

MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND

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ELEMENTS OF THE NEGOTIATING FRAMEWORK

Proposal for Improvement in Procedures for  
Dealing with Adverse effects in the Home Market of  
the Subsidizing Country and in Third-Country Markets

Submission by the United States

Introduction:

There is a need for more effective multilateral rules for dealing with the problems of adverse trade effects in the domestic market of subsidizing countries and in third-country markets. In examining this issue, this paper focuses on procedural mechanisms for gathering information necessary to make these assessments.

The issue of adverse effects in home and third-country markets is currently addressed in Article 8 of the Subsidies Code, under which signatories agree to:

seek to avoid causing, through the use of any subsidy

- (a) injury to the domestic industry of another signatory<sup>23</sup>,
- (b) nullification or impairment of the benefits accruing directly or indirectly to another signatory under the General Agreement<sup>24</sup>, or
- (c) serious prejudice to the interests of another signatory.<sup>25</sup>

Article 8.3 (footnotes omitted). These concepts also appear in the Chairman's Note at Article 5.<sup>1/</sup> The existing Code goes on to explain:

The adverse effects to the interests of another<sup>26</sup> signatory required to demonstrate nullification or impairment<sup>26</sup> or serious prejudice may arise through:

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<sup>1/</sup> All references to the Chairman's Note are to the version dated 18 May 1990.

- (a) the effects of the subsidized imports in the domestic market of the importing signatory,
- (b) the effects of the subsidy in displacing or impeding the imports of like products into the market of the subsidizing country, or
- (c) the effects of the subsidized exports in displacing<sup>27</sup> the exports of like<sub>28</sub> products of another signatory from a third country market.

Article 8.4 (footnotes omitted).

Material injury is a concept whose application is limited to the importing country's market, and nullification or impairment has thus far been applied only in connection with tariff bindings. Therefore, "serious prejudice" appears to be the most obviously appropriate concept applicable to home and third country markets. In the present Code (Article 8.3 and 8.4), the concept is not well described. As a result, it has had virtually no practical value as a means of identifying adverse trade effects from subsidization.

The current Code's only description of the adverse effects which would demonstrate serious prejudice are those set out in Article 8.4: the displacement or impeding of imports into the subsidizing country's home market, or the displacement of exports of another signatory from a third-country market. The Chairman's Note makes an effort to elaborate on the concept of serious prejudice at Article 6.2, including elements from the existing Code and more, as well as certain circumstances under which serious prejudice may be presumed unless rebutted.

Furthermore, the Code contains no operational elaboration of how the displacing or impeding of imports can be shown, nor does it provide any indication of a process or mechanism for obtaining the evidence necessary to make this showing where home and third-country markets are concerned. The need for information in such cases and the co-operation of the parties in obtaining that information is recognized in the Chairman's Note in Article 6.7. However, like the Code, this recognition is not accompanied by an information-gathering mechanism or a means for assuring the co-operation of the party in possession of information necessary to demonstrate adverse effects.

Under the current Code, consultations may be requested if a signatory believes a subsidy granted by another signatory is causing serious prejudice to its interests. That request for consultations must include (1) a statement of available evidence with regard to the existence and nature of the subsidy in question, and (2) the adverse effects caused to the interests of the signatory requesting consultations. If a dispute proceeds through consultations, conciliation, and a Panel under the dispute settlement provisions of the Code, the Committee may, ultimately, authorize appropriate countermeasures. The procedure is similar in the Chairman's Note except that the matter goes to the Committee after consultations.

Both the current Code and the Chairman's Note tie subsequent countermeasures to a demonstration of adverse effects but provide no credible, explicit means for determining the degree and nature of these effects. Unlike a multilateral review of a countervailing measure, where there is already a determination by an investigating authority of the existence of a subsidy and material injury, and a record of detailed evidence on which to conduct a review, a Panel or Committee proceeding with respect to serious prejudice is de novo.

With no effective, multilaterally-sanctioned guidelines for conducting the necessary serious prejudice enquiry, a party's ability to prepare an adequate case is limited. The party must rely on whatever information it can gather without any particular confidence regarding the factors essential to establish serious prejudice. Further, and perhaps as important, the complaining party may not get full or prompt co-operation from the subsidizing country or a third country in its efforts. In addition, it would be difficult for a multilateral body to discharge its responsibilities with due regard to all information relevant to the case on a timely basis.

The problem of developing a proper case is especially acute where third-countries are involved because the information necessary to show adverse effects caused by subsidized products is not necessarily within the reach of the complaining party. Moreover, unlike the situation where there are effects in the home market of the subsidizing country, such information is also beyond the reach of the subsidizing country. In some cases, the third country would have an incentive not to co-operate in producing the necessary evidence because the effects which are adverse to companies in the complaining country may actually be beneficial to the consumers in the third country. Thus, while the complaining country might be able to present a determination of subsidization and adverse effects with respect to the third country, it might be denied critical information regarding the relation between the imports and adverse effects in the third market.

To strengthen the ability to establish effects in the home market of the subsidizing country and in third countries, this proposal envisions an information-gathering process supported by a commitment to co-operate. With this information, the parties can make their arguments on adverse effects based on a record of information developed. If a country determines, on the basis of its examination of this information, to seek full multilateral review, the multilateral body can make an informed and timely determination on the basis of that record. An obligation to co-operate in the gathering of information, as well as, where necessary, reliance on best information available, should especially enhance the ability of countries with the most limited national resources in preparing cases to bring to multilateral dispute settlement.

Therefore, in order to improve the multilateral rules and procedures for demonstrating adverse effects required to show serious prejudice, and

for enhancing the credibility of the remedies in this area, the following mechanism is suggested.

OUTLINE OF PROCEDURES FOR DISPUTES INVOLVING  
ADVERSE EFFECTS IN HOME AND THIRD-COUNTRY MARKETS

I. Obligation to co-operate

All signatories shall have an obligation to co-operate in procedures established for the development of evidence to be examined by the multilateral body charged with resolving disputes relating to home or third-country markets. Each signatory shall notify the Committee within one year the organization responsible for administration of this provision within that country and the procedures to be used to comply with requests for information.

II. Procedures

A. Stage I - <sup>1</sup>Consultations prior to invoking multilateral process  
(60 days)

1. If signatory has reason to believe a subsidy is being granted or maintained which results in adverse effects in home or third-country market(s), signatory may request consultations with signatory(ies) believed to be providing subsidies.
2. Request shall include statement of "available evidence" of:
  - (a) existence and nature of subsidy, and
  - (b) if appropriate, the adverse effects caused.<sup>2</sup>
3. The signatory(ies) believed to be providing the subsidy shall respond with a view toward clarifying the facts of the situation and arriving at a mutually acceptable solution within 60 days.<sup>3</sup>

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<sup>1</sup>Any time periods mentioned in this proposal may be extended by mutual agreement.

<sup>2</sup>In the event the subsidy is either a prohibited subsidy, or a subsidy which is presumed to result in serious prejudice in accordance with Article 6 of the Chairman's Note, this element would be unnecessary.

<sup>3</sup>In the event the subsidy is either a prohibited subsidy, or a subsidy which is presumed to result in serious prejudice in accordance with Article 6 of the Chairman's Note, the time shall be 30 days.

B. Stage II - Multilateral process for developing record for dispute resolution (60 days)<sup>1</sup>

The Stage II process shall be under the auspices of the multilateral body. In this stage, the complaining country invokes the multilateral dispute resolution process.

1. Under auspices of the multilateral system, the complaining party shall be authorized to obtain such information from the government of the subsidizing country as necessary to establish the existence and amount of subsidies, as well as information necessary to analyze the adverse effects caused by the subsidized production. This process may include, where appropriate, presentation of questions to the government of the subsidizing country to collect information, as well as to clarify and obtain elaboration of information available to the parties through the notification procedures set forth in Part VI of the Chairman's Note.
2. In the case of effects in third countries, the complaining country may also collect information, including through the use of questions to the government of the third country, as to information to analyze adverse effects which is not otherwise reasonably available from the complaining country or the subsidizing country.
3. In the event an allegation involving serious prejudice exists, a subsidizing country may similarly present questions to the complaining and/or, where appropriate, a third country requesting information for defence or rebuttal purposes.
4. The multilateral body shall designate a representative to serve the function of facilitating the Stage II information gathering process. The sole purpose of the representative is to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the co-operation of the parties in that process.

C. Stage III - Multilateral review of dispute (60 days)

Upon completion of Stage II, if the complaining party determines to go forward, the parties shall present the information contained in the record developed in the Stage II process to the multilateral body reviewing the dispute. The information upon which the multilateral body shall make its

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<sup>1</sup>It is intended that the information-gathering process outlined shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by the parties to the investigation.

determination will be the record developed in Stage II consultations, including rebuttal evidence, as well as such supplemental information as the multilateral body deems relevant in the course of reaching its conclusions.

1. If the subsidizing and/or third country co-operate, the complaining government presents its case of serious prejudice to the multilateral entity charged with reviewing complaints, based on evidence gathered in the course of the Stage II process. The subsidizing and/or third country shall have the opportunity to present their cases based on the record.
2. If the subsidizing and/or third country fail to co-operate, the complaining government presents its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non co-operation of the subsidizing and/or third country. Where information is unavailable due to non co-operation by the subsidizing and/or third country or for other reasons, the reviewing body may complete the record as necessary relying on best information otherwise available.
3. In making its determination, the multilateral body should draw adverse inferences from instances of non co-operation by the subsidizing country in the Stage II evidence-gathering process. In appropriate circumstances, the reviewing body may also draw adverse inferences in the event of non co-operation by a third country, such as where it concludes that the third country is operating in concert with the subsidizing country.
4. In making a determination to use either best information available or adverse inferences, the multilateral body may consider the advice of its designee in the Stage II process as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a co-operative and timely manner.
5. Nothing in the Stage II process shall limit the ability of the multilateral body to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed in the Stage II process. However, ordinarily a Panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non co-operation by that party in the Stage II record development process.