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Group of Negotiations on Goods (GATT)
Negotiating Group on Subsidies
and Countervailing Measures

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COMMUNICATION FROM BRAZIL

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

Introduction

The Ministerial Declaration of Punta del Este sets out that negotiations in this group should be based on "a review of Articles VI and XVI of the General Agreement and the MTN Agreement on Subsidies and Countervailing Measures, with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade."

The disciplines and rules to be negotiated should therefore seek to establish a balance between the use of subsidies and the application of countervailing duties with a view to promoting the expansion of world trade by encouraging the export potential of all partners, in conformity with the spirit of GATT.

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With this in mind, Brazil submits the following considerations on some aspects currently under the examination of the Negotiating Group on Subsidies and Countervailing Measures. This proposal does not preclude the possibility of further developing the present comments or suggesting new ones at subsequent stages of the negotiation.

I - INITIATION OF INVESTIGATIONS

Experience has shown that the initiation of an investigation on subsidies, irrespective of its end results, creates in itself adverse effects on trade flows.

The number of investigations with positive results (almost 20% of all actions initiated between 1980 and 1986 by the signatories of the Subsidies and Countervailing Measures Agreement, henceforth referred to as "the Code") shows that a large proportion of the investigations are initiated on insufficient grounds.

Article 2:1 of the Code sets out the initiation of an investigation at the request of an affected industry. Such a request should contain sufficient evidience of the existence of subsidies, injury to the producing industry of a like product and of the causal link between the alleged injury and the presumed subsidy.

Article 3 of the code deals, in turn, with the holding of consultations, which has not been treated with due importance by the signatories, possibly as a result of the apparent waiver granted by Paragraph 3 of this Article.

In order to protect exporters against ill-founded complaints and the consequent loss of markets, the initiation of an investigation should be as stringent as possible. In this sense, we understand that the concepts and procedures as outlined below should be defined and adopted as parameters for the initiation of an investigation.

A) DOMESTIC INDUSTRY

The Code defines, for the purpose of determining injury, the concept of "domestic industry in its Article 6:5. There is not, however, a precise definition of the term "industry affected" for the request for initiation of an investigation in Article 2:1.

There is a logical relationship between the two Articles. Therefore it is important to clarify that the term "industry affected" is interpreted restrictively, within the meaning of "domestic industry" such as defined in Article 6:5.

Similarly, it is worth stressing that in this definition of domestic industry, the producers of inputs and components of the allegedly subsidized product are excluded.

B) LIKE PRODUCT

The Code defines "like product" as "a product which is identical, i.e., alike in all respects to the product under consideration or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration".

This definition specifies that the key elements concerning similarity are the characteristics and not the use of the product.

According to such a definition, a product in its original form and another derived therefrom cannot be considered "like products". Just as raw materials and final products cannot be considered as "like products", raw material producers cannot be considered as belonging to the producers of the final product. Similarly, components, parts and spare-parts cannot be assimilated with the end product and the domestic component industry cannot be considered as part of the domestic industry of the end product.

C) SUFFICIENT EVIDENCE

Article 2:1 of the Code sets out as necessary conditions for the initiation of an investigation the existence of "sufficient evidence" of a) subsidy, b) injury, and c) causal link between the subsidized imports and the alleged injury. The lack of a more precise definition of the concept of "sufficient evidence" has given rise to the initiation of a large number of ill-founded investigations, leading to an unnecessary increase in costs and uncertainty, thus inhibiting trade flows. It is also worth noting that the increase in costs caused by an investigation is proportionally higher for smaller exporters.

A more precise definition of the concept of "sufficient evidence" would contribute to avoiding the recourse to investigation as an instrument for unjustified protection. First of all, the tendency to place the burden of proof on the accused party should be stopped. It should be the responsibility of the petionner to provide clear and convincing evidence of material injury or threat thereof and not of the exporter to prove its inexistence. Secondly, the practice of "evaluation of cumulative injury" should also be eliminated, since it unjustifiably harms small suppliers and suppliers that receive minimal subsidies. The causal relationship should be shown for each exporter. Thirdly, it should be borne in mind that imports below a given proportion of apparent consumption - for example five per cent - do not cause injury and therefore do not justify the initiation of an investigation (marginal imports). Fourthly, it should be agreed that "de minimis" subsidies, - for example inferior to five per cent of the value of the product - do not cause injury.

D) SUBSIDIES

The lack of a common understanding of the meaning of the term "subsidies" has been one of the main reasons for divergences with respect to the application of the General Agreement and, above all, of the Code.

Brazil considers that the characterization of a compensatory subsidy should follow three criteriæ: the existence of a Governmental financial contribution, the sectorial specificity and the objectives of the program.

E) CONSULTATIONS

A concerted effort to render the consultations provision more effective could avoid the initiation of unnecessary investigations.

In this sense, perhaps it would be necessary to alter Article 3:3, so that consultations would be mandatory before the initiation of any investigation. At the same time, a time-period could be established - i.e. thirty days for the declaration of interest of the exporter in the holding of consultations, after which the investigation could be initiated.

II - PROCEDURES FOR THE APPLICATION OR MAINTENANCE OF COUNTERVAILING DUTIES

In order to avoid the arbitrary nature of the application of countervailing duties, it is important that the procedures adopted be interpreted in a consensual and respected manner.

A) THREAT OF INJURY

Article VI:6 of the General Agreement recognizes the possibility for the imposition of countervailing duties in cases of "threat of injury". Article 6 of the Code, in turn,

lists a series of factors to be considered by the investigating authorities, with a view to avoiding that the determination be based on allegations, conjectures or mere possibilities.

Brazil attaches great importance to the objectivity and uniformity of the criteria used in the implementation of the Code. In this specific case, we favour the embodiment into the text of the Code of the "Recommendation concerning determination of threat of material injury" (ADP/25) adopted by the Committee on Anti-Dumping Practices in 1985.

When situations of "threat of injury" are being examined the interests of the exporting country should be taken into account, in particular its stage of development. When the exporter is a developing country, the provision of Article 4:1 of the Code should be observed.

B) CUMULATIVE INJURY

The practice of some countries of taking imports together goes against the provisions relating to "causality" in the Code. Such a practice, in reality, eliminates the benefit of the injury test for small exporters when they are taken together with larger exporters. Besides that, article 2:12 already sets out that an investigation shall be terminated when the investigating authorities are satisfied that the effect of the alleged subsity is insufficient to cause injury. Cumulation should not be allowed. Subsidized exports from other suppliers

can be identified with "injury caused by other factors", as set out Article 6:4. Thus, it should be indicated in Article 6:1 that the objective examination of the "volume of subsidized imports and their effect on prices" should be carried out separetely for each supplier .

C) REVIEW

Articles 4:7 and 4:9 of the Code lay down that the investigating authorities may review the need to maintain a price undertaking, a suspension or the continued imposition of a duty. This may take place on the initiative of the investigating authorities or at the request of an interested party, when deemed convenient.

It is our understanding that there should be agreement on this matter with respect to:

1) the establishment of a minimum time-limit for acceptance of a review requested by any interested party;

2) the establishment of a time-limit (for example one year) for the investigating authorities to issue a final decision concerning the review requested;

3) possibility of a special review in exceptional circumstances;

4) the extension of prohibition, already provided for in Article 5:6, to retroactivity in the imposition of countervailing duties when resulting from a review.

D) SUNSET CLAUSE

According to Article 4:9 of the Code, countervailing duties the agreements entered into should only remain in force for the time necessary to prevent subsidies from causing injury to the domestic industry.

Therefore, it would be useful to adopt provisions establishing a maximum time-limit for the application of countervailing measures and undertakings (for example 5 years), at the end of which only a new investigation with positive findings, as set out in Article 2:1, could give rise to the imposition of countervailing duties.

III - DISCIPLINE ON SUBSIDIES

The negotiations that resulted in the Code represented important progress in the regulation of the forms of state intervention in the economy. In this sense, the signatories of the Code acknowledged the fundamental principle, which should guide the present negotiations, that "subsidies are used by governments to promote important objectives of social and economic polity" (Article 8). Besides this, we should not "restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable" (Article 11).

For this reason, the negotiations should be restricted to those subsidies directed above all to increasing exports, as well as to the discussion on the application of countervailing measures, which represent trade-inhibiting factors. Therefore it is important to establish clearcut definitions of domestic subsidies as well as of export subsidies for primary products. Such definitions will contribute to avoid abuses both in the application of countervailing measures and in the use of export subsidies for primary products.

A) DOMESTIC SUBSIDIES

The Code recognizes that subsidies are used "to promote important objectives of national policies". Article 11 exemplifies some of these objectives. In a general way, it can be said that a subsidy is justified when there exists a difference between the social cost and the private cost of production resulting from external economies. In this case, we could list, inter alia, domestic subsidies that aim at promoting regional or sectorial development or assuring structural adjustment.

We should not therefore condemn subsidies "per se", but try to avoid their eventual harmful effects on other countries. Neither should we assume that all subsidies distort trade. In reality, it can be argued that the majority of subsidies are a consequence and not the cause of market imperfections.

Furthermore, when the origin of the problem is domestic, a domestic subsidy is preferable, to all interested parties, to a quantitative restriction. In the present situation, however, greay-area measures are imposed, for which no effective remedy is available, since subsidies are subject to the abusive imposition of countervailing measures. This is a distortion that must be corrected.

B) EXPORT SUBSIDIES ON PRIMARY PRODUCTS

The displacement effects in traditional markets caused by subsidization programs for export of primary products have been the subject of deep controversy in the Committee. It is therefore justifiable that we carry out a review of the concepts applied in the identification of the impacts of these subsidies on third markets, such as the concept of "displacement" and that of "more than equitable share of world export trade" (Article XVI:3 of the GATT and Article 10 of the Code), account being taken of the shares of the signatories in the exports of the product concerned during a previous representative period (normally three years).

We propose the supression of the conflict between the interpretative notes nos. 27 and 28 to Article 8 of the Code, that affects particularly the developing countries' exports.

Note no. 27 of that Article establishes a concession

in the use of the expression "displacement", when applied to exports from developing countries, laying down that their "trade and development needs" should be taken into account and that therefore no traditional market shares would be determined in the case of these signatories' exports.

On the other hand, in note no. 28 to the same Article, it is set out, with respect to primary products, that the problem of third country markets should be dealt with exclusively by Article 10 of the Code. In this provision, no concession is made to the displacement effect when applied to developing countries's exports.

As has been clarified by the Report SCM/53, dated November 1984, the stress on note no. 28 is put on "displacement effect", to which a concession was explicitly acknowledged by note no. 27. Therefore, we propose a revision with a view to including:

1) concessions in the "displacement effect" when applied to primary product exports from developing countries;

2) concessions to new suppliers in world markets of a particular product for which the concept of "more that equitable share of world export trade" would not be applicable, since there would be no sense in establishing "traditional market shares".

In the latter situation, the negotiating group should examine the perspectives of redistribution of world market shares of the product throughout a reasonable period of time, as well as the expansion perspectives of world

trade of this product, so as to obtain a more global assessment of the "displacement effect" on the exports of other signatories.

IV - SPECIAL AND DIFFERENTIAL TREATMENT

The concrete application of the concept of special and differential treatment is an essential element for restoring the balance between rights and obligations upon which rests the effectiveness of the Code. It is also necessary so that the obstacles to the accession of a greater number of contracting parties to the Code be overcome.

Article 14 (§1 and 2) recognizes the special situation and consequently the rights of developing countries. These rights, however, have been nullified and impaired by the imposition of countervailing duties against legitimate measures taken for economic development promotion. This has been done exactly by those countries that set aside the largest amounts of resources for subsidization programs. The developing countries have thus been harmed on two fronts, through the use of countervailing duties as a barrier to trade and through the displacement effect on their exports to third markets, due to the enormous export subsidies to primary products applied by the major trading partners.

Brazil considers that these problems are not intrinsic to the Code but, in reality, derive, to a large extent, from the inobservance of the provisions of the Code by some signatories. However, the repeated attempts at denying developing countries the rights that are expressely recognized

in Part III of the code point to the necessity of a reaffirmation of these rights in the Uruguay Round.

This being so, special and differential treatment for developing countries should be respected at the outset of an investigation, in the examination of the nature and the ammount of the subsidy, during the investigating process, in the effort to establish a price undertaking or suspension, and in the strict observance of the provisions of article 14:4 with respect to the determination of injury or threat thereof.

Besides this, Brazil considers that it is vital to reaffirm that Article 14:5 refers to unilateral and voluntary decisions of developing countries, which solely can determine what are their competitive and developm . . needs. Still in relation to this Article, it is necessary to inhibit the undue use of Article 19:9, which has been resorted to extract countries acceeding to the Code concessions which go beyond the obligation laid down.