to whether an export credit at a rate below the actual market rate, but consistent with the arrangement referred to in paragraph (k) of the Illustrative List of the Agreement is (i) nevertheless a subsidy although not a prohibited one or (ii) does not constitute a subsidy at all.

VIII. SPECIAL TREATMENT FOR DEVELOPING COUNTRIES UNDER ARTICLE 14 OF THE AGREEMENT

At its 28 April 1980 meeting the Committee took a decision on procedures concerning commitments to be undertaken under Article 14:5 (SCM/M/2, paragraphs 5 and 31). This decision was accompanied by a statement by the Chairman concerning the operation of this decision (SCM/M/2, paragraph 36).

The questions related to Article 14:5 were discussed in the Committee on several occasions, in particular at its meeting of

- (a) 28 March 1980 (SCM/M/2, paragraphs 5-38)
- (b) 8 May 1980 (SCM/M/3, paragraphs 11-24)
- (c) 17 November 1983 (SCM/M/19, paragraphs 4-10 and 46-62)

At the November 1983 meeting the Committee authorized the Chairman to hold informal consultations on problems certain developing countries were facing in adhering to the Agreement. These informal consultations resulted in a proposal on procedures concerning commitments by developing countries under Article 14:5 of the Agreement, which was circulated in December 1984 under the responsibility of the Chairman of the Committee (SCM/W/86). At its special meetings held in March and April 1985 (SCM/M/26 and SCM/M/28), the Committee examined a revised version of this proposal (SCM/W/86/Rev.2). However, despite a lengthy debate, the Committee could reach no agreement on this proposal.

The following signatories have notified their commitments in terms of Article 14:5: Brazil (L/4922, SCM/13, SCM/38 and SCM/65); Uruguay (L/4924); Korea (SCM/3); Egypt (SCM/16); Turkey (SCM/61); Indonesia (SCM/62 and Add.1); Philippines (SCM/63) and Israel (SCM/67).

At its meeting held in April 1986 the Committee established a Working Party to examine obstacles which contracting parties face in accepting the Agreement. This Working Party met on 13 June 1986. It had a first exchange of views and requested the secretariat to prepare a note on the operation of Article 14:5 and Article 19:9 of the Agreement. This note has been circulated in SCM/W/116.