

# GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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## Multilateral Trade Negotiations

### GROUP 3(b) - SUBSIDIES AND COUNTERVAILING DUTIES

Note by the Secretariat on the Meeting of May 1974

DRAFT

#### A. Export subsidies

1. The Group met on 29-31 May 1974 to take up tasks 9 and 10 of the Programme of Work, i.e. the continuation of work already begun on export subsidies in respect of products other than primary commodities (Chapters 25-99 BTN), and the continuation of the study of a possible code regarding countervailing duties (General Aspects). The Group had before it a background note established by the secretariat (MTN/3B/10) as well as a proposal submitted by the United States delegation on the question of export subsidies (MTN/3B/W/2).
2. Some delegations stated that in their view export subsidies and countervailing duties were in reality two aspects of the same problem, and therefore the Group should work towards an overall solution which would encompass both subjects. Some other delegations, while acknowledging that there was a link between the two subjects, agreed that the principal problem lay in the field of countervailing duties and that this should be dealt with as a matter of priority. Some other delegations, while agreeing that countervailing duties presented a major problem, felt that equal importance should be given to other barriers to trade, such as domestic subsidies with import substitution effect.

3. Some delegations emphasized the dangers arising from the present international economic situation which could lead to competitive subsidization of exports.

Therefore, the aim should be to prohibit the use of certain practices in the field of export aids. These delegations thought that additional countries should be encouraged to adhere to the Declaration Giving Effect to Article XVI:4.

4. Some delegations stated that they were working on the assumption that any proposed solution would cover both primary and non-primary products, as had been the case with draft solutions on other topics which had been worked out in the context of the Committee on Trade in Industrial Products. Some delegations pointed out that the competence of the Group was limited to the consideration of products falling within Chapters 25-99 of the BTN. Some delegations, while accepting that the questions of subsidies on primary commodities should be kept separate from those affecting industrial products, drew attention to the problem of production subsidies on synthetic fibres which created problems for the trade of developing countries in natural primary products.

5. Some delegations stressed that any possible solution must be based on the existing provisions of GATT. It was the Group's task to contemplate refining or amplifying existing provisions, but in no circumstances should any changes in the General Agreement be considered. These delegations said that an important aim should be the elimination of the Protocol of Provisional Application. They considered that the continued existence of the Protocol gave rise to the intolerable situation that some contracting parties had more obligations than others. This problem arose in its most acute form in connexion with obligations arising under Article VI.

6. Some delegations stated that while they could not agree to the reduction of rights accruing under the General Agreement, they would be prepared to consider the addition of obligations. However, they emphasized that this should be done with great care, as the General Agreement was based on a delicate balance of rights and obligations which could be seriously disturbed. Given that countries differed greatly in economic size and in the ratio of trade to the GNP, the addition of equivalent obligations to all countries might bring about disproportionate additions to the rights of different contracting parties, thereby disturbing the balance established by the General Agreement.

7. Some delegations pointed out that the Protocol of Provisional Application was part of the original balance of the General Agreement, and its elimination would create an imbalance of rights and duties. These delegations agreed, however, that in the MTN ways should be found to eliminate the legal cover provided by the Protocol of Provisional Application. These delegations also agreed that there could be no formal amendment to the provisions of the General Agreement, but felt that more effective rules should be drawn up which could possibly be implemented in a forum similar to the Declaration Giving Effect to the Provisions of Paragraph 4 of Article XVI. These delegations agreed that the aim of the negotiations should be to add to the obligations under the General Agreement in the area of export subsidies and countervailing duties.

8. Some delegations pointed out that a suitable hypothesis for work on export subsidies was the criterion of differential treatment for exports in relation to export performance and the legal problems pertaining thereto. Article XVI was ambiguous in that respect. Nevertheless, this was one of the "grey areas".

9. Some delegations questioned the utility of drawing up a comprehensive list of prohibited export subsidies. They recognized that an attempt to work out a list (or definitions) was tantamount to opening negotiations, and was therefore not realistic; an alternative approach was necessary. This alternative could be found in the 1960 list of subsidy practices and the dual-price provision of Article XVI:4. Further characteristics could well be examined. Other delegations thought that while it might be useful to have such a list, it should be a limited one, since an extensive list of prohibited subsidies and related sanctions would seriously undermine the balance of the General Agreement. Some delegations expressed the view that such a list should be as complete as possible and should include both domestic subsidies which stimulate exports and domestic subsidies with import substitution effects. Some delegations thought that the list to be drawn up should be purely illustrative and that subsidies falling within the "grey area" could be the object of consultations. Such consultations would build up a valuable body of precedents.

10. Some delegations pointed out that only seventeen countries had endorsed the 1960 list, as compared with nearly 100 countries participating in the multilateral trade negotiations. The list did not encompass primary products, which was the area where subsidies were increasingly used; the so-called prohibitions were conditioned by the dual-price provision; the list was only illustrative, and there was no provision for sanctions.

11. On the question of corrective action, some delegations expressed the opinion that countervailing duties should not be imposed automatically, but rather should be used only as a measure of last resort. In accordance with the generally

accepted practice of the GATT, countervailing duties should never be imposed unless the consultative procedures of the GATT had been used and after the CONTRACTING PARTIES had been convinced that injury had in fact been caused to the domestic industry in accordance with the provisions of Article VI. In this connexion the Group should look into the question of strengthening the consultation procedures of paragraph 1 of Article XVI. Some delegations pointed out that the subsidies falling within the purview of Article VI may be different from those dealt with in Article XVI.

12. Some delegations referred to the problem of competitive subsidization of exports in third country markets. Although a country whose export interests had been affected could request countervailing action to be taken by the third country under paragraph 6(b) of Article VI, there was in fact no obligation for the country concerned to respond positively to such a request, and indeed there may be no economic interest in so doing. In the view of these delegations this problem might be quantitatively more important than the problem of subsidies for products imported into the domestic market. Some delegations, while agreeing that such a problem existed, felt that there could be a differing evaluation as to its real importance. These delegations thought that the existing provisions of the GATT, especially Article XXIII, were sufficient to take care of this problem.

B. Domestic subsidies that stimulate exports and domestic subsidies with import substitution effects

13. Some delegations said they had proposed a list of prohibited practices because there were specific notifications in the Inventory of Non-Tariff Measures and they wanted to stimulate the discussion by focusing on specific issues. The fact that they had proposed a list did not imply their acceptance of it. More specifically, like some other delegations, they did not wish the listed practices

altogether prohibited, although these could be banned under certain circumstances to be defined. There were some domestic subsidies which formed an integral part of national economic policy on which many countries relied.

14. Some delegations felt that domestic aids were a legitimate part of countries' internal policies and that therefore they should be completely excluded from such a list. If, however, it was found in practice that certain measures of this type were distorting trade, they could be taken up under one of the GATT consultative provisions, e.g. through the procedures of Articles XXII and XXIII.

15. Some delegations suggested that the most appropriate way to deal with domestic subsidies would be to elaborate improved notification and consultation procedures under Article XVI. Retaliatory action might be contemplated and other criteria, e.g. dual-pricing, could be worked out. Another delegation thought that the criterion to be retained should be the effect of the measure rather than the measure itself. These delegations were not in favour of the idea of a list of prohibited practices. One of these delegations suggested that there might be some merit in having procedures under XVI:1 reversed, i.e. the affected importing country notifying and consulting with a view to redressing the situation.

#### C. Countervailing duties

16. Some delegations considered that solutions to the problem of countervailing duties should be sought as a matter of priority because some practices by governments in this field both could and did constitute significant barriers to international trade. The problem was all the more serious because what was involved were measures taken by one country's authorities in challenge of measures by other governments. In the view of these delegations there was therefore a

need to establish stricter international discipline in the application of measures under Article VI of the General Agreement. They were therefore prepared to accept the establishment of a Code which within the framework of Article VI would ensure equality of rights and obligations of countries in this important field. In such a code it would be appropriate to specify that recourse to the imposition of countervailing duties should be the last resort of governments; there should therefore also be appropriate provisions for international consultation procedures.

17. Some delegations said that because present circumstances were very different from those envisaged when the countervailing duties provisions of Article VI were drafted, and because recent experience clearly showed that application of or the threat of application of countervailing measures could result in dangerous confrontations between governments, there was in their view an urgent need for a thorough review of international provisions governing the application of countervailing duties, with the aim of providing a greater measure of international discipline. While the provisions of Article VI dealt with both anti-dumping and countervailing duties, the two measures were in reality quite different, addressing themselves to different problems. Anti-dumping duties were designed to deal with discriminatory pricing practices of individual firms, whereas the purpose of countervailing duties was to offset assistance provided by governments. The problem of countervailing duties therefore required a different approach from the one that had been taken for questions of anti-dumping.

18. In the view of these delegations it was clear that the drafters of Article VI had in mind that countervailing duties should only be resorted to when it had been clearly established that the imports in question were causing or threatening material injury by reason of their being subsidized. Furthermore, apart from the problems of judgement that arose in respect of determinations of injury in particular transactions, there was the additional difficulty that in respect of countervailing duties, the government of one country, relying on the Protocol of Provisional Application, did not consider itself bound by the injury provisions of Article VI. It was not clear that in all cases the imposition of such duties in this country would have been justified if a material injury test had applied. A meaningful definition of material injury would therefore be a key matter for consideration in the course of any negotiations in this area.

19. These delegations felt that in view of the considerations reflected in paragraphs 17-18, the following questions would therefore seem to warrant careful consideration by the Group:

- (a) Questions related to the concept of material injury and a meaningful definition of it;
- (b) The range of subsidy practices to be covered;
- (c) Provisions for international discipline through development of adequate machinery for consultations between governments.

These delegations suggested the following alternative ways for the Group to proceed in dealing with the problems:

- (i) Development of a code governing the application of countervailing duties;



- (ii) Preparation of a Declaration or Interpretative Note expanding on particular provisions of Article VI as they apply to countervailing duties;
- (iii) Agreement on new bilateral consultative procedures reinforced by multilateral surveillance provisions;
- (iv) No change in the existing provisions or procedures under Article VI but perhaps a tightening up of the present provisions of Article XVI respecting subsidies;
- (v) A new article of the General Agreement dealing with measures which may be used to offset export subsidies or subsidies for import replacement;
- (vi) Some combination of the above alternatives.

20. Some other delegations drawing attention to the problem that the legislation of some contracting parties did not require the establishment of material injury, said that in their view the solution would be to bring the national legislations in question into conformity with Article VI. Such uniformity of national legislations and their implementation could be facilitated by the agreement on a code on countervailing duties. Increased multilateral discipline could thus be achieved by providing for prior notification of imminent countervailing action and subsequent consultations between governments concerned, and procedures for investigations. Other delegations supported the idea of a code on countervailing duties, saying that such a solution would be preferable to the disinvocation by governments concerned of the Protocol of Provisional Application with regard to Article VI.

21. Some delegations commenting on the view expressed that countervailing duty actions might constitute serious obstacles and distortions to trade, as well as lead to increased friction between governments, said that this was equally true with regard to the increasing use of export subsidies. It was hardly reasonable that the blame for creating a barrier to trade fell upon the government which imposed countervailing duties, rather than the country which subsidized its exports; if the export subsidizing government would refrain from such measures, there would be no need to impose countervailing duties. Similarly, these delegations considered that the use of export subsidies should be the last recourse of governments, rather than countervailing duties, as suggested by some other delegations. These delegations agreed that there might be a need for a thorough review of the GATT provisions governing the application of countervailing duties, but stressed the equal importance of reviewing the provisions relating to export subsidies.

22. As the distinction between anti-dumping and countervailing duties, these same delegations agreed that there were two problems involved which required different international solutions. Any major review of both the material injury concept and the consultation procedures would have to tackle the whole problem, not just one side of it. It would be necessary to look at the range of subsidies to be covered as well as the provisions for consultations both on subsidies and on countervailing actions. In the latter case, it would at any rate be necessary to retain provisions for sanctions. Finally, Article VI was inadequate to deal with the serious problem of competition from subsidized exports

on third country markets, and a re-examination of Article VI with a view to developing more effective rules in this area was in itself a necessity.

23. Some delegations were of the view that as any code of conduct or interpretative note should be ratified by all contracting parties, and as this would be a lengthy process, it would in their opinion be advantageous to seek the full implementation of existing GATT provisions, i.e. to utilize fully the procedures under Articles XXII and XXIII. If the provisions of these Articles had been properly used from the outset, the necessary case law relating to problems both of subsidies and countervailing actions would by now have evolved.

24. One delegation stated that under the law of its country the government had complete discretion in regard to the application of countervailing duties. It could deem any kind of financial support to be a subsidy and attach any conditions, procedural or substantive, to the exercise of that discretion. It was only required to act reasonably. Although the clause was clearly discretionary, his government was fully bound by the provisions of Article VI. Therefore, if it received a request for the application of countervailing duties, it had to decide what ad hoc procedures were needed to meet its obligations to find material injury as required by the GATT.

D. Differentiated treatment for developing countries

25. The Group had before it a working document presented by the Brazilian delegation on the question of differentiated treatment in the field of subsidies and countervailing duties for developing countries (MTN/3B/W/3).

26. One delegation from a developing country, in introducing the proposal contained in document MTN/3B/W/3, said that it stemmed from the Tokyo Declaration and particularly paragraph 5 therein. It was complementary to the document MTN/3B/W/2 and in fact was an attempt to respond to certain questions which had been posed in that proposal. This delegation reiterated the developing countries' request for differential treatment for both subsidies and countervailing duties. There was a need to begin consideration of how this concept could be implemented.

27. Many delegations from developing countries supported the statement concerning differential treatment. These delegations stressed that this statement, the Brazilian proposal and paragraph 17 of MTN/3B/10 summarized well the position of developing countries. They said that government aid was not only legitimate under Part IV of the GATT and the Tokyo Declaration, but also necessary and indispensable for a number of reasons, namely the limited size of the home market and the keen competition from developed exporters, the constant need for diversification of their exports and the different levels of their economic and technological development. For all these reasons government aids provided by developing countries had to be treated differently from those of developed countries. These delegations pointed out that the area of countervailing duties was one area where differential treatment could be applied.

28. Some delegations stated that they were willing to explore the possibility for differential treatment and would like to hear concrete proposals to this effect. They were very conscious of the fact that developing countries' interests would have to be taken fully into account throughout the negotiations. Some of these delegations said that the problem might not be so complex since developing countries' products were not likely to enter developed countries' markets in such large quantities as to cause injury. Some

delegations pointed out, however, that the relevant provisions of the GATT did not give "carte blanche" in the field of subsidies. With reference to countervailing duties the same delegations noted that when there was proof of injury, there was no question of exempting developing countries altogether. There was a need to be discretionary and not to work on the basis of automaticity.

29. Some delegations from developing countries acknowledged the positive intervention made by other delegations, saying that an atmosphere now prevailed to implement the Tokyo Declaration in so far as developing countries' interests were concerned. They said that what may be residual for developed countries was of considerable importance to developing countries' interests. One of these delegations stated that a general waiver should be granted to developing countries; this would be preferable to a discretionary use of the GATT provisions.

30. Some delegations said that any general solutions to the problems of export subsidies and countervailing duties might at the same time also meet the needs of developing countries for differentiated treatment. This was, in the view of these delegations, especially true if appropriate consultation procedures, a meaningful test of material injury and possibly some other elements were commonly adopted.

31. There was widespread support for the idea that the discussion on general rules and on differentiated treatment for developing countries should be pursued in parallel.