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Negotiating Group on Subsidies
and Countervailing Measures

COMMUNICATION FROM COLOMBIA

The following communication has been received from Colombia with the request that it be circulated to the members of the Group.

The negotiating objective of the Negotiating Group on Subsidies and Countervailing Measures is that of "improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade".

The problems usually raised in connection with subsidies and countervailing measures may be viewed from two very different standpoints. The first of these is the purely specific view point, which aims from the outset at proposing specific solutions, such as, for example, the need to improve the definition of "like product", "industry" or "injury". The second is diametrically opposed to this: before making any specific proposals it prefers to conceptualize the problem as a whole, and then go on to overall proposals and, lastly, specific proposals.

It is this second standpoint which the delegation of Colombia thinks it is important to emphasize on this occasion, although it is well aware that, for tactical reasons, it may also be useful to use the first alternative.

Thus, with a view to seeking to conceptualize the twin problem of subsidies and countervailing measures, it is necessary to begin by asking whether, globally and as a whole, the GATT disciplines in this field meet the objectives laid down for them.

The objective of the GATT disciplines in this field is fundamentally BALANCE: balance to ensure, and I quote from the preamble to the Code on Subsidies and Countervailing Measures, "that the use of subsidies does not adversely affect or prejudice the interests of any signatory to this agreement, and that countervailing measures do not unjustifiably impede international trade".

There should therefore exist a balance between the disciplines governing the use of subsidies and those regulating the use of countervailing measures. The disciplines governing the use of subsidies should be clear, so that it is easy to distinguish between a permitted

practice and a prohibited one. Likewise, the disciplines governing the use of countervailing duties should not lend themselves to ambiguity, and must be able to serve as a guide for cases in which countervailing duties may be applied.

The practical experience of the Code shows that, because too much emphasis has been placed on an effects-oriented approach, in other words, a countervailing-duties approach, the balance between the two sides of the equation has been destroyed. It has been destroyed because of the lack of any filtre for eliminating, in a first stage of the process, all subsidies which do not call for countermeasures. Without such a filtre, there is an amorphous mass of practices concerning which no-one knows whether they are permitted or not, and which will have to be judged solely and exclusively according to the rules of the term of the equation corresponding to countervailing duties.

This effects-oriented approach also suffers from the drawback that it allows abuse and concentration, in that it basically attacks the countries that use simple export subsidies, while leaving untouched those that use sophisticated domestic subsidies. It efficiently attacks the subsidies subject to so-called track I countermeasures, in other words those directly affecting the domestic market of the importing country, and does not affect, even marginally, the subsidies subject to so-called track II countermeasures, in other words those that displace exports of like products either in the market of the country applying the subsidy or in that of a third country.

Another negative effect of this imbalance is that of the famous interpretation that, in the absence of disciplines on the subsidies side, there is no need to grant the injury test as regards countervailing duties (track I).

Furthermore, as there are no sufficiently clear disciplines as regards subsidies or "track II", all guns have to be trained on the "track I" side, thus penalizing the countries that use simple export subsidies.

As may be seen, it is necessary to work on both sides of the equation equally intensively if balance is to be restored.

A good starting point is to revitalize the injury test as the principal criterion in the absence of which countermeasures cannot be applied. Clearly, however, this test should be applied solely to countervailable subsidies. In other words, before applying the injury test, it will be necessary that the alleged subsidy should first undergo a "classification test", which will make it possible to separate actionable subsidies from non-actionable ones.

In short, the disciplines in this field will be governed on the subsidies side by a "classification test", and on the countervailing duties side by an "injury test", which will take two different forms according to whether it is a case of "track I" or "track II" action.

Subsidies

In view of the vain attempts in the past to arrive at a definition of subsidies, it might be advisable to adopt a pragmatic approach under which "illustrative lists" would be established for three different types of subsidies. The first "illustrative list" would be that of prohibited subsidies, which could include such practices as those mentioned in Article 9 of the Code, naturally taking account of the provisions of Article 14.2 of the Code. The second "illustrative list" would be that of permitted subsidies that are not countervailable. Obviously, it is not easy to determine what subsidy practices would be covered here. Various concepts might be used, including the Effective Subsidy Rate (ESR), a concept whereby subsidies having an effective rate equal to zero would by definition fall in this group. The third "illustrative list" would be that of permitted subsidies that could be countervailable. This would basically include subsidies with an effective subsidy rate (ESR) that is positive. Clearly, after having passed the "classification test", the subsidies which ended up in the third illustrative list could be subjected to one of the two "injury" tests.

It is likewise clear that the above-mentioned illustrative lists will have to deal both with domestic subsidies and with export subsidies. The reference to the ESR concept obviously does not imply that the Group cannot discuss other concepts, such as general availability, regional development, cost to the government, development objectives or others, with a view to deciding on which practices would be included in each of the illustrative lists. However, it is important to distinguish between the criteria to be used in the "classification test" from the methodology to be used in the quantification of the amount of the subsidy in the "injury test".

Countervailing duties

As mentioned above, the improvements on the countervailing duties side should focus on the revitalization of the concept of the injury test, as a sine qua non condition for the application of countervailing duties. It will certainly be pertinent to follow closely the discussions taking place in the Negotiating Group on GATT Articles under the item on the force of the "Protocol of Provisional Application" of the General Agreement.

It will also be necessary to seek greater uniformity in the methodology used to quantify the amount of subsidies so as to reduce the possibility of unilateral interpretations.

Side by side with this, thought could be given to the desirability of establishing permanent machinery to supervise the uniform application of the methodology for quantifying the amount of subsidies and for the injury test. As may be seen, the objective here is to balance the provisions relating to track I type countermeasures.

With regard to track II type countermeasures, it would be desirable to establish a specific test of injury or prejudice for actions of this kind. The test will have to be defined in such a way that it can be made operational. Only after a subsidy has passed this test can countermeasures be applied; presumably the latter too will have to be clarified. Since the problems of causality and special factors seem so difficult to resolve unequivocally, the above proposal could be supplemented by the creation of a permanent mechanism also responsible for supervising the impartial application of the test of injury (or displacement prejudice) on the track II side.

In the case both of track I and track II, the permanent machinery would have to deal with the problems of the conflict between the affected contracting party and the contracting party taking the action.

Finally, it is obvious that many of the points raised above will have to be resolved pari passu with developments in other groups.