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Negotiating Group on Subsidies
and Countervailing Measures

# ELEMENTS OF THE FRAMEWORK FOR NEGOTIATIONS

## Proposal for Improvements to the International Rules on Countervailing Measures

## Communication from the United States

The United States submits the following comments and proposals in connection with the Negotiating Group's efforts towards improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade. The United States reserves the right to submit further comments and proposals as the negotiations proceed.

## I. Introduction

This paper supplements the United States submission to this Negotiating Group of 22 November 1989 (MTN.GNG/NG10/W/29), and addresses three additional areas. In Section II, the United States calls for an update of the international rules on subsidies and countervailing measures to prevent circumvention. Section III sets forth proposals for increasing transparency in countervailing duty proceedings and establishing minimum procedural standards. Finally, Section IV suggests reform of certain substantive provisions of the existing Code with the goal of achieving clearer guidance for their administration once incorporated into the new international rules emerging from these negotiations.

The United States' attention to circumvention arises from its concern that circumvention practices enable exporting firms to evade the remedy to which a domestic industry is otherwise entitled from subsidized imports. A consequence of the ability of exporting firms to negate this relief is the domestic industries' lack of confidence in the remedies available to address unfair competition.

Section III reflects the longstanding view of the United States that participants in countervailing duty proceedings, whether they be foreign or domestic, should have the opportunity to make their case before the investigating authorities, that investigating authorities should base their decisions upon the facts and the law in a particular case, and that the decisions of investigating authorities should be sufficiently clear and

detailed that concerned parties can make an assessment as to whether the authorities complied with applicable rules. The third section of the US proposal offers suggestions for strengthening the uniformity of minimum procedural standards for countervailing duty cases and for improving the "transparency" of the proceedings, and will increase the accessibility of the proceedings to participants, whether domestic firms, importers or foreign exporters.

Finally, the United States believes that there are certain other issues, related to provisions interpreting current GATT rules concerning the finding of injury, threat of injury or material retardation caused by subsidized imports, and critical circumstances, that merit clarification and elaboration. The fourth section of the US proposal includes amendments which would establish clearer guidelines for the administration of these provisions to make them more effective, when they are applicable under GATT-consistent procedures.

As it has made clear in the past, the United States is willing to examine all proposals submitted to the Negotiating Group, to discuss matters of specific concern to members of the Group as negotiations progress.

II. Amendments to the Code to prevent circumvention

In recognition of the need for more effective remedies against instances of circumvention, the United States proposes the following criteria, procedures and remedies for addressing these practices in a GATT-consistent fashion.

Industries that have demonstrated that they are entitled under GATT-consistent domestic procedures to relief from subsidies need to know that such relief will be effective - that it will not be neutralized as a result of minor changes to the covered product or the way in which the product is produced so as to avoid application of countervailing duty measures. Where it can be determined, on the basis of an objective analysis, that such minor manipulation of the form or production of a product exists, investigating authorities should have the ability to clarify the breadth of the original countervailing duty measure to prevent such circumvention.

The United States proposes that the instances in which there could be circumvention of a countervailing duty measure should fall into three categories:

1. Instances where parts and components are shipped from the country covered by the countervailing duty finding[1] to the importing country for assembly or completion into a product covered by the

[1]Reference to a "countervailing duty finding" means that the investigating authorities have found subsidies and, where appropriate, injury caused by the subsidized imports under GATT-consistent procedures.

countervailing duty finding, and the value of the parts and components imported from the country subject to the countervailing duty finding is equal to or exceeds [X] per cent of the total value of the assembled or finished product.

2. Instances where parts and components are shipped from the country covered by the countervailing duty finding to a third country for assembly or completion into the product covered by the countervailing duty finding, which is then exported to the importing country, and the value of the parts and components imported from the country subject to the countervailing duty finding is equal to or exceeds [X] per cent of the total value of the assembled or finished product.

3. Instances where producers in a supplier country covered by the countervailing duty finding begin exporting to the importing country altered or later-developed products.

These scenarios describe the essential thresholds for identifying where circumvention may be occurring. In the first two cases of circumvention through minor assembly or completion, a "bright line" value test is included to provide a transparent and predictable initial measure enabling businesses to determine whether a particular activity or set of activities is likely to result in a finding or circumvention.

In determining whether to include parts or components assembled or completed in the importing country within the original countervailing duty measure, investigating authorities should consider: (i) whether imports of the parts or components have increased since the issuance of the countervailing duty measure; (ii) the relationship between the exporter of the parts or components, the producer covered by the countervailing duty measure, and the assembler in the importing country; and (iii) whether the most significant parts or components are being shipped to the importing country for assembly or completion.

In determining whether to include merchandise assembled or completed in a third country within the original countervailing duty measure, investigating authorities should consider: (i) whether shipments of the parts or components to the third country have increased since the issuance of the countervailing duty measure; (ii) whether exports to the importing country of the merchandise assembled or completed in the third country have increased since the issuance of the countervailing duty measure; (iii) the relationship between the exporter of the parts or components, the producer covered by the countervailing duty measure, and the assembler or finisher in the third country; and (iv) whether the most significant parts or components are being shipped to the third country for assembly or completion.

In the third case, involving production and exportation of altered or later-developed products, the clarification of the products covered by the original countervailing duty measure could encompass merchandise which, for example, is altered slightly to place it technically outside the stated scope of the original measure.

In all three categories of circumvention, investigating authorities should be permitted to withhold appraisement of the relevant merchandise entering from the time the circumvention enquiry is instituted, with a view toward assessing duties from that time forward if circumvention is found to exist. In addition, because of the minor nature of the changes in the production of the product, there should be no requirement to determine whether the relevant merchandise is being subsidized. However, in all three cases, the original countervailing duty measure may not be extended if doing so would be inconsistent with any injury determination that gave rise to it.

## III. Minimum procedural standards and transparency in countervailing duty proceedings

The United States is of the view that greater transparency in countervailing duty proceedings would help make these proceedings more understandable to all participants, whether domestic firms, importers or foreign exporters, and would ensure that uniform minimum procedural standards exist. The United States has identified a number of specific areas where it believes that parties would benefit from more precision in the rules that currently exist for the conduct of national countervailing duty actions. This proposal incorporates and builds upon the procedural requirements already reflected in current interpretations of existing GATT rules, and proposes that the instrument that results from these negotiations contain at least this level of particularity with regard to such proceedings. To this end, the United States offers proposals in the following areas.

### A. Initiation of countervailing duty investigations

The initiation of a countervailing duty investigation is a significant event, and the Subsidies Code currently requires that investigating authorities publish notice of an initiation of a countervailing duty investigation and notify certain parties known to be interested in a case. However, a decision not to initiate a case is also a significant event, and if authorities do not announce that fact, parties are left with uncertainty and business planning is rendered more difficult. Therefore, we propose that the Code require the authorities concerned to publish notice when they reject a written request to initiate a countervailing duty investigation, and to provide notice to all interested parties, in accordance with a new definition of "interested parties", discussed infra.

### B. Access to information and argument

The current Code provides generally for the right of interested signatories and interested parties to submit information and written legal arguments to investigating authorities in order to defend their interests. However, it does not clearly provide a party with a right of access to the written arguments made by the party's adversaries. It is only through access to such information and argument that a party can point out any

inaccuracies or irrelevances in information submitted or errors in arguments presented, and thereby defend its rights. For this reason, the United States believes such access should be required.

The Code also provides parties with the opportunity to see information in the possession of investigating authorities that is relevant to the parties' defence. However, it could be improved by providing that the investigating authorities shall, where practicable, provide the opportunity to see information on a timely basis.

The Code does not clearly provide for treatment of factual information received orally or discuss how, if at all, such information is to be made available to the parties. Based on our experience, investigating authorities ought to discourage parties from making oral submissions of factual information. However, there may be situations in which such submissions are necessary. When such situations exist, parties should subsequently be required to reduce such submissions to writing. In the opinion of the United States, investigating authorities should be required to summarize information obtained orally (such as information obtained from non-parties) and to make all summaries of oral submissions available to interested parties, taking into account the need to protect confidential information.

C. Definition of "Interested Party"

We also propose that the Code include a new definition of "interested party", to clarify those currently referred to in the Code as "interested parties" or "interested signatories". An "interested signatory" or "interested party" in the existing Code refers to a signatory or a party economically affected by the subsidy in question. The United States believes that the Code should include a minimum list of those entities that would have to be considered "interested parties" under national countervailing duty legislation. We emphasize that those countries that choose to do so could add additional categories of interested parties to their own domestic legislation. The list of "interested parties" should include:

(i) a foreign manufacturer, producer, or exporter, or the importer of merchandise which is the subject of an investigation, or a trade or business association a majority of the members of which are exporters or importers of such merchandise;

(ii) the government of the country in which such merchandise is produced or manufactured;

(iii) a manufacturer, producer, or wholesaler in the importing country of a like product;

(iv) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the importing country of a like product;

(v) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the importing country;

(vi) an association, a majority of whose members is composed of interested parties described in clauses (iii), (iv) or (v) with respect to a like product; and

(vii) in an investigation involving an industry engaged in producing a processed agricultural product, a coalition or trade association which is representative of either processors, or processors and growers.

D. Business confidential information

As currently written, the Code permits investigating authorities to treat business information as confidential, and to require a non-confidential summary of such information. The thrust of the provision is to strike a balance between the need to protect confidential business information from unwarranted disclosure and the need to provide parties with access to such information so that they may defend their interests. However, the Code does not specify the nature of the non-confidential summary that may be required.

The United States is aware of criticisms to the effect that, in certain cases, investigating authorities may have required non-confidential summaries that were insufficiently detailed. To overcome this problem, the United States proposes strengthening the obligation on investigating authorities to provide parties with adequate access to information. First, a person claiming confidential treatment for information should be required to show "good cause", not merely "cause", as is currently required. Second, the obligation on investigating authorities to provide a non-confidential summary should be mandatory, not discretionary. This obligation may be met by requiring all persons submitting information to prepare a summary, or by the investigating authorities preparing a summary, or any combination of the two. Finally, the summary should be in sufficient detail so as to permit a reasonable understanding of the substance of the confidential information.

One method of dealing with the problem of confidential business information is to permit access to such information under protective order to representatives of parties to countervailing duty proceedings. In general, the experience of the United States with this type of procedure has been successful. Currently, the Code acknowledges the existence of protective order procedures, but expresses no preference that such procedures be used. We believe that the interests of transparency could be furthered if the Code recognized the desirability of protective order procedures.

The Code also deals with the treatment of confidential business information and as currently written, permits investigating authorities to reject unwarranted claims for confidential treatment. Where confidential

information is rejected, and where the supplier of the information refuses to make the information or a summary thereof publicly available, authorities may, but are not required to, disregard such information.

The United States believes that the interests of transparency could be furthered if, where claims of confidentiality are unwarranted, other parties should have access to all the information, not just a summary. Moreover, the investigating authorities should not have the option of using non-confidential information which is not disclosed in toto to other parties. Thus, we would require an investigating authority to return information to the submitter where: (1) the authority concludes that a request for confidential treatment is unwarranted; and (2) the submitter refuses to withdraw its request for confidential treatment.

E. Verifications

On-site verification of the accuracy of information submitted in countervailing duty proceedings is an extremely important event. If an investigating authority concludes as a result of the verification process that submitted information is inaccurate, it is authorized to disregard such information. In the experience of the United States, the outcome of countervailing duty proceedings sometimes turns on the question of whether or not a particular item of information was verified. Thus, access to verification reports is critical if parties are to defend their interests, both at the administrative and judicial levels.

While we believe that access to verification reports is essential to transparency, it is not clear to what extent countries provide such access. It is our view that the goal of transparency could be strengthened by expressly requiring in the Code that verification reports must be made available to the firms to which they pertain. Investigating authorities would have the discretion to make such reports available to complainants.

F. Hearings

Various countervailing duty systems provide for a right of parties to confront their adversaries in "confrontation conferences" or "hearings". The US believes that any interested party (as defined in this proposal) should have the opportunity to confront its opponents and that authorities should be required to prepare a transcript of hearings, and that a copy of such transcripts (taking account of the need to protect confidential business information) should be made available to the public. The US believes the Code could be strengthened by requiring such hearings, on request.

G. Undertakings

The Code deals with the obligation to provide notice of (1) the suspension or termination of a countervailing duty investigation due to an undertaking, and (2) the termination of an undertaking. However, as currently written, the notice requirements of the Code are minimal. In

order to have the same transparency requirements for undertakings as for investigations that result in countervailing duties, authorities should be required to publish a copy of any undertaking concluded.

H. Explanation of findings

The Code establishes an obligation to give public notice of preliminary and final countervailing duty findings. The United States believes that this provision could reinforce the goal of transparency by strengthening the code requirements for explaining the authorities' decisions. The obligation on authorities to explain their decisions should not be limited to those issues "considered material by the investigating authorities". This leaves too much discretion with the authorities not to explain their treatment of certain issues by simply labelling them "immaterial".

In addition, the Code should require just as full an explanation for negative as affirmative findings. The goal of transparency in countervailing duty proceedings is that cases be decided pursuant to the rule of law. One aspect of the rule of law is that these cases be decided consistently or, when they are not, the reasons for different outcomes are explained by the decision maker. In terms of their precedential value, negative findings are equally as important as affirmative findings and should, therefore, be subject to the same "transparency" requirements.

Finally, the Code should require disclosure of the details of a countervailing duty calculation methodology. Countervailing duty findings sometimes hinge upon simple matters of arithmetic but, for reasons of confidentiality and administrative practicality, the details of calculations cannot be included in a public notice. Nevertheless, these details are often critical, and access to such information is necessary for parties to defend their interests at the administrative level and make informed decisions as to judicial challenges to countervailing duty findings. For these reasons, investigating authorities should be required to disclose, upon request, the details of their calculation methodologies, after both preliminary and final findings.

I. Review of findings

In general, reviews are used to: (1) review the continued need for countervailing duty measures; and (2) modify the amount of countervailing duties to be imposed. It is the experience of the United States that, although such reviews can have important practical consequences, the Code is woefully inadequate in terms of establishing transparency requirements. Therefore, the United States would propose that the Code require that the notice and procedure requirements similar to those that apply to countervailing duty investigations be applicable to reviews.

J. Retroactivity

Decisions on retroactivity can be extremely important to the parties involved in a countervailing duty proceeding, because they establish the

effective date for the imposition of the duties. However, it is unclear in the current Code whether an investigating authority need even announce to the public the retroactive imposition of duties, let alone the reasons for such imposition. To remedy this defect, the Code should require the same type of notice for decisions on retroactivity as for preliminary and final determinations.

K. Independent review of administrative action

Finally, the United States believes that the operation of countervailing duty systems would be improved if certain minimal obligations pertaining to the review of administrative actions were added to the Code. It is the understanding of the United States that such review may not exist in all countervailing duty systems, and that the type of review available may depend upon the category of interested party into which a particular person happens to fall.

The United States proposes, at a minimum, that all final countervailing duty findings and the results of reviews of countervailing duty findings should be subject to review by an independent tribunal. In addition, all interested parties to the countervailing duty investigation should have equal access to immediate independent review.

IV. Substantive clarifications to ensure effective relief

There are several Code provisions related to the issues of injury, threat of injury and critical circumstances, which the United States believes should be clarified to provide more precise guidelines to ensure more effective relief. The US proposal articulates additional factors to be considered in determining injury and threat of injury, and suggests clarifying the critical circumstances provision.

A. Factors for determining injury

The United States believes that an additional factor should be added to those considered in determining injury. Specifically, this enquiry should take into account the harm done to efforts to develop and produce derivative or more advanced versions of the like product, in addition to other factors listed in the existing Code.

B. Threat of injury

The United States also proposes listing specific additional factors for determining threat of injury. The enquiry should consist of an evaluation of all relevant economic factors and indices, including among other things: a significant rate of increase of subsidized imports into the domestic market; freely disposable capacity in the exporting country; exports at prices that will have a suppressing or depressing effect on domestic prices; inventories in the importing country of the product being investigated; the likelihood of increased imports due to product shifting;

and actual and potential negative effects on existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

C. Critical circumstances

Finally, the United States would point out that the timing and volume of subsidized imports, as well as other circumstances attending the subsidized imports, may have the effect of postponing the remedial effect of the order, where the injury is caused by sporadic subsidization. Indeed, massive subsidized imports which enter into inventories over a short period prior to entry of an order may be drawn down subsequent to the entry of the order, temporarily vitiating the remedial effect of the order. Accordingly, the retroactivity provision needs to be clarified in order to prevent palpable circumvention or evasion of countervailing duty findings by delaying their remedial effect.