

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

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Group of Negotiations on Goods (GATT)

Negotiating Group on Subsidies  
and Countervailing Measures

CHECKLIST OF ISSUES FOR NEGOTIATIONS

Note by the Secretariat

1. At its meeting of 1-2 June 1987 the Negotiating Group agreed that, in accordance with the decision taken at its first meeting, the secretariat would prepare a first version of a checklist of issues for negotiations. This list would be circulated at the beginning of September 1987 and would be revised after the third meeting in the light of possible further submissions (MTN.GNG/NG10/2, paragraph 10).

2. The attached checklist is based on written submissions circulated in documents MTN.GNG/NG10/W/1, 2, 5-8, MTN.GNG/NG8/W/3 and MTN.GNG/NG8/W/5. An attempt has been made to include also issues raised in oral statements at the two first meetings of the Group. In accordance with its purpose, the checklist contains only issues proposed for negotiations and not comments of a general nature or comments made on other participants' proposals.

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I. GENERAL NEGOTIATING OBJECTIVES

- Any review, in the context of the Uruguay Round, of the provisions on subsidies and countervailing duties should aim to restore the equilibrium of rights and obligations in terms of equivalent disciplines regarding subsidies on the one hand and countervailing measures on the other by reinforcing the rules governing countervailing measures.
  
- Before examining specific improvements to the current rules, it will be important to review the fundamental objectives of Articles VI and XVI. For example Article VI leaves no doubt regarding the requirements for imposing such duties: the existence of subsidization and its causal link to injury. The purpose of countervailing duties is not to offset comparative advantage. With respect to Article XVI, it is clearly recognized that subsidies may cause serious prejudice to the export or import interests of other parties and the possibility of limiting the subsidization in such instances is clearly envisaged. Disciplines on the use of subsidies were intended. Experience with the Code<sup>1</sup> suggests that the balance between Articles VI and XVI may be insufficiently appreciated. If the objective of "improving GATT disciplines relating to all subsidies and countervailing measures" is to be realized we must be prepared to envisage more symmetry and better meshing of the rights and obligations of both Articles VI and XVI. To that end the work of this Negotiating Group should seek first to reach an understanding on the direction and dimension of the negotiations before it addresses specific problems.
  
- The Negotiating Group should be prepared, in pursuit of the fundamental objective of eliminating trade distortion, to contemplate restraints on the use of countervail in relation to carefully circumscribed government interventions to promote structural adjustment. More could be achieved over the longer term in the interests of eliminating trade distortion, through improved disciplines under Article XVI which could have a broader impact - particularly in relation to third markets - than any unilateral rights under Article VI. This should make it possible in turn to contemplate changes in the disciplines under Article VI.
  
- The objective of the negotiations is to improve GATT disciplines and the outcome of the review process may demonstrate the need to reinforce existing measures. However, prior to the possible establishment of new disciplines it is necessary to ensure that the basic principles underlying Articles VI and XVI and the Code are applied fully. In

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<sup>1</sup>The term "the Code" used hereinafter means Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.

addition, before contemplating a reinforcement or, as some contracting parties suggest, an extension of the rules, there should be agreement on fundamental conceptual and definitional issues left unresolved in the Tokyo Round negotiations. In the absence of consensus on such basic matters, an attempt to establish a more elaborate edifice of rules and disciplines is bound to founder. At this stage the negotiations should therefore focus on the need to:

- ensure that certain key principles already agreed upon in the Tokyo Round but which have been discarded by certain Code signatories should be fully implemented;
  - agree on basic definitions and concepts relating to subsidies and countervailing measures such as the definition of a subsidy and its measurement.
- In general terms, there will be a need to work in a pragmatic manner, but there will be a need also to take account of the essential linkages that exist between issues. For instance, the question of general availability/specificity in countervailing duty proceedings could not be dealt with effectively in the absence of precision in respect of the obligations and rights under Article XVI:1. Where direct or indirect subsidies affecting trade are concerned, possible clarification on the conditions for the application of countervailing duty to imports is but one element of an approach to restore or strengthen the balance of rights and obligations. That element of an approach cannot be developed in isolation from, e.g. improvements in the existing rights and obligations that are embodied in Article XVI:1 as relate, e.g. to serious prejudice arising from trade impacting subsidization. More precisely, any more explicit limitation on the right to countervail, e.g. of Article VI:3 has to be assessed in light of whether there is a compensating strengthening of the right to take direct remedial action against trade impacting subsidization seriously prejudicial to another contracting party. This is particularly important in relation to maintaining effectively the balance that currently exists in Article XVI:1 in respect of rights to action in respect of a home market or in respect of world markets.
- It is necessary to negotiate on improved subsidies and countervailing duty disciplines together. The existing rules have to be examined and improved as a whole. One cannot expect any restriction of the right to countervail in cases of injury when experience shows that protection against subsidy practices themselves has actually been eroding. Furthermore, it is important to ensure a better balance between subsidies disciplines and countervailing duty disciplines. In effect, because countervailing duty disciplines are being obliged to tackle trade distortions that are far larger than ever envisaged in the General Agreement, they are carrying a load that they cannot bear. In other words, they are becoming a substitute for proper subsidies disciplines and they cannot play that rôle. Indeed, it is dangerous that this has happened, because it can easily spill over into protectionist measures.

- The mandate of the Negotiating Group is to strengthen disciplines on all subsidies. The negotiations therefore do not start from scratch. There exists a certain degree of discipline and this existing discipline needs to be respected and strengthened.
- Bearing in mind the need to give primacy to tackling trade distorting subsidy practices and to build on existing disciplines the Group needs to avoid being side-tracked by other aspects. This will ensure that existing loopholes are closed and that no new loopholes emerge. At every step one needs to remember that we are trying to lessen trade distortions and to assess any proposed rule less from its technical description than from its practical effect. For example, the prohibition of direct export subsidies on non-primary products can be circumvented by other practices having an equivalent effect, e.g. the subsidization of a primary product element.
- The present problems are due to certain deficiencies in the rules which give rise to different interpretations or otherwise do not establish sufficiently clear disciplines on the use of subsidies or countervailing measures. Therefore, the review of the existing disciplines is necessary. It is, however, fair to say that it has not always been the deficiencies but also the lacking observance of the rules which has caused problems.
- The Negotiating Group should focus its attention on subsidies affecting international trade. Fundamental questions should be addressed regarding the principles underlying the regulation of subsidies and countervailing measures in the General Agreement and in the Code. The existing framework of rules is based on two different approaches. The first approach takes into consideration the nature of a subsidy, distinguishes between permitted and prohibited subsidies and favours different types of remedies depending on the nature of the subsidy. A second approach, on the other hand, considers only the effects of subsidies and defines the remedies in relation to those effects, without taking into account the nature of the subsidy. The question is whether the rules in this area should continue to be based on a combination of these two approaches.
- The Uruguay Round should seek to strengthen the current disciplines over the use of trade distorting subsidies.

## II. SUBSIDIES

### II.1 Subsidies in general

#### II.1.1 Definition

- Agreement should be reached and uniform application achieved on:
  - (i) the definition of a subsidy and how to distinguish between subsidies and other measures having trade distorting effects.
  - (ii) when subsidies are potentially trade distorting and hence potentially actionable under Track I or Track II of the Code.
- As to the definition of a subsidy itself, the guidance given in the Code should be followed and confirmed, i.e. subsidies in international trade exist only when a financial charge has been incurred by a government or administrative authority on behalf of a beneficiary.
- Among issues in subsidies area, the definition of a subsidy should be examined in the first place. A financial contribution by a government should be considered as an essential criterion for determining the existence of a subsidy.
- It is necessary to recognize the primacy of addressing trade distorting subsidies, i.e. as defined in Article XVI:1, "any subsidy ... which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into its territory".
- There is a need to distinguish between subsidies and incentives. Subsidies are those financial assistance measures meted out to ailing industries to bail them out or to prop up economically unjustified activities. Incentives on the other hand are to induce or encourage the pursuit of some desired direction in a country's development objectives. This incentive would facilitate the development process which might otherwise require a much longer period to achieve. Consequently, while blatant subsidies are countervailable, incentives should not and must not be as there are clearly no trade-distorting intentions.

#### II.1.2 Notification

- The objectives of and procedures associated with the notification requirement should be reviewed to make them more meaningful.

- Article XVI:1 of the GATT provides that any contracting party should notify any subsidy granted which operates to increase exports or to decrease imports. To reach a common understanding on the scope of the subsidy which so operates would help improve transparency in this Article.
- There would be value in considering the scope for achieving, in relation to the notification obligation, a clarified and common understanding of notifiable subsidies consistent with the objective of improved GATT disciplines.
- In order to facilitate the surveillance of subsidies and their possible adverse effects, improved transparency is needed. The existing notification procedures should be improved by e.g. establishing clearer criteria with regard to their contents and form. An improvement of content and form of the notifications and a better discipline in observing the provisions of Article XVI:1 may create preconditions for a more systematic examination of the notifications. This would allow a stricter surveillance of the distortionary and adverse effects that subsidies may have.
- It would be useful to review the application of the subsidies notification procedure of GATT Article XVI:1. These procedures were designed to promote multilateral review of all subsidies that operate directly or indirectly to increase exports or reduce imports. Work to date has revealed a number of disagreements as to the scope of Article XVI. These disagreements have reduced transparency and have weakened the ability of the contracting parties to effectively review subsidy practices that affect trade.

### II.1.3 Serious prejudice

- Article XVI:1 also provides that when it is determined that serious prejudice to the interests of any other contracting party is caused by any subsidization, the contracting party granting the subsidy should discuss the possibility of limiting the subsidization. In this respect, examinations should be made of the definition of "serious prejudice" and of whether a contracting party granting the subsidy has an obligation to limit the said subsidy (in latter case, reference should be made to the provisions of Article 8:3 of the Code).
- There is an absence of detailed precision on or explicit guidelines to be utilized for ascertaining whether serious prejudice arising from trade impacting subsidies exists in a given case. The implications of this lack seem to be most acute in situations where there is distortion



of the conditions of normal competition on world markets. Furthermore, as provisions presently stand, it is possible for a finding of serious prejudice to be made in a particular case, but there is a lack of discipline for securing appropriate remedial measures to be applied in response to such a finding, such as would remove or modify the cause of such serious prejudice.

- Article XVI:1 of the General Agreement gives the right to resort to serious prejudice provisions in order to deal with a subsidy practice itself. The intention of this provision, taken in conjunction with Article XVI:2, Article XVI:3 first sentence and Article XVI:4 is to limit subsidization. This provision applies equally to effects on importing markets and third markets. This provision, which has not proved effective, needs to be strengthened.
- There appears to be some question as to what, if any, obligation exists if a domestic subsidy causes "serious prejudice" to the trade interests of another contracting party or signatory. In particular, it is unclear whether a contracting party whose subsidy practice has been found to cause serious prejudice has a corresponding obligation to reduce or eliminate the offending subsidy or to take any other action to relieve the serious prejudice. If the review either shows that no obligation exists or reveals an underlying lack of agreement as to the extent of the domestic subsidy obligation, then participants might wish to re-examine the utility of the "serious prejudice" concept as a basis for future work.

## II.2 Subsidies other than export subsidies

- Clarification of the rights and obligations regarding the use of subsidies other than export subsidies is required if effective rules are to be subject to less unilateral determination and provide more certainty for traders and investors, particularly as they relate to the application of countervailing duties. This could involve greater international consensus and more useful and effective guidance regarding the nature of subsidies that could be considered countervailable or non-countervailable as well as the examination of the rights and obligations of countries regarding subsidies affecting exports to third country markets.
- An approach aimed at identifying non-export subsidies which do not distort trade by causing material injury, serious prejudice or nullification or impairment of the benefits to another signatory, should parallel the work on prohibited export subsidies already undertaken and would constitute a major step towards erecting a stable set of rules for dealing with subsidies in international trade. With regard to the

types of subsidies which may be excluded, within the context of international trade, from the scope of actionable trade-distorting subsidies, attention should be given, inter alia, to the following types of subsidies:

- (i) Generally available subsidies: generally available measures such as, for example, tax concessions or other such measures taken by governments to which all enterprises have access (possibly after fulfilling certain general conditions) should not be considered to be subsidies under the Code since they are not the result of sector-specific government intervention and thus do not benefit particular industries. These measures tend to be counterbalanced by other macro-economic factors, such as, for example, the variation in exchange rates or the level of taxation influenced by the measures in question.
  - (ii) Regional subsidies: these subsidies should not be considered to be trade distorting and actionable if their objective is to achieve a better structural balance by overcoming dislocation disadvantages.
  - (iii) Structural adjustment subsidies: these are aids which are given to companies to assist them to positively restructure their business, for example, by reducing capacity. The very purpose of such subsidies is to restore economically justified activities and to generally facilitate the structural adjustment of production and export operations. They should therefore be exonerated from trade protective measures provided that the measures do genuinely lead to a reduction in trade distortions in international markets.
  - (iv) Indirect subsidies: these are subsidies given on inputs which are subsequently incorporated into a product traded internationally. In circumstances where the subsidy conferred on the input product is generally available or where the input itself is generally available to a wider range of users, the downstream product should be considered not to have benefited from actionable trade-distorting subsidies.
- Difficulties exist in determining whether subsidies other than export subsidies have trade effects. Also domestic subsidies - legitimate as they are per se - may have adverse effects on trade.
  - The review should examine whether GATT Article XVI:1 and Code Article 8 provide an appropriate level of discipline over trade-distorting domestic subsidies.

### II.3 Export subsidies on primary products

- Regarding Article XVI:4 of the General Agreement, negotiations should deal with two important issues. Firstly, the scope of the prohibition contained in this paragraph should be broadened so as to render it applicable to both primary and non-primary products. Secondly, the principle of special and more favourable treatment of developing countries should be observed in Article XVI:4.
- In light of the disputes that have arisen in recent years, the disciplines and rules associated with subsidies, particularly subsidies on the export of certain primary products, are clearly in need of improvement.
- There is a need for a review, with a view to improving GATT disciplines, of the provisions of Article XVI:2 and 3. Notably, there is a need to build on the recognition embodied in Article XVI:2 and the exhortation in the first sentence of XVI:1 in the direction of improving the conditions of competition on world markets for primary products currently covered by the equitable share criterion in the second sentence of Article XVI:3.
- The review should examine the application of the "more than an equitable share" rule for primary products. This rule has serious conceptual flaws and in practice has failed to provide clear guidance as to the permissible scope of primary product subsidization. As a result, the rule has imposed little discipline over agricultural subsidies. On the basis of this review, the participants will be able to come to a conclusion on the basic question of whether - pending results from the Negotiating Group Agriculture - the current GATT and Code rules provide a useful starting point for further work. If not, the Group might wish to explore some alternative approach to primary product subsidies negotiations.
- The Negotiating Group should consider negotiating a similar prohibition to that of Article 9 of the Code on the use of export subsidies for forest, fishery and farm products.

### II.4 Export subsidies on non-primary products

- Clarification of the scope of Article 9 of the Code regarding export subsidies on products other than certain primary products is required. The content of the Illustrative List should also be clarified.

- It is apparent that a systematic practice of export subsidization of certain products processed from, but other than, primary products, has developed in spite of the terms of the clear proscription of export subsidies on non-primary products embodied in Article XVI:4 of the General Agreement and Article 9 of the Code. In light of this, there is a need for a review of the effective application of the above provisions in relation to this practice. Such review, in keeping with the objective of achieving improved GATT disciplines, would be directed toward obtaining improvement in the observance of existing disciplines. It could include, as appropriate, relevant matters related to the more effective functioning of the dispute settlement provisions in this area.
- Article XVI:4 of the General Agreement rests on a distinction between export pricing and domestic pricing. In the Code this has been restructured on the basis of export subsidies and subsidies in general. But the prohibition of export subsidies has not contained serious trade distorting practices that elude the definition of export subsidies. There is a need to develop a broader coverage under tougher subsidies rules to take more account of e.g., the Article XVI:1 notion of a subsidy (export increasing) and more general terms used in Article XVI:2 and 3 ("subsidy on the export") in order to apply tougher disciplines on a wider range of trade distorting subsidy practices.
- Experience has shown that there is currently no agreement among Code signatories on the scope of Article 9, as well as the rôle and effect of the "Illustrative List" associated with Article 9. These points should be clarified through the review.
- It would be useful to review and update the Code provisions relating to export financing.

### III. COUNTERVAILING MEASURES

#### III.1 Definition of a countervailable subsidy

- Negotiations should clarify which measures can be countervailed in order to reduce uncertainty for industries.
- There is a need to review the Code with a view to adopting criteria for the determination of countervailable subsidies (government's expenses, grantee's benefits or specificity). This revision would also aim at defining the difference between subsidies and various trade distorting measures.
- There is a whole range of issues surrounding the definition and measurement of a countervailable subsidy which should be reviewed to ensure uniform application of countervail legislation. The need to examine such issues is particularly important in light of the unilateral right to impose countervailing duties. A lack of agreement in this area is the source of many problems that have arisen under the current rules (e.g. general availability, cost to government/benefit to recipient, input subsidies).
- An approach aimed at identifying non-export subsidies which do not distort trade by causing material injury, serious prejudice or nullification or impairment of the benefits to another signatory, should parallel the work on prohibited export subsidies already undertaken and would constitute a major step towards erecting a stable set of rules for dealing with subsidies in international trade. With regard to the types of subsidies which may be excluded, within the context of international trade, from the scope of actionable trade-distorting subsidies, attention should be given, inter alia, to the following types of subsidies:
  - (i) Generally available subsidies: generally available measures such as, for example, tax concessions or other such measures taken by governments to which all enterprises have access (possibly after fulfilling certain general conditions) should not be considered to be subsidies under the Code since they are not the result of sector-specific government intervention and thus do not benefit particular industries. These measures tend to be counterbalanced by other macro-economic factors, such as, for example, the variation in exchange rates or the level of taxation influenced by the measures in question.
  - (ii) Regional subsidies: these subsidies should not be considered to be trade distorting and actionable if their objective is to achieve a better structural balance by overcoming dislocation disadvantages.

- (iii) Structural adjustment subsidies: these are aids which are given to companies to assist them to positively restructure their business, for example, by reducing capacity. The very purpose of such subsidies is to restore economically justified activities and to generally facilitate the structural adjustment of production and export operations. They should therefore be exonerated from trade protective measures provided that the measures do genuinely lead to a reduction in trade distortions in international markets.
- (iv) Indirect subsidies: these are subsidies given on inputs which are subsequently incorporated into a product traded internationally. In circumstances where the subsidy conferred on the input product is generally available or where the input itself is generally available to a wider range of users, the downstream product should be considered not to have benefited from actionable trade-distorting subsidies.
- It is the definition of countervailable subsidies and the criteria for the calculation of the amount of the subsidy that are the most fundamental and significant issues regarding countervailing measures and hence an agreement should be reached on these matters. A financial contribution by a government is an essential criterion for determining the existence of a subsidy. With this in mind, an early agreement on the concept of specificity in view of determining the definition of countervailable subsidies would facilitate the work to be undertaken in the Group. With regard to the industrial policy type measures, it is not necessary to take up this issue in general terms, since these measures, composed of research and development programmes, structural adjustment, etc. could be adequately dealt with in more specific terms if necessary.
  - Negotiations should aim at reaching agreement on how to define countervailable subsidies.
  - There is a need for developing precision on the nature of the distinction between "general availability" and "specificity" of subsidies as they relate to application of countervailing duties. Such distinction does not explicitly exist in Articles VI or XVI, although some important elements exist in the Code. In assessing the scope for any such clarification, it would be necessary to bear in mind the terms of Article VI:3. It will also be necessary to bear in mind the terms of Article XVI:1.
  - The Group cannot and should not avoid a discussion of basic issues: what is really a subsidy, what kind of measures and practices are countervailable. There still exist a lot of differences in views on

that score and we should at least aim at narrowing them down. Therefore a thorough discussion might serve the Group's work in developing clearer disciplines on subsidies and countervailing measures.

- There is a need to develop precision on the nature of the distinction between "general availability" and "specificity" of subsidies. Also in reviewing the list of countervailable subsidies, especially in the area of domestic and production subsidies, due account must be taken of the development objectives that subsidies seek to achieve, particularly for developing countries. Attention should not be unduly focussed only on their trade distorting effects, if any.
- The Uruguay Round negotiations should clarify what remedies are available for the trade distortions and economic damage associated with targeting and other industrial policy measures that affect trade. The existing international trade rules do not adequately address the trade damage that can result from industrial targeting programmes.

### III.2 Measurement of the amount of a countervailable subsidy

- There is a need to review the Code with a view to providing uniformity of the criteria used by the signatories to calculate the subsidies granted by a particular country.
- There is a whole range of issues surrounding the definition and measurement of a countervailable subsidy which should be reviewed to ensure uniform application of countervail legislation. The need to examine such issues is particularly important in light of the unilateral right to impose countervailing duties. A lack of agreement in this area is the source of many problems that have arisen under the current rules (e.g. general availability, cost to government/benefit to recipient, input subsidies).
- An agreement should be reached that the basis for measuring the degree of subsidization should be the effective cost of the measure to the government concerned.
- It is the definition of countervailable subsidies and the criteria for the calculation of the amount of the subsidy that are the most fundamental and significant issues regarding countervailing measures and hence an agreement should be reached on these matters.

- This is an area where varying national practices lead to uncertainty in international trade. Experience has shown that the very basis for calculation of countervailing duty by any given administration (let alone as between different contracting parties), can be variable, even where there is no variability in the common basis for calculation, certain methods of calculation can still lead to a trade disrupting and distorting lack of symmetry as between level of subsidy granted, level of subsidy assessed, and level of countervailing duty actually applied in a given case. The need to develop uniform practice also needs to be based firmly on the basic principle embodied in the terminology of Article VI:3 of the General Agreement, viz, that the countervailing duty may be levied on a particular product determined to be subsidized should be strictly linked to the actual "estimated bounty or subsidy determined to have been granted ... on the manufacture, production or export of such product". That is, the countervailing duty to be applied to a particular product should be assessed strictly in relation to the actual subsidy granted on that particular product.
- Certain problems related to the definition and measurement of the amount of a subsidy add to the difficulties confronted in the application of countervailing measures.
- Varying national practices are being employed in calculating the amount of the subsidy, thus creating trade disruption. There is a need to develop a uniform practice based clearly on the principles of the General Agreement.

### III.3 Determination of the existence of material injury, or threat thereof

#### III.3.1 Definition of "domestic industry"

- The definition of "domestic industry" (as established in Article 6:5 and 6:7 of the Code) should be maintained.
- There is a need to address the issue of the definition of a domestic industry.
- The lack of clarity regarding, inter alia, the definitions of industry and of sale have given rise to problems (particularly with regard to capital goods and processed agricultural products) and they need to be reviewed.



- The scope of the domestic industry petitioning for relief from allegedly injurious subsidization and on which material injury should be assessed must be limited strictly to the domestic producers of the like product.
- Problems have arisen from the absence of a common understanding on the scope of the term "domestic industry". The definition of the term needs to be clarified.
- Since there is no definition of "a major proportion" of the total domestic production of the like products, there are substantial differences in the interpretation of this concept from country to country. The term "domestic industry" would be clarified through the negotiation of an additional footnote to Article 6:5 of the Code which would quantify "a major proportion" in this paragraph.
- In the context of the Code, at least two disputes have arisen between signatories over the question what constitutes the "domestic industry" in countervailing duty investigations involving processed agricultural products. The review of these GATT disciplines should focus on the relationship between the primary and processed product producers in certain processed product industries where the production of the primary product in question is wholly or primarily dedicated to the production of the processed product.
- The coverage should clearly refer only to a sufficiently representative segment of producers of the like product.

### III.3.2 Definition of "like product"

- Despite the existing definition of "like product", it is feared that the term might be so arbitrarily interpreted as to allow including input products (components and parts) in the same investigation as the product itself. The operation of the code would be more effective through the negotiation of an amendment or a footnote to Article 6:1 clarifying the scope of application of the concept of "like product" in this context.
- The definition of "like product" as established in footnote 18 to Article 6:1 of the Code should be maintained.

### III.3.3 Threat of material injury

- To clarify the concept of "threat of material injury", the Recommendation concerning this concept, adopted by the Committee on Anti-Dumping Practices on 31 October 1985, should be incorporated to the extent appropriate into the Code.

#### III.3.4 Cumulative injury assessment

- One of the basic principles contained in the Code is the declaration that in many cases subsidies serve important social and economic purposes for developing and developed economies alike. The Code is intended to ensure that countries which use subsidies in a responsible manner, and in a way which avoids harming the interest of other countries, should be protected from countermeasures. Mandatory cumulation impedes countries' efforts to apply subsidies in a responsible manner, and deprives all countries equally of the protection against countermeasures. An appropriate solution to the problem of mandatory cumulation should be reached in the negotiations in this Group.
- There should be negotiation of a consensus on whether to recognize the practice of "cumulation" of imports and an examination of the possibility of adopting a market penetration threshold below which importations will be exempted from finding of injury.
- Cumulative injury assessment should not be permitted.
- The determination of the existence of (threat of) material injury should clearly be on a case-by-case basis only. Attempts to introduce variations in such determinations by use of cumulative injury assessment and cross-cumulation cannot be permitted.

#### III.3.5 Amount of subsidy and injury determination

- A causal link between the price of the subsidized imports and the injury to domestic producers would not seem to be present where the margin of price undercutting is substantially larger than the margin of subsidization. The operation of the Code would become more equitable through the negotiation and implementation of footnotes to Article 6:2 and 6:4 that would address these concerns.

#### III.4 Definition of Sale

- The concept "introduced into the commerce of another country", established in Article VI:1, should be reviewed.
- The lack of clarity regarding, inter alia, the definitions of industry and of sale have given rise to problems (particularly with regard to capital goods and processed agricultural products) and they need to be reviewed.

- Since there is no definition of the concept of "introduced into the commerce of another country", the concept lends itself to such a broad interpretation by signatories that it allows circumstances where injury can be found in the absence of actual imports. The Code would be significantly clarified through the negotiation of a consensus interpretation of this phrase.

### III.5 Initiation and conduct of a countervailing duty investigation

#### III.5.1 Criteria for the initiation of a countervailing duty investigation

- There is a need to revise appropriate provisions of the Code with a view to providing a definition of the expression "sufficient evidence" as related to the initiation of an investigation, as established in Article 2 of the Code. In this context, more precise rules for the initiation of an investigation should be created in order to avoid the carrying out of unjustifiable investigations which could be harmful to the exporters.
- With respect to initiation, the issues of the verification of the standing of the complainant and injury thresholds are particularly important.
- The scope of the domestic industry petitioning for relief from allegedly injurious subsidization and on which material injury should be assessed must be limited strictly to the domestic procedures of the like product.
- The review of the definition of domestic industry is of great importance in light of the fact that it leads to the review of the scope of petitioners requesting the initiation of a countervailing duty investigation.
- Under the current practice of a certain signatory, the investigating authorities appear to assume that a case is brought on behalf of the domestic industry unless a majority of the domestic industry actively opposes the case. To ensure the functioning of the Code as is originally proposed, an amendment to Article 2:1 should be negotiated to require the request for investigation to contain evidence that it is brought on behalf of the domestic industry as defined in Article 6.
- The criteria for the initiation and conduct of countervailing duty investigations and for the imposition of countervailing duties should be examined. Compensation should be granted for unjustified countervailing duty investigations.

- In some countries an investigation is often too easily initiated on the alleged existence of a subsidy. One cannot avoid the impression that the imposition of a countervailing duty is sometimes used to give temporary relief to an industry which cannot match its foreign competitors.

### III.5.2 Information used in a countervailing duty investigation

- The scope of information required for the conduct of an investigation should be reviewed.
- At times paragraph 9 of Article 2 of the Code is used when exporter's replies are late or incomplete even in limited ways. This paragraph might be redrafted to reduce the scope for employing arbitrary methods, or to prevent the punitive use of "the facts available" only because a response is late or does not fully meet the standard of requirement set out by the importing signatory. An amendment to this Article should be negotiated to address this concern.

### III.6 Imposition and duration of countervailing duties

#### III.6.1 Imposition of countervailing duties

- Relevant provisions of the Code should be reviewed with a view to adopting criteria to be applied in cases where the level of subsidization is irrelevant or in case of marginal suppliers.
- With regard to duty imposition, the current rules should be examined to ensure that duties are not unjustifiably applied (e.g. against marginal suppliers or in situations where the level of subsidization is insignificant).
- Rules should be developed for determining the appropriate level of countervailing duty.
- The implementation of countervailing duties should never be mandatory under national legislations and, therefore, should be the subject of a public interest clause.
- The rule contained in Article 4:1 of the Code which establishes that "the duty be less than the total of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry" should be maintained.

- In cases where the conditions for applying countervailing duties are met, duties should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry.
- The Negotiating Group should seek to identify solutions which will:
  - (i) reduce the uncertainty of countervailing duty actions;
  - (ii) simplify the procedures of countervailing duty investigations;
  - (iii) find the proper way to take into account, with regard to the countervailing duty investigations, the commitments of the parties under the relevant provisions of the GATT and the Code;
  - (iv) eliminate the effects on exports of countervailing duty actions which are aimed mainly against imports from third countries;
  - (v) permit the implementation by a country of an economic policy aimed at industrial development and balanced economic development in all areas.
- The Negotiating Group should consider the following questions and provide for appropriate solutions:
  - (i) are countervailing duties levied only at the minimum level necessary to offset material injury?
  - (ii) are programmes subject to commitments made under the Code exempted from countervailing duties?
  - (iii) do importing country procedures take into account the fact that the developing country's economy is still in a process of development and that it is in a disadvantaged position?
  - (iv) are all countervailing duties collected only after a material injury test is granted?

Solutions should be elaborated upon to allow consistency with the GATT and the Code provisions in view of the need to allow developing countries to build a sufficiently competitive economy in order to achieve its social and economic goals.

### III.6.2 Undertakings

- The acceptance of undertakings to raise prices provides protection to the local industry while not unduly penalizing exporters. The acceptance of an undertaking should be a right granted to exporters and

should not be rejected on political grounds. The current language of the Code provides too much discretion to investigating authorities. The operation of the Code would become more equitable through the negotiation and implementation of an amendment to Article 4 to address this concern.

#### III.6.3 Duration, review and revocation of countervailing measures

- Rules should also be developed to ensure periodic reviews of the need for countervailing measures and their termination when no longer warranted as well as for determining the appropriate level of countervailing duty.
- There is no fixed time-limit to the duration of the imposition of duties. The Code would be more meaningful if there were a "sunset" provision.
- In certain Signatory countries, it takes a very long time (often one year or more) for the investigating authorities to start a review upon request, and subsidy determinations are usually based on an investigation period which has terminated a year or more before the imposition of measures. Therefore, subsidy determinations may continue to be based on out-of-date information for a considerable period of time. The operation of the Code would be strengthened through the negotiation of a time-limit requirement for decisions on requests and a new provision enabling exporters to request expedited reviews in certain circumstances. The Code would also be more meaningful if there were a requirement for an obligatory review on the initiative of the investigating authorities after a certain period of time.

#### III.6.4 Use of countervailing measures in case of injury to an industry in a third country

- Article VI:6 of the General Agreement recognizes that injury from trade distorting subsidies granted on products exported to a given market can actually affect a third country supplier. This remedy has not been effective, but clearly the General Agreement does not consider that effects on third country markets should be without remedy. There is therefore a need to strengthen the rules in direction of providing equivalence of remedy, in cases of injury, to countervailing duty action for third country suppliers to third country markets.

#### IV. DEVELOPING COUNTRIES

- The use of Article 19:9 in relation to Article 14:5 of the Code is inconsistent with Article VI of the General Agreement. The principle of special and more favourable treatment of developing countries should be observed under Article XVI:4.
- New provisions should be created in order to include:
  - (i) special treatment for the exports of primary products from developing countries in what concerns the "displacement effect";
  - (ii) concessions to those countries which are "new comers" to the world market of a particular primary product, since the provisions contained in Article 10 of the Code are of different application to countries which do not hold traditional shares of the world market of a particular product;
  - (iii) special treatment in favour of developing countries in cases of acceptance of price undertakings found to be mutually satisfactory.
- The right of developing countries to grant export subsidies should not be subject to any special conditions or limitations. Export subsidies granted by developing countries should not be subject to countervailing duties or countermeasures if the country concerned agrees to phase out these export subsidies within an agreed time framework. An important problem regarding Article 14 of the Code is the fact that a link has been established between Article 19:9 and Article 14:5.
- The Negotiating Group should examine how contracting parties signatories of the Code are interpreting and applying Article 14:5 of that Agreement.
- The accession of developing countries to the Code needs to be facilitated; the application of Article 14:5 needs to be reviewed.
- The negotiations should seek to identify solutions which will find the proper way to take into account, with regard to countervailing duty investigations, the commitments of signatories under relevant provisions of the GATT and the Code and which will permit the implementation by a country of an economic policy aimed at industrial development and balanced economic development in all areas.

- A review of Article 14 of the Code should focus on two essential issues. Firstly, attention should be given to the erroneous and unjustified application of Article 14:5 which is the main obstacle to accession by more developing countries. Secondly, negotiations should review the provisions on the determination of material injury with a view to safeguarding the rights of developing countries under Article 14. In this context special attention needs to be given to the practice of cumulative injury assessment.
  
- It would be useful to review the application of Article 14 of the Code in the context of the more advanced developing countries and to economic sectors in which an industry in a developing country is internationally competitive and, as a result, the need for subsidies to facilitate the economic development programme of that country is not readily apparent.



V. DISPUTE SETTLEMENT

- For various reasons, there are a relatively large number of outstanding panel reports made pursuant to the dispute settlement provisions of the Code. This problem might be substantially reduced if there are improved disciplines on the provision of subsidies and the taking of countervail actions. The negotiations underway in the Negotiating Group on Dispute Settlement may have relevance for improving the dispute settlement provisions of the Code. Once those negotiations have advanced, the Group should review the work and assess the degree to which it is relevant.
  
- Since the subsidies issues have created particular difficulties in the dispute settlement process, it would be useful to examine the application of dispute settlement mechanisms to subsidies disputes, in light of work in the Dispute Settlement Negotiating Group.