Committee on Trade in Industrial Products  

Working Group 1  

DRAFT REPORT OF WORKING GROUP 1 ON NON-TARIFF BARRIERS  

Examination of Items in Part I of the Illustrative List  
(Government Participation in Trade)  

Revision  

1. Working Group 1 was established by the Committee on Trade in Industrial Products in December 1969 to examine the following subjects in the Illustrative List (Annex 1 to document L/3298): trade diverting investment, export subsidies, countervailing duties, government procurement and State-trading enterprises in market economy countries. The task of the Group was to explore, on the basis of the information in the inventory and any information that might be subsequently furnished, possibilities for concrete action, both with regard to reducing or removing notified barriers within its competence, and to developing possible rules of conduct. The work was to be conducted on the understanding that it was exploratory and preparatory in nature, and involved no commitment on the part of any member of the Working Group to take or join in any action under discussion. Special attention was to be given to the interests of the developing countries, which had submitted a number of notifications on subjects within the competence of the Group.  

2. The Working Group met from 12 to 21 January and from 2 to 5 November 1970 under the chairmanship of Mr. Latimer (Canada). In formulating views on suitable solutions the Group took into account the question whether particular problems appeared to be pervasive in their occurrence or whether, even if difficulty arose only in a few instances, the effects were yet of concern to many countries. A third possibility was that both the causes and the effects were confined to a few countries only. It was considered that these characteristics could have a bearing on the type of solution.
3. An effort was made to define in each case the main headings or topics to be covered, especially if some form of multilateral arrangement appeared to some or most members to be indicated. The Group not only had in mind the general terms of reference in regard to the exploratory nature of its work, but wished to emphasize in this connexion that in many cases the views recorded are only tentative at this stage, and that all delegations would have full latitude to supplement and clarify them when the report was brought for discussion by the Committee on Trade in Industrial Products.

4. The Group also discussed the notifications included under the section "restrictive practices tolerated by governments" and certain proposals were made which are recorded in Section VI of this document.

I. Trade-diverting aids other than export subsidies

Type of solution: Most members of the Group tended to favour, as explained below, a wider concept for consideration of the Illustrative List item "Trade-diverting investment" as reflected in the heading above. Some felt that the problem of serious trade-diverting effects of government aids to production and investment was general both in occurrence and in effects on other countries as most countries grant some sort of assistance or other aid to economic development of a general or regional character. Others basing their information on the Inventory doubted at this stage whether the present and prospective cases of difficulty arising out of such aids were so important or numerous. One member doubted, moreover, that incentives had been shown in any case as decisive in creating a problem of serious trade diversion.

There was, however, rather general agreement that the essential element which would justify GATT attention to domestic aids was serious prejudice to trade interests through trade diversion. Some delegations felt that particular situations such as research and development requirements, the need for assistance to depressed regions, reconversion of an industry or possibly other considerations were elements which could be taken into account by the contracting parties in the consideration of a particular case. These delegations considered that the existing notification procedures might be improved, inter alia, by including information on aids granted by local and regional authorities, and that provision for specific notification and consultation on request would be useful.
Those members which considered trade-diverting aids to be a problem of general concern favoured a set of rules, whether in the form of an Interpretative Note to Article XVI, or a code of good conduct. Among those which doubted the need for such an approach, the question was raised whether a code would contribute to solution of the specific problem notified, to which it was after all the first obligation of the Group to address itself. Inquiry into reasons why existing consultation procedures on subsidies had not been used might, for example, offer a more useful approach.

Main headings: As a working hypothesis it was proposed by some delegations that a set of rules might contain the following main headings:

(i) The Note would build on the existing provisions of the GATT. It would not envisage new GATT commitments although this possibility should not be precluded if further discussion among the contracting parties indicated that additional obligations would be appropriate.

(ii) Improved notification of domestic aids having trade-diversionary effects was considered to be desirable, since relatively few contracting parties report, and most of those reporting do so less frequently than required and tend to omit domestic production and investment aids. To deal with the situation where a country applying certain measures does not itself consider that such measures fall within the notification requirements of Article XVI:1, it was further suggested that opening the way to requests by interested countries, through the secretariat, for prompt special reports by countries giving domestic aids would improve the coverage of aids of real international concern.

(iii) Specific provision for consultations upon request, either among interested parties or with the CONTRACTING PARTIES as a whole, along the lines of Article XXII or, if no satisfactory solution is found, as provided for in Article XXIII, to determine whether serious prejudice to a contracting party's trade interests had occurred or was likely to occur through trade diversion caused by such aids.
(iv) Adjustment, in the event of a decision by the CONTRACTING PARTIES finding such serious prejudice

(a) Preferably by elimination or reduction of the aid to the point where prejudicial effects were eliminated;

(b) Failing that, the grant of compensatory new concessions to the injured party or parties; and

(c) If neither solution proved feasible, authorization by the CONTRACTING PARTIES for the suspension of the application of concessions or other obligations by the injured party or parties toward that party.

II. Export subsidies

Type of solution: Most members of the Group considered that the problem of export subsidies was general in nature, in that many countries appeared to maintain aids of various kinds which had been mentioned in one context or another, as export subsidies, whereas only the major developed countries had agreed in paragraph 4 of Article XVI to limitations on use of export subsidies in regard to non-primary products. Others, considering the information contained in the Inventory, were not in a position to conclude therefrom that the problem was of a general nature. Some felt that the major element should be an effort to strengthen existing obligations through clarification of obligations and supplementary procedures. In the opinion of most members of the Group it was important that more countries, particularly those developed countries which have not accepted the prohibition of export subsidies on non-primary products, should accept it so as to ensure proper balance in the legal commitments in this field. Some favoured consideration of certain new obligations as well. Attention was drawn to paragraph 5 of Article XVI which calls for a review of the operation of the provisions of Article XVI.
The following proposals, which met with general approval, were put forward as the main elements of a solution to the problem of export subsidies:

(i) An important step would be for those contracting parties, particularly developed countries, not having accepted the obligation to do so.

(ii) It was recognized that there was a need to refine and elaborate a definition of the measures that countries regard as constituting export subsidies. It was proposed that consideration be given to the following suggestions:

(a) Clarification of the scope of measures presently covered by the provisions of paragraph 4.

(b) Procedures, including notifications and reviews, should be elaborated to ensure improved and continuing implementation of the obligations of paragraph 4.

In addition, some members of the Group favoured giving consideration to the following possible extensions of existing obligations through an interpretative note or set of guidelines:

(i) There may be need to include in the obligations of paragraph 4 export subsidies having trade diverting effects, even though they do not result in sale for export below the comparable domestic price.

(ii) Consideration should be given to more comparable treatment as between export subsidies on primary and on non-primary products.

(iii) A list of prohibited practices could be incorporated into the General Agreement.

III. Countervailing duties

Type of solution: The predominant view was that the injury question was the main problem, where the solution was to be sought in action by particular countries. It was suggested that the root of this problem lay in the fact that the Protocol of Provisional Application had been in force for over twenty years, thus permitting some contracting parties to be legally exempt in certain circumstances from obligations arising out of Part II of the General Agreement. The problem was
aggravated in a particular case by the fact that prior existing mandatory requirements removed all discretion as to the imposition of countervailing duties.

As regards the general question of the application of countervailing duties, several representatives suggested that there was need for a code along the lines of the Anti-Dumping Code, although the adoption of such a code would be difficult until all contracting parties had accepted the same obligations. Any code might include, *inter alia*, determination of the subsidy and its amount, determination of injury and the trade effect for third countries.

The view was expressed that any new code on countervailing duties should be consistent with the Anti-Dumping Code since they would both be interpretations of Article VI. One delegation presented a note (annex) which outlined those elements of the Anti-Dumping Code, which could be applicable to a code on countervailing duties.

It was noted, however, that a code on countervailing duties would presumably have to contain a definition of what constituted a subsidy and, hence, would involve Article XVI. Another consideration was that countervailing duties, unlike anti-dumping action, were a response to measures that were in most cases illegal.

Some delegations expressed the view that export subsidies rather than countervailing duties were the real problem because it was the export subsidies themselves in the first instance, and not the countervailing duties, which resulted in uneconomic trade distortion. If there were no export subsidies there would be no need for countries to resort to countervailing duties, thus the elimination of export subsidies should be the first objective. It was further suggested that any solution to this problem could be considered only in the broad context of export subsidies and countervailing duties, and that this might be dealt with by the Working Group which the twenty-fourth session has agreed to establish. In this context the desirability of including primary products should be borne in mind.
With regard to the proposed code on countervailing duties, it was suggested that more experience should be gained on the operation of the Anti-Dumping Code before embarking upon the elaboration of a second code. As for the suggestion that the problem was really one of export subsidies, the opinion was expressed that this argument would be valid only after all contracting parties had signed the Declaration prohibiting export subsidies, a step which seemed unlikely in the case of some developing countries. Furthermore, certain differences of opinion exist, and will most likely continue to persist, as to what constitutes an export subsidy. Therefore, a more pragmatic course of action would be to reach an agreed definition of those measures that were prohibited by the existing obligations on export subsidies. In this context it was suggested that contracting parties might dispense with the requirement for proof of injury in cases where there was a violation of the Declaration.

The view was expressed by some delegations that the distinction between primary and non-primary products was a fundamental one in that it had been a part of Article XVI from the outset and had been confirmed during the Review Session in 1955. It was suggested by others that a more precise definition of what constituted a primary product might be useful.

It was further pointed out by some delegations that the present GATT rules relating to export subsidization are unsatisfactory since third countries are not obliged to impose countervailing duties to offset export subsidization that causes or threatens injury to an export industry of another contracting party. It was suggested that it might be preferable to permit the injured party, in such cases, specifically to suspend concessions on products of interest to the export-subsidizing country.

Certain delegations suggested that in view of the proposed solutions for trade-diverting aids, export subsidies and countervailing duties, a Group should be set up as provided for in Article XVI:5 to review the operations of that Article, since such a review had never taken place.
IV. Government procurement

Type of solution: Government procurement was a problem of a general nature and both the legal and practical aspects of the problem would have to be considered together. It was felt that the solution lay in the formulation of a code or set of guidelines that would apply to the contracting parties' government procurement operations. The Group agreed that in determining guidelines, the following elements should, inter alia, be considered.

Main headings:

(i) Objectives and principles
(ii) Definitions
(iii) Procurement entities
(iv) Elimination of existing discrimination
(v) Exceptions
(vi) Purchasing procedures
(vii) Publication of government procurement regulations
(viii) Reporting, review, complaint and confrontation procedures.

Note was taken of the fact that the OECD is addressing itself to this problem and that all the suggested main headings were covered by the guidelines which are under preparation in OECD. The Group was informed of the status of the work in OECD and of the main contents of the envisaged guidelines, in particular with regard to purchasing procedures and publication of regulations. It was noted that the work in OECD would be pursued at a meeting in February 1971 and that the work there was in a fairly advanced stage. It was not considered useful to elaborate further at this stage on the main headings in the Group and it was agreed that the best way to proceed would be for the Group to follow developments in OECD.

V. State trading in market economy countries

Type of solution: It was generally agreed that the existing rules of Articles XVII and II:4, as well as the interpretative note ad Articles XI to XV, regarding non-discrimination and limitation of protection, seemed reasonably adequate as far as basic principles were concerned, and that the problems appeared to lie in the area
of implementation, where some elaboration of procedures might be considered. Some countries suggested that specific solutions might be worked out, and the view was expressed that this might be on a case-by-case basis. It was noted that the notifications named in this section of the Illustrative List related to State-trading enterprises in developed market economy countries and on that basis the developing countries had participated on their understanding that the Group would base its discussions on State-trading practices of developed market economy countries.

Main headings: The following ideas were expressed, inter alia, with regard to the principal elements towards a solution:

(i) With a view to strengthening the effectiveness of Article XVII, consideration should be given to improving the quality, frequency and coverage of reports by contracting parties on State-trading enterprises. (It was noted that only a handful of contracting parties report with anything like the prescribed regularity and that reports were in some cases incomplete as to coverage or failed to respond in the detail envisaged by the questionnaire.) A possible device, which might be applicable here, would be to invite countries who consider their trade interest affected to obtain, through the secretariat, notifications on subjects not covered by regular notifications. The view was expressed that lack of information regarding the margin by which prices are increased (mark-ups) in State trading, including failure to state whether a country is meeting full demands for imported products in accordance with the interpretative note to Article 11:4, made it difficult for foreign firms and trade partners to determine the extent of discrimination.

(ii) Inclusion of specific reference to the possibility of bilateral and multilateral consultation along the lines of Articles XXII and XXIII might be useful on the understanding that, if no satisfaction were obtained through such consultation, the injured country could be granted compensatory concessions or, failing that, be authorized to suspend the application of equivalent concessions or obligations.
(iii) The view was expressed that the effectiveness of the provisions on State trading might be enhanced if countries sought to negotiate to a greater extent than heretofore, concessions - including possible global purchase commitments - on State-traded products in which they have a trade interest.

The secretariat will undertake a review of the effectiveness of procedures in Article XVII:4 and make recommendations for improving them. Where concessions were in operation, the review might cover the question whether countries had observed the rules of Article II:4. Further light might be shed on the notifications by a study to determine to what degree the problems involved in the notifications had been caused by governmental restriction of quantity purchased rather than by the nature of State trading as such. This would narrow the problem somewhat by showing separately the degree to which, and ways in which, State trading as such created problems, as distinct from the effects of other objectives which might also be involved, such as the protection of particular sources of supply, revenue considerations or social policy.

VI. Restrictive practices tolerated by governments

Notifications under this heading, which are not on the Illustrative List, related mainly to practices of trade unions which refused to handle certain imports, restrictions on advertising of certain spirits and restrictions on establishment of branches of companies in foreign countries.

It was agreed that the question of prohibitions on advertising of spirits should continue to be treated by Group 5. Some delegations suggested that, in addition to solutions proposed in that Group, an explanatory note to Article III:1 should be prepared defining the expression "offering for sale" so as to include advertising, and also clarifying the phrase "afford protection to domestic production". It was also suggested that the problem could be tackled by creation of standards in this field and in co-operation with other organizations such as the WHO, though any solution on this basis required further detailed examination. Other members did not consider that the problem was sufficiently widespread to justify a general solution on the lines proposed. One maintaining country also stated that restrictions on advertising were operated consistently with Article XX.
On the general question of restrictive practices, it was noted that although some of the problems notified were actually outside the control of governments and therefore did not run counter to the provisions of the Agreement, they could be particularly harmful to trade. It was suggested that GATT should recommend that governments use their best endeavours to ensure that also private bodies operating within their jurisdiction observe the principles of the General Agreement. This could be achieved through an undertaking along the lines of that contained in Article XXIV:12 with respect to local and regional governments and authorities.
Annex

ELEMENTS OF A CODE ON COUNTERVAILING MEASURES

Because of the close relationship between anti-dumping and countervailing measures and the fact that Article VI of GATT deals with both, it seems desirable to introduce a measure of consistency between any new Code on countervailing duties and the existing Anti-Dumping Code. From the note it can be seen that a large part of the existing Code would be equally applicable to a new Code so that major problems in drawing up a new text might be minimized. Although, for the same reason, the adoption of such a Code would not be a major step forward, it would in our view make the contractual position on countervailing duties somewhat clearer and would remove certain anomalies which exist at present.

1. The Anti-Dumping Code interprets Article VI of the GATT and elaborate rules for its application in respect of anti-dumping duties. In the opinion of the United Kingdom it would be useful to consider whether a similar Code could be applied to countervailing duties.

2. In so far as it interprets concepts such as material injury which are quoted in Article VI as applying to both countervailing and anti-dumping action it would seem reasonable to hold that the interpretation given in the Anti-Dumping Code should apply equally to countervailing action.

3. In relation to procedures laid down in the Anti-Dumping Code which are not specified in Article VI (e.g. on notifying the countries and firms concerned; what is an "industry"; the public announcement of decisions reached) signatories are formally committed to apply them in relation to anti-dumping duties only. Although many countries no doubt already apply these procedures in countervailing duty cases also, it would be useful to make this a formal obligation.
4. The following Articles in the Code would be relevant also in relation to subsidization, the only changes necessary being, in general, the substitution of the words subsidy, subsidies or subsidization for dumping:

- **Article 1** - All countervailing action to be subject to Article VI.
- **Article 3** - Determination of injury.
- **Article 4** - Definition of industry for the purpose of an investigation (including the possibility of action on behalf of regional industries in certain circumstances).
- **Article 5(a)** - Initiation of cases on application only (normally).
  
  (b) - Subsidization and injury to be considered simultaneously.
  
  (c) - Application to be rejected, or the investigation stopped, if the effect of subsidization is found to be negligible.
  
  (d) - Normal customs clearance of goods to continue.
- **Article 6(h)** - Notification of decisions to the countries and firms concerned.
  
  (i) - If facts are withheld decisions may be taken on the information available.
- **Article 8(a)** - Action to be permissive. A countervailing duty less than the margin of subsidization to be imposed, if this would suffice to remove the material injury.
  
  (c) - Duty not to exceed the subsidy element.
- **Article 9(a)** - Countervailing duties to remain in force only so long as is necessary to counter materially injurious subsidization.
  
  (b) - Authorities to review cases at intervals and on request.
- **Article 15** - Any changes in legislation, regulations etc. to be notified to the contracting parties.
- **Article 16** - Annual Report to be made to the contracting parties on action taken.

It would be for consideration whether the Code provisions on provisional and retroactive duties (Articles 10 and 11) should be applied also in the case of countervailing duties. The question of machinery to review implementation would also arise.
6. Articles 2, 6(a) to (g), 7, 8(b), 8(d) and 8(e) of the Code could not be applied directly to countervailing action. But the following points might arise in this connexion:

(a) The accused government to be given a proper opportunity to comment on the charges.

(b) The investigating government to be given all reasonable information including the opportunity of personal discussions with the authorities directly concerned with the alleged subsidy.

(c) How any necessary enquiries of firms as well as governments should be conducted.

(d) The accused government to be given the opportunity of making suitable administrative changes as an alternative to countervailing duties, if the verdict goes against it.