

**IMPROVED DISCIPLINES UNDER THE AGREEMENT  
ON SUBSIDIES AND COUNTERVAILING MEASURES**

Communication from Canada

The following communication, dated 5 June 2003, has been received from the Permanent Mission of Canada.

The Uruguay Round *Agreement on Subsidies and Countervailing Measures* (the “Subsidies Agreement”) introduced significant improvements to prior multilateral and plurilateral rules/disciplines on subsidies and countervailing measures, as enshrined in the GATT 1947 and the 1979 Tokyo Round Subsidies and Countervailing Duties Code, respectively. These included, a comprehensive definition of “subsidy”, the further elaboration of prohibited subsidy practices, improved multilateral disciplines on domestic subsidies, and the clarification of rules for the conduct of subsidy investigations and the application of countervailing duties.

That said, the experience to date with the operation of the Subsidies Agreement (as reflected, *inter alia*, in the WTO litigation record, the operational ineffectiveness of certain parts of the Agreement and the lapsing of specific provisions in December 1999) points to a need for the further clarification and improvement of disciplines in this area with a view to achieving greater convergence in the manner of their interpretation and application and enhancing predictability.

As a next step in the evolution of multilateral rules in this area, Ministers at Doha instructed the Negotiating Group on WTO Rules to clarify and improve disciplines under the Subsidies Agreement while preserving the basic concepts, principles and effectiveness of the Agreement as well as its objectives, and taking into account the needs of developing and least developed Members.

In carrying out this mandate, Canada sees an important opportunity for the Negotiating Group to work toward minimizing the scope for the evasion or abuse of Subsidies Agreement disciplines and remedies while, at the same time, ensuring the continued effectiveness of the Agreement in addressing trade-distorting subsidy measures.

With the mandate from Ministers and these objectives in mind, Canada has identified the following issues as possible subjects for negotiation. This does not, however, purport to be an exhaustive enumeration of the negotiating issues that Canada may wish to pursue.

Finally, it is Canada’s view that developing and developed countries share a mutual interest in advancing the issues presented in this submission. In this regard, Canada is prepared to discuss specific proposals for the consideration of the special circumstances of developing and least developed countries.

## PROPOSED ISSUES FOR CLARIFICATIONS AND IMPROVEMENTS

### 1. DEFINITION OF SUBSIDY

*General Objective:* To require that the constituent elements of the definition of “subsidy” in Article 1.1 of the Subsidies Agreement be clearly established in an investigation.

*Underlying Principle:* Where the recipient of the original “financial contribution” and the recipient of the resulting “benefit” are alleged to be different entities, the investigating authorities cannot assume but, rather, must definitively establish, a subsidy pass-through from the former to the latter.

**Pass-Through of Benefit:** WTO jurisprudence has clarified that an investigating authority cannot assume that the benefit of subsidies provided to producers of upstream input products passes-through to producers of downstream products, especially if there is evidence on the record that the transactions occurred at arms-length. Rather, the investigating authority must examine whether, and to what extent, upstream subsidies benefited downstream producers. In this regard, consideration should be given to establishing appropriate guidelines to assist investigating authorities in conducting pass-through analyses.

### 2. SPECIFICITY

*General Objective:* That the Subsidies Agreement provide clearer guidance as to when a subsidy is “specific”.

*Underlying Principle:* Certain aspects of the current definition of “specificity” would benefit from clarification.

The concept of “specificity” is a cornerstone of the Subsidies Agreement upon which both the actionability and countervailability of a subsidy depend. In this regard, Canada believes that certain aspects of the current provisions on “specificity” would benefit from clarification (e.g., the meaning of the phrase “enterprise or industry or group of enterprises or industries”).

### 3. ACTIONABLE SUBSIDIES

*General Objective:* To ensure that the Subsidies Agreement includes an effective remedy to respond to the export and import displacing effects of subsidies.

*Underlying Principle:* The “serious prejudice” provisions of the Subsidies Agreement are an important complement to the rules/disciplines in respect of prohibited subsidies and countervailing measures, particularly for export-oriented economies. However, the lack of recourse to the serious prejudice remedy and the lapsing of certain serious prejudice provisions in 1999 indicate a need to revisit this part of the Agreement with a view to its clarification and improvement.

**Serious Prejudice:** The “deeming” clause in Article 6.1 conferred an evidentiary advantage to complainants in respect of the specific measures enumerated in that provision by relieving them of the burden of having to demonstrate adverse effects once it was established that the subsidy in question was one described in Article 6.1. In addition to the loss of this evidentiary advantage, the expiration of this provision in 1999 had consequential implications for a number of other related

provisions in the Subsidies Agreement, which were rendered either inoperative or of uncertain status.<sup>1</sup> Canada believes that consideration should be given to reinstating and enhancing the deemed serious prejudice provision.

Paragraph 4 of Annex IV provides a deemed serious prejudice threshold for start-up incentives that is distinct from the *ad valorem* subsidization threshold prescribed in Article 6.1 of the Subsidies Agreement. In this regard, Canada will also want to explore how current disciplines in respect of start-up subsidy incentives, which can have obvious trade distorting effects, might be improved.

The *Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures*<sup>2</sup> on Annex IV to the Subsidies Agreement contains a number of practical recommendations on the calculation of the cost to government and *ad valorem* subsidization for different types of subsidies as well as on related issues. Consideration should be given to building these recommendations into the Agreement, if and as appropriate, with a view to improving the clarity and effectiveness of Annex IV and, by extension, Article 6.1(a) of the Subsidies Agreement.

Finally, the Rules Group should explore how the current serious prejudice provisions might be usefully clarified and improved in order to render the multilateral discipline more effective. For example, consideration should be given to clarifying the subsidy “effects” requirement (including the identification of other factors that may be contributing to export or import displacement).

#### 4. DISPUTE SETTLEMENT

*General Objective:* The special dispute settlement rules in respect of prohibited subsidies should function effectively with the generally applicable dispute settlement rules in the DSU.

*Underlying Principle:* General dispute settlement procedures should accommodate the prescribed accelerated timeframes for the adjudication of prohibited subsidy claims without impairing the ability of Members to advance other claims of violation.

**Accelerated Timeframes:** Article 4.12 of the Subsidies Agreement, which provides accelerated timeframes for the adjudication of prohibited subsidy disputes, is listed among the special or additional dispute settlement rules and procedures in Appendix 2 to the DSU. The language of Article 4.12 is mandatory, affording no discretion with respect to the application of these accelerated timeframes. Moreover, in accordance with Article 1.2 of the DSU, these special timeframes prevail over the generally applicable timeframes set out in the DSU. However, giving effect to these special timeframes has proven difficult where other claims of violation, in addition to those in respect of prohibited subsidies, are also at issue. Consideration should, therefore, be given to how the special timeframes for prohibited subsidies can be reconciled with the generally applicable timeframes in the

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<sup>1</sup> Among the provisions affected by the lapsing of Article 6.1 are the following:

- (i) Article 6.2, which operates “*notwithstanding*” Article 6.1;
- (ii) footnote 19, which establishes a limited evidentiary requirement for Article 6.1;
- (iii) Annex IV on the calculation of total *ad valorem* subsidization for the purpose of Article 6.1(a);
- (iv) footnote 66, insofar as serious prejudice must now be demonstrated in all cases;
- (v) Article 27.8, which eliminates the presumption of serious prejudice under Article 6.1 for subsidies granted by developing countries;
- (vi) footnote 15, which refers to Article 6.1(a); and
- (vii) footnote 16, which refers to Article 6.1(d).

<sup>2</sup> Document G/SCM/W/415/Rev.2 of 15 May 1998.

DSU in such situations, having regard to parallel negotiations currently taking place in the Doha Round, to improve the efficiency and effectiveness of the DSU.

**Permanent Group of Experts:** The functioning of this institution should be examined to determine how its advisory and dispute settlement roles might be improved.

## 5. OTHER ISSUES

Canada notes that certain Members have proposed that the Rules Group consider the treatment of certain subsidies (e.g., in relation to environmental protection) under the Subsidies Agreement. Canada would support such a discussion.

## 6. COUNTERVAIL

The following issues should be read in conjunction with those clarifications and improvements proposed in Canada's earlier submission on the Anti-Dumping Agreement<sup>3</sup> that are equally relevant to the negotiations in respect of this Agreement (e.g., *vis-à-vis* initiation standards, transparency, public interest, and duty imposition).

*General Objective:* To achieve greater convergence among Members in the manner in which the countervailing duty provisions of the Subsidies Agreement are interpreted and applied.

*Underlying Principle:* Greater guidance and definitional precision are required for key concepts and principles relevant to the conduct of subsidy investigations and the application of countervail measures.

**Investigations:** The countervail part of the current Subsidies Agreement could benefit from various clarifications and improvements. For example, consideration should be given to:

- the need for further and more detailed guidelines concerning the quantification of amounts of subsidy (e.g., in respect of royalty-based financing); and
- the harmonization, where possible and appropriate, of the provisions of the Subsidies Agreement and Antidumping Agreement, (e.g., whereas the Subsidies Agreement provides expedited reviews for any exporter that was not actually investigated, the Antidumping Agreement restricts expedited reviews to new shippers).

*General Objective:* To ensure greater equity in the countervail process.

*Underlying Principle:* The countervail process should take into account the amount of subsidy benefiting the domestic industry.

**Subsidized Domestic Like Product:** Where, in a countervailing duty investigation, the domestic like product is itself being subsidized, trade is arguably distorted only to the extent that the foreign and domestic subsidies have a differential impact.

In the interest of greater systemic fairness, the Rules Group should explore practical modalities to ensure that the countervail process takes account of the amount of subsidization specifically benefiting the domestic like product.

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<sup>3</sup> Refer to document TN/RL/W/47.