

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

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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

Revision

The attached checklist is based on written submissions made during the initial stage in documents MTN.GNG/NG10/W/1, 2, 5-8, 11-16, 19-20 and 24. An attempt has been made to include also issues raised in oral statements at the 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. PRINCIPLES AND APPROACHES

- 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 the Group 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.
  
- 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.

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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.

- 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.
- There is a need to elaborate and clarify the goals and objectives of the negotiations. These should be: (a) to elaborate rules and disciplines leading to the liberalization and expansion of trade, i.e. an increase in output. This should be done in the context of proper balance of rights and obligations. As a result of this expansion, the valance of rights and obligations must provide for special and differential treatment for LD Contracting Parties, to allow them to acquire an equitable share in that increased output; (b) to ensure predictability for producers; (c) to provide procedures for an effective dispute settlement mechanism; (d) to provide remedies where subsidies nullify and impair the rights of contracting parties, particularly Less Developed Contracting Parties.
- It seems essential that the law-making task of this Group is particularly emphasized. Given the preparatory work available there may be some inclination by this Group merely to continue the work on interpretation. Given the breadth and extent of single and detailed problems yet unsolved there may be also a danger that the Group directly turns to the single and well known issues without doing what other groups necessarily have to do: to address the basic and underlying issues of present regulations and to lead discussions first of all without paying yet full attention to details, often preventing the view for all of the forest, as the saying goes.
- 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.
- All governments have a common interest in moving toward a trading system in which international subsidy disciplines are substantially strengthened. Subsidies distort the allocation of resources and reduce total world wealth and income. In contrast, effective anti-subsidy disciplines generate support for liberal trade policies by giving efficient firms a stake in keeping markets open. The ultimate goal of the negotiations therefore should be to achieve rigorous discipline over subsidies and substantially equivalent forms of government assistance. Since this objective will be difficult, the first priority should be the development of common principles to guide the negotiations.
- The Group should, at this stage identify and exchange views on some of the fundamental problems related to subsidies and countervailing duties before it embarks on a more detailed discussion of the many problems contained in the checklist. Such a discussion will contribute to the definition of a meaningful schedule and order by which problems of a more detailed nature are to be eventually addressed. The following five principal issues are proposed for the discussion:
  - (i) the basic purposes of Articles VI and XVI of the GATT and the Code,
  - (ii) the extent to which definitions for different categories of subsidies are truly necessary in order to pursue the purpose and task of the entire regulation,
  - (iii) various strategies to achieve better disciplines in the administration of countervailing duties,
  - (iv) the question of whether there should be subsidies which from the outset, and by definition, are not actionable,
  - (v) remedies available (only duties or also other measures).
- 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 it is important to emphasize on this occasion, although, for tactical reasons, it may also be useful to use the first alternative.

- There should 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.
- 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.
- 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.
- A better balance and harmonization of obligations and rights under Articles VI and XVI will have to be found so as to ensure that countervailing measures do not become a protectionist instrument, in view of the unilateral power to impose them. This arises because the misuse of such measures is made easier by the fact that the concept of material injury and the requirement of a causal link between subsidies and injury are not clearly defined, and sometimes there is confusion between subsidies and injury and comparative advantage.
- 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.

- The point of departure for the review and consequent further development and clarification of disciplines on subsidies and countervailing duty action should be the existing GATT rules, particularly the Code. Furthermore it is important to maintain the delicate balance in the Code when we try to develop and improve it further.
- 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 Code itself had left unresolved a number of problems which were reflected in ambiguities and deficiencies in the provisions. Over the past eight years or so these shortcomings have proved to be the starting points for non-observance of the letter and spirit of the rules over the use of countervailing measures. The negotiations must address these problems appropriately.
- 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 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;
- Before devising new disciplines and strengthening the Code, the Group should focus on the aspects and definitions relating to subsidies and countervailing measures that remain unresolved since the Tokyo Round.



- Negotiations should improve disciplines on all subsidies, covering the full range of relevant trade distorting government intervention and support measures. Accordingly, instead of seeking a new or more narrow definition of subsidy, negotiations should further develop existing criteria embodied in, inter alia, Article XVI:1, Ad to Article XVI:3 and items (c) (d) and (f) of the Illustrative List in the direction of more operationally effective disciplines, focusing on a more comprehensive elaboration and specification of the range of measures subject to improved rules.
  
- 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.

## II. DEFINITIONS AND CONCEPTS RELATING TO SUBSIDIES

### A. Definition of a Subsidy

- 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 should be accepted that only measures which constitute a charge on the public account or government budget such as grants, concessional loans, loan guarantees constitute a subsidy.
- A direct cost to government should not necessarily be the only criterion used in identifying a subsidy. For example, a variety of selectively applied measures which do not make a direct claim on government expenditure may still represent subsidies that affect trade.
- The essential criterion for determining the existence of a subsidy must be the government's financial contribution. However, this should not be an absolute criterion for the determination of a countervailable subsidy, particularly in the area of internal or domestic subsidies and production subsidies, for which the declared objectives sought through the subsidies should be taken into account. This is the case of some incentives and some programmes of subsidies (listed under C below) where even though the government has incurred a financial charge, the aim is not to distort trade.

- 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.
- While there may be merit in distinguishing between subsidies and incentives, there are obvious problems inherent in distinguishing between the two categories solely on the basis of intention while ignoring any trade-distorting effects.
- Agreement on the definition of a subsidy is not a prerequisite to the development of effective disciplines on the use of subsidies. The Group will need to address the important issue of developing an agreed definition of a subsidy. However, experience has shown that this will be a complex and protracted process and the consideration of this issue should not and need not become an impediment to progress in the Group.
- Although Article VI of the GATT and of the Code clearly apply to natural resources and national resource pricing practices, it would be useful to re-examine this applicability with a view to further strengthening existing disciplines and remedies.
- The Negotiations should carefully review certain recent developments relating to the application of countervailing measures to counter so-called "natural resource subsidies" and other similar measures involving government pricing of raw materials for the domestic use, insofar as such practices involve dual pricing schemes. The examination of whether subsidy exists in a given case should be based strictly on the concepts of financial contribution by a government and on the principle of specificity. It is particularly important to arrive at a clear understanding that the examination of whether these practices constitute subsidies should not be based on a comparison of price at which the product in question is sold to domestic producers with external prices or a constructed "true market value".
- 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.

- The Uruguay Round SCM Group should examine the targeting issue, with a view to determining whether some forms of government industrial policies aimed at promoting export-oriented industries have effects analogous to those of a subsidy and result in economic damage to the legitimate interest of other trading nations. While we recognize that there are philosophical differences with respect to the appropriate level of government intervention in structuring domestic economic activity and fostering exports, we believe that the Group should examine whether at a certain point such policies can go beyond the bounds of appropriate government involvement in promoting exports.

B. Prohibited subsidies

1. Prohibited export subsidies

- The rôle and effect of the "Illustrative List" associated with Article 9 of the Code should be clarified.
- 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.
- Priority attention should be given to an effective prohibition on all export subsidies.
- The Uruguay Round agreement should provide that export subsidy disciplines apply, regardless of the product or the level of development of the country providing the export subsidy. The artificial distinctions in GATT and the Subsidies Code between primary and non-primary (i.e. primary farm, forest, and fishery) export subsidies should be eliminated.

2. Other prohibited subsidies

- The current GATT rules are inadequate and should be replaced by clear and precise prohibitions with respect to the use of domestic subsidies that result in import substitution losses or displacement in third country markets. The rules must also cover substantially equivalent forms of government assistance so as to prevent governments from replacing a prohibition subsidy with other equally trade-distorting practices.

- The Negotiating Group should prohibit the use of all domestic and export subsidies that directly or indirectly affect trade in agricultural products, i.e. eliminate the artificial distinction in present GATT rules between primary and non-primary products and apply this obligation to domestic agricultural subsidies that affect trade.

C. Actionable subsidies

1. Countervailable subsidies

- Negotiations should clarify which measures can be countervailed in order to reduce uncertainty for industries.
- The effectiveness of countervailing measures would be enhanced by an internationally agreed expansion of the practices that can be subjected to countermeasures.
- 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).
- 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.

- 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 focused only on their trade distorting effects, if any.
  
- In view of the main attempts in the past to arrive at a definition of subsidies, it might be advisable to adopt a pragmatic approach under which "illustrative lists" could be established for three different types of subsidies ... "The third illustrative list" would be that of permitted 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.
  
- Negotiations should aim to develop consensus regarding the circumstances under which certain practices could be considered to constitute countervailable subsidies. Firstly, only measures which constitute charge on the public account of government budget should be taken into account. Consequently, an important element is whether there is a financial contribution by a government. The concept of financial contribution should be interpreted in a restrictive manner and not include the so called opportunity cost. Furthermore, the notion of countervailable subsidy should be based on the concept of specificity. This concept should be interpreted as relating exclusively to the question of whether a government makes a given programme available to a specific industry or a group of industries; a pure "effect" test should be rejected. Secondly, a clear distinction is necessary between trade

distorting subsidies and subsidies which are designed to enhance efficiency, facilitate the development of infrastructure for industrialization or facilitate structural adjustment. Such subsidies normally have no trade-distorting effects and therefore should not be countervailable. Other particular practices which should be examined in detail in order to clearly define, in the light of the general criteria mentioned above, whether they constitute countervailable subsidies if they include regional assistance measures, research and development programmes, indirect subsidies, etc.

- The characterization of a compensatory subsidy should follow three criteria: the existence of a governmental financial contribution, the sectorial specificity and the objectives of the programme.

## 2. Other actionable subsidies

- 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.
- It should be agreed that any domestic subsidies which demonstrably restrict or distort trade are actionable under the GATT and the Code.

## D. Non-actionable 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.
- 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 temporary economic assistance measures in some sectors for the purpose of economic structure reform and structural adjustment are not meant to have trade distorting effects and therefore should not be considered as actionable subsidies.
  - The Negotiating Group should defer any attempt to define broad categories of non-actionable measures until it has examined the trade effects of at least the more commonly used types of subsidies and identified those which have no impact on trade. The definition of non-actionable subsidies should not become a prerequisite for progress on other issues before the Negotiating Group.
  - There is no consensus on the circumstances under which export incentives and other programmes of Government assistance to enterprises constitute countervailable subsidies. While financial contribution by Government is a necessary pre-requisite, this should not imply that such contribution per se makes the practice a countervailable subsidy.



Compensatory payments which merely offset a handicap should not be countervailable. Reimbursement of difference between the international price and the domestic price of products and services used in the production of exported goods is an example of such compensatory payments. Contribution by Government for enabling financial institutions to extend export credit at rates different from those at which credit is made available for other purposes, should not be deemed to be a countervailable subsidy as long as the credit is given at rates equal to or above the rates prevalent in international capital markets. On the same principle, rebate of prior stage cumulative indirect taxes should not be treated as countervailable subsidy whether or not such taxes have been levied on goods and services physically incorporated in the exported product ... Incentives given to enterprises to enable them to overcome locational disadvantages should also be non-countervailable.

- 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, one could list, inter alia, domestic subsidies that aim at promoting regional or sectorial development or assuring structural adjustment.

### III. DISCIPLINES ON SUBSIDIES

#### A. Prohibition

- The Uruguay Round agreement should provide that export subsidy disciplines apply, regardless of the product or the level of development of the country providing the export subsidy. The artificial distinctions in GATT and the Subsidies Code between primary and non-primary (i.e. primary farm, forest, and fishery) export subsidies should be eliminated.
- The Negotiating Group should prohibit the use of all domestic and export subsidies that directly or indirectly affect trade in agricultural products, i.e. eliminate the artificial distinction in present GATT rules between primary and non-primary products and apply this obligation to domestic agricultural subsidies that affect trade.
- There are a number of approaches the Group could explore that might serve in some combination to provide a solution. The Group, for example, could look at prohibiting domestic subsidies that exceed a specified size or amount. Second, with respect to third country displacement, the Group could prohibit domestic subsidies on the basis of the level of export activity of the industry. One relatively straightforward approach would be to bar an industry from receiving domestic subsidies if a specified percentage of its production is exported. Thus, domestic subsidies to industries that are significantly engaged in exporting can be assumed to have a trade impact and treated as analogous to export subsidies, which are already prohibited under GATT. Alternatively, along these lines the Group could seek to bar domestic subsidies if an industry is significantly more heavily engaged in exporting than the average industry within the territory of the subsidizing government.

#### B. 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 on 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.
- A second approach would be to attempt to define "serious prejudice" to provide clearer guidance to dispute settlement panels. This approach would focus on the "effects" of domestic subsidies and would essentially build upon the concepts used in the Tokyo Round. This approach also has major drawbacks. As the Tokyo Round Code showed, judgements as to "serious prejudice" or "more than an equitable share" are inherently subjective and necessarily open to different and conflicting interpretations. They create tremendous difficulties for international panels, are hard to enforce in practice, and do no result in credible discipline.
- The current provisions regarding limiting or removing subsidies which nullify or impair benefits or which cause "serious prejudice" (Article XVI:1 of the GATT and Article 8 of the Code) are inadequate. These provisions should be amended to impose a clear obligation on the subsidizing country to remove the cause of the nullification or impairment or the prejudice. Action taken in this regard should be subjected to effective multilateral surveillance.

C. 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.
- There is a need to develop effective disciplines for production and other domestic subsidies which directly or indirectly affect trade, and that this should be a high priority for the Negotiating Group. This could entail negotiating new disciplines on the use of such subsidies.
- The SCM Group should explore new approaches that would prohibit certain domestic subsidies on the basis of objective and verifiable criteria. The criteria would serve to identify and prohibit subsidies that are likely to have a significant effect on competitiveness or trade. This approach avoids the reliance on subjective judgements, or impractical prohibitions, that are inherent in the other subsidy approaches. It would minimize the potential for trade frictions by limiting the scope for trade-related subsidization.
- Although subsidies other than export subsidies are permitted, they may have a trade-distorting effect, and therefore a clarification is necessary concerning rights and obligations as regards the use of such subsidies, particularly with respect to the application of countervailing duties.
- 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.
- The Code quite rightly intends not to restrict the right of signatories to use other subsidies than export subsidies as legitimate instruments for the promotion of important social and economic policy objectives which are given the form of e.g. regional development, employment policy

programmes, structural adjustment, research and development schemes. Furthermore, it is also stated in the Code, that the type of the subsidy is not decisive when the possible adverse effects of a subsidy on other signatories are assessed. Subsidies not having adverse effects on trade give no grounds for CVD-action.

- Domestic subsidies should aim at reducing the disadvantages the beneficiary has to bear as a consequence of e.g. commitments related to location or adjustment measures it undertakes to fulfil. A subsidy should thus not create any additional economic advantage to improve the competitive standing of the beneficiary.

- The following issues regarding "targeting" merit examination:

Whether targeting can have delayed effects in that government practices can be separated from their market effect by time. Some studies have argued that the effects of targeting can persist after the practices themselves have been abolished.

Whether targeting has "multiple effects". Once an industry has been targeted by a government, commercial banks and other service institutions may give the targeted industry preferential treatment because of its government backing.

What are the effects of industrial policies to promote high technology industries such as computers and electronics. Complaints about excessive government involvement have been particularly persuasive in these sectors.

Accordingly the Negotiating Group should review the targeting issue with a view to determining whether greater disciplines are necessary to ensure conformity with principles of free and fair trade.

- It is imperative that this Negotiating Group agree on strong and enforceable disciplines concerning natural resource practices that, through government intervention in the marketplace, create artificial competitive advantages for domestic producers and lower production costs. By lowering costs, the government intervention can channel benefits to certain industries using the resource as a major input into the production of their final product. Thus, by benefiting specific industries rather than providing general assistance for economic development or growth in the country concerned, such actions can have consequences analogous to a traditional subsidy.

D. Export subsidies on primary products

- 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:3 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.
- The prohibition on export subsidies for products other than basic or primary products under Article XVI:4 and Article 9 of the Code should be extended to agricultural, forestry and fishery products, in other words to all basic or primary products.
- A major objective of these negotiations should be to extend the existing prohibition on export subsidies to cover all products, primary as well as non-primary.
- There are serious deficiencies in Article XVI:3 of the GATT and in Article 10 of the Code, notably the fundamental problems connected with the "more than equitable share" concept. However, these problems arise from the basic fact that current disciplines for primary products are

significantly weaker than those which apply to manufactured goods. They cannot be resolved merely by making minor adjustments to rules which are intrinsically defective. The only genuine, long-term solution is an effective prohibition on all export subsidies. Accordingly, at this stage of the negotiating process, there is little value in trying to improve the "more than equitable share" rule, which is only relevant so long as there is no general prohibition on export subsidies.

- 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.
- Improvements in GATT subsidy provisions should lead to:
  - (1) the phased elimination of all direct and indirect agricultural subsidies having an effect on trade;
  - (2) stronger GATT rules based on trade liberalizing principles (rather than market management principles); and
  - (3) stronger GATT subsidy rules and disciplines.
- The displacement effects in traditional markets caused by subsidization programmes for export of primary products have been the subject of deep controversy in the Committee. It is therefore justifiable to 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). It is proposed to suppress the conflict between the interpretative notes nos. 27 and 28 to Article 8 of the Code, that affects particularly the developing countries' exports.

E. 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 product 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.
- One aspect of particular concern is the problem of export subsidization of processed primary products. This practice is contrary to the intent of the current rules and should be eliminated. It is clear that the weak disciplines currently applying to primary product subsidies have contributed to this problem, the most appropriate resolution of which would be the prohibition of all export subsidies.
- 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 ("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.
- There is growing doubt in some quarters that the Code's treatment of border tax adjustments (that is, the assumption that non-excessive remission of indirect taxes on exported products is trade-neutral) reflects the true economic effect of such adjustments. Accordingly, the Agreement's current treatment of this practice should be re-examined.



F. Notifications and surveillance

- The objectives of and procedures associated with the notification requirement should be reviewed to make them more meaningful.
- Increased transparency, and better monitoring of subsidies could be achieved and facilitated through development of the notification procedures and practise. A first step should be that all parties would notify and supply appropriate information on their subsidies. In addition, more detailed guidelines on the coverage and contents as well as the form and frequency of the notifications could include more specific information on the government aids (objective, type, possible conditions attached) to facilitate the examination procedures. As thorough an examination of the notifications of subsidies as that of countervailing measures would improve the possibilities to come to grips with and consequently to reduce government aids that constitute trade barriers or promote unfair conditions of competition.
- 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.

- Differences of opinion as to the scope of Article XVI have reduced transparency and ultimately weakened the ability of countries effectively to examine subsidy practices affecting trade. It is therefore essential to seek to strengthen the system of notifications as regards both content and form. Agreement must be reached on which subsidies must be notified, and how. This will contribute to an effective surveillance process; and reaching consensus on the definition of a subsidy which operates to increase exports or to reduce imports will certainly help to clarify Article XVI:1.
  
- Priority attention should be given to improving the provisions relating to the notification of subsidies with the aim of establishing more clearly those measures for which notification is required and to the establishment of multilateral surveillance of adherence to the rules, disciplines and procedures in respect of subsidies.

#### IV. MEASUREMENT OF THE AMOUNT OF A COUNTERAVAILABLE 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 when 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 "estimate 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.
- It would be useful to clarify that "benefit to the recipient" is the appropriate standard of measurement for a countervailable subsidy.

V. DETERMINATION OF THE EXISTENCE OF MATERIAL INJURY, OR THREAT THEREOF

A. Application of an injury test in all countervailing duty investigations

- The application of an injury test should be the sine qua non condition for the application of countervailing duties. In this respect account should be taken of the result of the discussions in the Negotiating Group on GATT Articles on the Protocol of Provisional Application of the General Agreement.

B. 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.
- Article 6:5 of the Code provides that the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. Apparently, there has been a lack of common interpretation of the term "major proportion". In some cases "major proportion" has been interpreted as referring to 50 per cent of the total output while in some other cases 30 per cent only. Agreement on the term "major proportion" would eliminate disputes concerning the standing of petitioners while it would also prevent abuse of the right of petition. For example, if the "major proportion" were to be designated as 50 per cent, then a petitioner who represents below 50 per cent would not be allowed to file a petition.

- 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.
- An unduly narrow interpretation of the phrase "domestic industry" would deny any remedy against injurious subsidization to producers of agricultural and other raw materials which are destined for transformation into a commonly traded form. In particular, under one current Panel Report countervailing measures would offer no remedy at all in the very area where subsidy disciplines are weakest and cause the greatest problems. The Group should develop an agreed and more reasonable interpretation of the definition in relation to this type of product.
- The coverage should clearly refer only to a sufficiently representative segment of producers of the like product.
- Article 6:5 of the Code provides that in determining injury, the term "domestic industry" refers to the domestic producers as a whole of the like products. The term "like product" is interpreted, in footnote 18 to Article 6:1, to mean 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. According to the definition given in the Code, it is clear that components, parts or raw agricultural products are not like products to finished or processed products. It follows that the producers of components, parts or raw agricultural products, and the producers of finished or processed products should be regarded as separate industries and the determination of injury ought to be made separately for each industry. In particular, it is regrettable that in violation of the Code, some signatories are extending countervailing duties imposed on finished products to components or parts of such finished products. In view of the present GATT and Code provisions, the following four conditions should be satisfied in order to impose countervailing duty on imported components or parts. (1) Initiation of a countervailing duty investigation in respect of components or parts. (2) Existence of subsidized imports of the components or parts. (3) Existence of injury to domestic industries which produce like components or parts. (4) Existence of a causal link between the subsidized imports and the injury.

- The definition of "like product" as established in footnote 18 to Article 6:1 of the Code should be maintained.

C. Threat of material injury

- The Group should address the question whether it is appropriate to apply countervailing duties merely on the basis of a finding of a "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.

D. 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. Subsidized exports from other suppliers can be identified with "injury caused by other factors", as set out in 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 separately for each supplier.
- 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.

- The Group should reach agreement that the injury standard requires importing countries to determine that subsidized imports from a particular supplier contribute significantly to the material injury suffered by a domestic industry.
- Negotiations should arrive at an understanding on a minimum market share or a threshold of market penetration below which there would be a presumption of absence of material injury.

E. Causal link between subsidization and injury

- 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.
- The amount of subsidization should be an important consideration in the determination of the existence of a causal link between subsidized imports and material injury to a domestic industry.
- Article 2:12 of the Code provides that an investigation shall be terminated when the investigating authorities are satisfied either that no subsidy exists or that the effect of the alleged subsidy on the industry is not such as to cause injury. It stands to reason that in case of a de minimis subsidy, a causal link does not exist between subsidized imports and material injury to a domestic industry. It would be useful to reach agreement on the level below which a subsidy should be deemed to be de minimis.

VI. DEFINITION OF SALE; "INTRODUCTION INTO THE COMMERCE"

- 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 definition of sale has given rise to problems (particularly with regard to capital goods) 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.



VII. INITIATION AND CONDUCT OF COUNTERVAILING DUTY INVESTIGATIONS

A. Criteria for the initiation of countervailing duty investigations

- 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.
- 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 petitioner 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 5 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 5 per cent of the value of the product - do not cause injury.
- 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.
- There is a logical relationship between Article 6:5 and Article 2:1. 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.

- 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 concept of "domestic industry" by or on behalf of which a petition can be filed must continue to relate only to producers of the "like product". The basic element in determining what constitutes a "like product" are the characteristics of a product, not its uses. There is also a need to develop procedures to ensure that a petition is indeed filed by or on behalf of a majority of the domestic producers concerned, i.e. a procedure for the verification of the standing of a petitioner needs to be developed.
- The definition of "like product" in the Code 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 products 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. the characteristics and not the use of the product.
- 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.
- There is a need for clarification or development of rules on questions like the initiation and conduct of an investigation, imposition of countervailing duties, lack of sunset clauses and cumulation of injury. How to secure the interests of the exporter, especially where the investigation proves the case to be unfounded, also deserves attention and arrangements might be envisaged with the aim of raising the threshold for the initiation of investigations. In many cases the threshold seems to have been arbitrarily low indeed, as also demonstrated by the great number of negative findings.

- Another issue relating to the initiation of a countervailing duty investigation is the problem of the simultaneous initiation of anti-dumping and countervailing duty investigations on imports of the same product from the same country.
- 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.

B. Conduct of countervailing duty investigations

- The scope of information required for the conduct of an investigation should be reviewed.
- Article 2:9 of the Code provides that when an interested party fails to provide necessary information, findings may be made on the basis of the facts available. Some signatories resort to this provision in order to justify making adverse factual inferences against the exporters. In the cases where an interested party has not been able to provide the required information within a prescribed time period, or has not been able to meet the standard of information requested by the investigating authorities (e.g. computer generated formats and printouts), it would be equitable, before resorting to the facts available clause, to extend every opportunity to the exporters to meet the requirements of the investigating authorities.

VIII. IMPOSITION AND DURATION OF COUNTERVAILING MEASURES

A. Imposition of countervailing measures

- 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.
- The amount of a countervailing duty should be set at a level sufficient to remove the injury.
- 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.

B. 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.

C. 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.

- There should be agreement on this matter with respect to:
  - (a) the establishment of a minimum time-limit for acceptance of a review requested by any interested party;
  - (b) the establishment of a time-limit (for example one year) for the investigating authorities to issue a final decision concerning the review requested;
  - (c) possibility of a special review in exceptional circumstances;
  - (d) the extension of prohibition, already provided for in Article 5:6, to retroactivity in the imposition of countervailing duties when resulting from a review.
- With respect to outstanding countervailing measures the negotiations should focus on the question of the introduction of a "sunset" clause and on procedures for review and revision of countervailing measures in order to ensure full observance of the provisions of Article 4:9.
- 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.

D. 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.

- The Group should review the operation of Article VI:6 of the GATT with a view to introducing more effective provisions enabling contracting parties to take countervailing action on behalf of third countries.

E. Diversiory practices in the countervailing duty area

- The Group should examine the problem of certain diversiory practices in the countervailing duty area.



IX. 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.
- The Group should re-examine Subsidies Code Article 14 with a view to formulating a framework for greater participation on the part of developing countries in normal GATT subsidies disciplines. Recognizing that many adjustment measures, however sound economically, cannot be accomplished overnight, we would be receptive to firm commitments to scheduled phase-cuts. Such commitments (as well as existing commitments) should of course be subject to multilateral surveillance, and dispute settlement procedures should apply in the event of an inconsistency.
- It is essential that the negotiations should reaffirm the provisions of Article 14:1 and 14:2 of the Code. There is also a need to reaffirm the purely voluntary and unilateral character of "commitments" under Article 14:5. In this respect, it is necessary to carefully examine the use of Article 19:9 in relation to Article 14:5. Furthermore, the negotiations should reaffirm that the situation in which a developing country does not enter into a commitment under Article 14:5 is adequately dealt with by the provisions of Articles 14:6 and 14:8 of the Code.
- It is proposed to suppress the conflict between the interpretative notes Nos. 24 and 28 to Article 8 of the Code that particularly affects the developing countries. 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 than 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.

- The Group should examine ways in which differential treatment can be given to developing countries in the area of countervailing measures. There could be a rule that, if imports from developing countries account for less than a specified percentage of domestic consumption and/or imports, no countervailing measures shall be imposed on such imports.
  
- Special and differential treatment for developing countries should be respected at the outset of an investigation, in the examination of the nature and the amount 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. Furthermore 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 development 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 acceding to the Code concessions which go beyond the obligation laid down.

## X. 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.
- There is a real need to review the dispute settlement provisions of the Subsidies Code at a later stage of the negotiations. This issue should be considered in the light of developments in the Negotiating Group on Dispute Settlement, with a view to possibly integrating the various dispute settlement provisions in the Code with the main GATT instrument.
- Two potential approaches to the dispute settlement problem that the SCM Group should consider are as follows. First, the Group should consider a special strengthened GATT procedure for subsidies disputes. A special procedure is appropriate in view of the political sensitivity of subsidy disputes and the history of problems in this area. The new procedure must make rights to compensation for import substitution and third country displacement losses clear and timely. The procedure must encompass procedures to prevent delay and assurance of a GATT ruling by a date certain, in effect guaranteeing a ruling by a panel by a specified time. If the panel finds a GATT-illegal subsidy, it would go on to determine the amount of compensation. With respect to a prohibited subsidy, proof of nullification or impairment would not be required. Instead, the only issue would be the amount of the trade loss. After a further time-limited period for exploration of agreed compensation, the aggrieved party must have a right to rebalance the level of concession. these actions cannot be subject to blocking. In addition, current "nullification and impairment" remedies of GATT Article XXIII and Subsidies Code Article 18 could be replaced with a new procedure that would transfer the initial responsibility for action to national governments. Thus, within a framework of agreed rules and procedures, national governments would be authorized to calculate the compensation owed from violations of the rules and rebalance the level of concessions. Proof that a prohibited subsidy result in nullification or impairment would not be required but instead would be

presumed per se. This procedure would work in a manner roughly analogous to the right to compensation for trade-restricting actions under GATT Article XIX. Because such actions would take place within a framework of clear multilaterally agreed procedures and rules, this approach would ensure that the scope for such actions would be subject to agreed multilateral disciplines. In addition, to assure conformity with the multilaterally agreed rules and procedures, a subsidizing government would have a right to seek multilateral review of the action. Thus, if a government believed that another government's response to a subsidy was unjustified, it could challenge the action in a standing GATT body, thus ensuring tight multilateral surveillance and discipline. Such actions presumably would not be subject to delay or blocking.