GENERAL AGREEMENT ON TARIFFS AND TRADE

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REPORT OF WORKING PARTY G ON THE AUSTRALIAN SUBSIDY ON AMMONIUM SULPHATE

I. INTRODUCTION

1. The Working Party examined with the delegations of Australia and Chile the factual situation resulting from the removal, on the 1st July 1949, of nitrate of soda from the pool of nitrogenous fertilisers which is subsidised by the Australian Government. It then considered whether the measure taken by the Australian government constituted a failure by the Australian government to carry out its obligations under the Agreement, within the terms of Article XXIII.

Having come to the conclusion that the measure taken by the Australian government did not conflict with the provisions of the Agreement, the Working Party then examined whether the Australian measure had nullified or impaired the tariff concession granted by Australia to Chile on nitrate of soda in 1947, and agreed on the text of a recommendation which, in its opinion, would best assist the Australian and Chilean governments to arrive at a satisfactory adjustment.

The Australian representative stated that his government was unable to associate itself with the conclusions reached by the Working Party in paragraph 12 of this Report; their views are reproduced in the Annex to this Report.

II. THE FACTS OF THE CASE

2. Prior to the out-break of war in 1939, ammonium sulphate was distributed in Australia by a commercial pooling arrangement operated by Nitrogenous Fertilisers Proprietary Ltd., a private enterprise; that corporation bought ammonium sulphate from the local producers (both by-product and synthetic sulphate) and from foreign sources of supply; the ammonium sulphate from all sources was sold to consumers at a uniform price. The distribution of imported sodium nitrate was effected by independent agencies.

3. In view of the scarcity of ammonium sulphate during the war, the Australian government purchased sodium nitrate from abroad and appointed Nitrogenous Fertilisers Proprietary Ltd. to act as distributing agent for the Commonwealth for both such fertilisers, which were sold to consumers at a uniform price of £A 16.10 per ton. During the first year of the operation of the pooling arrangement, the company could supply the market without any loss; during the later years, the Australian government undertook to meet the deficit of the company on the sales of both ammonium sulphate and sodium nitrate. This financial support by the Commonwealth government had the effect

of a subsidy on imported fertilisers.

4. As from 1st July 1949, Nitrogenous Fertilisers Proprietary Ltd. ceased to distribute sodium nitrate, the trade of which reverted to the pre-war commercial channels. The Australian government continued, however, to purchase abroad ammonium sulphate which it sold to Nitrogenous Fertilisers Propietary Ltd. at landed cost. The retail price of ammonium sulphate, both domestic and imported, was no longer fixed by government control; the price, therefore, rose by stages to £A. 22.10 per ton but the Australian government agreed to meet any loss on procurement or distribution of sulphate which might be incurred by Nitrogenous Fertilisers Proprietary Ltd., up to an amount of approximately £A. 500,000.

5. On the basis of information supplied by the Australian representative, the financial implications of that arrangement for 1949-50 may be summarised as follows:

	tons	1. estimated retail price on a commercial basis	2. retail price under subsidised pooling arrangement	3. Gross difference between columns 1 and 2
a) <u>domestic supply of sulphate</u>				
by-products	15,000	£A. 15.10	£A. 22.10	£A30,000
synthetic products	30,000	£A. 25		
b) <u>foreign supply of sulphate</u>				
various sources	26,700	£A. 31. 0 - £A. 33. 0	£A. 22.10	approx. -- £A275,000

<u>Note</u>: The weighted average of the quantities of ammonium sulphate listed under a) and b) above at the prices indicated in column (1) would give a selling price of £A. 25.12 in the absence of a subsidy. However, as some elements of cost annot be estimated with perfect accuracy, the figure of £A. 28 per ton was indicated by the Australian representative as a fair estimate of the maximum selling price of ammonium sulphate through Nitrogenous Fertilisers Proprietary Ltd. pooling arrangement if no subsidy were maintained.

6. The subsidy on sulphate of ammonia was maintained because, inter alia, users of that fertiliser would have been prevented, by domestic price control and long-term contracts, from increasing their selling price in order to take account of the increased cost of ammonium sulphate which would have resulted from the discontinuance of the subsidy. The same conditions did not exist in the case of sodium nitrate as the agricultural producers who used most of that fertiliser were no longer subject to price control arrangements and adequate supplies to meet all demands were available. The un-subsidised retail price of nitrate of soda is estimated at £A. 33.10 by the representative of Australia and at £A. 31.10 by the representative of Chile. These prices may be compared with the price of £A. 28 per ton for ammonium sulphate referred to in the above note.

The Australian imports of sodium nitrate during the post-war period were limited to the amounts allocated by the IEFC until June 1949. The total imports, mainly for industrial purposes, are estimated at about 14,000 tons for 1949-1950 as compared with about 7,000 tons for 1948-1949. However, the Working Party took note of the information supplied by the Australian representative that the agricultural demand for nitrate of soda had dropped from 6,300 tons in 1947-48 to 450 tons in 1948-49 (when nitrate of soda was sold under the pooling arrangement at the same price and on the same conditions as sulphate of ammonia) and the same amount will probably be used in agriculture in 1949-50 under the new arrangements. The Chilean representative stated that during 1948/49 nitrate of soda was not sold under the same conditions as sulphate of ammonia, as the whole allocation made that year by the IEFC to Australia was assigned by the Australian Government for industrial purposes and due only to Chile's reiterated petitions was 450 tons withdrawn from industrial stocks and given to agricultural uses, leaving therefore a demand of more than 3000 tons without fulfilment.

III. CONSISTENCY OF THE AUSTRALIAN MEASURES WITH THE PROVISIONS OF THE GENERAL AGREEMENT

7. The removal of nitrate of soda from the pooling arrangements did not involve any prohibition or restriction on the import of sodium nitrate and did not institute any tax or internal charge on that product. The Working Party concluded therefore that the provisions of paragraph 1 of Article XI and of paragraph 2 of Article III were not relevant.

8. As regards the applicability of Article I to the Australian measure, the Working Party noted that the General Agreement made a distinction between "like products" and "directly competitive or substitutable products". This distinction is clearly brought out in paragraph 2 of Article III, read in conjunction with the interpretative note to that paragraph. The most-favoured-nation treatment clause in the General Agreement is limited to "like products". Without trying to give a definition of "like products" and leaving aside the question whether the two fertilisers are directly competitive, the Working Party reached the conclusion that they were not to be considered as "like products" within the terms of Article I. In the Australian tariff the two products are listed as separate items and enjoy different treatment. Nitrate of soda is classified as item 403 (C) and sulphate of ammonia as item 271 (B). Whereas nitrate of soda is admitted free both in the preferential and most-favoured-nation tariff, sulphate of ammonia is admitted free only for the preferential area and is subject to a duty of 12½% for the m-f-n countries; moreover, in the case of nitrate of soda the rate is bound whereas no binding has been agreed upon for sulphate of ammonia. In the tariffs of other countries the two products are listed separately; in certain cases the rate is the same but in others the treatment is different; for instance in the case of the United Kingdom nitrate of soda is admitted free whereas a duty of £4 per ton is levied on ammonium sulphate.

9. In view of the fact that paragraph 4 of Article III applies to "like products" the provisions of that paragraph are not applicable to the present case for the reasons set out in paragraph 8 above. As regards the provisions of paragraph 9 of the same Article, the Working Party was informed that a maximum

selling price for ammonium sulphate was no longer fixed by governmental action and, in any event, noted that Australia had considered the Chilean complaint and had made an offer within the terms of that paragraph. Since it was not found that any of the substantive provisions of Article III were applicable, the exception contained in paragraph 8 (b) is not relevant.

10. The Working Party then examined whether the Australian government had complied with the terms of Article XVI on subsidies. It noted that, although this Article is drafted in very general terms, the type of subsidy which it was intended to cover was the financial aid given by a government to support its domestic production and to improve its competitive position either on the domestic market or on foreign markets.

Even if it is assumed that the maintenance of the Australian subsidy on ammonium sulphate is covered by the terms of Article XVI, it does not seem that the Australian government's action can be considered as justifying any claim of injury under this Article. It is recognised that the Contracting Parties have not been notified by the Australian Government of the maintenance of that subsidy, but the Working Party noted that the procedural arrangements for such notifications under Article XVI have only been approved by the Contracting Parties at their present session, and that they only require notification after imposition of the measure. Moreover, the Chilean Government has not suffered any injury from this failure to notify the Contracting Parties as it is established that the Chilean Consul General had an opportunity to discuss this matter with the Australian authorities before the decision to discontinue the subsidy on sodium nitrate had been enforced. The Australian Government has discussed with the Chilean Government the possibility of limiting the effects of the subsidisation and has also discussed the matter with the Contracting Parties, in accordance with the provisions of Article XVI.

11. Within the terms of reference of the Working Party, the examination of the relevant provisions of the General Agreement thus led it to the conclusion that no evidence had been presented to show that the Australian Government had failed to carry out its obligations under the Agreement.

IV. NULLIFICATION OR IMPAIRMENT OF THE CONCESSION GRANTED TO CHILE ON SODIUM NITRATE

12. The Working Party next considered whether the injury which the Government of Chile said it had suffered represented a nullification or impairment of a benefit accruing to Chile directly or indirectly under the General Agreement and was therefore subject to the provisions of Article XXIII. It was agreed that such impairment would exist if the action of the Australian Government which resulted in upsetting the competitive relationship between sodium nitrate and ammonium sulphate could not reasonably have been anticipated by the Chilean Government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty free binding on sodium nitrate. The Working Party concluded, that the Government of Chile had reason to assume, during these negotiations, that the war-time fertilizer subsidy would not be removed from

sodium nitrate before it was removed from ammonium sulphate. In reaching this conclusion, the Working Party was influenced in particular by the combination of the circumstances that:

a) the two types of fertilizer were closely related;
b) both had been subsidised and distributed through the same agency and sold at the same price;
c) neither had been subsidised before the war, and the wartime system of subsidisation and distribution had been introduced in respect of both at the same time and under the same war powers of the Australian Government;
d) this system was still maintained in respect of both fertilizers at the time of the 1947 tariff negotiations.

For these reasons, the Working Party also concluded that the Australian action should be considered as relating to a benefit accruing to Chile under the Agreement and that it was therefore subject to the provisions of Article XXIII. In reaching this conclusion, however, the Working Party considered that the removal of a subsidy, in itself, would not normally result in nullification or impairment. In the case under consideration, the inequality created and the treatment that Chile could reasonably have expected at the time of the negotiation, after taking into consideration all pertinent circumstances, including the circumstances mentioned above, and the provisions of the General Agreement, were important elements in the Working Party's conclusion.

The situation in this case is different from that which would have arisen from the granting of a new subsidy on one of the two competing products. In such a case, given the freedom under the General Agreement of the Australian Government to impose subsidies and to select the products on which a subsidy would be granted, it would be more difficult to say that the Chilean Government had reasonably relied on the continuation of the same treatment for the two products. In the present case, however, the Australian Government, in granting a subsidy on account of the wartime fertilizer shortage and continuing it in the post-war period, had grouped the two fertilizers together and treated them uniformly. Under such circumstances it would seem that the Chilean Government could reasonably assume that the subsidy would remain applicable to both fertilizers so long as there remained a local nitrogenous fertilizer shortage. The Working Party has no intention of implying that the action taken by the Australian Government was unreasonable but simply that the Chilean Government could not have been expected during the negotiations in 1947 to have foreseen such action or the reasons which led to it.

13. Having thus concluded that there was a prima facie case that the value of a concession granted to Chile had been impaired as a result of a measure which did not conflict with the provisions of the General Agreement, the Working Party came to the conclusion that there was no infringement of the Agreement by Australia. Since Chile had not applied for a release from any of its obligations, under the provisions of the last two sentences of paragraph 2 of Article XXIII, and it was moreover hoped that an adjustment of the matter satisfactory to both parties could be reached (without prejudice to the views of either on the merits of the case), it was not necessary for the Working Party to consider whether the above-mentioned provisions were applicable to the case.

14. The Chilean representative stated that his government did not press for a discussion of the question of the degree of damage sustained and would be satisfied if an arrangement could be made to remove the cause of the present competitive inequality between the two fertilizers. Such an arrangement would not necessarily involve the restoration of the previous method of subsidization. The Chilean representative suggested that no subsidy be granted for either fertilizer or that, if the Australian Government wishes to subsidize certain agricultural products, the subsidy might be paid on fertilizer used by the producers of those crops which it desires to subsidize, without distinction between types of fertilizer. Thus, wherever one nitrogenous fertilizer is subsidized for a particular crop, the other would receive equal subsidization.

15. As the declared intention of the Australian Government in maintaining the subsidy on ammonium sulphate was to give financial aid, not to the producers of a certain type of fertilizer, but to the producers of certain crops, whose selling price was limited by price control and who preferred to use ammonium sulphate for technical reasons, irrespective of price considerations, the Working Party came to the conclusion that a satisfactory adjustment would be achieved if the Australian Government could consider the possibility of modifying the present arrangements in such a way as to achieve that object while giving to the two types of fertilizers equal opportunity to compete on its market.

16. In the light of the considerations set out above the Working Party wishes to submit to the Contracting Parties the following draft recommendation which, in its opinion, would best assist the Australian and Chilean Governments to arrive at a satisfactory adjustment. In making this recommendation the Working Party wishes to draw attention to one point of particular importance. There is in their view nothing in Article XXIII which would empower the Contracting Parties to require a contracting party to withdraw or reduce a consumption subsidy such as that applied by the Government of Australia to ammonium sulphate, and the recommendation made by the Working Party should not be taken to imply the contrary. The ultimate power of the Contracting Parties under Article XXIII is that of authorizing an affected contracting party to suspend the application of appropriate obligations or concessions under the General Agreement. The sole reason why the adjustment of subsidies to remove any competitive inequality between the two products arising from subsidization is recommended is that, in this particular case, it happens that such action appears to afford the best prospect of an adjustment of the matter satisfactory to both parties.

17. The following is the text of the draft recommendation submitted by the Working Party to the Contracting Parties:

RECOMMENDATION REGARDING THE COMPLAINT OF CHILE CONCERNING THE AUSTRALIAN SUBSIDY ON SULPHATE OF AMMONIA

The Contracting Parties recommend that the Australian Government consider, with due regard to its policy of stabilizing the cost of production of certain crops, means to remove any competitive inequality between nitrate of soda and sulphate of ammonia for use as fertilizers which may in practice exist as a result of the removal of nitrate of soda from the operations of the subsidized pool of nitrogenous fertilizers and communicate the results of their consideration to the Chilean Government, and that the two parties report to the Contracting Parties at the next Session.

ANNEX

STATEMENT BY THE AUSTRALIAN REPRESENTATIVE

The Applicability of Article XXIII, paragraph 1 (b) to the complaint of Chile regarding the Australian Subsidy on Ammonium Sulphate

1. The Working Party has concluded that the Australian subsidy on Ammonium Sulphate in so far as it might affect the competitive position of Sodium Nitrate and Ammonium Sulphate constitutes actual or potential impairment of a benefit accruing to Chile under the General Agreement. The statement of the Working Party in paragraph 12 would seem to be derived from the following line of reasoning :

a) The direct benefit acquired was the binding of the duty-free rate on Sodium Nitrate.
b) The indirect benefit was the belief that in securing (a) above Chile had achieved a certain competitive relationship between Sodium Nitrate and Ammonium Sulphate, two fertilizers which Australia considers substantially different.
c) The Australian subsidy had upset this competitive relationship.
d) If in the light of pertinent circumstances and the provisions of the General Agreement this subsidy could not reasonably have been anticipated then impairment within the meaning of Article XXIII existed.

2. The Working Party then went to considerable trouble to show why Chile could not reasonably expect that Australia in abolishing its wartime emergency subsidies would do so as the needs of its economy dictated rather than in accordance with the anticipation of Chile that these two fertilizers possessing substantially different characteristics and uses and not being like products would be treated in an identical manner. The question of what obligations with respect to Ammonium Sulphate Australia could reasonably have expected when she consented to a binding of the free-duty rate on Sodium Nitrate would seem to be no less relevant. Equally relevant is the question of whether Australia reasonably could have anticipated the needs which would give rise to her present subsidy policy.

3. In view of the above and the fact that the Working Party has also found that the Australian subsidy on Ammonium Sulphate is completely in accordance with the provisions of GATT - including the provisions specifically relating to subsidies, Australia cannot consider it a sound argument that what a country might now say was its reasonable expectation three years ago in respect of a particular tariff concession should be the determining factor in establishing the existence of impairment in terms of Article XXIII. If it were accepted by the Contracting Parties then this interpretation of Article XXIII would require a complete re-examination of the principles on which Australia (and, we had supposed, all other countres) had hitherto granted tariff concessions. The history and practice of tariff negotiations show clearly that if a country seeking a tariff concession on a product

desires to assure itself of a certain treatment for that product in a field apart from rates of duty and to an extent going further than is provided for in the various Articles of the General Agreement, the objective sought must be a matter for negotiation in addition to the actual negotiation respecting the rates of duty to be applied.

4. If this were not so and if an expectation (no matter how reasonable) which has never been expressed, discussed or attached to a tariff agreement as a condition is interpreted in the light of the arguments educed in the Report of the Working Party, then tariff concessions and the binding of a rate of duty would be extremely hazardous commitments and would only be entered into after an exhaustive survey of the whole field of substitute or competitive products and detailed analyses of probable future needs of a particular economy.