

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

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

MEETING OF 20-21 FEBRUARY 1990

Note by the Secretariat

1. The Group met on 20-21 February 1990 under the Chairmanship of Mr. Michael D. Cartland (Hong Kong). The Group adopted the following agenda:

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

A. Framework for the negotiations: discussion of issues in specific proposals from participants

1. The Group had before it a total of ten submissions on various elements of the framework for the negotiations. In addition to Canada (MTN.GNG/NG10/W/25), Switzerland (W/26), Japan (W/27), United States (W/29), Nordic countries (W/30), EEC (W/31), Australia (W/32) and India (W/33) which had tabled their submissions prior to previous meetings, Korea (W/34) and the United States (W/35) had put forward new detailed proposals.

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 2.1.2 (Actionable subsidies - remedies), item 4 (Special and differential treatment for developing countries) and item 5 (Notification and surveillance).

Actionable subsidies - trade effects: injury

3. One participant said that there was a consensus in the Group that the injury test was a conditio sine qua non for countervailing measures. He also saw a large measure of agreement that cumulation of injury should not be mandatory and that de minimis subsidies and negligible imports might be

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excluded from cumulation. He recalled his delegation's proposal that the criteria of price suppression or lost sales and reduced profits should be considered as minimum requirements for every injury determination. Several participants shared the view that cumulation should not be mandatory; some considered that it should be flatly prohibited. A number of participants were of the view that in no case marginal suppliers with a small market share and suppliers with a de minimis subsidy should be included in an investigation. A view was also expressed that non-actionable subsidies should not be included in any cumulation nor should they be considered in establishing the level of subsidization. Some delegations reiterated the view that the injury threshold should be strengthened and that the causality link between subsidized imports and injury should be clearly established.

4. Some participants said that cumulation of subsidized imports was economically sound and necessary. Indeed, if injury was caused by subsidized imports, it was irrelevant whether these imports originated in one or several countries. They also considered that the concept of minimum market shares was not workable and that, in general, mechanical criteria would not allow to capture the specificity of each particular case. One participant gave some concrete examples to show that the criteria of price suppression or reduced profits could not be considered as principal factors in all injury cases.

5. Several participants expressed the view that the recommendation concerning determination of threat of material injury, adopted by the Committee on Anti-Dumping Practices in October 1985 (ADP/25) constituted a good basis to deal with this issue. It was also suggested to include, in any new agreement, a provision corresponding to Article 3:6 of the Anti-Dumping Code. One participant referred to his newly-tabled proposal (W/35) which contained some suggestions on specific additional factors for determining threat of injury. Another participant found some of these factors too imprecise and discretionary.

6. Some participants considered that the existing definition of the term "domestic industry" should be interpreted in a narrow way, i.e. not to include producers of inputs or parts and components. They did not see any rationale for establishing different rules for producers of agricultural inputs and considered that such exceptions would constitute dangerous precedents and would lead to a significant increase in countervailing duty actions. Some other participants recalled that agricultural inputs were not subjected to the same disciplines as industrial inputs and if this could be resolved it might, at least indirectly, resolve the problem of the definition of "domestic industry". Several participants reiterated the need of defining the term "major proportion" and recalled their previous proposals that it should mean at least 50 per cent of the total domestic production of the like product.

Actionable subsidies - trade effects in the domestic market of the subsidizing country and in third country markets. Related remedies.

7. A number of participants agreed that this issue was of key importance to make the so-called "effect-oriented approach" to subsidy disciplines credible and workable. It was pointed out that the negative experience with this approach related to such factors as the general weakness of the dispute settlement procedures, absence of precise criteria for the determination of the existence and the assessment of injury and lack of an effective remedy mechanism. If this mechanism was to be based on a dispute settlement procedure involving panels, these panels would have to have precise criteria to be used as guidelines in the determination of the existence of adverse effects and their assessment.

8. Some delegations said that as the question of nullification or impairment had been sufficiently covered by existing GATT rules or decisions, the basic effort should concentrate on the concept of serious prejudice. There were some similarities between this concept and that of injury, although there were also some important differences. The concept of injury was used to deal with adverse effects caused in the domestic market of the importing country and focused on the harm done to the domestic industry, whereas serious prejudice was caused to the trade interest in third country markets. A view was expressed that serious prejudice could be caused either by some subsidies because of their nature (e.g. large domestic subsidies) or by effects of a subsidy such as displacement, price undercutting or price suppression. There was, therefore, a clear need for precise criteria which would enable parties concerned to establish a quantifiable standard of evidence, which standard would be rebuttable under some precise criteria. The experience with injury determinations could be used in the sense that, similarly, subsidized imports would result in such serious prejudice factors as changes in relative market shares, price suppression or price undercutting. The second important element for improved disciplines was the nature of remedies. The widespread view was that if adverse effects had been found, the subsidizing country would be obliged to redress the situation. This could involve elimination or reduction of the subsidy or compensation and, finally, countermeasures affecting products traded between the subsidizing and the complaining country.

9. Some participants recalled their position that a remedy mechanism for subsidy effects in markets other than the importing country market had to be multilateral and that countermeasures could be taken only after appropriate multilateral authorization. Some participants considered that there was a difference between situations arising in a third country market and in the domestic market of the subsidizing country. In this latter case one should consider the factual and conceptual relationship between subsidies and tariffs. There was no rationale to treat subsidies less favourably than tariffs, except where there was a clear case of nullification or impairment. It was also suggested that, in dealing with the question of displacement, due account should be taken of the existing provision in footnote 27 to Article 8 of the Subsidies Code.

10. Some delegations said that they were still not convinced that the effect-oriented approach would be workable. Most of the criteria proposed were hardly quantifiable or assessable in any other way. There was also the question of burden of proof which, so far, had been used in such a way that it was very difficult, if not impossible, to prove anything. There had also been a rather disappointing experience with dispute settlement in the subsidies area.

Actionable subsidies - countervailing measures

11. Most participants were in favour of a sunset clause under which a countervailing duty would be terminated after five years, unless a review was requested, and in such a case the duty could be maintained for a further three years. Some other participants were of the view that, after a five-year period, any further maintenance of a countervailing duty could be possible only after a new and full investigation. A participant considered that any automaticity was not a logical way to resolve the problem and the existing mechanism of periodic reviews, suitably improved, could ensure that countervailing duties would be used only as long as there was subsidization which was causing injury. Some participants said that the review mechanism was not sufficient, in particular that it was very difficult for the exporting country to obtain a sufficient basis for an injury review and that most reviews were delayed by several years. A sunset clause mechanism would ensure that the whole situation would be periodically reviewed.

12. Several delegations reiterated their proposal to provide procedures for formal consideration of whether the imposition of countervailing duties was in the public interest. Some other delegations said that their investigating authorities had always been taking account of the public interest in their decision-making process and that it was up to each country to decide what was in the best interest of its constituencies.

13. A number of participants called for greater transparency and predictability in the conduct of countervailing duty investigation. It was pointed out that, in many instances, the standard of evidence required for the opening of an investigation was too low and that investigations had been opened without verification of the standing of petitioners. Several delegations repeated their position that the investigating authority should verify that the petitioner was supported by producers representing at least 50 per cent of the total domestic production and that it should not initiate investigation without having sufficient evidence of such a support. Several participants voiced their support for a proposal that sufficient time should be allowed for consultations between countries concerned before the opening of an investigation. This time-period could be prolonged by mutual agreement if the consultations seemed to lead to a mutually acceptable solution.

14. Some delegations proposed to clarify the definition of sale in the sense that it would not permit countervailing duty investigation or action at the tendering stage before a sales contract had been concluded. Some other participants considered that, in respect of large investment goods offered for sale at long intervals on the basis of tenders, it might be too late to take remedial action against subsidized imports when a definitive sales contract had been concluded or when the product had actually been imported. However, the countries which had made the proposal, while recognizing the problem, were of the view that permitting the initiation of countervailing duty investigation already at the stage of irrevocable offers would open the door for harassment complaints and other impediments to the normal conduct of international trade.

15. One participant, supported by some others, suggested that in order to prevent frivolous and unjustified petitions for countervailing duties and avoid undue harassment of exporters, a provision should be established that, in case of negative findings, all legal expenses of the petitioned party or at least a substantive part of them should be borne by the petitioners. This suggestion was not acceptable to several other participants. They pointed out that there was no legal basis in the General Agreement or the Subsidies Code for such an action. Furthermore, they considered that any such provision would have to be balanced by a provision establishing compensation for past injury and legal expenses of the petitioner in the case of an affirmative finding.

#### Special and more favourable treatment for developing countries

16. Several developing participants expressed the view that the situation which had prevailed at the time when Article 14 of the Subsidies Code had been drafted remained unchanged and that the need for special treatment still existed. It was pointed out that developing countries, because of limited resources and balance-of-payment problems, had to give priority to the export sector but, in total, their subsidies constituted only a fraction of those given in developed countries. It was also stated that Article 14 of the Subsidies Code was based on sound economic logic and principles. Developing countries faced a number of external and internal distortions and the best way to deal with them was to eliminate them at the source, and subsidies seemed to be the most appropriate instrument to that end. The objective of export incentives was not, therefore, to give an additional advantage vis-à-vis competition but to neutralize the handicap which developing countries had in their export markets and export activities. This was why Article 14 recognized that subsidies were an integral part of economic development programmes and provided that developing countries should not be prevented from adopting measures and policies to assist their industries including those in the export sector. Those participants, therefore, wished that Article 14 be retained and that developing countries should not be bound by any prohibition of subsidies. If measures were to be taken against such subsidies, they could be taken only under procedures for actionable subsidies. In addition, some of

those subsidies, of particular interest for developing countries, should be non-actionable. Several developing participants expressed the view that Article 14 could not be construed as a blank cheque for developing countries. Indeed, it contained a number of provisions to ensure that developing countries do not adopt measures which would be inconsistent with their development needs. A view was also expressed that developing countries had already been subjected to a natural discipline on subsidies resulting from the lack of financial resources. This important constraint prevented them from causing injury or serious prejudice to the trade interests of other participants.

17. Some participants said that the approach reflected in the Subsidies Code to the problems of developing countries had not worked effectively. Some more developed among the developing countries faced different generic problems than other developing countries, not to mention the least-developed ones. There was, therefore, a need to have a more specific approach and to integrate developing countries into the subsidy disciplines in relation to their level of economic development. A view was expressed that the model of economic development based on massive subsidization of exports while the domestic market remained closed proved to be highly unsatisfactory. There were countries which had achieved such a level of economic development that there was no justification for their export subsidization or for their claim to special treatment. On the other hand, the economic situation of certain countries had not improved. This latter group deserved special and even improved treatment. Such treatment would not, however, be available to those countries which were able to assume the obligations of the Code. It was also pointed out that countervailing measures, because of their nature and the fact that they were to offset material injury to an industry, could hardly be different for different contracting parties. However, some subsidies, otherwise actionable, could be considered as non-actionable for the least-developed countries. As to some other developing countries, a transitional period could be established to enable them to gradually assume subsidy disciplines. Some developing participants said that the approach of many other participants would result in the creation of a new category of participants in the negotiations. However, neither the Punta del Este nor the Montreal Declaration provided for such a distinction, and therefore this approach was not acceptable.

#### Notification and surveillance

18. Several participants stressed the need for increased transparency and discipline regarding the notification of subsidies, in order to give individual countries and the relevant GATT bodies a real opportunity to assess and appreciate a subsidy in the light of possible new obligations. It was pointed out that one of the reasons for the failure of the present disciplines on subsidies was the fact that the existing system of notifications had not fulfilled its rôle. The general feeling seemed to be that a new, improved system of notifications was a conditio sine qua non for better disciplines in the subsidies area.

19. A number of participants supported the proposals on the improvement of notifications contained in W/30. Some added further ideas, such as a requirement for new and full notifications under Article XVI:1 of the General Agreement to be submitted and reviewed every year or the rôle of notifications as a condition for non-actionability of certain subsidies. A suggestion was made that every participant, while notifying its subsidies, should indicate to which category (i.e. prohibited, actionable or non-actionable) each of the notified measures belonged.

20. Some participants, while recognizing that transparency through notifications was a key requirement for effective multilateral disciplines on subsidies and countervailing measures, said that the nature of improvements would not become clear until there was a clearer sense of what substantive rules were agreed to by the participants. There were also some doubts as to the proposal in W/30 to notify also planned or proposed subsidies. It was pointed out that in some cases such planning required confidentiality and, more importantly, it might constitute part of sovereign policies of governments which, at the decision-making stage, had never been scrutinized by GATT. Some participants said that the need for increased transparency should not result in unmanageable inflow of information which would be impossible to digest and therefore useless in practice.

B. Arrangements for the next meeting of the Group

21. The Chairman reported to the Group on the informal consultations he had held with interested delegations concerning the organization of the Group's further work and how it should proceed into the final stage of the negotiations. As a result of these consultations, he had been requested to prepare a single draft text which could be used as a basis to bring the Group's work to a conclusion. He would accept such a request, if confirmed by the Group, although he did recognize that it was a heavy responsibility, particularly considering that there were still wide divergencies in some areas. The Chairman's text would not be a compilation of alternative proposals nor would it contain square brackets or alternative approaches, but it would be a single text attempting to address all issues in the Framework for the negotiations. However, at least in its first version, the text would not address every issue in the same degree of detail. In certain areas it would be quite specific while remaining more conceptual in nature in other areas and leave room for further precision to be brought in through the negotiating process.

22. The Chairman further said that he had taken note of the caution expressed by some delegations about the timing of the paper and recognized the need to discuss certain subjects further and to give more precision to some aspects. For that reason, no such paper would appear in time for the next meeting. Instead, the Group would continue to have on the agenda the discussion of issues in the Framework and this should give an appropriate opportunity for delegations which wished to explore certain issues further to do so. The delegations should, therefore, give every consideration to

these issues and inform the Chairman or the secretariat in advance of the March meeting of subjects they wished to discuss. At the meeting these delegations would introduce their subjects and other participants would be invited to speak on one subject at a time. In this way each subject would be examined before moving to the next subject.

23. The Chairman proposed that, in addition to the meetings already scheduled (i.e. 27-28 March, 30 April-1, 2 May and 31 May-1 June), the Group hold two more meetings, on 21 and 22 June and on 12 and 13 July 1990. That would give a total of five more meetings covering eleven meeting days and should be considered as the totality of the remaining negotiating time available to the Group before the TNC meeting in July, bearing in mind the time-table given by the Chairman of the TNC, i.e. that during the period January-August 1990 the objective should be to reach negotiated agreement in each of the Groups.

24. The Group agreed with the Chairman's statement.