APPLICATION OF ARTICLES 14:5 AND 19:9 OF THE AGREEMENT

Note by the Secretariat

At its meeting of 13 June 1986 the Working Party requested the secretariat to prepare a note on the application of Articles 14:5 and 19:9 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement (hereinafter referred to as "the Subsidies Code") and on a possible link between these two provisions. This note has been prepared in response to this request.

ARTICLE 14:5

I. Drafting History

1. In the first version of the Subsidies Code, circulated on behalf of the delegations of Canada, the EEC, Japan, the Nordic countries and the United States on 10 July 1978 (MTN/NTM/W/168), there was a short chapter dealing with developing countries. It read as follows:

"VI. Developing countries

1. Signatories recognize that subsidies can play an important role in the development strategies of developing countries. Therefore although all signatories accept the principles of this arrangement, developing signatories need not implement immediately those obligations on export subsidies which are inconsistent with their individual trade and development needs.

2. Exceptions to specific obligations under this arrangement as well as undertakings to phase out these exceptions over a period appropriate to their particular stage of development may be agreed for individual signatories which invoke this clause.

3. The Committee of Signatories will review these exceptions annually and may as appropriate develop special exemptions and obligations for new developing country signatories which invoke this clause."
2. Between July 1978 and the circulation of the second version in December 1978, a number of consultations between some developed and developing countries took place and the chapter dealing with developing countries was substantially modified. In document MTN/NTM/W/210 prepared by several delegations of developed and developing countries, the language of the relevant chapter (Chapter V) was very close to the existing language of Article 14. There were, however, some differences in paragraph 5 which read:

"5. A developing country signatory should agree or commit to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive needs."

3. Pursuant to further modifications, the text of Article 14:5 in MTN/NTM/W/220 circulated on 21 February 1979 read:

"A developing country signatory should agree or enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive needs."

4. On 30 March 1979 some delegations proposed several amendments, inter alia, to Article 14:5, in order "to take into account certain points raised by developing countries" (MTN/NTM/W/220/Rev.1/Add.1). Consequently, Article 14:5 read:

"A developing country signatory should enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs."

5. Before the final version (MTN/NTM/W/236) was circulated on 5 April, a further amendment had been made to the text of Article 14:5, namely the words "endeavour to" had been inserted between "should" and "enter". Consequently the text read, as it reads now:

"A developing country signatory should endeavour to enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs."

A footnote to this Article reads: "It is understood that after this Agreement has entered into force, any such proposed commitment shall be notified to the Committee in good time".

II. Developments in the Committee

6. At its 28 March 1980 meeting, the Committee on Subsidies and Countervailing Measures took the following decision on procedures concerning commitments to be undertaken under Article 14:5 (SCM/M/2, paragraphs 5 and 31):

"In accordance with footnote 32 to Article 14:5, countries intending to enter into a commitment under Article 14:5 should notify the Committee in good time. For this purpose they are invited to notify the Chairman of the Committee of the proposed commitments at least forty-five days before the matter is taken up by the Committee."
7. This decision was accompanied by a statement by the Chairman concerning the operation of this decision (SCM/M/2, paragraph 36):

"(a) The Chairman will seek to consult informally with signatories and the country proposing to undertake the commitment before formally putting the commitment before the Committee;

(b) when the matter comes before the Committee, signatories of the Agreement may request the Committee:

(i) to seek further clarification and information on the proposed commitment;

(ii) to examine, in the light of the provisions of Article 14:5, the applicability of the provisions of Articles 14:6 and 14:8 to the proposed commitment;

(c) the Committee then takes note of the commitment."

8. The questions related to Article 14:5 were discussed by the Committee on several occasions, in particular at its meetings of:

(a) 28 March 1980 (SCM/M/2, paragraphs 5-38);

(b) 8 May 1980 (SCM/M/3, paragraphs 11-24);

(c) 17 November 1983 (SCM/M/19, paragraphs 4-10 and 46-62).

9. In November 1983 the observer for Colombia reiterated the problems his country and certain other developing countries were facing in their efforts to obtain the Subsidies Code treatment from the United States. At the same meeting the Committee authorized the Chairman to hold informal consultations on this matter (SCM/M/19, paragraphs 46-62). These informal consultations resulted in a proposal on procedures concerning commitments by developing countries under Article 14:5 of the Subsidies Code, which was circulated in December 1984 under the responsibility of the Chairman of the Committee (SCM/W/86). At its special meetings held in March and April 1985 (SCM/M/26 and SCM/M/28), the Committee examined a revised version of this proposal (SCM/W/86/Rev.2). However, despite a lengthy debate, the Committee could reach no agreement on this proposal.

10. The following signatories have notified their commitments in terms of Article 14:5: Brazil (L/4922, SCM/13, SCM/38 and SCM/65); Uruguay (L/4924); Korea (SCM/3); Egypt (SCM/16); Turkey (SCM/61); Indonesia (SCM/62 and Add.1); Philippines (SCM/63) and Israel (SCM/67).

11. It seems that some signatories concluded bilateral arrangements with another signatory in connection with their acceptance of the Subsidies Code. These arrangements have not been notified to the Committee and cannot be considered as commitments under the Subsidies Code. In particular, they cannot be invoked for the purposes of Article 14:6 and 14:8 of the Subsidies Code.
ARTICLE 19:9

I. Drafting History

12. The only pre-MTN GATT Code (Anti-Dumping Code 1967) did not contain any non-application provision.

13. The non-application provision was introduced, in the draft Subsidies Code, for the first time in December 1978 (MTN/NTM/W/210). It read:

"This Arrangement shall not apply as between any signatory accepting this Arrangement or government acceding thereto, if at the time of acceptance of the Arrangement or of Accession thereto, a signatory of the Arrangement or the acceding government does not consent to such application."

This language was taken from the draft Technical Barriers to Trade Code (MTN/NTM/W/192 of 17 October 1978) and had not been discussed in the context of subsidies/countervailing measures negotiations.

14. In March 1979 an Informal Technical Group was established to work out possible standard final provisions for all MTN Codes. It based its discussion on an informal text, submitted by the secretariat. The relevant provision in that text read:

"8. This Agreement shall not apply as between any two parties to this Agreement if either of the parties, at the time either accepts or accession to this Agreement, does not consent to such application."

This provision had not met any objections in the Informal Group and subsequently was, mutatis mutandis, introduced in most of the MTN Codes, including the Subsidies Code.

15. The drafting history of the non-application provision in the MTN Codes indicates that the main reason for its introduction was an intention to have a final provisions of the Subsidies Code similar to the respective provisions of the General Agreement itself. The origins and use of the General Agreement's non-application clause are discussed in the following chapter.

II. Article XXXV of the General Agreement

(a) Origin and application of Article XXXV

16. Under the original text of the General Agreement, non-contracting parties could accede to the General Agreement only with the consent of all contracting parties. Since each contracting party could therefore veto the accession of any non-contracting party, a clause permitting the non-application of the General Agreement between an existing and a new contracting party was not included in the original text.

17. In 1948 it was proposed to change the unanimity rule for accessions to a two-thirds majority requirement. This proposal gave rise to objections. It was pointed out that the proposed change would permit two-thirds of the contracting parties to oblige a contracting party to enter into a trade
agreement without its consent and that it would give rise to problems of relations between the new contracting party and those other contracting parties with which no tariff negotiations had taken place (GATT/1/SR.6, page 2, and GATT/1/SR.7, page 5). To meet these objections a protocol was drafted which introduced the two-thirds majority requirement in Article XXXIII and at the same time added Article XXXV to the General Agreement. This Protocol entered into force on 24 March 1948. Since that time Article XXXV has been invoked by the following contracting parties: Australia, Austria, Barbados, Belgium, Benin, Brazil, Burundi, Cameroon, Central African Republic, Congo, Cuba, Cyprus, Czechoslovakia, Egypt, France, Gabon, Gambia, Ghana, Guyana, Haiti, India, Ireland, Ivory Coast, Jamaica, Kenya, Korea, Kuwait, Luxembourg, Madagascar, Malaysia, Malta, Mauritania, Netherlands, New Zealand, Niger, Nigeria, Pakistan, Portugal, Romania, Rwanda, Senegal, Sierra Leone, South Africa, Spain, Tanzania, Togo, Trinidad and Tobago, Uganda, United Kingdom, United States and Upper Volta.

18. Article XXXV presently operates between the following contracting parties:

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<tr>
<th>Invocation by</th>
<th>in respect of</th>
<th>Reference</th>
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<tbody>
<tr>
<td>Cuba</td>
<td>Dominican Republic</td>
<td>GATT/CP/TN.1/33</td>
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<td>Italy</td>
<td>GATT/CP/111</td>
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<td></td>
<td>Germany (Fed.Rep. of)</td>
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<tr>
<td>Cyprus</td>
<td>Japan</td>
<td>Succession</td>
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<td>Czechoslovakia</td>
<td>Korea (Rep. of)</td>
<td>L/2783</td>
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<td>Egypt</td>
<td>Zimbabwe</td>
<td>L/3386</td>
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<td>South Africa</td>
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<td>Ghana</td>
<td>Portugal</td>
<td>L/1764</td>
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<td>Haiti</td>
<td>Japan</td>
<td>L/405</td>
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<td>India</td>
<td>South Africa</td>
<td>GATT/CP.2/4</td>
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<td>United States</td>
<td>Hungary</td>
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<td>Romania</td>
<td>L/3619</td>
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19. Article XXXV permits the non-application either of the General Agreement as a whole or only of its Article II which incorporates the contracting parties' schedules of concessions into the General Agreement. All past invocations of Article XXXV related to the General Agreement as a whole. The invocations took the form of a communication to the Director-General to the GATT in which in most cases no reasons for the invocation were indicated.
However, in the case of Japan, some of the contracting parties concerned issued public statements explaining their action, and some others furnished explanations subsequently when the question of application of Article XXXV to Japan was discussed from time to time by the CONTRACTING PARTIES. It is common to most of these explanations that what the invoking countries sought to guard against was injury or threat thereof to domestic industries because of the exceptionally acute competition which they feared from Japan (see L/1545, page 7).

(b) Interpretation of Article XXXV

20. At the Second Session of the CONTRACTING PARTIES in 1948 a delegate asked whether the two conditions, in (a) and (b) of paragraph 1 of Article XXXV, were meant to be mutually exclusive or interdependent. The Chairman replied that "according to the paragraph, if two countries, one of which was a contracting party and the other of which was acceding to the General Agreement, had not entered into negotiations, either of them, the contracting party or the acceding party, could decide that the Agreement or Article II should not apply between them when the second party became a contracting party" (GATT/CP.2/SR.18, p.4).

21. The Chairman of the CONTRACTING PARTIES ruled in 1949 that "delegations should be deemed to have entered into negotiations when they had held a first meeting scheduled by the Tariff Negotiations Working Party at which they had exchanged lists of offers" (BISD Vol.II/35). A 1964 "Note by the Director-General" refers to the above-mentioned "Chairman ruling" and states, inter alia: "The ruling and the procedure described in the preceding two paragraphs are based on the earlier technique of tariff negotiation under which offers are made by each participant to other individual participants" (TN.64/60).

22. The Working Party on Article XXXV Application to Japan discussed in 1961 the question of the invocation of Article XXXV by governments of territories to which the General Agreement had been applied and which had assumed the status of a contracting party pursuant to Article XXVI:5(c). The Working Party stated: "... if Article XXXV had been invoked in respect of that territory (or if that territory had not been specifically excluded from such an invocation), it would continue to be valid unless expressly disinvoked by the succeeding government" (BISD 10/73).

23. The Working Party, in concluding its examination of the application of Article XXXV to Japan, stated: "As regards countries acceding to the General Agreement under Article XXXIII, the Working Party felt that there could be no question of depriving them of the legal right of making use of Article XXXV. The CONTRACTING PARTIES might, however, wish to take steps to dispel the idea that the invocation of Article XXXV was a part of the normal practice of accession or that the invocation of Article XXXV could legitimately be used as a bargaining lever for gaining privileges or advantages over and above those provided for in the General Agreement. The CONTRACTING PARTIES might wish to consider recommending to acceding countries that they afford the government against which Article XXXV might be invoked an opportunity for an exchange of views." (BISD 10/73, 74). This report was adopted by the CONTRACTING PARTIES on 7 December 1961. Before its adoption the representative of Australia had sought and obtained a confirmation that the CONTRACTING PARTIES were not asked to set up further procedural machinery which involved some kind of obligation (SR.19/10, page 162).
24. In 1971, during the Council discussion of Romania's application for accession to GATT, the Chairman confirmed that there was nothing in the rules of the GATT which would prevent a contracting party from voting in favour of a decision pursuant to Article XXXIII, even if it did not consent to apply the General Agreement to the newly acceding country in accordance with Article XXXV (C/M/73, p.2).

III. Use of the non-application provision under the Subsidies Code

25. Since the entry into force of the Subsidies Code on 1 January 1980 the non-application clause contained in Article 19:9 has been invoked on eleven occasions (see Table 1). In eight cases, the United States has notified either that it would not apply the Subsidies Code to another signatory at all or that it would apply it on a provisional basis only. In three cases other signatories have notified that they would apply the Code to the United States only provisionally. Four out of the eleven cases listed in Table 1 concern a developing country.

26. The Subsidies Code does not provide for a provisional application. The only alternative is to apply the Subsidies Code fully or not to apply it at all. Consequently, any notification to the effect that a signatory will apply the Subsidies Code to another signatory only on a provisional basis has to be construed as a non-application. This means that the legal relationship between the signatories concerned is not based on the Subsidies Code but on their bilateral understanding or a unilateral decision to apply the Subsidies Code provisionally. This may have consequences for the right of the signatories concerned to resort to the dispute settlement procedure under the Code, which, in principle, applies only to disputes between countries the mutual relations of which are governed by the Code itself.

| Invocation by country | In respect of | Period of the non-application
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<tbody>
<tr>
<td>Australia</td>
<td>United States</td>
<td>28.9.1981-</td>
</tr>
<tr>
<td>New Zealand</td>
<td>United States</td>
<td>16.9.1981-</td>
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<tr>
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<td>16.4.1982-</td>
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<td>Portugal</td>
<td>4.12.1984-***</td>
</tr>
<tr>
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<td>13.2.1985*</td>
</tr>
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<td>4.3.1985-</td>
</tr>
<tr>
<td>United States</td>
<td>Philippines</td>
<td>15.3.1985*</td>
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<tr>
<td>Turkey</td>
<td>United States</td>
<td>4.3.1985-</td>
</tr>
</tbody>
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* Provisional application as of the same date
** Provisional application from 16.9.1981 to 31.3.1985
*** Provisional application as of 25.2.1985
27. The invocation of the non-application provision was always done by notification to the Committee through the Director-General. The notifications were not accompanied by any statement of reasons therefor. However, on 8 May 1980 the United States made a statement in the Committee explaining its position. This position is that the United States could extend the benefits of an injury test in its law only to those countries that had undertaken increased discipline in the subsidy area. In the case of developing countries, the United States could apply its new countervailing law only to those countries that had undertaken commitments with regard to their export subsidy practices (SCM/M/3, paragraph 11). A number of developing countries criticized this US position (SCM/M/3, paragraphs 14-15, 18, 22-24).

28. This matter was further discussed in relation to the invocation of the non-application clause by the United States vis-à-vis India (SCM/M/4, paragraphs 49-61 and SCM/M/5, paragraphs 5-25). At the April 1981 meeting the representative of India submitted a draft decision regarding the use of Article 19:9 (SCM/W/14). The Committee discussed this proposal at that meeting (SCM/M/6, paragraphs 23-32) and reverted to it at the meetings of October 1981 (SCM/M/9, paragraph 31), April 1982 (SCM/M/11, paragraphs 80-84) and October 1982 (SCM/M/13, paragraph 45).

29. The question of Article 19:9 was also briefly touched upon in discussions concerning reservations by some developed countries regarding Article 9 of the Subsidies Code. In particular it should be noted that all decisions by the Committee on these reservations contain a provision which says that until the thirtieth day following the date by which the reservation should be withdrawn, signatories' rights under Article 19:9 of the Subsidies Code remain unaffected (SCM/12, SCM/25, SCM/57/Rev.1).

CONCLUDING REMARKS

30. The detailed analysis of the drafting history of Articles 14:5 and 19:9, respectively has not revealed any link between these two provisions (nor between any other article of the Subsidies Code and Article 19:9). Article 19:9 was conceived independently of any specific consideration regarding other articles of the Subsidies Code.

31. There are no legal restrictions on the use of Article 19:9 except the time constraints referred to in this Article ("at the time either accepts or accedes to the Agreement").

32. An analysis of the application of Article XXXV of the General Agreement has not disclosed any other constraint which could be interpreted as applying also to Article 19:9:

(a) Article XXXV can be invoked only if the two contracting parties have not entered into tariff negotiations with each other, which, according to the existing interpretation, means that they have not officially exchanged the lists of offers; this condition is not, however, relevant to the procedures under the Subsidies Code.
(b) Contracting parties have invoked Article XXXV for various reasons, some of which were economic and some seemed to be political in nature. In most cases, except in the case of Japan, no explanation was given or sought.

(c) Paragraph 20 of the report of the Working Party on Article XXXV Application to Japan (see paragraph 23 above) cannot be construed, given its context and circumstances, as anything more than a proposal for a future legal action by the CONTRACTING PARTIES, which action was never taken.