Export Competition

Chapter 6. Export Subsidies after Nairobi

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>> Background: GATT and WTO legal framework

The first provision on export subsidies appeared in the first paragraph of Article XVI of The General Agreement on Tariffs and Trade of 1947 (GATT). The paragraph mainly established an obligation to notify the contracting parties, which provided the possibility to discuss the effect of the subsidization and, in the event of prejudice or threat, evaluate the possibility of limiting said subsidization.

In 1955, Section B of this Article was introduced and this led to the first distinction between subsidies on primary products (including agricultural products) and on products other than primary products. For the latter, the article established a prohibition[59], as from 1 January 1958 or the earliest practicable date thereafter, of any form of subsidy on the export of any product other than a primary product *"which subsidy results in the sale of such product for export at a price lower than the comparable price charged for a like product to buyers in the domestic market"*.

The situation was different for primary products. In this case, the commercial effects criterion was applied. This implied that the contracting parties *"should seek to avoid"* these kinds of measures. However, if a subsidy was granted, such measure couldn´t be applied in a manner which resulted in that contracting party having more *"than an equitable share of world export trade in that product"*.

Such was the situation when the Uruguay Round took place. The Agreement on Agriculture (AoA), which establishes the first set of rules regulating subsidies on the export of agricultural products, was established in these negotiations. Article 1 of this agreement defines these measures as subsidies *"contingent upon export performance"* and in article 9 is listed a series of measures[60] that group most of the practices relating to export subsidies, practices which were frequently applied in the agricultural sector.

Paragraph 3 of Article 3, Article 8 and Article 10 establishes a prohibition on export subsidies in excess of the budgetary outlay and quantity and levels of commitment specified in the Members' Schedules.

In this regard, only twenty-five Members of the WTO are authorized to provide export subsidies, and they will only be able to do so in respect of the products for which they have undertaken reduction commitments.

[59] Most parties did not apply such a prohibition immediately. Later, during the Tokyo Round, a Subsidies Code -where the prohibition was extended to more contracting parties - was established. However, it was the Agreement on Subsidies and Countervailing Measures of the Uruguay Round of 1995 which finally established the prohibition of subsidies on the export of non-agricultural products, with some special considerations towards developing countries and transitional economies.

[60] We can mention those contingent upon export performance, the sale of non-commercial stocks at a price lower than the comparable price in the domestic market, measures to reduce costs, subsidies financed by producers, subsidies on internal transport and on incorporated products.

Countries with reduction commitments*

Australia (5)	Iceland (2)	Romania (13)
Brazil (16)	Israel (6)	South Africa (62)
Bulgaria (44)	Mexico (5)	Switzerland-Liechtenstein (5)
Canada (11)	Norway (11)	Turkey (44)
Cyprus (9)	New Zealand (1)	EU (20)
Colombia (18)	Panama (1)	Uruguay (3)
United States (13)	Poland (17)	Venezuela (72)
Hungary (16)	Czech Republic (16)	
Indonesia (1)	Slovak Republic (17)	

Source: WTO
* The number of products that each country can subsidize appears between brackets.

Countries which have not undertaken commitments are unable to provide export subsidies on agricultural products. However, the provisions related to the Special and Differential Treatment (SDT), which appear in Article 9, paragraph 4 of AoA, allow developing countries to use two types of export subsidies:

- Subsidies that aim to reduce the costs of marketing exports of agricultural products, including upgrading and other processing costs, and the costs of international transport and freight;

- Internal transport and freight charges on export shipments, on terms more favour able than for domestic shipments.

>> More negotiations: the Doha Round and the Nairobi conference

Once the WTO was established, it was agreed that negotiations on the reform of the agricultural trading system would continue[61]. Therefore, negotiations would be initiated by the beginning of 2000. By November 2001, the negotiations on agriculture became part of the *"single undertaking"* of the Doha Round.

In 2004, members of the WTO managed to agree on a group of decisions, which led to the *"July package"* of 2004. The main section in relation to agriculture provided a framework for what could have been a definitive agreement. Members managed to work out their differences in the Hong Kong Ministerial Conference (December 2005) but negotiations could not be completed. The signed Declaration aimed to ensure the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect to be completed by the end of 2013.

61 Article 20 of AoA

In the succeeding years, different draft texts and revisions on agriculture[62] were presented. By the end of 2008, a fourth revision of the project of agreement on agriculture was published, showing the progress made but also the on-going differences. This was the closest step towards an agreement. The project of agreement established that export subsidies had to be eliminated in five years, in order to comply with the term of 2013 fixed in Hong Kong. However, negotiations halted and all efforts were in vain. It is argued by many that the search for the *"single undertaking"* was one of the main causes of negotiations slowing down, given the different interests of members with different stages of development.

In 2011, conversations centered again on the mitigation of the differences in the positions of Members. In the Ministerial Conference at the end of that year, ministers agreed to focus on the items on which progress was more probable.

At the Bali Ministerial Conference, held in 2013, important decisions on agriculture were taken[63]. In relation to export competition, Ministers agreed[64] to exercise *"utmost restraint"* with regard to any recourse to all forms of export subsidies and to ensure "to the maximum extent possible" that the progress towards the elimination of all forms of export subsidies would be maintained. Ministers also reinforced the commitment to maintain the level of such subsidies as low as possible in relation to Members' commitments.

The tenth Ministerial Conference, which was held in Nairobi in 2015, saw one of the greatest advances in the agricultural sector since the creation of the WTO. That Conference culminated in the adoption of the *"Nairobi Package"*, a series of six Ministerial Decisions on agriculture, cotton and issues related to least-developed countries (LDCs).

In regard to agriculture, the topics were: i) a Special Safeguard Mechanism (SSM)[65] for Developing Country Members, which gives those countries the right to temporarily increase tariffs in the face of import surges by using an SSM; ii) the Public Stockholding for Food Security Purposes, a decision which commits members to engage constructively in finding a permanent solution to this issue[66]; and iii) a third document on Export Competition, which is discussed below.

In regard to this last topic, a Ministerial Decision was taken[67]. This Decision included, inter alia, the commitment to eliminate export subsidies on agricultural products.

62 https://www.wto.org/english/tratop_e/agric_e/chair_texts08_e.htm#dec08

63 There were Ministerial Decisions on topics like General Services (WT/MIN(13)/37 or WT/L/912), **Public Stockholding for Food Security Purposes** (WT/MIN(13)/38 or WT/L/913) and Administration of agricultural tariff quotas (WT/MIN(13)/39 or WT/L/914). Furthermore, there were Ministerial Declarations on Cotton (WT/MIN(13)/41 or WT/L/916) and on Export Competition (WT/MIN(13)/40 or WT/L/915).

64 https://www.wto.org/english/thewto_e/minist_e/mc9_e/desci40_e.htm

65 It was established that Members would continue with the negotiations on the mechanism in dedicated sessions of the Committee on Agriculture, but there has not been an agreement on volume or threshold of subsidies for the application of the SSM yet.

66 Under the Bali Ministerial Decision of 2013, developing countries are allowed to continue food stockpiling programmes, which are otherwise at risk of breaching the WTO's domestic subsidy cap, until a permanent solution is found by the 11th Ministerial Conference in Buenos Aires (2017)

67 Ministerial Decision on Export Competition (WT/MIN(15)/W/47).

In this regard, the Decision specifies that Developed Members shall immediately eliminate export subsidies, except for some agricultural products[68]. On the other hand, based on the Special and Differential Treatment, the Decision establishes that developing country Members shall eliminate their export subsidy entitlements by 2018. In addition, they will keep the flexibility to cover marketing and transport costs for agricultural exports until the end of 2023. The poorest and food-importing developing countries will enjoy additional time to cut export subsidies.

Furthermore, the Decision seeks to avoid the use of other export policies as a disguised form of subsidies. This includes terms to limit the benefits of financing support to agricultural exporters, establishing a maximum repayment term of 18 months and the fact that export credit guarantee, insurance and reinsurance programmes shall be self-financing and cover long-term operating costs and losses. It also established rules on state enterprises engaging in agricultural trade, which shall not operate in a manner that circumvents any other rules. Lastly, it establishes provisions to ensure that food aid does not negatively affect domestic production, by setting a series of commitments to prevent or at least minimize the potential of such measures to displace national or regional trade and production.

Again, there is a difference in the terms of application, based on the degree of development of the countries.

>> The day after Nairobi

In relation to the Nairobi Decision, WTO Director-General Roberto Azevêdo has pointed out that WTO Members – especially developing countries – had consistently demanded that measures on export subsidies be taken due to the enormous distorting potential of these subsidies for domestic production and trade. He affirmed that such a decision tackled the issue once and for all[69]. The question now is: Does it?

It is stipulated that the decision is legally binding, establishing the elimination of these subsidies and preventing governments from reverting to trade-distorting export support in the future.

Strictly speaking, the Nairobi Decision does not replace, reform or even amend the AoA. It is only a decision of the Members by virtue of Article IX: 1 of the WTO Agreement and, as such, cannot modify rights or obligations.

The Nairobi decision did not prohibit export subsidies, but committed the pertinent Members to present a new Schedule within the GATT to amend Section II, Part IV of its national schedule of commitments, inserting zero in the budget limit and the subsidized volume. That is, for that decision to be implemented, countries must make an amendment to their lists.

In this regard, it is important to mention that Australia has notified the WTO of its intention to stop subsidies on the export of agricultural products by eliminating this right from its schedule of commitments. Consequently, it became the first country to follow up on Nairobi's achievements.

68 Processed products, dairy products and pig's meat.

69 https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm

In effect, what Australia did was to unilaterally modify its schedules of commitments by removing export subsidies. If all countries with such commitments on their schedules did the same, the Decision would be implemented and Article 8 of the AoA would apply: *"Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule".*

In response to the question posed before: it does. In accordance with what was previously explained, in order to effect the Nairobi Decision, countries must implement the commitments through the modification of their schedules. If such implementation does not occur, members can continue applying export subsidies without breaching international regulations.

For this reason, it is important to follow the implementation of the Decision by the Members. The Buenos Aires Ministerial Conference could provide an excellent opportunity to reinforce the need for compliance. This would finally enable the guarantee of the implementation of the reform that took place in Nairobi, which, in terms of the AoA, has been the most significant reform since the creation of the WTO.

>> Some final considerations

Although the implementation of these agricultural aids has been significantly reduced since the 2000s, it is still a tool used by certain countries on a contingency basis.

As a matter of fact, a document[70] by the Cairns Group in the WTO underlines that of the 18 Members of the Organization that had scheduled export subsidy commitments, Australia, Brazil, Colombia, Iceland, Indonesia, New Zealand, South Africa and Uruguay have reported zero use of export subsidies since the Doha Round started in 2001. But it also highlights that five new countries—Barbados, Republic of Korea, India, Mauritius and Mexico—have implemented these policies and warn about the delay of many countries in notifying the WTO Secretariat on the use of subsidies.

Following the negotiation process, which peaked at the end of 2008 when the Doha Round was almost ended, there was a process of trust-building in the multilateral trading system. In this context, the advances in Bali and Nairobi were the alternative to progress on certain issues. These were probably not as significant as had been hoped, but they represented a vote of confidence in the WTO.

In regard to the use of Decisions as an option to *"legislate"* specific topics, this could be a window of opportunity for the Buenos Aires Ministerial Conference to produce results. This seems to be the better option to continue moving towards trade liberalization, at least until the international situation allows for a comprehensive reform of the WTO Agreements.

Given the current situation, this seems to be the most viable option, although we must not lose sight of the accomplishment of *"the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform"*, which was established in the Original Mandate, Article 20 of the AoA and reinforced through the Doha Mandate: *"to establish a fair and market-oriented trading system through a pro-*

70 Annual export competition review. Submission from the Cairns Group to the 80th meeting of the Committee on Agriculture (CoA) in June 2016

gramme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets".

It is in this direction that work continues, at a multilateral level and through a continuous process that guarantees desired results in the long term. The Buenos Aires Ministerial Conference seems to be the right environment to reinforce the role of the WTO as the place to address and regulate international trade, bringing some certainty and stability to the global uncertainty.