AIBE IX

[illegible]ES

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Article XVI*

Subsidies

Section A – Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING P

2. For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

Paragraph 3

1. The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.

2. A system for the stabilization of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the C

(d) Internal transport charges

It was agreed during the meetings of the Preparatory Committee at Geneva in 1947 that the granting of reduced internal transport charges on goods for export "would be subject to the provisions of Article [XVI] if it operates directly or indirectly to increase the exports of any product"[7].

(e) Tax exemptions

It was agreed at Havana that the terms of Article 25 [XVI] were sufficiently wide to cover a system where methods of direct subsidization to domestic industries were not used but whereby "certain domestic industries were exempted from internal taxes payable on imported goods"[8]. See also the reference to the Panel on "United States Tax Legislation (DISC)" below at page 449.

(f) Multiple exchange rates

See Interpretative Note 1 Ad Section B of Article XVI, which was added at the Review Session in 1954-55. The Report of the Review Working Party on "Other Barriers to Trade" notes, concerning the provisions added to Article XVI in the Review Session:

> "A number of members of the Working Party were concerned as to the possible effect of the proposed additional provisions on the right of countries to use multiple exchange rates in accordance with the Articles of Agreement of the International Monetary Fund. The Working Party has therefore recommended an interpretative note to cover this case. It wishes also to record the fact that the draft provisions have been considered by the Working Party on the assumption that paragraph 9(a) of Article XV in the present Agreement will not be altered"[9].

means of a partial depreciation of a country's currency which may be met by action under [Article VI:2]. By 'multiple currency practices' is meant practices by governments or sanctioned by governments".[12]

(g) Border tax adjustments and duty drawback

See the general Interpretative Note to Article XVI. This note, added in the 1954-55 Review Session, was drawn from paragraph 2 of Article 26 of the Havana Charter, the text of which appears below at page 465. The records of the Havana Conference note the understanding that paragraph 2 "covers the case of remission of duties or taxes imposed on raw materials and semi-manufactured products subsequently used in the production of exported manufactured goods".[13]

The relevance of Article XVI to border tax adjustments was examined by the Working Party on "Border Tax Adjustments" in 1968-71; the 1971 Report of the Working Party notes that "It was agreed that GATT provisions on tax adjustment applied the principle of destination identically to imports and exports".[14]

The 1977 Report of the Working Party on "Suspension of Customs Liquidation by the United States" examined the compatibility with Article VI:4 of the Japanese practice of exempting exported products from domestic consumption taxes and noted that "All but one member of the Working Party … agreed that the Japanese tax practices in question were in full accord with the provisions of GATT, its established interpretation as well as established practice of the GATT. They also agreed that … if countervailing duties were imposed, the imposition of such duties would be in contravention of the provisions of the GATT including Article VI:4 and the note to Article XVI …".[15]

(3) [illegible]

The New York Report notes, with regard to the draft Charter provision corresponding to Article XVI:1, "It will be observed that the provision in this sentence as now drafted applies to cases in which the subsidy operates, 'directly or indirectly', to increase exports or reduce imports of any product and can thus not be interpreted as being confined to subsidies operating directly to affect trade in the product under consideration".[16]

(4) [illegible]

The Report of the Working Party in 1948 on "Modifications to the General Agreement" notes that the Working Party agreed not to amend Article XVI:1 to incorporate the changes made to the corresponding Charter Article at the Havana Conference, inter alia in view of the understanding that

> "The phrase 'increased exports' in [Article XVI:1] of the General Agreement was intended to include the concept of maintaining exports at a level higher than would otherwise exist in the absence of a subsidy, as made clear in line 3 of Article 25 of the Havana Charter".[17]

The 1960 Report on the "Review Pursuant to Article XVI:5" provides:

> "In the opinion of the Panel, it is not sufficient to consider increased exports or reduced imports only in a historical sense. In this connexion the Panel had in mind [the interpretation which appears directe(o)-1.5(subsi

> fair to assume that a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, e.g., a consumption subsidy, either increase exports or reduce imports[18]".

This finding was referred to in the 1990 Panel Report on "EEC - Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins"[19].

The Panel Report on "United States Tax Legislation (DISC)" notes: "The Panel considered that, as it had found the DISC legislation to constitute an export subsidy which had led to an increase in exports, it was also covered by the notification obligation in Article XVI:1"[20].

(5) [illegible]

In 1950 the CONTRACTING PARTIES made arrangements for the reporting of existing subsidies and for the notification of modifications therein and of new measures of subsidization[21]. These arrangements were confirmed in the Report of the Review Working Party on "Other Barriers to Trade"[22]. The questionnaire now used for the reporting of subsidies was established in 1960[23]. Procedures for Notifications and Reviews under Article XVI:1, which were adopted in 1962, provide for a new and full notification every third year and, in the intervening years, for a notification of the changes that have occurred[24].

The 1961 Report on "Operation of the Provisions of Article XVI", examining the kinds of notifiable subsidies, the scope of the notification requirement and the adequacy of notifications received, noted:

> "The rôle of Article XVI in providing the CONTRACTING PARTIES with accurate information about the nature and extent of subsidies in individual countries has been partly frustrated by the failure of some contracting parties to notify the subsidies they maintain. To the extent that this is based on the reluctance of contracting parties to expose themselves to charges of non-conformity with the Agreement, it reflects a misinterpretation of Article XVI. Moreover, a contracting party can be required to consult concerning a subsidy, whether or not it has been notified. There seems, therefore, no advantage to a contracting party in refraining from notifying its subsidies; on the contrary, notifications may dispel undue suspicions concerning those subsidies not previously notified[25]".

The question of notification of subsidies has also been examined at a number of meetings of the Committee on Subsidies and Countervailing Measures. The 1986 Report of the Committee on Subsidies and Countervailing Measures refers to a Note by the Secretariat reproducing all decisions by the CONTRACTING PARTIES with respect to notifications under Article XVI:1 of the General Agreement, and notes: "The decisions reproduced in this note are binding on all contracting parties and should be used as guidelines in the preparation of notifications under Article XVI:1". [26]

See also the general notification obligations in paragraphs 2 and 3 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979, which appear *in extenso* in the section on "Notification in GATT" under Article X.

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[18] L/1160, adopted on 24 May 1960, 9S/188, 191, para. 10.
[19] L/6627, adopted on 25 January 1990, 37S/86, 131, para. 154.
[20] L/3851, adopted on 7-8 December 1981, 23S/98, 114, para. 77.
[21] II/19.
[22] L/334, adopted on 3 March 1955, 3S/222, 225 para. 16.
[23] 9S/193.
[24] 11S/58. The most recent full notifications under this procedure appear in the addenda to L/7162 of 11 January 1994 (updated by addenda to L/7375 of 11 January 1994 and L/7611 of 11 January 1975).
[25] L/1442 & Add.1-2, adopted on 21 November 1961, 10S/201, 206, para. 19.
[26] L/6089, 33S/197, para. 13, referring to SCM/W/98.

(6)

The New York Report notes that the Drafting Committee changed the words "anticipated effect" to "estimated effect" "in order to remove the possible impression that the effect of a subsidy on export trade could be accurately predicted".[27]

"The intent of the last sentence of Article XVI ofthe General Agreement is that consultation shall proceed upon the request of a contracting party when it considers that prejudice is caused or threatened and would not require a prior international determination[31]".

[31] This understanding was confirmed in the Report of the Review Working Party on "Other Barriers7 764.4203 Tm -i(Gf)-1(

The 1958 Panel Report on "French Assistance to Exports of Wheat and Wheat Flour" provides that "The Panel … found that even if the French system had the characteristics described in paragraph 2 of [Interpretative Note 2 to Article XVI] the exemption provided from the provisions of paragraph 3 of Article XVI would be precluded if operations under such a system were 'wholly or partly financed out of government funds in addition to funds collected from producers in respect of the products concerned'". The Panel further found that the operation of the French system involved financial contributions from the government since part of the export losses was covered by Government funds. Accordingly, "the Panel concluded that the operation of the French system did in fact result in the grant of subsidies on the export of wheat and wheat flour within the terms of paragraph 3 of Article XVI".[47]

(3)

circumstances, it is reasonable to conclude that, while there is no statistical definition of an 'equitable' share in world exports, subsidy arrangements have contributed to a large extent to the increase in France's exports of wheat and of wheat flour, and that the present French share of world export trade, particularly in wheat flour, is more than equitable.[50]

The Panel then examined French trade in particular markets (Sri Lanka, Malaysia and Indonesia) to consider whether French export subsidies had caused injury to Australia's normal commercial interests, and whether such injury represented an impairment of benefits accruing to Australia under the General Agreement. The Panel concluded that

"While other suppliers of wheat flour have recently begun to play a larger part in the Southeast Asian markets, and although it is difficult to estimate to what extent such incursions as these are displacing traditional exporters, it is nevertheless clear that French supplies have in fact to a large extent displaced Australian supplies in the three markets.

…

"Since it is obviously more profitable to export wheat flour rather than wheat, Australia has suffered a direct damage which could be evaluated by applying the price difference between wheat flour and wheat to the quantity of Australian exports that were displaced by French exports. It would, however, be difficult to assess this displacement quantitatively with any precision. In addition to this direct damage, there were other incidental adverse effects upon Australia which cannot be measured …[51]

"The Panel then directed itself to the question of whether the damage apparent in recent years was likely to recur or be prolonged. …

"Although the Panel recognized that the French Government's policy [to reduce subsidies] would tend to reduce the effects of the system on world trade, it considered, nevertheless, that the operation of the system was such that when climatic circumstances were favourable there might be substantial quantities of wheat in excess of normal consumption requirements. … Also experience has shown … there was no inherent guarantee in the system that it would operate in such a manner as to conform to the limits contemplated in Article XVI:3".[52]

The 1967 Report of the Working Party under Article XXII:2 on "United States - Subsidy on Unmanufactured Tobacco" contains a discussion of the concept of "equitable share", particularly in relation to the trade of a less-developed country.

"The representative of Malawi stated that … the concept of equitability in this context … did not refer to the maintenance by the subsidizing contracting party of a predetermined proportionate share of a growing world market … in view of the provisions of an Interpretative Note to paragraph 3 which allowed for the entry of new exporters, there were grounds for maintaining that 'equitable shares' could vary …

"The representative of the United States said that … the United States Government shared the view of the Malawi Government that it would not be desirable to assume that a particular country's share of a market should remain static. It was not the intention of the United States to increase its share beyond an 'equitable level' but it could not be expected to accept the continued erosion of its relative position".[53]

In the 1979 Panel Report on "European Communities - Refunds on Exports of Sugar - Complaint by Australia",

[50] Ibid., 7S/53 paras. 17-19.
[51] Ibid., 7S/54-55, para. 23(c), 23(e).
[52] Ibid., 7S/55-56, paras. 24-25.
[53] L/2925, adopted on 22 November 1967, 15S/116, 122-123 paras. 21-22.

"The Panel considered that its examination should be based not on the concept of 'free market'

(4)

The term "previous representative period" is also used elsewhere in the General Agreement. See discussion of base periods under Articles XI:2, XIII:2(d) and XXVIII.

The 1958 Panel on "French Assistance to Exports of Wheat and Wheat Flour" made no specific reference to "previous representative period" in terms of Article XVI:3. It reviewed trade statistics from the pre-war (1934-1938) and post-war (1948-1958) periods, including statistics available for part of the year in which the Panel had been established.[60]

In the 1979 Panel proceeding on the complaint of Australia concerning "European Communities - Refunds on Exports of Sugar", the appropriate "previous representative period" was at issue. The representative of Australia argued that its complaint concerned the post-1975 period (i.e. 1976 to 1978, preliminary data only being available for 1978) and that the entire period 1961-1975 should be considered as a "previous representative period". Reference was also made to the "precedent of the Canadian lead/zinc case" interpreting Article XXVIII,

See also the 1983 Panel Report on "EEC - Subsidies on Export of Wheat Flour", which has not been adopted.[69]

4.

Article XVI:4 was added as a result of discussions in the Review Session of 1954-55.[70] This paragraph does not specify a date for the entry into force of the first sentence and has entered into force only for the seventeen countries which have accepted the Declaration Giving Effect to the Provisions of Article XVI:4.[71] See below.

(1)

Article XVI:4 states in its first sentence that the cessation of certain export subsidies called for will apply "as from 1 January 1958 or the earliest practicable date thereafter". The second sentence provides for a standstill on such export subsidies in the interim. The Interpretative Note to this provision states that "The intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement".

The Report of the Working Party in 1960 on "Provisions of Article XVI:4" reports on the consideration of

or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes."[95]

(2) [illegible]

"Primary product" is defined in Note 2 ad Article XVI, Section B, paragraph 2. The same definition of "primary product" appeared in paragraph 1 of Article 56 of the Havana Charter. See also the discussion of Article XVI:3 above.

Article 9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade provides that "1. Signatories shall not grant export subsidies on products other than certain primary products. 2. The practices listed in points (a) to (l) in the Annex are illustrative of export subsidies". A footnote to Article 9 states that "for purposes of this Agreement 'certain primary products' means the products referred to in Note ad Article XVI of the General Agreement, Section B, paragraph 2, with the deletion of the words 'or any mineral'".[96]

Article XVI:4. The Panel further noted that these contracting parties considered that, in general, the practices contained in the illustrative list could be presumed to result in bi-level pricing and that this presumption could therefore be applied to the [French, Belgian and Netherlands'] practices. The Panel concluded, however, from the words 'generally to be considered' that these contracting parties did not consider that the presumption was absolute.

"The Panel considered that, from an economic point of view, there was a presumption that an export subsidy would lead to any or a combination of the following consequences in the export sector: (a) lowering of prices, (b) increase of sales effort, and (c) increase of profits per unit. Because [France, Belgium and the Netherlands] were an important supplier in certain export sectors it was to be expected that all of these effects would occur and that, if one occurred, the other two would not necessarily be excluded. A concentration of the subsidy benefits on prices could lead to substantial reductions in prices. The Panel did not consider that a reduction in prices in export markets needed automatically to be accompanied by similar reductions in domestic markets. The Panel added that the extent to which tax havens existed was well known and that they considered this some evidence of the extent to which bi-level pricing had probably occurred.

"The Panel therefore concluded that the … tax practices in some cases had effects which were not in accordance with … obligations under Article XVI:4."[103]

Similar findings were made by the Panel on United States Tax Legislation (DISC).[104]

In the 1979 Panel Report on "Export Inflation Insurance Schemes",

"The Panel noted the conclusions of the Panels on United States Tax Legislation (DISC), on Income Tax Practices Maintained by France, by Belgium and by the Netherlands, as presented to the CONTRACTING PARTIES, according to which the contracting parties which had accepted the 1960 Declaration 'considered that, in general, the practices contained in the illustrativ

5.

In 1958 the CONTRACTING PARTIES appointed a Panel to undertake the preparatory work for a review envisaged in paragraph 5. The Panel submitted three reports which were adopted by the CONTRACTING PARTIES in 1960 and 1961, but the conduct of the review was postponed and has never taken place.[107]

The GATT Ministerial Declaration of November 1982 provided for the establishment of a Committee on Trade in Agriculture to examine, inter alia, "The operation of the General Agreement as regards subsidies affecting agriculture, especially en of November 1982

Articles 27 and 28 applied to subsidies on “primary commodities”, which were defined in Article 56:1 of

IV. DRAFTING HISTORY

London

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Geneva

Discussion: EPCT/EC/PV.2/22
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Reports: E/CONF.2/C.3/51

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Reports: GATT/CP.2/22/Rev.1

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