MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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

ELEMENTS OF THE FRAMEWORK FOR NEGOTIATIONS

Submission by Australia

I. Introduction

1. This communication from Australia sets out detailed proposals on a number of key aspects of the negotiating framework agreed to at the Mid-Term Review. Changes are proposed to the existing disciplines under Articles VI and XVI of the GATT as well as of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement ("the Code").

2. The new rules and disciplines on subsidies and countervailing measures should be applicable to all goods and all contracting parties. References to the CONTRACTING PARTIES or the Committee are without prejudice to the final legal arrangements or instruments for new rules and disciplines, including any rights and obligations in respect of non-participants in those arrangements. However, the new rules and disciplines should apply to all members of customs unions that are participants in the new arrangements.

3. The objective of the proposals in this Communication is to provide an equitable basis for remedying the deficiencies in the GATT system regarding the lack of effective disciplines on a wide range of subsidy practices. The unfettered use of subsidies has in many areas nullified or impaired contracting parties' rights and obligations under the GATT. The balance of benefits that individual contracting parties should obtain from the GATT is frequently affected by the lack of restraint on the part of other contracting parties in providing subsidies.

4. In addition, there is already a heavy imbalance between the disciplines on those remedies that are available to counter subsidy practices and the lack of discipline on the subsidies themselves. Accordingly, a significant increase in disciplines on subsidies in the Uruguay Round would be a major contribution towards improving the international trading system and must be a key element of the final outcome of the Round. This need for improved disciplines applies to an even greater extent in those areas of trade that are particularly affected by the lack of disciplines on national support policies.

5. This communication is without prejudice to proposals advanced and developed in other Negotiating Groups for additional disciplines and these will need to be taken into account in the final outcome on subsidies and countervailing measures.

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II. Prohibited subsidies

Scope

1. It is proposed that the category of prohibited subsidies be expanded from that in the Code and that it contain two classes. Firstly, there needs to be a normative class of those types of subsidy practices that are the most trade distorting. Secondly, past experience has shown that an effective multilateral system of disciplines would also require, apart from the normative class, another class of prohibited subsidy programmes (with practices considered both individually and in aggregate) based on objective and verifiable criteria.

Normative class

2. All export subsidy practices would fall within this normative class of prohibited subsidies. In addition to export subsidies it is proposed that the normative class should also include other trade-distorting subsidies, in particular, certain performance-based subsidy practices. The normative class would be equally applicable to all goods. In particular, export subsidies on all primary products would be prohibited.

3. The normative class should be defined through an illustrative list. Given the damaging impact of subsidization on world markets and the ingenuity of governments in devising new subsidy programmes, it would be inappropriate to rely on a definitive list, though the illustrative list should be as definite and exhaustive as is feasible.

4. The current illustrative list in the Annex to the Code is a suitable starting point for the negotiation of the list. However, some areas even of the existing list should be improved and clarified. Firstly, all areas of the new disciplines on subsidies, including the prohibited category, should clearly also cover forms of subsidization where there may be no contribution by government but which are dependent on government action for their enforcement (in particular, preferential arrangements, including certain levy/subsidy arrangements). By way of a second instance, a number of the actual items in the existing list have given rise to concern and indeed to dispute, for example, the situation in respect of compliance with items (d) and (i) needs to be clarified.

Other trade-distorting subsidy programmes

5. In order that there be effective disciplines on trade-damaging subsidization programmes, there should be a second class of subsidy programmes that are prohibited without the need for an adverse effect test. It is proposed that the classification of such practices be on the basis of objective and verifiable criteria, in particular quantitative criteria. To be effective, the application of such criteria should also apply to measures in the aggregate as well as individually, given that otherwise, governments would have the flexibility to circumvent disciplines by providing a range of separate subsidy measures. One approach would be for individual products to be subject to an overall ceiling on subsidization

and any breach of that ceiling would entail that the contracting party in breach would be subject to the remedies for this prohibited category of subsidies.

Time period for implementation

6. It is proposed that contracting parties would be permitted an adequate time period for the implementation of new obligations in respect of subsidy programmes in this prohibited category.

Remedies

7. There needs to be a balanced set of arrangements that will both go some way to offsetting the damage being done by prohibited subsidies while at the same time putting pressure on the offending contracting party to bring its policies into conformity with its obligations. There should be standard dispute settlement procedures for consultation and conciliation and failing resolution, a panel with consideration of the report by the CONTRACTING PARTIES. Where this process is simply aimed at establishing whether the practices are indeed prohibited, it could be expedited.[1]

8. Where a subsidy programme is found to be prohibited by the CONTRACTING PARTIES, then there would be a legal obligation to remove it forthwith. If such a programme was not brought into conformity with obligations within a reasonable period of time, then all affected contracting parties should be entitled to take countermeasures (including the withdrawal of GATT concessions or obligations) while the programme was maintained. Given the implications for other parties' interests, the proposed countermeasures would need to be considered by the CONTRACTING PARTIES but with the onus on the offending contracting party to demonstrate that any countermeasures to be taken were not commensurate with the nature of the subsidy programme and the degree of its impact.[2]

Countervailing duties

9. In respect of countervailing duty remedies, there should be no requirement for an injury test in order to deal with prohibited programmes. This would not require a prior finding by the CONTRACTING PARTIES. The onus would be on the subsidizer to seek a panel in order to demonstrate in the panel process that its practices are not prohibited.

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[1] In the event of any delay on the part of the defendant in the dispute settlement process, unless there is a request by the panel for an extension of time and this is agreed to by the CONTRACTING PARTIES, the injured contracting parties would be automatically authorized to take countermeasures.

[2] As in the current Code, a decision should be provided within thirty days.

10. An effective countervailing duty remedy should also be available in third country markets. Where there is the need for an injury determination, the countervailing duty remedy can give rise to some issues in the context of third country markets.[1] However, it is proposed that in the case of prohibited subsidy practices, no injury determination would be required. Accordingly it would be straightforward for other contracting parties who are importers to impose countervailing duties upon notification of the practices to the GATT. A suitable period would be provided for to allow the charges to be rebutted. However, after the expiry of that period, if contracting parties are satisfied with the nature of the complaint brought, then they would have the right to impose countervailing duties on the product in question. Indeed other contracting parties should be encouraged, though not obliged, to take such action. The subsidizing contracting party would be able to have recourse to a panel process and such countervailing duties should be withdrawn promptly if the CONTRACTING PARTIES disapproved.

III. Non-prohibited but countervailable or otherwise actionable subsidies

Scope

1. The subsidies in this category are necessarily the residual from the other two categories of prohibited and of non-actionable/non-countervailable subsidies. However, since it is proposed that particularly for the prohibited subsidy category there would be criteria applied to subsidy measures, both individually and in aggregate, this category also would not consist of a precise set of policy types.

2. As proposed in Section II[2] contribution by government should not be a necessary criterion for a subsidy to be countervailable or otherwise actionable. Other subsidies which are dependent for their enforcement on government action should also be included.

Remedies

3. Subsidy practices in this category should be disciplined through trade effect tests.[3] Article XVI:1 should be strengthened to provide for a mandatory obligation to limit the extent and nature of subsidy programmes that have an adverse effect on other contracting parties.

Importing country's market

4. In the case of the importing country's market the existing adverse effect test of material injury for countervailing should be maintained.

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[1] This issue is discussed further in paragraph III.10.

[2] See paragraph II.4.

[3] As proposed in paragraph II.5 if the overall level of subsidization of an individual product is higher than a ceiling level, then the subsidy programme would be prohibited and would be subject to the appropriate remedies.

5. The current arrangements on the countervailing duty remedy are generally working satisfactorily so as to provide a balance of protection against injurious unfair trade, while at the same time providing protection against harassment of exporters. However, it is recognized that some areas may require improvement or clarification.

6. In particular, the criteria for the initiation of countervailing duty investigations need to be reviewed with a view to ensuring that they preclude harassment of fair trade by domestic industry interests.

7. In respect of the definition of industry, there have been apparent differences of view over the interpretation of relevant clauses of Article VI (and the Code). These apparent differences need to be resolved to remove a potentially major source of dispute while ensuring both adequate protection to domestic industries from subsidy practices and greater surety to exporters. The implementation of effective prohibitions on the most trade-distorting subsidy programmes would go a long way to resolving the problems that have arisen.

Subsidizing country's market

8. In the market of the subsidizing country, a distinction should be made between the cases where there is a concession under Article II on the product in question and where there is not. Where there is a concession, the introduction of any new subsidy measures or any increase in existing measures should be considered to be prima facie nullification and impairment of all exporters' rights in respect of that market with the onus on the subsidizer to demonstrate that there has been no adverse trade effect. In other circumstances, including where there is no concession involved, the onus of proof should be on the exporter to demonstrate a substantial impact through market displacement or lower prices attributable to the subsidies in question.

Third country markets

9. In order to make subsidy disciplines more effective in third country markets, the onus of disproving adverse effect should lie with the subsidizing party. In considering adverse effect displacement or price depression either in individual markets or globally should be considered.

10. An effective third country market countervailing duty remedy should also be provided for. This remedy has already been discussed in the case of prohibited subsidies.[1] For non-prohibited subsidies, injury to an export industry should have to be shown. Given the wider nature of such countervailing duty action, it is appropriate to require a multilateral examination of injury but, given that, a lower level of adverse effect test on an export industry should be required than the the material injury test

[1] See paragraph II.10.

required under countervailing disciplines in the market of the importing country and with the onus of disproving adverse effect lying with the subsidizing country. A positive finding on the question of injury by the CONTRACTING PARTIES would constitute an authorization for all third countries to take countervailing measures without the need for a further injury test. Contracting parties that are importers of the product in question would be encouraged, though not obliged, to take countervailing duty action. As provided for in Article VI:6(c) in exceptional circumstances other contracting parties would be entitled to levy countervailing duties without the prior authorization of the CONTRACTING PARTIES, provided that such duties should be withdrawn promptly if the CONTRACTING PARTIES disapproved.

Countermeasures

11. Once the general dispute settlement procedures of consultation, conciliation, and if need be a panel had been utilized, the obligation would be on the contracting party to take appropriate action in the event that its subsidy practices were found by the CONTRACTING PARTIES to be causing adverse effect. If the recommendations of the CONTRACTING PARTIES were not followed within a reasonable period, then the CONTRACTING PARTIES would be able to authorize appropriate countermeasures (including withdrawal of GATT concessions or obligations).

IV. Non-countervailable, non-actionable subsidies

1. The principal basis for a measure being non-countervailable should be general availability. The draft Guidelines for the Application of the Concept of Specificity in the Calculation of the Amount of a Subsidy Other Than an Export Subsidy (SCM/W/89), drawn up by the group of experts of the Committee on Subsidies and Countervailing Measures, is an appropriate starting point for the definition of general availability.

2. It needs to be explored whether it is possible to arrive at a general approach for determining whether an overall subsidy programme[1] on an individual product should be regarded as being de minimis and so non-countervailable. It may also be possible to draw up a definitive list or lists of subsidies which would be prima facie non-trade distorting and for which the onus of proof would be on the party claiming adverse effect to demonstrate that they are having a significant impact on trade[2] either to be countervailable or to be otherwise actionable. Such measures would need to be fully notified to the CONTRACTING PARTIES for them to be eligible for consideration as being non-countervailable or otherwise non-actionable.

3. It would be inappropriate for any policies to be considered to be either non-countervailable or otherwise non-actionable on the basis of the alleged purpose or objective of the policies. These are not criteria that

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[1]Prohibited subsidies would be actionable/countervailable regardless of their level of subsidization

[2]As part of the overall subsidization programme for a product

can be meaningfully tested in a multilateral process and so should not be entertained as possible bases for criteria.

4. However, contracting parties should be able to bring measures to the CONTRACTING PARTIES to seek some prima facie approval of them as falling within the purview of some definitive list of non-trade distorting measures so as to qualify either as non-countervailable or as otherwise non-actionable. Such approvals would need to be subject to periodic renewal by the CONTRACTING PARTIES, particularly in the light of any change in circumstances.

V. Special and differential treatment for developing countries

1. Consideration should be given to whether certain subsidy programmes should be regarded as being otherwise non-actionable[1] according to their consistency with the individual trade, financial and development needs of developing countries, in particular the least-developed countries. In addition, there will be a need to provide developing countries with longer time periods for the implementation of certain new obligations according to their individual trade, financial and development needs.

VI. Notifications and surveillance

1. In the new régime for disciplines on subsidies and countervailing measures there will need to be more effective procedures for the notification of subsidy arrangements and changes to those arrangements. A significant number of the deficiencies in the current notification procedures and their application arise from the lack of observance by a wide range of contracting parties of their existing notification obligations under Article XVI:1.

2. Effective notification procedures should be based on the acceptance of obligations by all contracting parties, including those that are parties to customs unions. Moreover, in cases where central or federal governments are involved in subsidy programmes with regional or local governments or authorities, in particular by way of contributing funds (including foregoing revenue), then there should be a full notification of the programmes involved.

3. There should be annual full notifications of subsidy programmes with interim notifications of any new measures or any major changes to existing measures. In keeping with existing obligations under, for example, the 1979 Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance, contracting parties should endeavour to notify such measures in advance of implementation and where that is not possible to do so promptly ex post facto. In particular, if the institutional structure of the new arrangements were to be similar to that of the Code with regular six-monthly meetings, then updates of notifications should be provided at least for those meetings.

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[1] Such programmes would remain countervailable

4. Notifications of measures should be without prejudice to contracting parties' rights under the GATT, including the issue of the precise definition of a subsidy. Accordingly, contracting parties should be required to notify as widely as possible with the commitment to notify when there may be some doubt about the classification of a particular measure. This commitment should not apply to measures considered by the contracting party concerned to be generally available. However, it would be open to any other contracting party to raise the absence of the notification of any measure.

5. Any measure that was not notified (and claimed at the time either to be non-countervailable or to be otherwise non-actionable) should be ineligible for consideration as such for the purposes of remedies and dispute settlement.

6. In addition to full compliance with the existing notification requirements under Article XVI:1, contracting parties should be required to notify sufficient details of their measures to enable other contracting parties to assess their compliance with the terms of the new subsidy disciplines, in particular to enable contracting parties to be satisfied that measures do not fall into the category of prohibited subsidies.

7. The existing notification requirements under the Code for countervailing duty remedies are satisfactory and are consistent with what is proposed above for subsidy notifications. Similar notification requirements would be needed for other remedies that are part of the new arrangements.

8. The character of the surveillance mechanism will necessarily depend on the final legal arrangements or instruments for subsidies and countervailing measures. However, whether this be done through meetings of, for example, the Committee or the CONTRACTING PARTIES, it should provide for both regular and special surveillance arrangements.

9. There should be annual reviews of contracting parties' notifications of subsidies, though questions should also be able to be raised at regular meetings of the relevant institutional body. There should also be arrangements for counter-notification of subsidies. In addition, contracting parties should be able to call for special meetings, including on issues related to subsidy programmes.

10. The current arrangements under the Code for the notification and surveillance of legislation and regulations pertaining to the Code are basically satisfactory and should be maintained.

VII. Dispute settlement

1. The dispute settlement provisions should closely reflect mutatis mutandis the new general arrangements for dispute setttlement in the GATT, including procedures for consultation and conciliation. Moreover the scope for different provisions will also depend on the final legal nature of the new arrangements for subsidies and countervailing measures.

2. Apart possibly from the mechanism for adoption of panel reports, the problems that the Code has faced on dispute settlement are not ones that could have been avoided or remedied by some mechanical changes in the dispute settlement arrangements. The current Committee/panel approach would seem to provide the most appropriate and flexible mix of arrangements with the decisions and interpretations of the new arrangements continuing to be taken substantively by the Committee or the CONTRACTING PARTIES.

3. While having due regard to what general dispute settlement procedures are adopted in the GATT, the preferred system for the adoption of decisions by the CONTRACTING PARTIES under the new arrangements for subsidies and countervailing measures in respect of dispute settlement should be that parties to a dispute can join or abstain from, but not block, a consensus on decisions. The other areas in which somewhat different procedures would be required for the new arrangements have been set out above in conjunction with specific proposals.