

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG10/16

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Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on Subsidies
and Countervailing Measures

MEETING OF 30 APRIL-1 MAY 1990

Note by the Secretariat

1. The Group met on 30 April-1 May 1990 under the Chairmanship of Mr. Michael D. Cartland (Hong Kong). The Group adopted the following agenda (GATT/AIR/2972 and Add.1 and 2):

- A. Framework for the negotiations - discussion of issues proposed by participants
- B. Arrangements for the next meeting of the Group.

A. Framework for the negotiations - discussion of issues proposed by participants

Countervailable subsidies

1. One participant raised a number of issues illustrating in a general manner the ways in which current countervail practice was, in his view, inimical to the operation of an open, liberal trading system. He stressed the need for greater clarity and certainty as to what was countervailable. Otherwise there would continue to be uncertainty which in turn would create problems for businesses trying to make price, output and investment decisions and for policy advisors and programme administrators trying to design government programmes. He also said that standards for initiation had to be sufficiently vigorous; if not, there would be scope for harassment due to the possibility of launching frivolous cases and due to the costs to exporters of fighting such cases. There was also a need to ensure that the countervail remedy corresponded to the trade distortion caused by subsidized imports. The current system could also be improved regarding the equity and fairness in the procedures for investigation and application of countervailing measures and the transparency and administrative simplicity. He gave a number of concrete examples to illustrate the difficult situations that had arisen under the current system.

2. Some delegations fully supported these remarks. Some others referred to their procedures and said that these procedures were transparent and contained a number of specific requirements to prevent their use for harassment purposes. Some participants stressed the need to maintain a balance between the two objectives underlying Article VI of the General Agreement, i.e. to ensure the effective protection of those adversely affected by subsidies and not to unjustifiably impede international trade.

Injury determination - causality

3. A number of participants were of the view that the current interpretations of the causality standard had proven, in a number of cases, unsatisfactory as this standard was interpreted to mean just something less than the full health of industry. If injury was to be attributed to subsidized imports then the causal link had to be clearly demonstrated and the criteria upon which this could be done should be clarified and strengthened. There should be an affirmative finding that there had been an increase in the volume of subsidized imports, which had an effect on prices and consequential impact on the domestic industry. In particular, certain factors should be present, such as either price suppression or lost sales and reduced profits. The amount of subsidization should also be taken into account. If the margin of subsidy was less than the price undercutting found to exist, then the injury determination should be negative. The rôle of other factors which at the same time might be injuring the domestic industry should be examined and explained in a public notice. Some other participants agreed that the causality analysis was a fundamental principle of subsidy disciplines. They considered, however, that there should be no automaticity in the process and that there should be no single factor or factors which, to the detriment of others, would be determinative. The rôle of each factor should be assessed in a particular situation, e.g. whether it was adversely affecting the situation of the domestic industry or preventing it from improving. They also considered that there should be no automatic relationship between the margin of subsidization and injury. Indeed, in some cases a relatively small amount of a subsidy could result in material injury. Furthermore, the effects of a subsidy were not necessarily reflected in prices but could materialize in preserving profits, maintaining levels of exports or enhancing marketing. Finally, they stressed the contributory rôle of subsidization, i.e. it was sufficient that it contributed to injury as one of several factors.

Cumulation and de minimis standards

4. Some delegations considered that cumulation should not be automatic and in no case should there be cumulation of subsidized and dumped imports (across-the-Codes cumulation). The decision whether to cumulate or not should be made on a case-by-case basis. It should take account of whether there were dominant suppliers and fringe suppliers and whether the total share of these fringe suppliers had a collective effect in the determination of injury. The investigating authorities should also

consider the existence of a co-ordinated action by the exporters of the product investigated. Furthermore, de minimis subsidies and negligible market shares should be excluded from cumulation in all cases. As to the de minimis subsidy, it was proposed that it should be established at a certain level below which no countervailing duty action would be possible. As to the de minimis market share, the view was expressed that a small supplier could not cause injury. In addition, such a supplier was usually a price taker and had to follow the prices of dominant suppliers. Any countervailing investigation involving a small supplier automatically eliminated him from the market because he was not in a position to assume the high costs relating to such an investigation. It was, therefore, necessary to establish a de minimis market share threshold. In order to prevent a situation where a high number of small suppliers would obtain, cumulatively, an important market share, a rule could be established that injury would not be found if the total share of all fringe suppliers did not exceed X per cent.

5. Some other participants said that cumulation of imports was not a harassment but an economic necessity. If injury was caused by a given quantity of imports, it was irrelevant whether these imports originated in one or several countries. One participant, referring to his practice, said that the investigating authorities used clearly established criteria to decide whether to cumulate or not. They were also identifying circumstances where imports were to be considered as negligible but market shares were not the only factor in this identification. They had to take account of the susceptibility of the product as in some situations even a small quantity of imports might have important effects. Another participant said that in his practice an important consideration was whether the subsidized products from different sources were competing with each other and with the domestic industry. Another consideration was to determine whether imports from a particular country contributed to injury in a discernible manner. Every such determination had to be made on a case-by-case basis and might differ depending on circumstances surrounding each case.

Definition of "domestic industry" and "like product"

6. A number of participants considered that the term "a major proportion of the total domestic production" in Article 6:5 of the Code and "industry affected" in Article 2:1 should be defined in quantitative terms and suggested a threshold of 50 per cent of the value of the domestic production. They also considered that producers of input products or parts and components should neither be considered as being a part of the industry nor as producers of like products. Some other participants said that the scope of "domestic industry" and of "like product" varied depending on the circumstances of each case; to establish an arbitrary rule that under no circumstances parts and components and the final output were like products was not possible. They also considered that a 50 per cent threshold was too rigid because in some cases producers representing less than 50 per cent should have access to relief.

Initiation and conduct of countervailing duty investigation

7. Several participants considered that the investigating authority should verify that the petitioner or petitioners were actually supported by producers representing at least 50 per cent of the total domestic production or by their duly authorized representatives, and that they should not initiate an investigation without having sufficient evidence of such support. They complained that some participants had, over the period of the functioning of the Code, reduced the requirements relating to the standing of petitioners. There had been cases when only one producer could initiate an investigation.

8. One participant said that if it appeared in the course of an investigation that there was opposition to the petition and that this opposition exceeded the support for it, then his authorities would immediately terminate the case. In this participant's view, it would be difficult to establish a rule requiring affirmative support of more than 50 per cent of the domestic industry and to put the burden of proof on the petitioner. Another participant shared the view that it would be difficult, in particular in a case involving a number of small producers, to observe the formal requirement of 50 per cent. A third participant said that, in his practice, the percentage of the domestic production supporting a petition was usually indicated to the extent possible.

9. Some participants said that it was necessary to define with some precision what constituted sufficient evidence required for the opening of an investigation. This should include some prima facie evidence of the existence of a subsidy, injury and causality. The information submitted should be verified and the investigating authorities should satisfy themselves that all necessary conditions for the opening of an investigation had actually been met. Other participants agreed that there was a need for greater specificity as to the requirements for information to be contained in a petition. They pointed out that some information might not be available to the petitioner and that the petitioner was not required to prove his case at the stage of submitting a petition. However, the investigating authorities should request that a petition contain enough information to avoid frivolous cases and harassment.

10. A participant said that countervailing duty investigations should be initiated only after the product in question had actually been imported or at least the final contract had been signed. He considered that an irrevocable offer was not sufficient to initiate such an investigation. Some participants disagreed with this view and said that in some situations, the likelihood of sales or an irrevocable offer might have a similar injurious impact as actual imports. This was particularly relevant in the case of some capital goods requiring substantial time for delivery.

11. Several participants referred to their proposals submitted in another negotiating group and containing further precision as to who were the interested parties. In particular, they proposed an illustrative list including, inter alia, users and consumers of the affected products. Some other participants expressed their concern about the possibility of an open-ended category of interested parties and its implication for the question of access to judicial review.

12. Several delegations were of the view that procedures should be established for countervailing duty investigations to take into consideration the wider public interests, i.e. not only the interests of the affected domestic industry, but also the interests of users and consumers, and the costs of the countervailing duty investigation to the national economy. It was pointed out that some legislations already contained such a public interest clause. One participant said that a country which wished to have such a clause in its legislation should be free to do so; however, this should not be imposed on other countries as the determination of public interest should be left to the national sovereignty. Another participant said that in his authorities' investigations the interests of consumers, users and the influence of customs duties on the conditions of normal competition had always been taken into account. He considered, however, that a public interest clause should not be diverted from its original purpose and should not make the decision-making process an arbitrary one.

13. Most participants agreed that countervailing duty procedures should be transparent at all stages and that the parties involved should be given adequate opportunity to defend their interests.

Net subsidy concept

14. One participant recalled his proposal that in a countervailing duty investigation the determination of the amount of a subsidy should be based on the difference between the subsidy on imports and the subsidy on domestic production of like products. He gave a concrete albeit hypothetical example to illustrate how the proposal might actually operate. Several delegations supported the "net subsidy concept" and reiterated their views that this concept would ensure more equitable disciplines and might discourage industries from bringing frivolous cases. They said that the example given had helped to understand better how some technical problems could be resolved and expressed their willingness to seek solutions to some remaining problems. Some participants said that although they saw some logic in this concept, they considered it to be too mechanical; they were not clear as to its implications for the subsidies disciplines in general. Some other participants said that this concept could result in perpetuating certain subsidies as the normal reaction of a subsidized domestic producer would be to seek additional subsidies to match the foreign subsidization, instead of having recourse to relief procedures. Consequently, governments would be under tremendous pressure to maintain and even increase subsidies. They also saw dangerous implications for the

question of injury determination. On the one hand, some other factors than injury would have to be taken into account in determining whether or not countervailing duties should be imposed; on the other, injury determined to be caused by subsidized imports would be offset only partially or not at all. Questions were also raised as to the logic of this concept in the wider context of the amount of a subsidy and injury, as well as in relation to the protection through the use of tariffs and other measures. A view was reiterated that this concept was inconsistent with the approach reflected in Article 6:3 of the Subsidies Code which provided that injury might be found if "there has been an increased burden on government support programmes". It was also pointed out that the objective of countervailing duty action was to offset injury caused by subsidized imports and not to deal with subsidies in general.

Imposition of countervailing duties

15. Several participants said that the present language of Article 4:1 of the Subsidies Code indicated a strong preference for a "lesser duty rule". Indeed, a duty could be imposed only if there was injury, and if the injury could be removed by a lower duty, there was no justification for a higher duty. They considered, therefore, that as the removal of injury was a dispositive factor, the "lesser duty rule" should be mandatory and not only desirable. Some other participants expressed their preference for the existing flexibility, because in their view it was very difficult to make a precise assessment as to the amount of injury. In addition, in many cases, injury had already existed for a time before countervailing duties were imposed and this factor should also be taken into account. They also pointed out that countervailing duties were a response to an unfair trade practice which was more easily quantifiable than injury itself.

Undertakings

16. Several participants said that undertakings should be sought or accepted only after the authorities of the importing country had initiated an investigation and had made a preliminary decision on the existence of a subsidy and of injury. They considered that undertakings should be possible also after a preliminary determination of injury had been made and that undertakings should be limited to prices and not quantities. In their view the lesser duty rule should also apply to undertakings. They were in favour of better transparency of undertakings including their publication. Other participants agreed with the need for better transparency. One participant could not agree that undertakings should be limited to prices only; in exceptional circumstances, undertakings on quantities would be appropriate.

Duration of countervailing measures

17. Most participants were in favour of a sunset clause under which a countervailing measure would be terminated after three or five years, unless a review was requested; in such a case the duty, if warranted, could be maintained for a further three years. Those participants

considered that such a procedure should not prevent an earlier elimination of a countervailing duty under a periodic review if the conditions of Article 4:9 of the Code were met. However, their experience with the practical application of this provision was that it was very lengthy and the evidence required on injury was not easily available to exporters. A participant expressed his concern about automatic rules under a sunset clause. He said that although everybody agreed that a countervailing duty should be terminated if there was no subsidy or no injury, the reverse was also true and, therefore, as long as subsidization was causing injury, there was no reason to remove a countervailing duty. He also said that his authorities had a system of annual reviews to determine that a subsidy had been provided; otherwise, no countervailing duty was imposed for that period. In addition there were injury reviews upon request. Another participant said that a sunset clause would not mean an automatic expiry, after some years, of a measure if subsidization and injury were still present. It was an addition to other possibilities, and it differed from an Article 4:9 review in that it required the domestic industry to re-argue its case, in particular with respect to injury.

Compensation by the petitioner of legal expenses of petitioned parties in the case of negative findings

18. One participant reiterated his proposal that in order to prevent frivolous and unjustified petitions for countervailing duty actions and avoid or compensate for the harassment and financial burden borne by exporters, a provision should be established that, in case of negative findings, all legal expenses of the petitioned party, or at least 50 per cent of them, should be borne by the petitioners. Several participants supported this proposal. Other participants pointed out that there was no legal basis in the General Agreement or the Subsidies Code for such an action. They considered that any such provision would have to be balanced by a provision establishing compensation for past injury and for legal expenses of the petitioner in the case of an affirmative finding. A view was expressed that the problem could be allayed by higher standards for the opening of an investigation.

Measures to prevent circumvention

19. One participant referred to his proposal in MTN.GNG/NG10/W/35 and described circumstances where, in his view, it would be appropriate to take measures to prevent circumvention of the remedy to which a domestic industry was otherwise entitled because of subsidized imports. Another participant said that although he might have different views on the mechanism to be used, he strongly supported the principle of anti-circumvention. Several participants expressed their doubts as to whether the question of circumvention was relevant to the countervailing measures area, in particular regarding shipments from third countries. However, assuming that it was relevant, they considered that the key element was the formal relationship between the parties involved and the share of parts and components in the total value of the assembled or

finished product. A number of participants contested the notion of altered or later-developed products and considered that either the product in question was a like product, in which case it was covered by the existing measure; if it was not a like product, a new and full investigation was required. The participant who had submitted the proposal on anti-circumvention said that if a subsidized manufacturer modified, only slightly, his product, then there should be no need for a new investigation. He further said that in the case of circumvention through a third country the problem was not whether there were subsidies in that country but that the product was assembled from parts or components subsidized in the country of origin. As to the question of "related", he said that the formal relationship was not necessary as there could be all sorts of informal arrangements having exactly the same effect.

Remedies - dispute settlement

20. One participant said that although it was difficult to discuss specific mechanisms of dispute settlement before discipline on subsidies and countervailing measures had been fully defined, he saw the need of starting to look at this issue in some detail and stressed the importance to have unified dispute settlement provisions in the GATT to avoid what he described as "forum shopping". However, he recognized that there were certain unique characteristics of subsidies and countervailing measures disciplines which might warrant special procedures. In particular, it was important to ensure that these procedures be speedy and completed in approximately the same time-frame as a typical domestic countervail process. In this respect a panel providing advisory opinions on subsidy practices would have an important rôle to play. Nevertheless, a number of elements of Article XXIII proposals could be replicated in the subsidies/countervail context, e.g. notification, consultation, joint complaints, third party rights, adoption of panel reports and implementation of reports. Several participants stressed the important rôle of the dispute settlement process, not only regarding subsidy disciplines but also at all stages of countervailing actions and in ensuring the conformity of national legislations with the Code. They also agreed with the need to ensure consistency of this procedure with general GATT dispute settlement procedures. Some participants said that they had some doubts regarding the concept and the rôle of an advisory panel.

B. Next meeting of the Group

As agreed at the meeting of 21 February 1990, the next meeting of the Group will be held on 31 May-1 June 1990.