

COUNTERVAILING MEASURES: ILLUSTRATIVE MAJOR ISSUES

Paper by Brazil

The following communication, dated 3 October 2002, has been received from the Permanent Mission of Brazil.

This paper has the objective of identifying some illustrative major issues related to the countervailing measure provisions contained in the Subsidies Agreement that would need to be clarified and improved, as mandated in the Doha Ministerial Declaration. The mandate provides for an adequate opportunity to fill several lacunae contained in Part V of the ASCM.

Brazil has already presented most of these ideas in the course of the discussions of “tired 80” of the implementation issues, at the Committee on Subsidies. Extensive debate was undertaken at the Committee from September/2001 to July/2002. Unfortunately, it was not possible for Members to reach agreement, then, on solutions to the several issues raised.

Some of the lacunae of the Subsidies Agreement become evident by comparison with the Anti-Dumping Agreement. Many of the provisions related to the application of countervailing measures mirror, to a certain extent, the procedures related to anti-dumping. This fact implies that, in many cases, the same need for clarification and improvement of the Anti-Dumping Agreement indicated by members, in previous submissions to this Negotiating Group, would be applicable to the countervailing measures provisions of the Subsidies Agreement.

The case for a clarification and improvement of the countervailing measure provisions is reinforced by the fact that a number of analogous provisions in the Anti-Dumping Agreement are more detailed. This asymmetry needs to be addressed by the Negotiating Group.

The factors mentioned above provide for the generic “rationale” for improvement of the countervailing provisions of the Subsidies Agreement. In this paper, Brazil presents some illustrative major issues related to CVD, adding questions to the explanation of some of the perceived problems. These questions are raised with the purpose of promoting the discussion while giving a sense of the direction the negotiations should have. In some cases, concrete proposals are already tabled.

This is a first contribution to the deliberation of the NG on Rules, as far as countervailing measures are concerned. Brazil may, in the future, present additional contributions with new areas for negotiation.

ARTICLE 11.4

Article 11.4 of the SCM Agreement provides that petitions need support by domestic producers whose collective output constitutes more than 50 per cent of the total production by that portion of the domestic industry expressing either support for or opposition to the petition. This provision also states that “no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of the total production of the like product produced by the domestic industry”.

Under these current rules, an application can be filed with the support of those representing only a minority portion of the total domestic production of the like product. Is it acceptable to consider that the application represents the total domestic production when the application is supported by such a small portion of the total domestic production? Shouldn't the application be supported by at least more than 50 per cent of the total domestic production?

ARTICLE 11.9 and ARTICLE 19

Article 19 of the Agreement on Subsidies and Countervailing Measures should be interpreted in a way that is compatible with its Article 11.9. The latter determines, inter alia, that “there shall be immediate termination [of an investigation] in cases where the amount of a subsidy is *de minimis*”. However, when it comes to the imposition and collection of countervailing duties, as set forth in Article 19 of the cited agreement, there is an omission of such a “*de minimis*” clause. If, for a certain reason, the amount of the subsidy is found to be less than the “*de minimis*” threshold for a specific exporter, the text does not provide explicit guidance. This lacuna, in practice, may be interpreted as allowing the collection of duties even if the amount of the subsidy is below the “*de minimis*”.

There is an important element in this discussion that would be worth exploring: the distinction between the moments of imposition and collection of the duty. Brazil naturally considers that there would be no possibility to impose duties when the amount of subsidy has been found to be “*de minimis*” during the investigating period. However, in some cases, specially when the amount of the countervailing duty is assessed on a retrospective basis, when it comes to the final assessment for the collection of the duty, some countries would not apply the “*de minimis*” rule. Brazil's position is that, in both systems (prospective and retrospective), no countervailing duties should be collected when the amount of the subsidy is found to be “*de minimis*”.

There are several instances related to anti-dumping investigations where duties have been collected, even though the actual dumping margin was “*de minimis*”. As there exists a parallelism between the collection of anti-dumping and countervailing duties, it is quite possible that this sort of situation might arise also regarding the collection of countervailing duties.

PROPOSAL UNDER ARTICLE 11

The SCM Agreement does not currently contain any provision defining the product under investigation/consideration. This ambiguity allows the authorities to define a group of products destined for very different market segments to be a single “product under investigation” based on the petition of domestic industry, or based on the authorities' own discretion. The purpose of a countervailing measure is to remove injury caused by subsidized imports. In light of this purpose, is it appropriate to exploit the fact that a certain specific product has been found to be subsidized, and then to “use” that finding for one product to apply CV measures to another product, which is a superficially similar but substantially different product, for example, a product that is destined to a different market segment? What rules would provide a more rational and disciplined framework to determine the scope of “product under investigation”, so that CV measures would only be applied to

those products found to be “subsidized” and causing injury? Shouldn’t there be appropriate criteria for determining the “product under investigation” to limit arbitrary expansions of product scope?

Determining the scope of “product under investigation” at initial stage of investigation could have significant effect on the whole process of the CVD proceedings. For example, the scope of the product under investigation/consideration defines the scope of "like product", which in turn determines domestic producers that constitute the "domestic industry" and also determines the data that will be necessary for the injury analysis.

Allowing an undisciplined definition of the scope of "product under investigation/consideration" could also permit the authorities to include products developed at a later time in the scope of the "product under consideration", even if such later-developed products would be radically different. Should the authorities be given so much discretion to effectively redefine the scope after affirmative determination?

ARTICLE 12.7

In this area, some sort of symmetry should be established between the provisions of the Anti-Dumping Agreement on facts available (Annex II of the Agreement) and the Agreement on Subsidies and Countervailing Measures, which, although providing for the possibility of recourse to facts available in its Article 12.7, does not elaborate on the matter.

The AD Agreement already establishes guidance for the use of “facts available” in its Annex II, which details, for instance, the procedures to be applied in case an interested party refuses access to information or does not provide the necessary information. These two situations are exactly those referred to in Art. 12.7 of the SCM Agreement. Given this fact, it is Brazil’s view that there is no reason why the same procedures should not be applied in CVD investigations. The need for improvement in the provision is particularly clear in the situation where AD and CVD investigations on imports from the same Member are conducted at the same time, the investigating authorities being obliged to follow guidelines on the treatment of the information provided in one investigation and not in the other.

Article 12.7 of the SCM Agreement clearly establishes that “facts available” could only be used when an interested party refuses access to information or does not provide the necessary information. Thus, Brazil considers that the “facts available” concept allows the investigating authorities to use information originated in sources other than the party concerned only under those specific circumstances.

A few modifications should be done in Annex II in order to adapt it to the language and concepts of the SCM Agreement. For instance, where Annex II of the AD Agreement reads “interested parties”, it should be read “interested Members and/or interested parties”; where Annex II reads “normal value”, it should be read “amount of subsidy”; and, of course, where Annex II reads “Paragraph 8 of Article 6”, it should read “Paragraph 12 of Article 7”. As "independent sources" (paragraph 7 of Annex II) are concerned it could be mentioned, for instance, Members’ notifications to WTO and public reports of the agencies responsible for programs.

ARTICLE 14

The “chapeau” of Article 14

Brazil understands that, for the purpose of Part V of the SCM Agreement, investigating authorities shall calculate the amount of the subsidy in terms of the benefit conferred to the recipient

(producer/exporter) and do so on a product unit basis. This approach is the only one consistent with the title of the article; therefore no other basis for this calculation should be allowed.

Although most of the Members agree with this interpretation of the SCM Agreement, the text of the “chapeau” of Article 14 might leave room for misinterpretations as a result of the fact that only its title refers explicitly to the calculation of the amount of a subsidy in terms of the benefit to the recipient, but not the “chapeau” itself.

This absence may lead to the incorrect interpretation that Article 14 refers strictly to the calculation of the benefit to the recipient but not to the calculation of the amount of the subsidy in terms of the benefit of the recipient. Consequently, some may argue that, for the purpose of Part V of the SCM Agreement, it would be possible to adopt any method for the calculation of the amount of the subsidy (for instance, one based on the cost to the granting government).

For illustrative purposes, suppose, for instance, that the Government of a certain country provided, in 2001, US\$10,000 for the producers of product A and that the total production of that good in the given country, in the period in question, amounted to 10 tonnes. So, it was determined that the amount of the subsidy was US\$1/Kg and, considering that the imports of this product caused injury to the domestic industry of another Member, this Member applied a countervailing duty of US\$1/Kg on the imports of product A, irrespective of considerations about the actual benefit to the recipients. Such an approach would be, in Brazil’s view, inconsistent with Article 14. However, in order to remove any possibility of misinterpretation, we propose that the chapeau mirrors the language of the title.

There is a second element to be addressed in the discussions, related to transparency. The obligation of transparency established in the chapeau (“any method used ... shall be transparent and adequately explained ...”) can also be misinterpreted as only referring to the method for the calculation of the benefit and not to the method for the calculation of the amount of the subsidy. Consequently, a Member could consider itself not to be required to include in its national legislation - or implementing regulation – the method used to calculate the amount of the subsidy. Therefore, there seems to exist a margin for the utilization of non-transparent methods for the calculation of the amount of the subsidy.

Thus, in order to clarify Article 14 and avoid misinterpretations, the “chapeau” of that Article should read as follows:

“For the purpose of Part V, any calculation of the amount of a subsidy shall be effected in terms of the benefit conferred to the recipient on a per unit and per exporter/producer basis. Any method used by the investigating authority to calculate the amount of the subsidy in terms of the benefit conferred pursuant to paragraph 1 of Article 1 shall be transparent and adequately explained.” (...)

Additional Guidelines to Article 14

In order to guarantee more predictability and harmonization of the methods adopted by the Members for calculating the amount of the subsidy, Brazil also considers that additional guidelines should be included in Article 14. The topics covered by these additional guidelines are of a different nature from those topics covered by letters (a) to (d) of Article 14. It is important to note that the Brazilian proposal does not intend to cover all the relevant aspects that are involved in a subsidy investigation.

The proposed additional guidelines are:

(e) expenses incurred by the exporter/producer in order to obtain the subsidy (e.g. administrative charges) shall be deducted from the amount of the subsidy. Export taxes applicable to the export of the product under investigation and intended to offset the subsidy shall also be deducted from the amount of the subsidy;

(f) in case the subsidy is not granted according to the quantities that are produced, exported or transported, the amount of the subsidy shall be calculated by determining the corresponding proportion of the subsidy amount that is related to the production, sale or export, as appropriate, of the good; and

(g) in case the subsidy is granted to acquire capital goods, the amount of the subsidy shall be calculated according to the rules for the depreciation of the good in the industry concerned and with the volume of production, sale or export, as appropriate, of the product.

(i) Deduction of expenses and export taxes

As for the issue related to the deduction of expenses and export taxes, the idea behind this proposal is that the investigating authority should calculate the amount of the subsidy based on the net benefit to the exporter.

In relation to the expenses, it is important to clarify that the Brazilian proposal refers only to the expenses necessarily incurred in order to qualify for or obtain the subsidy. These expenses are of an administrative nature (e.g. application fees) and are paid by the producer/exporter directly to the authority responsible for the concession of the subsidy.

It must be shown that such payment is compulsory by law or any applicable legislation in order to receive the subsidy. Thus payments to private parties, e.g. lawyers, accountants, incurred in applying for subsidies, would not be deductible. Neither would voluntary contributions to governments, such as donations.

With regard to the export taxes, Brazil considers that if they were not intended to offset subsidies, they should not be deducted, once they do not have the effect of reducing the benefit that a recipient has obtained. For instance, if a Government decided to apply export taxes on exports of a large group of products, regardless of the consideration whether they have been subsidized or not, the export tax paid by a specific exporter that had obtained a subsidy would not be deducted from the benefit received.

A different situation would be if the export taxes were applied only on the exports of the subsidized product, as a result, for instance, of an agreement between the exporting Member and a Member that has its exports to third markets affected by the subsidy. In this case, the export taxes were intended to offset the subsidy and should be deducted.

It would be necessary to analyse the criteria that should be used to determine if the export tax is intended to offset the subsidy. One of those criteria could be the scope of the export tax, that is, whether it is applied only on exports of subsidized products or on a large group of products. Another criteria would be the moment when the decision to apply the export tax was taken (for instance, if the export tax is previous of the implementation of the subsidy program it is obviously not intended to offset the subsidy). It should also be investigated whether the export tax was created as a result of bilateral consultations or of a dispute settlement procedure; and if not, what its motivation was. Those

are some examples of criteria/aspects that should be analysed in order to determine whether the deduction is warranted.

It is also important to note that those deductions (expenses and export taxes) would require the demonstration by the exporter/producer under investigation that he has effectively paid administrative charges and/or export taxes. The burden would rest with the exporter to request such deductions and to present verifiable evidence that they were warranted.

In the case of export taxes, claims for deductions should only be accepted if the charges involved were levied during the investigation period, and if it were established that they continued to be levied at the time when definitive measures were recommended.

(ii) Appropriate Denominator for the Calculation of Subsidy Amount

As the amount of the subsidy shall be calculated on a per-unit product basis, it is important to introduce a guideline related to this issue.

Once the total amount of benefit related to a subsidy is determined for the period under investigation (period for which the amount of the subsidy is determined), the investigating authority shall calculate the amount of the subsidy on a per unit-basis. The unit adopted depends on the characteristics of the product under investigation and normally should be the commercial unit. For instance, in the case of an investigation on imports of shoes, the unit adopted should be pair of shoes; in the case of an investigation on imports of chemicals, the unit adopted should be tons, and so on.

When the subsidy is tied to production, sales or exports, it is not a difficult task to determine the amount per unit. Nevertheless, when this is not the case, some doubts could be raised with regard to the denominator to be adopted in order to calculate the amount per unit. In order to clarify this matter, Brazil suggests that the denominator should be the production, sales or export, depending on the characteristics of the subsidy. For instance, if it benefits only the exports of the firm, the benefit should be divided by the total volume of its exports. If the subsidy implies a reduction of the cost of production, the benefit should be divided by the whole volume of production. If the subsidy affects the sales of the firm, the benefit should be divided by the volume of sales. If the benefit of a subsidy is limited to a particular product, the denominator should reflect only sales [production/exports] of that product. If this is not the case, the denominator should be the recipient's total sales [production/exports].

We provide, below, some examples to illustrate the matter:

Example 1

A producer of a single product receives a subsidy on energy, and he pays for the energy consumed in the production process a price that is lower than the price paid by other producers. For instance, instead of paying, in the period of investigation, \$10,000, he pays \$5,000 that is, a benefit of \$5,000 is conferred to that producer. Taking into account that the reduced cost of energy benefits all the volume of the production of the product under investigation, regardless whether it is destined to exports or to the domestic market, the benefit of \$5,000 should be divided by the total production in the same period (5,000 tons.). In this example, the amount of the subsidy granted would be \$1 per unit.

Example 2

A producer of a single product pays a lower price for the transportation of his production either to domestic consumers or to the domestic port of loading of his exports. In the period of

investigation, instead of paying \$2,000 for transport costs, he paid \$1,000 for the transportation. He received a benefit, then, of \$1,000. If 2,000 units of the product were sold (either to domestic market or exports), the amount of the subsidy would be \$0.50 per unit.

Example 3

In this example the subsidy is granted by reference to exports:

A producer of a single product receives a grant of \$50,000 in 1987 to subsidize its exports to a certain country. The period of investigation is 1995. In 1995, total sales of its product were 30,000,000 units, exports to that country were 10,000,000 units. The useful life period of the assets in the industry in question (which is the same for the company under investigation) is 10 years. The amount of the subsidy in the investigation period would be calculated by spreading the total benefit conferred over the useful life period of the assets, what would result in a benefit of \$5,000 during the period of investigation, and then dividing the amount so obtained by the volume of the exports. The amount of the subsidy conferred to the exports of the product under investigation would be \$0.0005 per unit.

Subsidy Tied to the Acquisition of Capital Goods

Considering that the investigating authorities should determine the amount of subsidy for the period of investigation and considering that there are subsidies the effects of which extend over a number of years, it is important to introduce guidelines related to this issue. One of the cases in which this situation can be raised refers to subsidies tied to the acquisition of capital goods.

For those subsidies, Brazil considers that the amount of benefit has to be spread over the useful life period of the assets. This should be done on the basis of the depreciation rule adopted by the recipient, considering that it is in accordance with the generally accepted accounting principles/legislation of the exporting country. Normally, Members' legislation establishes a period for the depreciation of fixed assets and the method adopted refers to the straight-line-method.

It should also be considered that some Members' legislations allow for an "accelerated accounting depreciation" that is based on the actual utilization of the fixed assets (equipments, machinery) which result in a different useful life period of assets from that provided for in the legislation. For instance, suppose an equipment with a useful life period established by the fiscal legislation at 10 years, and consequently with the normal depreciation rate of 10 per cent (straight-line-method). This equipment can be depreciated in faster (higher depreciation tax) if it is demonstrated that its actual utilization is more intensive than the utilization normally considered to determine the useful life period of the good. In those cases, the burden is on the producer to demonstrate this circumstance (more intensive use) to the tax authority, on the basis, for instance, of the numbers of hours of working, volume of production and/or other indicators.

Summing up, considering the existence of subsidies tied to the acquisition of capital goods the effects of which are not concentrated in the period they were granted/conceded, it is important to spread the benefit over the useful life period of the assets. This useful life period should be established on the basis of the legislation of the exporting Member.

Sampling

Considering that the calculation of the amount of the subsidy shall be in terms of the benefit, it implies that an amount of the subsidy shall be calculated for each exporter under investigation. Nevertheless, there are cases in which the number of exporters under investigation is so large that makes it impossible to arrive at a specific determination of the amount of subsidy for each of them. In

those cases, the investigating authorities would use samples. In order to avoid divergent practices among Members, it is important that the use of sample obeys specific criteria, such as those mentioned in Article 6.10 of Agreement on Anti-Dumping.

ARTICLE 15.3

Article 15.3 of the current SCM Agreement recognizes the general principle of cumulatively assessing injury, if the authorities determine, among other conditions, that a cumulative assessment of the effects of imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

Notwithstanding, the Agreement does not establish what factors should be analyzed to make that determination. As a result inappropriate determinations related to the “conditions of competition” can be made.

What factors should be considered to evaluate if the conditions of competition between the imported products from both countries and between them and the like domestic product are the same? Current practice on cumulation of small exporters from different countries demonstrate a need to clarify this aspect.

ARTICLE 18.1

Price undertakings are a useful tool to provide concrete guidelines for exporters to manage their businesses, while protecting the domestic industry from any further injury through the effects of subsidies. Article 18.1 of the SCM Agreement, however, does not state what should constitute “satisfactory voluntary undertakings”. Article 18.3 also provides the authorities with wide discretion to refuse proposals for price undertakings, including undefined “reasons of general policy”. Because of these ambiguities, the current SCM Agreement provides few meaningful procedures for exporters to return to its ordinary business with the price undertakings.

ARTICLE 19.2

The purpose of a countervailing measure is to remove injury caused by subsidized imports, the logical consequence of such a purpose being the convenience of a lesser duty, if the latter is adequate to remove injury. Nevertheless, some Members calculate the countervailing duty without assessing if a lower duty could be sufficient to offset injury. In these cases, the objective of a countervailing duty may be gravely distorted.

For developing countries, this situation has even more serious consequences. As the trade restrictive effects of a countervailing duty are enhanced when the “lesser duty” rule is not applied, developing countries face an additional burden.

In order to reduce these trade restrictive effects, the use of the “lesser duty” rule shall be made mandatory.

ARTICLE 21.3 and 21.4

A. INTRODUCE PROVISION FOR ASSESSMENT OF DEGREE OF SUPPORT FOR REVIEW REQUESTS

The Brazilian proposal regarding “standing” applies to “sunset” reviews conducted pursuant to Art. 21.3 of the SCM Agreement and what Brazil suggests is the adoption of the same “standing” test established in Art. 11.4. Art. 21.3 already requires that a petition be made “by or on behalf of the

domestic industry”. Our proposal intends to clarify that the expression “by or on behalf of the domestic industry” should be understood as in Art. 11.4. Brazil considers that it is relevant to make clear that the same test should be applied in both cases (initiation of investigation and initiation of review).

It is important to emphasize that the Brazilian proposal should not be construed as to impede the authorities to initiate a review on their own initiative.

B. INTRODUCE PROVISION FOR NOTIFICATION AND CONSULTATION OF MEMBERS WHOSE PRODUCTS ARE SUBJECT TO REVIEW

In view of the fact that the initiation of a review under Art. 21.3 of the SCM Agreement implies that the duty may remain in force pending the outcome of such a review, it is important that, before this initiation, Members whose products may be subject to such review shall be notified of this possibility and invited for consultations with the aim of clarifying the situation and arriving at a mutually agreed solution.

Article 21.4 establishes that the provisions of Art. 12 regarding evidence and procedures shall apply to any review. By analogy, there is no reason why the procedures of notification and consultation as established by Art. 13.1 should not apply to the reviews.

REVIEWS

The current SCM Agreement does not clearly articulate the concepts, procedures and methodologies applicable to reviews under Article 19.2 (countervailing duty assessment), Article 21.2 (revocation reviews) and Article 21.3 (sunset reviews). The lack of explicit rules makes it possible for the authorities to introduce rules, procedures, and methodologies arbitrarily into these reviews that differ substantially from those in initial investigations and thereby placing undue burden on the respondent. Is this fair? Shouldn't many of the same rules as those used in the initial investigation be applied for reviews?

Furthermore, shouldn't the duration of reviews stipulated in Article 11.4 be limited to maximum of 12 months?"
