

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG10/15

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

MEETING OF 30 NOVEMBER-1 DECEMBER 1989

Note by the Secretariat

1. The Group met on 30 November-1 December 1989 under the Chairmanship of Mr. Michael D. Cartland (Hong Kong). The Group adopted the following agenda:

- A. Framework for the negotiations: discussion of issues on specific proposals from participants
- B. Arrangements for the next meeting of the Group.

A. Framework for the negotiations and discussion of issues on specific proposals from participants

1. The Group had before it a total of eight submissions on various elements of the framework for the negotiations. In addition to Canada (MTN.GNG/NG10/W/25), Switzerland (W/26) and Japan (W/27) which had tabled their submissions prior to previous meetings, the United States (W/29), Nordic countries (W/30), EEC (W/31), Australia (W/32) and India (W/33) had put forward new detailed proposals. Furthermore, the delegation of Bangladesh submitted, on behalf of the least developing countries, a proposal for special treatment for those countries.

2. In accordance with its agreed procedures, the Group did not discuss each proposal separately, but continued the issue-oriented approach, going through the main issues in the framework in the light of the specific proposals. At this meeting, the Group discussed issues relating to item 1 (prohibited subsidies), item 2.1.1 (definition of countervailable or actionable subsidies) and item 3 (non-countervailable, non-actionable subsidies).

Prohibited subsidies

3. Most delegations concurred that subsidies contained in the Illustrative List should continue to be prohibited. There were, however, different approaches as to whether this list should be exhaustive or whether it should remain illustrative. One approach was that the

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non-exhaustive nature of the list should be preserved, given the risk of circumvention of an exhaustive list, no matter how comprehensive. Another approach was that the list should not be open-ended but should be dynamic, in the sense that the Subsidies Committee should review it regularly and be authorized to amend it. Some delegations saw a link between the exhaustive nature of the list and the remedy question, in the sense that if stringent remedies were to be used against prohibited subsidies it would be necessary to have a high level of certainty as to what was prohibited. Another important problem was the product coverage of the prohibition, i.e. to what extent primary products not covered by the existing rules of Article 9 of the Code should be included. Some delegations reiterated their view that the artificial distinction which currently existed with respect to export subsidies on primary and non-primary products should be eliminated, while some others recalled their position that disciplines regarding these products were discussed in another group and that the results of that negotiation would have to be taken into account in this Negotiating Group. Finally, there was a wide measure of agreement that the Illustrative List should be clarified and improved, although specific proposal to this effect went in rather opposite directions.

4. Three different approaches have emerged regarding the question of a possible extension of the existing prohibition to cover some subsidies other than those in the Illustrative List. One approach was to identify subsidies with potentially direct trade-distorting effects and to prohibit them, ex ante, on the presumption of such effects. There would be three main criteria to achieve this goal. Under a normative criterion, certain performance-based subsidy practices such as those contingent on a firm's meeting a domestic content or local sourcing requirement or upon export performance would be prohibited. The second criterion would prohibit any subsidies to a firm predominantly engaged in export trade, i.e. where such subsidies exceeded [X] per cent of the firm's total sales. The third criterion would be a quantitative one, i.e. to prohibit subsidies to a firm where such subsidies exceed [X] per cent of the firm's total sales. Another approach was based on a premise that the rationale for prohibiting subsidies had always been that these subsidies aimed at distorting trade by favouring exports. Consequently only export subsidies and de facto export subsidies should be prohibited ex ante. To prohibit other subsidies, not aimed at distorting trade, on the presumption that they might have some trade effects, would be inconsistent with this rationale. If such subsidies, despite their objectives, had some demonstrably negative effects on trade, they should rather be subject to remedial action. The third approach started from a similar premise as the second one. It put emphasis on the fact that subsidies other than export subsidies are widely used as important instruments for promotion of social and economic policy objectives and therefore it would not be appropriate to extend the concept of prohibition to any category of domestic subsidies. Furthermore, developing countries faced a multitude of distortions which needed to be corrected for promoting efficiency. In some cases, because of paucity of resources, developing countries had to limit their corrective measures to the export sector only. For that reason also some export subsidies should be excluded from the prohibited category (see paragraph 9 below).

5. On the question of remedies, the prevailing view was that the consequence of the prohibition of a subsidy was the obligation not to grant such a subsidy and, in case of violation, the obligation to remove the measure. The approaches differed in the area of countermeasures. One approach was that the appropriate remedy for any violation of a prohibition should be recourse to GATT dispute settlement procedures and multilaterally authorized countermeasures. In this context some delegations expressed their view that the dispute settlement procedures should be improved to ensure equitable solutions for both parties to a dispute. Another approach started from the premise that classifying subsidies under the prohibited category contained the presumption of nullification and impairment, including injury. This presumption was the basis for abandoning the injury test, i.e. to permit countervailing measures without injury test but to provide recourse for the subsidizing country to a more effective dispute settlement procedure to prove that the subsidy in fact is not of a prohibited type. The third approach was based on the same premise as the second one, i.e. that the maintenance of a prohibited subsidy should be considered as a per se violation of the subsidizing party's obligations and therefore the affected country would be entitled to take appropriate countermeasures which, in some cases, would be in the form of a duty equalling the amount of the subsidy. No agreement has emerged from the discussion of these three approaches. The countries favouring the first approach maintained that the nature of countervailing duties must remain inherently remedial and, consequently, an "injury test" must remain necessary to justify the application of countervailing duties even when they are imposed to offset the effects of a prohibited subsidy. They were also against any extension of the possibility to take unilateral countermeasures. The position of the countries supporting the second and the third approach was that the prohibited category would have to be subjected to more stringent countermeasures, otherwise it would not differ from the category of actionable subsidies.

#### Definition of an actionable subsidy

6. Some delegations proposed a number of criteria to define an actionable subsidy while some others considered that the category of actionable subsidies should rather be a residual category, i.e. comprising those subsidies not fulfilling the criteria for either prohibited or non-actionable subsidies. Criteria proposed under the first approach were that a subsidy (i) had to confer a quantifiable benefit to the recipient, (ii) be limited to actions which imply expenditure of public funds or otherwise a cost to a government (including revenue foregone) and (iii) be specific to a firm or an industry (the concept of specificity covering de jure and de facto specificity). Other delegations said that although they were not objecting to those criteria, they did not consider them as covering all cases. In their view, a charge on the public account was not always a necessary criterion for a subsidy to be countervailable or otherwise actionable. Other measures which were dependent for their enforcement on government action should also be included, for example any government action which conferred a benefit to the recipient firm. They also considered that under certain circumstances, a subsidy could exist even if the conditions of specificity were not fully met, e.g. in the case of so-called "natural resource subsidies".

7. Delegations which favoured the first approach were of the opinion that going beyond the criteria proposed by them, in particular using what they consider to be such a vague concept as "benefit to the recipient" or extending actionability to some generally available measures, would result in an unlimited definition of a subsidy under which any governmental action could be countervailable or actionable. They considered that this would be inconsistent with the traditional GATT concept of a subsidy and would create a legal uncertainty in a field which is particularly delicate because of the possibility for contracting parties to take unilateral countermeasures.

#### Non-actionable subsidies

8. There was widespread agreement in the Group that de minimis subsidies should not be actionable. There was also strong support for the idea that generally available measures should be non-actionable. However, one participant was of the opinion that there might be situations where general availability of a measure might not be sufficient to make it non-actionable. This participant considered that generally available measures which would be non-actionable should be clearly spelled out.

9. A number of approaches were proposed for the non-actionability of some specific measures. One approach was that this category should include those practices which, subject to strict conditions, do not affect international trade, or whose effect was less than significant or not identifiable. If these conditions were not met, the subsidy would become actionable. Specific examples of measures to be included into this category were given. Another approach was based on an exhaustive list of domestic subsidies which, under specified conditions, would not be actionable. In addition, in order for a particular subsidization programme to enjoy the benefit of non-actionability, the subsidizing contracting party should have the obligation to notify such a programme to the GATT. In the absence of such a notification, a programme would automatically be presumed to belong to the actionable category. Under another approach, the major test for classifying subsidies in this category should be whether the measure was one which caused distortions or eliminated existing distortions. If the subsidy was neutral or compensatory in nature, it should be non-countervailable/non-actionable. This category could also include some export subsidies if they served merely to offset existing distortions, especially in the case of developing countries. Some examples of such export subsidies were given. A view was also expressed that incentives to enhance efficiency and productivity of already profitable and developing industries should not be considered as subsidies and thus should not be actionable.

10. There were also some differences as to the so-called "special safeguard procedures". One view was that non-actionable subsidies should have no trade effects; if such effects could be demonstrated, the subsidy in question would become actionable. Another view was that even if a non-actionable subsidy resulted in some negative trade effects, such effects should be tolerated and no action should be possible.

Proposals on behalf of the least-developed countries

11. The representative of Bangladesh introduced document MTN.GNG/NG10/W/28 containing proposals for special treatment of the least-developed countries in the subsidies/countervailing measures area. The Group will revert to this proposal at a subsequent meeting, in the context of the discussion of item 4 of the framework, concerning special treatment for developing countries.

B. Arrangements for the next meeting of the Group

12. As agreed at the meeting of 27 April 1989, the next meeting of the Group will be held on 20-21 February 1990. At that meeting the Group will complete its discussion of issues in specific proposals from participants.

13. In his concluding remarks the Chairman recalled that, as required by the Negotiating Plan, the Group should start negotiations on the basis of specific drafting texts. He also referred to the introductory part to the framework adopted by the Ministers in Montreal which provided that "further progress in the negotiations will depend on the submission of specific drafting proposals". Delegations were, therefore, requested to submit specific drafting texts which would constitute a basis for the negotiations.