

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

AG/W/9/Rev.1

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Special Distribution

Committee on Trade in Agriculture

RECOMMENDATIONS: DRAFT ELABORATION

Note by the Secretariat

Revision

1. In accordance with the decision of the Committee at its meeting on 2 April 1985, the present note has been prepared by the secretariat, in consultation with the Chairman, as a contribution to the Committee's further consideration of the approaches to be elaborated in terms of the recommendations adopted by the CONTRACTING PARTIES at their 40th Session (L/5753).

Introduction

2. The present note comments in somewhat greater detail than has hitherto been the case on the manner in which the approaches embodied in the Recommendations might be developed. The ideas and suggestions outlined in the explanatory note AG/W/9 have served as the principal point of reference for the present exercise, with account being taken of ideas and suggestions put forward in the course of the Committee's meetings in February and April of this year. In general, however, the present note does not purport to deal extensively with particular suggestions made, and indeed is without prejudice as to how these or other suggestions might be developed in the course of the Committee's work. Rather, the present exercise is concerned with how certain of the basic GATT rules and disciplines might be developed, interpreted or more effectively applied in the context of elaborating an improved framework of rules and opportunities for trade in agriculture.

3. The main focus of the present note is on the operative sections of the Recommendations relating to access, subsidies affecting trade, sanitary and phytosanitary measures, and review and examination of policies and measures affecting trade in agriculture. With regard to the Chapeau, which is a thematic statement of the objectives and purposes of a general approach or framework for future action aimed at bringing trade in agriculture more fully into the multilateral trading system, the general observations contained in paragraphs 4 to 7 of AG/W/9 are taken as being equally relevant in the present context. As

stated in paragraph 4 of the Recommendations, it is in the framework of a general solution covering all problems relating to trade in agriculture, as defined in the Ministerial Declaration, that the various approaches are to be considered. Rather than commenting further in the abstract on the general considerations mentioned in paragraph 3 of the Recommendations, reference has been made to these aspects, as appropriate, in various sections of this Note.

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4. ACCESS

Text: "... under which (a) all quantitative restrictions and other related measures affecting imports and exports are brought within the purview of strengthened and more operationally effective GATT rules and disciplines, including restrictions maintained under waivers and other derogations or exceptions, and the import and export activities of state trading and other related enterprises. Appropriate rules and disciplines relating to voluntary restraint agreements, to variable levies and charges, to unbound tariffs, and to minimum import price arrangements should be elaborated as part of this approach;"

5. In order to bring all, or substantially all, quantitative restrictions and other related measures within the purview of strengthened and more operationally effective GATT rules and disciplines, it has been suggested that an approach embodying three main lines of action would need to be developed.

6. The first line of action would consist in bringing under a reinforced Article XI those quantitative restrictions which at present escape the disciplines of that Article as a result of various derogations and exceptions (waivers, protocols of accession, grandfather clauses etc.), as well as residual quantitative restrictions. The second would consist in bringing all related or assimilable measures which are not explicitly provided for in the General Agreement, or which escape effective disciplines because of imperfect interpretation of the existing rules, under the disciplines of a reinforced Article XI, or if that is not appropriate, under equivalent disciplines within the framework of an appropriate GATT provision or an interpretative note or whatever (voluntary restraint agreements, variable levies and charges, unbound tariffs, MIPs). The third line of action would consist in a parallel endeavour to negotiate, as an integral element of the first and second lines of action, improved and more liberal opportunities for trade in agriculture in the framework of a negotiation that would also have as an objective the reduction and binding of tariffs on agricultural products generally.

QUANTITATIVE RESTRICTIONS

7. At present Article XI:2(c)(i) permits restrictions on imports (but not a prohibition of imports) under two basic conditions. One condition is that the restrictions are necessary to the enforcement of governmental measures which operate to restrict the quantities of the like (or directly substitutable) domestic product permitted to be marketed or produced. The second condition is that the import restriction shall not be such as to reduce the total of imports relative to the total of domestic production, compared with the proportion that might reasonably be expected to rule between imports and domestic production in the absence of restrictions. Thus the General Agreement intended that in any case where restrictions are imposed under Article XI:2(c)(i) to protect the operation of a certain class of domestic income or price support policies, a minimum level of access based, inter alia, on a ratio between imports and domestic production, should be respected for each and every product to which restrictions are applied.

8. In considering the adequacy of the existing Article XI:2(c)(i) criteria for the invocation of quantitative restrictions and the conditions under which substantially all quantitative restrictions might be brought under effective rules and disciplines, it is apparent that the maintenance or continued expansion of import access is more likely to be assured in an environment in which domestic production is effectively controlled. In general, if a criterion other than effective restriction or control of production were to govern the invocation of restrictions, not only would access under the last paragraph of Article XI:2 be less secure but the Article itself would be less of a deterrent to the imposition of new restrictions.

9. In practice, the range of quantitative restrictions applied in conformity with the existing Article XI:2(c)(i) criteria is not extensive. This, in itself, however, does not constitute a valid basis for relaxing the existing criteria, since to do so would involve the risk of merely legitimizing certain non-conforming measures at the expense of jeopardizing existing unrestricted tariff bindings. Such an approach could hardly be regarded as a strengthening of the linkages under Article XI between national policies and trade measures, or as a step in the direction of greater liberalization of trade in agriculture. On the other hand, if Article XI:2(c)(i) is to be more operationally effective, some better definition is needed of the domestic measures or policies in respect of which contracting parties may legitimately have recourse to quantitative restrictions.

Possible approaches

10. It is suggested that an approach that might be considered as a means of reinforcing the provisions of Article XI:2(c)(i), and bringing a wider range of quantitative restrictions under more operationally effective Article XI:2(c)(i) disciplines, would be: (i) to maintain the existing "restriction of production" criteria for the introduction of

new import restrictions; (ii) to introduce effective regulation of production as a basis for the continued maintenance of existing non conforming restrictions; and (iii) to make the introduction or maintenance of restrictions under Article XI:2(c)(i) subject to the observance of bound minimum access commitments.

11. The formal requirement of Article XI:2(c)(i) is that restrictions imposed on imports should be necessary to the enforcement of governmental measures which operate to restrict the quantities of the domestic product permitted to be marketed or produced. Although not incorporated in the report on quantitative restrictions adopted at the 1955 Review Session (3 BISD at pp. 189-191), interpretations of the corresponding Havana Charter provisions indicate that the domestic restrictions on production must be effectively enforced, and that to "restrict" is to be understood in the sense that "the measures of domestic restriction must effectively keep domestic output below the level which it would have attained in the absence of restrictions".

12. The concept of the level which production would have attained "in the absence of restrictions" would appear to constitute either a rather strict standard (if it relates to the absence of both internal and import restrictions) or a somewhat elastic standard (if it relates only to the absence of the internal restriction). It may be useful in giving greater precision to Article XI:2(c)(i) if the requirements of the last paragraph of Article XI:2 were also to include a requirement that public notice be given of the quantities of the domestic product permitted to be marketed or produced. Consideration might be given as well to an interpretation of "marketing" which would be intended to make it clear that restrictions on quantities permitted to be marketed should be operated in a manner which prevents production in excess of the marketable quantity from entering indirectly into commercial sales.

13. With regard to "effective regulation of production" the question is whether governmental measures which do not as such impose restrictions on the quantities permitted to be marketed or produced, should nevertheless be entitled to Article XI:2(c)(i) cover if such measures in fact operate to restrict or effectively control production? There are two aspects involved: (i) the conditions underwhich import restrictions can be legitimately imposed in the first instance; and (ii) the conditions underwhich import restrictions once imposed can be maintained. The fact that at present import restrictions are sometimes imposed to enforce governmental measures which purport to restrict the quantities permitted to be produced but which may or may not result in domestic production being effectively restricted, would not appear to provide a sound argument for a "wait and see" approach regarding the imposition of new restrictions based, for example, on price-related governmental measures.

14. On the other hand it is considered that a case can be made for regularizing existing non-conforming import restrictions on condition that such measures operate to restrict or effectively regulate domestic production and that the minimum access provisions of the last paragraph of Article XI:2 are respected. For this purpose "effective regulation

of production" might generally be taken to include measures which operate, and which are demonstrably designed to operate, to stabilize or control domestic production so as to prevent an undue increase in production relative to trends in domestic consumption, and which are not operated inconsistently with commitments with respect to imports and exports under the General Agreement.

15. In order to give operational effect to the access obligations of the last paragraph of Article XI:2, it is submitted that restrictions imposed or maintained under Article XI:2(c)(i) should be subject to a minimum access commitment equivalent to [x] per cent of total domestic production, or the existing ratio of imports to domestic production, whichever is the higher. The minimum access commitment, whether expressed as a proportion of domestic production or in quantitative terms, should also be consolidated as a tariff or zero duty quota in the Schedule of the contracting party applying restrictions under Article XI:2(c)(i). In accordance with general GATT principles minimum access commitments should be administered on a non-discriminatory basis and in accordance with such provisions for special and differential treatment as may be negotiated.

16. It is a moot point whether an import restriction maintained in conformity with the suggested "effective regulation of production" criteria should be subject to a higher minimum access commitment. Certainly there should be less tolerance of any deviation from any standard ratio established. Another aspect requiring comment is that, under the approach suggested, there could be a relaxation in governmental measures which currently restrict quantities permitted to be marketed or produced, thereby possibly prejudicing existing access under related Article XI:2(c)(i) restrictions. This would have to be assessed in the light of the protection afforded to existing access levels under the proposed reinforcement of the minimum access provisions of the last paragraph of Article XI:2, as well as in the light of the effectiveness of the particular domestic restrictions in terms of the existing and proposed criteria. It may be noted that only those non-conforming restrictions in force prior to a date to be negotiated, could be maintained on the basis of effective regulation of production.

17. The general objective of the approach outlined above would be to make it possible for a wider range of existing quantitative restrictions to be brought within the ambit of more operationally effective Article XI:2(c)(i) disciplines, while at the same time maintaining the present criteria governing the imposition of new restrictions. The essence of any negotiation along these lines would be to determine the standard minimum access or [x] ratio and the elements of an interpretative note relating to "effective regulation of production" that would serve as a basis for the negotiation of a list of governmental measures that would qualify a country to continue to maintain import restrictions. Existing import restrictions which could not be brought into conformity with the provisions of a reinforced Article XI:2(c)(i), under transitional arrangements relating to minimum access and to the effective regulation of production criteria, would have to be phased out.

Other criteria for invoking or maintaining import restrictions under Article XI:2(c) (i)

18. The suggestion that, in effect, the criteria for the invocation or maintenance of restrictions under Article XI:2(c) might be extended to include exceptions based on regional development policies and food security would appear to encounter certain objections, not the least of which would be that the security of tariff bindings generally could be undermined and that such an extension of the grounds on which quantitative restrictions could legally be invoked or maintained would be difficult to reconcile with the broader objectives of the Recommendations as they relate to access issues. The specific characteristics and problems of agriculture are, of course, matters to be taken into account but to do so on the basis suggested, rather than on a case by case basis in the context of a reinforcement of the existing Article XI:2(c) framework, could run counter to, or compromise, the development of an improved framework of rules and disciplines aimed at progressively achieving greater liberalization for trade in agriculture over a medium to longer term time-frame.

19. There are, moreover, a number of general aspects relating to the specificity of agriculture on which it might be appropriate to comment in this context. Firstly, one of the basic objectives of the ideas developed in paragraphs 10 to 17 above is to make the existing access obligation of the last paragraph of Article XI:2 more operationally effective. While the existing provisions of Article XI:2(c) do not entitle a country to prohibit imports, the detailed rules governing the determination of an appropriate proportionality between imports and domestic production are less than precise. The concept of "the proportion which might reasonably have been expected to prevail in the absence of restrictions" would, in and by itself, suggest that the share of imports should not be derisory. Furthermore, "special factors" to which due regard shall be paid in determining this proportion include "changes in relative efficiency as between domestic and foreign producers but ... not changes artificially brought about by means not permitted under the General Agreement". Thus, non-observance of the provisions of Article XI:2(c), or the consequences thereof in terms of lower levels of imports than might otherwise have prevailed, could not be called in aid to support the proposition that recent or historical import levels necessarily represent realistic minima.

20. Secondly, as a means of reinforcing the last paragraph of Article XI:2, one suggestion is that, for practical as well as other more general reasons, a minimum level of access might be introduced, either as an integral element of a revision of Article XI:2 or as a negotiating rule. One figure mentioned, by way of example, was a 10 per cent minimum access ratio. In such a case one of the issues that would need to be addressed is whether, as a general proposition, 90 per cent self-sufficiency in a particular product would provide adequate scope for the realisation of national policy objectives in terms of food security, and for a less intensive, or more equitably distributed, pattern of domestic production in terms of environmental or regional development desiderata.

21. Thirdly, the purpose of an arbitrarily determined minimum access ratio would be to express the existing Article XI:2 obligation in more operational terms precisely in order to deal more effectively with difficult cases. It is submitted that the specific problems that would arise in particular cases might be addressed in the context of transitional measures or on the basis of negotiated interim arrangements.

Other aspects

22. It may be noted that any reinforcement of the last paragraph of Article XI:2 along the lines suggested would involve some modifications of the Article XIII:4 procedures relating to the determination of the proportion between imports and domestic products. The existing procedures for notification of measures invoked under Article XI:2(c) might also need to be considered. The Article XI:2 requirement to give public notice has been construed by the CONTRACTING PARTIES as a requirement to also convey a copy of the public notice to the GATT. It is suggested in paragraph 12 above that the scope of this requirement might be extended. A further matter for consideration in the context of any reinforcement of Article XI:2(c)(i) as outlined in paragraphs 10 to 17, would be whether specific provision should be made for prior notification and consultation on new restrictions.

23. The extent to which restrictions on domestic production would entitle a country to restrict imports of like or processed products is an issue which will need to be examined in detail at the appropriate stage. The general approach, however, should be one which limits the scope for using quantitative restrictions as a method of protecting the industrial processing of agricultural products.

Temporary surplus

24. Article XI:2(c)(ii) provides that restrictions may be imposed to enforce governmental measures for the internal disposal of a temporary surplus. Restrictions under this sub-paragraph are not subject to the proportionality provisions of the last paragraph of Article XI:2. While the precise relationship between sub-paragraphs (i) and (ii) of Article XI:2(c) does not appear to have been determined in any definitive sense, it seems to be reasonably clear that restrictions under one or other of these provisions but not both is permitted. It would be important to ensure, however, that the temporary surplus situation should not be used as an escape clause from the strengthened provisions proposed in connection with the use of restrictions under Article XI:2(c)(i). In other words, sub-paragraph 2(c)(ii) should not be used to make restrictions under sub-paragraph 2(c)(i) more restrictive.

25. It is suggested, therefore, that consideration might be given to an interpretative note which would provide that additional restrictions may not be applied under Article XI:2(c)(ii) on products in respect of which import restrictions are already in effect under Article XI:2(c)(i).

26. With regard to the substance of Article XI:2(c)(ii), one of the difficulties is to determine what is a "temporary" surplus as opposed to a "more than temporary" surplus. In theory, if not in practice, the temporary surplus exception could be relied on to justify quasi-permanent restrictions, thereby avoiding the disciplines that would apply if the restrictions were instead invoked under Article XI:2(c)(i). Two suggestions might be considered in this regard: (i) that the contracting party having recourse to the temporary surplus exception be required to notify its intention to invoke Article XI:2(c)(ii) and to consult with the CONTRACTING PARTIES regarding the measures proposed to avoid a recurrence of the surplus situation; (ii) that if the restrictions are not revoked within a reasonable period, the contracting party concerned should be required to invoke Article XI:2(c)(i) restrictions. It might be a matter for consideration whether the application of Article XI:2(c)(ii) with respect to seasonal restrictions in certain product sectors might be clarified.

Article XI:2(c)(iii) restrictions

27. This provision enables import restrictions to be imposed as a special departure from the Article XI:2(c) "like or directly substitutable product" requirements. Thus where: (i) production of an animal product (e.g. meat) is directly dependent, wholly or mainly, on an imported commodity (feed grain); and (ii) domestic production of that commodity (feed grain) is relatively negligible: - then import restrictions may be imposed on imported feed grain in order to enforce restrictions on the quantities of meat permitted to be produced. Since "feed grain" and "meat" could not be regarded as "like products" it would not be possible to impose restrictions on imported feed grain under sub-paragraphs (i) or (ii) of Article XI:2(c) in order to enforce a restriction on domestic production of meat. Apart from these explanations Article XI:2(c)(iii) would not appear to call for particular comment, except perhaps to note that the conditions governing its invocation are rather carefully circumscribed.

State trading and other related enterprises

28. In the case of "state trading and other related enterprises" the approach that might be elaborated would be directed to reinforcing the existing GATT rules and disciplines to ensure that the activities of these enterprises are conducted in a manner which is consistent with the obligations assumed by governments in respect of import and exports. In addition to seeking greater transparency as regards the activities of such enterprises, one general objective should be to ensure that the obligations of governments with respect to import and export measures under the relevant GATT rules, including a reinforced Article XI.2(c), are not circumvented by the operation of state trading or other related enterprises. Thus minimum import obligations should have to be respected in cases where, although Article XI:2(c) is not as such invoked, the activities of such enterprises have the effect of quantitative or other related restrictions.

29. Another feature of any approach in this area should be to ensure that the proposed disciplines are respected in any situation where a monopoly of imports, or a controlling influence over whether imports may be carried out, is exercised by or through an entity in virtue of a formal or de facto relationship with governmental authorities. In other words, if the de facto situation is one in which control over imports is delegated to or exercised by a body or organization, even a producers' association, the proposed disciplines should be respected. Marketing Boards are already specifically covered under the Note to Article XVII:1.

30. An improved application of Article XI:2(c) obligations in this general sense would depend, in part at least, on an approach being adopted in negotiations under which the existence of a situation where imports are effectively controlled by a state-trading enterprise, or some other body or organization as described above, would be covered by negotiating procedures on minimum access commitments notwithstanding the fact that Article XI:2(c) may not have been invoked in respect of the product whose importation is controlled by virtue of the activities of such enterprises or bodies. This in turn would suggest that the existence and activities of such enterprises or bodies should be more extensively notified than would appear to be the case at present. One possibility in this regard might be to consider more comprehensive agricultural product-related notification procedures, either on an ad hoc basis for the purposes of any future negotiation, or as a general improvement in the notification and transparency procedures under paragraph 2 of the Recommendations.

31. In this connection, consideration might also be given to the modalities under which non-discrimination and national treatment requirements would be complied with, as appropriate, in all transactions.

Tariffs as the principal form of protection

32. The objective of any shift away from quantitative and other non tariff restrictions would be to allow progressively greater scope for the interplay of market forces in agricultural trade. Any transition to tariffs from quantitative and other non tariff restrictions would necessarily involve a number of stages. In the first instance a major negotiating effort would be required to establish levels of tariff protection corresponding to the protection afforded by the existing non tariff measures. Given the broader ramifications of such a transition, it would not be unrealistic to expect that in certain, if not many, cases, tariffs would tend to be established initially at highly protective rates.

33. A second stage might consist in an agreement on the principles and procedures to govern negotiations aimed at reducing and binding these tariffs. Presumably the results of such a negotiation would be implemented over a number of years in accordance with whatever formula was adopted. Moreover, as with any other tariff negotiation, the

negotiating rules would presumably make provision for, or not exclude, exceptions. In the case of certain countries and products the specific characteristics and problems involved would tend to limit, at least in an initial round of negotiations, the scope for progress much beyond a conversion to tariffs. In any event a general transition to tariffs would allow market forces to have at least some influence in domestic markets and would provide, in subsequent negotiating rounds, a basis for the progressive reduction of agricultural tariffs in a number of areas to less protective or more tradeable levels.

34. It is considered such an approach would represent an important step forward in the general direction of more liberal agricultural trading conditions. However, it would not necessarily follow that, initially at least, levels of effective protection would be significantly lower than under current practices. They could in certain sensitive areas remain at relatively higher levels. Indeed there could also be a tendency to negotiate gaps in the bottom of the fence through tariff quotas, rather than to reduce overall tariff levels. In practice the likely short to medium-term impact of such a transition would depend on the extent to which, in a first negotiating round, it was possible to negotiate both a conversion to and a reduction in tariffs on the basis of reciprocity and balance of rights and obligations.

Other related measures

35. The general prohibition in Article XI:1 relates to restrictions or prohibitions "other than duties, taxes or other charges". Paragraph 1 (a) of the recommendations refers, in addition to quantitative restrictions, to a number of other restrictive measures, such as voluntary restraint agreements, variable levies and charges, unbound tariffs and minimum import price arrangements. In calling for the elaboration of appropriate rules and disciplines on such measures the recommendations are not intended to prejudge whether a particular measure not explicitly recognized in the General Agreement would be so recognized or legitimized (e.g. an appropriate rule on VRA's could be a provision declaring such measures to be illegal simpliciter). Nor does the formulation in paragraph 1(a) presuppose that it is necessarily under Article XI itself that a home should be found for one or other of these measures, although it would appear logical to do so.

36. Rather, the general philosophy developed in the course of the work of the Committee has been that in order to bring substantially all measures under more operationally effective rules and disciplines, and thereby bring trade in agriculture more fully into the multilateral trading system, it is necessary that the restrictive measures to which countries can resort, whether or not they are explicitly provided for a present in the General Agreement, should also be subject to effective disciplines. If, for example, only the rules on quantitative restrictions were to be reinforced the tendency could be for countries to resort to other measures that are not subject to equivalent rules and disciplines or not subject to multilateral disciplines of any kind.

Voluntary restraint agreements

37. In the agricultural sector, at least, it does not appear that voluntary restraint agreements are a substitute for orthodox Article XIX safeguard action. From the information notified or available such agreements are not a temporary response to injury caused or threatened by a surge in imports. Instead they tend to be a political half-way house between Article XI:2(c) and Article XXVIII, with action under Article XI not being palpably justified and with recourse to Article XXVIII being unduly expensive in terms of compensation. For the importer a VER is a convenient and economic method of loosening the constraints which a bound tariff would otherwise impose on its freedom to pursue its domestic policies. For the exporter it is usually the least bad short-term alternative.

38. Whatever the motivations involved, VERs are generally inconsistent to one degree or another, with the provisions of Articles XI, XIII or XIX. In these circumstances there are only two possible solutions: either they are specifically prohibited or they are authorized under certain conditions.

39. The basic elements of any prohibition on VERs would be (i) an interpretative note to Article XI:1 specifically providing that such agreements may not be resorted to (ii) the negotiation of procedures for phasing out existing VERs or bringing such restrictions into conformity with Article XI:2(c) and other relevant GATT provisions.

40. The elements of an approach aimed at bringing VERs under effective disciplines would depend to some extent on the nature of the conditions that would in future govern the recourse to quantitative restrictions under Article XI:2(c)(i). The following suggestions are predicated on the basis that recourse to Article XI:2(c)(i) would continue to be governed by an effective regulation or management of production in terms that would not go beyond a moderate and controllable extension of the existing criteria.

41. On this basis it is suggested that there should be a requirement to submit voluntary restraint agreements to the CONTRACTING PARTIES who, on the basis of a negotiated set of criteria, would make a determination as to the agreements conformity therewith. An agreement once concluded would remain in force unless disapproved by the CONTRACTING PARTIES. The criteria or conditions to be negotiated might include:

- a zero duty for suppliers from LDC's parties to such agreements
- conditions regarding transparency (notification, annual report, surveillance)
- conditions regarding consistency of the restrictions with the provisions of Article XIII

- limitations as to duration
- clauses allowing any party to such agreements to denounce them during the period of application
- automatic increase clauses concerning imports, carry-over, etc.

42. When examining these agreements the CONTRACTING PARTIES would not have to determine whether or not they are appropriate but would make a simple determination as to their consistency with the negotiated criteria.

Variable levies

43. The question whether a variable levy is an unbound variable tariff, a variable minimum import price arrangement, a safeguard measure, or a restriction within the scope of the Article XI:1 prohibition, is unlikely to be resolved in any definitive legal sense. Some of the arguments and considerations relevant to this question are summarized in paragraphs 26 and 27 of AG/W/12. The fact of the matter is that a variable levy is a chameleon-like measure which compensates for changes in the relationship between international and domestic prices. Depending on the particular relationship between these prices, and also on the relationship between orientation prices and the prices ruling in the domestic market, the variable levy can theoretically have the characteristics of any one or more of the measures mentioned above.

44. In the present context the question is whether the variable levy should be treated as a measure to be negotiated on a formula or ad hoc basis, or whether, having regard to certain inherently restrictive features of variable levies, such measures should be subject to certain Article XI:2(c) disciplines, in particular the disciplines of the last paragraph of Article XI:2.

45. There would, it is submitted, be certain difficulties of a presentational nature in regularising the GATT status of variable levies by treating such measures on the same footing as quantitative restrictions: that is, by prohibiting variable levies under Article XI:1 and then, in the same breath, treating them as an exception under paragraph 2 of that Article. To do so would be to fail to give adequate weight to the fact that variable levies are not per se prohibitive in all circumstances. If the status of variable levies under the GATT is to be regularized on the grounds, inter alia, that the use of variable levies has become, and is likely to continue to become, more widespread, then a separate GATT provision which associates such measures with the disciplines of the last paragraph of Article XI:2 is considered to be a more appropriate solution. If a variable levy system is applied in a not unduly restrictive manner, the proposed minimum access disciplines would not constitute a significant burden. On the other hand, if a variable levy system is applied in a generally restrictive or prohibitive manner, then the association of such measures with the disciplines of the last paragraph of Article XI:2 would not seem to be inappropriate.

46. Other elements of a possible GATT rule on variable levies might include provisions relating to their non discriminatory application, to the manner in which they are calculated (transparency), and to the frequency and amplitude of changes in variable levies (e.g. the use of a 3 or 6 months moving average of a range of world market export prices as the basis for deriving levies).

Minimum import prices

47. Minimum import prices tend to be used in a variety of situations, either as an adjunct to other measures or as a form of trade regulation in their own right. In these circumstances, it is considered that a specific provision might be introduced under which minimum import price arrangements would be dealt with in terms of their trade effects. If minimum import prices are established at levels which prevent imports from any principal or developing country supplier from being commercially marketed at prices prevailing in the domestic market, they should be prohibited simpliciter. Minimum import price arrangements which do not operate as a prohibition but which are nevertheless restrictive of trade should be dealt with under Article XI:2(c).

Unbound tariffs

48. It is one of the underlying principles of the GATT system that tariffs, as opposed to quantitative or other restriction, should constitute the principal form of permitted protection. At the same time it is recognized "that customs duties often constitute serious obstacles to trade" and that "negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs ... in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities ... are of great importance to the expansion of international trade" (Article XXVIIIbis). The fact remains, however, that following seven rounds of trade negotiations many tariffs in the agriculture sector remain unbound or at levels which discourage trade. Some of the factors which have led to this situation are discussed in AG/W/5.

49. In essence there are two options for making further progress in the reduction and binding of tariffs in the agricultural sector. One is to conduct any future agricultural tariff negotiations on the basis of an across the board formula that would involve proportionately greater reductions in high unbound (and high bound) tariffs, and which would provide that where reductions on this basis were not feasible, the aim should be to negotiate bound tariff quotas, or duty free quotas, in line with the reinforced provisions at the last paragraph of Article XI:2.

50. The other option would be to establish a provision under which unbound tariffs in excess of a specified level would be associated with the minimum access provision of the last paragraph of Article XI:2. Appropriate negotiating procedures for the further reduction of bound and non prohibitive unbound tariffs would also need to be developed, since the introduction of specific disciplines on high unbound tariffs would not mean that other tariffs should escape the negotiating net.

51. The second option would establish a substantive obligation to provide a minimum level of access as opposed to a commitment to negotiate, ad referendum, on a particular basis. Moreover, the second option in treating high unbound tariffs as quasi non-tariff restrictions, would be something of an innovation in terms of general GATT principles. On the other hand, in terms of a broader approach inspired by equivalence of commitment and disciplines relating to all measures affecting access, some departure from the orthodoxy of the past may be indicated, particularly if the basis for an overall balance of rights and obligations is to be achieved.

SUBSIDIES AFFECTING TRADE IN AGRICULTURE

52. Text: "... under which (b) all subsidies affecting trade in agriculture, including export subsidies and other forms of export assistance, are brought within the purview of strengthened and more operationally effective GATT rules and disciplines. With regard to export subsidies and other forms of export assistance, including subsidized export credits, both the following approaches should be elaborated in parallel:

- an approach based on improvements in the existing framework of rules and disciplines;
- an approach based on a general prohibition subject to carefully defined exceptions, in conjunction with improvements in the existing rules and disciplines and their application."

General

53. In broad terms the task of the Committee is to develop certain options with regard to strengthened and more operationally effective GATT rules and disciplines on subsidies affecting trade in agriculture generally and on export subsidies and other forms of export assistance in particular. Within the parameters of an approach, or approaches, aimed at improving the rules and achieving greater liberalization for trade in agriculture, the general objectives, in terms of the Chapeau, are to bring export competition under greater discipline, to reinforce the linkages under Article XVI between national policies and trade measures in a manner which more clearly defines the limits to the impact of domestic policies on trade, and to more effectively implement the GATT provisions providing for differential and more favourable treatment for developing countries. Furthermore, in the elaboration of the various elements of these approaches, full account is to be taken of the general considerations in paragraph 3 of the Recommendations.

54. The rules and disciplines of Article XVI are an integral part of the norms which underpin the operation of the GATT multilateral trading system. In agriculture, as in other sectors of international trade, the result would be little short of anarchy if countries were free both to prohibit or restrict imports and to subsidize exports. Accordingly, the nexus between the conditions under which agricultural imports may be restricted other than through tariffs under Article XI, and the

conditions under which exports may be subsidized under Article XVI, assume a particular importance in considering possible approaches on subsidies affecting trade in agriculture. While the specific characteristics of agriculture may justify the tolerance of a lesser degree of obligation with respect to import restrictions than that generally applicable to trade in other sectors, the same reasoning would seem to apply with less force to the use of export subsidies.

55. In a situation in which export subsidies, and other measures having equivalent effect, are condoned or are not completely prohibited, the scope for better disciplines will depend on the extent to which more effective limitations on both the use of export subsidies and their adverse effects can be developed and ultimately negotiated. Each of the options in paragraph 1(b), the existing framework approach (Option A) and the new framework (Option B), are capable of being elaborated in a more, or in a less restrictive way. For the purposes of the present note, it is assumed that the general objectives as described in paragraph 53 above are equally applicable to each of the approaches to be elaborated. In essence the question to be addressed at the appropriate stage is, whether, in the light of the results of an elaboration exercise, more effective disciplines on the use and effects of export subsidies, and of other equivalent measures, can best be negotiated within the existing framework based on equitable share and serious prejudice, or within a new framework based on a general prohibition with exceptions.

OPTION A: IMPROVEMENTS IN THE EXISTING FRAMEWORK OF RULES AND DISCIPLINES

56. At the outset, it may be useful to address the normative question: "What specific objectives should improvements in the existing framework of rules and disciplines be designed to achieve?" In substance, paragraph 5 of Article XVI itself provides a reasonably unequivocal answer to this question: namely, promoting the objectives of the General Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties. Alternatively stated, the general objective should be to improve the effectiveness of the rules and disciplines in avoiding subsidization seriously prejudicial to the trade or interests of contracting parties in a manner which is consistent with, and contributes to, the trade liberalization objectives of the General Agreement.

57. Accordingly, if the rules and disciplines of Article XVI are to be more operationally effective in the general sense described above, then it is important that the improvements to be made should be such as to render the dispute settlement process more predictable, and to facilitate the task of contracting parties in seeking to avoid the use of subsidies on the export of agricultural products. This would suggest, particularly in the light of experience in applying the present rules, that there should be a decided preference in favour of more objectively ascertainable criteria or guidelines.

Discordance in the existing framework

58. It is to be noted that there is a certain discordance of exhortation and obligation in the existing provisions of Article XVI which, to a greater or lesser degree, needs to be addressed in improving the existing framework of rules and disciplines.

59. On the one hand, it is recognized (Article XVI:2) that export subsidies may adversely affect the normal commercial interests of other contracting parties, and that contracting parties (Article XVI:3, first sentence) should accordingly seek to avoid using subsidies on the export of agricultural products. On the other hand, contracting parties are not prevented from using such subsidies (Article XVI:3, second sentence). However, two apparently quite distinct results can ensue where a contracting party grants, directly or indirectly, any form of subsidy, including any form of income or price support, which operates to increase exports of an agricultural primary product:

- (i) under Article XVI:1 (second sentence) there is an obligation merely to discuss the possibility of limiting the subsidy where it is determined that serious prejudice is thereby caused or threatened to the interests of another contracting party;
- (ii) under Article XVI:3 (second sentence) there is an obligation not to apply any subsidy in a manner which results in the acquisition of more than an equitable share, the breach of which would give rise to a duty to take remedial action and, in default thereof, to the possibility of the affected contracting party or parties being authorized to suspend, or withdraw concessions under Article XXIII.

60. This discordance in the existing framework and the difficulties associated with the interpretation and application of a rule based on principles of equity or fairness, have contributed to the emergence of a situation where export subsidization tends to escape any real multilateral discipline. Whereas at an earlier stage in the life of Article XVI:3 it was possible for a dispute settlement body to determine that it was reasonable to conclude that subsidy arrangements had contributed to a large extent to an increase in exports and that the share of world export trade thus acquired was more than equitable, the more recent practice of panels has been to shy away from such findings and to resort instead to findings under the less coercive provisions of Article XVI:1, and even under Article XVI:2. When a system is under stress, as Article XVI has been because of the impact of domestic support policies on production and trade, pressure tends to concentrate itself at the weakest point in the system. If this situation is to be redressed, a greater degree of harmony needs to be established between the various disciplines of Article XVI, particularly if shares of world trade are in future to be determined less by ability to subsidize and more by ability to compete.

Suggested improvements

61. It is considered that, as a general proposition, improvements should be sought: (i) which enable cases of specific serious prejudice to the normal commercial interests of other contracting parties to be dealt with under reinforced Article XVI:1 disciplines; and (ii) which enable the "more than equitable share" principle to operate as a broader safeguard or preventive discipline on the use of export subsidies and their more generalized effects on world export trade in a particular commodity. It is submitted that the following interrelated improvements might be considered as a means of making the existing provisions of Article XVI more operationally effective as regards export subsidies and other forms of export assistance:

- (i) the existing Article XVI:1 (second sentence) obligation to discuss the possibility of limiting subsidization which has been determined by the CONTRACTING PARTIES to cause or threaten serious prejudice should be converted into an obligation to take appropriate remedial action in cases involving displacement in individual markets;
- (ii) a conventional and readily ascertainable indicator of what constitutes an "equitable share" should be introduced as a reference point for countries using export subsidies, together with general policy guidance for the determination in contested cases of whether a share acquired through the use of subsidies is, or should be treated as, "more than equitable" under Article XVI:3;
- (iii) a particular regime should be considered on the subsidization of agricultural primary products which are incorporated in processed agricultural products.

62. A reinforcement of the concept of serious prejudice under the second sentence of Article XVI:1 would be intended to establish a greater degree of harmony or equivalence of obligations within Article XVI as a whole. One advantage could be that matters relating to disturbance of the normal commercial interests of contracting parties in individual markets could be dealt with in that context, without the necessity of a dispute settlement body having to traverse the gamut of issues relating to the equitable or more than equitable character of a subsidizing country's overall share. In other words, if export subsidies are applied in a predatory manner thereby causing serious prejudice to another contracting party in an individual market, there should be a more effective remedy than exists at present, and this independently of possibly unrelated movements in the subsidizing country's share of total trade. Such an approach would also relieve a dispute settlement body of having to stigmatize a subsidizing country's entire global share as being more than equitable in order to make a finding that carries more weight than an obligation merely to discuss possibilities in relation to unfair competition in an individual market.

63. The corollary to confining complaints under a reinforced Article XVI:1 mainly to displacement in individual markets would be to deal with the less tangible but no less important categories of undue disturbance to normal commercial interests, or of hindrance to the achievement of GATT objectives, in the context of consideration, under Article XVI:3, of a subsidizing country's global share and of the impact of that share on world markets. Thus, it is submitted that such matters as, for example, the depressive effect of a subsidized share of trade on world market prices, pre-emption of the growth in the world market, or uncertainty resulting from the open-ended nature of export subsidy arrangements, are all matters which it would be more appropriate to consider in the wider context of the impact of the acquired global share and in the context of the promotion of the objectives of the General Agreement.

Serious prejudice: Article XVI:1 (second sentence)

64. In essence, what is suggested is that under a re-interpreted or modified Article XVI:1 (second sentence) serious prejudice to the trade or interests of another exporting contracting party in individual markets would be recognized as being caused by any form of subsidy which operates, directly or indirectly, to increase exports of any product in any of the following situations:

- (i) where the export subsidy in question is applied in a manner which results in displacement of the exports of a non-subsidizing contracting party in an individual market, or which hinders the normal evolution of the trade of such a contracting party in that market;
- (ii) where the export subsidy in question is applied in a manner which results in the displacement of the exports of another subsidizing contracting party in an individual market, or which hinders the normal evolution of the trade of such a contracting party in an individual market;
- (iii) where the export subsidy in question is applied in a manner which prevents developing country exporters from acquiring a share of a market (i.e., a market in which the developing country exporter has not participated in the preceding [three-year] period).

65. The provisions of Note 2 to Article XVI:3, with appropriate modifications, might provide a basis for defining the conditions under which, for the purposes of sub-paragraph (i) above, exports would be regarded as not being subsidized.

66. In any complaint under (i) and (iii) above, the onus would be on the complainant to establish a prima facie case that its exports to an individual market were being displaced or that the normal evolution of its trade in that market was being hindered. Having established such a prima facie case, the onus would then be on the subsidizing country to demonstrate, in respect of any special factors relating to that market or to the ability of the complainant to supply, that it would be unreasonable in the light of such factors that the dispute settlement

body should determine that the subsidizing country should limit its exports to the individual market in question or modify the manner in which subsidies are applied on its exports to that market. Under (ii), which would normally involve cases between subsidizing exporters, no particular presumptions would arise in favour of one party or the other.

More than equitable share

67. As suggested above (paragraph 61), the more than equitable share principle should operate as a broader discipline on the use of export subsidies and on the more generalized effects of the acquired share itself on world export trade. The main elements of this approach would be:

- (a) to provide a dispute settlement body with a number of policy guidelines to assist in the determination of whether a more than equitable share should be considered to have been acquired;
- (b) to introduce a readily ascertainable indicator of what constitutes an "equitable share" to serve as a reference point for countries using export subsidies and to facilitate their efforts in seeking to avoid undue recourse to export subsidies. This would involve the calculation of shares of trade in quantitative terms. A subsidizing country's share of trade would generally be regarded as not being more than equitable if exports in any year do not exceed a specified average.

General Policy Guidance in the Determination of More than Equitable Share

68. The suggested improvements outlined in paragraphs 72 to 74 below, concerning the calculation of shares and the attribution of the evidentiary onus could, it is submitted, contribute to making Article XVI:3 a more operationally effective discipline. However, at the end of the day a dispute settlement body is still going to be confronted with determining whether the facts, established or not rebutted, on undue disturbance to normal commercial interests and on hindrance to the achievement of general GATT objectives, entitles it to make a finding of "more than equitable share". In other words one of the main problem facing a dispute settlement body is perhaps not so much the range or complexity of the factors, special or otherwise, to be taken into account, but the absence under the existing arrangements of any effective policy guidance against which the complex range of issues involved can be weighed and assessed.

69. A complementary approach would be to attempt to circumscribe the role of special factors. To attempt to do so would, in effect, be to arbitrarily preclude factors which could in fact have an important bearing on the issues under consideration in a particular case. Moreover, ex hypothesi, "special factors" will always remain intractable or elusive from a definitional point of view: cut one special factor off and two or three are likely to crop up in its place. Attempts to define "irrelevant" special factors are unlikely to be any more promising. In these circumstances it is submitted that what is needed is a set of policy guidelines that will assist a dispute settlement body in finding its way through the inevitable maze of factors to be taken into account, special or otherwise, and make its determination.

70. The equitable share principle was originally conceived of as being applied on the basis of general policy guidelines and, in fact, a limited measure of guidance was adopted in 1955 for the purposes of determining equitable shares under Article XVI:3. In essence the suggestion would be to graft a more substantive body of policy guidance onto Article XVI:3.

71. The following guidelines are not presented as a menu, but rather to emphasize the point that without some such general guidance, it is not surprising that it has not proved possible to effectively apply the uprooted version of equitable share in Article XVI:3 exclusively on the basis of causal linkages, particularly where more general forms of prejudice or hindrance are at issue in considering the impact of a given share of trade:

- (i) the shares of individual contracting parties of world trade in the commodity concerned during a previous representative period and the recent trend of those shares;
- (ii) the shares of individual contracting parties of world trade in the commodity concerned which might reasonably be expected to prevail in the absence of the subsidy;
- (iii) the degree of importance of the trade to the economy of the grantor, and to the economies of the countries materially affected by the subsidy;
- (iv) whether the share of world trade of the grantor is so small that the effect of the subsidy on the trade in question is likely to be of minor significance;
- (v) the existence of pre-established limitations in the subsidizing country on the volume of its exports that can be subsidized;
- (vi) the effect of the subsidy on the level of prices in international trade;
- (vii) the desirability of facilitating the gradual extension of production for export in those areas able to satisfy world market requirements of the commodity concerned in the most effective and economic manner, and therefore, of limiting any subsidies or other measures which make that extension difficult.

Predetermination of Equitable Shares

72. The purpose of any predetermination of equitable shares would be to provide contracting parties which have recourse to export subsidies with an objective point of reference, or quantitative reference level, beyond which a share acquired, if challenged, would be subject to certain evidentiary presumptions. An approach along these lines might be as follows:

- (a) shares of world trade should be calculated and expressed in absolute or quantitative terms and should include all transactions other than donations and certain non-commercial transactions (where the grant element is more than an agreed percentage) provided such transactions are not linked to commercial sales;
- (b) a subsidizing country's share of world trade should be considered to be not more than equitable provided its exports in any calendar year do not exceed a reference level equal to the average level of the immediately preceding [five]-year period;
- (c) exports at a level which is necessary to facilitate the implementation of minimum access commitments under Article XI:2, on such temporary terms and conditions as may be negotiated, could be additional to the equitable share under (b) above;
- (d) exports under a system in accordance with Note 2 to Article XVI:3 would continue to constitute an exemption from the provisions of Article XVI:3.

73. The proposed method of ascertaining shares would not be definitive or immune from challenge. Firstly, where the level of subsidized exports exceeds the reference level (i.e. the level calculated under (b) and (c) above), there would be an evidentiary onus on the subsidizing exporting country in any proceedings under Article XVI:3 to demonstrate that the acquired share is not more than equitable having regard, inter alia, to the general policy guidelines, and to establish that any special factors invoked clearly outweigh other causative factors. Secondly, in any case where the acquired share of a subsidizing country is claimed to be more than equitable, even though the reference level has not been exceeded, there would be no such presumption.

74. The calculation of shares of trade in quantitative terms and by reference to previous performance would be intended to avoid the uncertainty inherent in the calculation of proportionate shares of total world export trade. It may be objected that such an approach would tend to legitimize existing shares acquired through relatively unfettered subsidization. On the other hand, one result of calculating shares in quantitative terms and by reference to previous performance, would be to progressively reserve a larger share of the growth in world trade to those countries that do not resort to export subsidization. Inordinate fluctuations associated with the suggested method of calculating base shares could be moderated by excluding the highest and lowest years from the immediately preceding representative period.

75. An alternative approach would be to predetermine equitable shares on the basis of negotiations amongst principal and other suppliers. Possible disadvantages of such an approach are that the techniques involved may not be applicable to more than a limited number of commodities, and that in the event that negotiated arrangements were to collapse the only fall-back would be the existing inadequate rules. In these circumstances it would still seem to be necessary to consider improvements in the existing framework, either to deal with export subsidization on other agricultural products, or to cater for the situation that would arise if such negotiated arrangements were to collapse under the pressure of market forces or for other reasons.

Subsidized Export Credits and other Related Forms of Assistance

76. As the existing Article XVI framework does not prohibit the use of, or discriminate between, particular categories of export subsidization, transactions which are less than fully commercial because they benefit from subsidized credit or insurance facilities, would simply be subject to the same disciplines as other directly or indirectly subsidized exports. On this basis, transactions benefiting from subsidized credit or insurance arrangements would be governed by any reinforced Article XVI:1 and XVI:3 disciplines. One approach might be to develop criteria to enable a dispute settlement body to more readily determine in particular cases whether export credit or insurance facilities should be regarded as being on less than fully commercial terms.

Non-Commercial Transactions

77. The extent to which reinforced disciplines under the existing Article XVI framework might apply to non-commercial transactions, is a matter which involves a number of general policy considerations. One approach would be to provide that, for the purposes of Article XVI:3, world export trade would include all transactions other than non-commercial transactions which are not linked to commercial sales and in respect of which the grant element is not less than an agreed percentage. In the case of Article XVI:1 (reinforced) consideration could be given to an approach under which a certain class of concessional transactions in least developed country markets might be excluded from the scope of the disciplines of any reinforcement of Article XVI:1, but that in other markets the suggested disciplines might apply where there is a linkage with commercial sales or where the complainant is able to demonstrate that FAO/CSD conditions relating to the non-commercial transaction have not been complied with.

Export subsidies on primary products incorporated in processed agricultural product

78. By virtue of paragraphs 3 and 4 of Article XVI no export subsidy may be granted directly or indirectly on an agricultural product unless it is a primary agricultural product "in its natural form", or a primary agricultural product which has only undergone "such processing as is customarily required to prepare it for marketing in substantial volume in international trade". The prohibition of subsidies on the export of agricultural products other than primary agricultural products as defined, is unconditional. To consider sugar incorporated as an ingredient in biscuits as a primary product in its "natural form", or baking as a process customarily required to prepare sugar for marketing in substantial volume in international trade, would deprive the Article XVI:4 prohibition of any substance in relation to non-primary agricultural products.

79. One possible interpretation of paragraph (d) of the Subsidies Code illustrative list is that any agricultural primary product used as an input in the production of an exported product may, under certain terms and conditions, be subsidized to cover the difference between the domestic and world market prices of the input. Another possible

interpretation would involve construing "commercially available on world markets to their exporters" to mean that the extent of the permitted subsidization should be limited to the difference between the price of the internally produced input and the price at which the same input is in fact commercially available to export manufacturers, i.e. the landed duty paid price. That a drawback of duty may be granted to export manufacturers, which would at least favour international trade, is of somewhat doubtful relevance in the present context, as is the fact that export manufacturers in third countries, presumably as a result of more liberal import regimes, may happen to enjoy access to agricultural raw materials at subsidized world market prices.

80. However this may be, the basic issue is one that is not likely to be resolved by splitting legal hairs but rather by deciding whether the widespread practice of subsidizing, directly and indirectly, incorporated primary agricultural products should be permitted, prohibited or limited.

81. One approach involving elements of both limitation and prohibition would be to:

- (i) limit the method of subsidization to the supply ex store of the agricultural primary product input to export manufacturers at the world market prices in respect of products for which recognized international price quotations exist;
- (ii) subject processed agricultural exports subsidized in accordance with (i) above to the disciplines suggested in respect of a reinforced Article XVI:1 on the basis that serious prejudice would be deemed to exist, unless the subsidizing exporter is able to establish affirmatively that the domestically produced agricultural input has been supplied at a price which is not less than the ruling world market price;
- (iii) prohibit the subsidization of agricultural primary product inputs to processed products in respect of which the "added value" of the input is less than [] per cent of the value of the processed product.

Other aspects

82. The foregoing suggestions are set out in the form of possible improvements in the existing rules and disciplines under Article XVI:1 and Article XVI:3. It could well be that Article XVI:3, which relates exclusively to primary products might constitute a more appropriate framework within which improved disciplines on both serious prejudice and equitable share might be developed in respect of agricultural products. In general, the question of the form these or other suggested improvements might take (modification of the rules, additional interpretative notes, guidance to a dispute settlement body, or a code) is a matter which would have to be considered at the appropriate stage.

OPTION B: A NEW FRAMEWORK FOR LIMITING THE USE OF EXPORT SUBSIDIES
AND THEIR ADVERSE EFFECTS

83. The issues relevant to the elaboration of this approach can be subdivided under four main headings:

- (a) the scope of a general prohibition
- (b) the nature of possible exceptions
- (c) the improvements in the existing rules
and discipline governing the use of subsidies permitted
under exceptions
- (d) export subsidies on incorporated agricultural primary
products

Scope of the prohibition

84. In principle the scope of any general prohibition should be broadly framed so as to cover all relevant export subsidy practices. One alternative would be a general prohibition on the granting of direct export subsidies, i.e., subsidies granted on the occasion of, or in connection with, the export of an agricultural primary product. This would avoid the necessity of prohibiting income or price support arrangements, as well as a host of other indirect or domestic subsidies which may or may not affect exports. Under this alternative, the adverse effects of indirectly subsidized exports would be subject to either the existing or reinforced disciplines of Article XVI relating to serious prejudice. A variant of this alternative would be to define a prohibition on the basis of an illustrative list of direct export subsidy practices.

85. Another alternative would be to simply extend the Article XVI:4 prohibition to agricultural primary products. This would involve a prohibition on granting, either directly or indirectly, any form of subsidy on the export of any agricultural product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. This alternative would have the advantage of providing a reasonably ascertainable (price-related) yardstick both for delimiting the scope of a prohibition and for surveillance and enforcement purposes. However, certain deficiency payment arrangements would not necessarily be caught under an Article XVI:4 prohibition.

86. A broader prohibition would be one based on the terminology of Articles XVI:1 and XVI:3. This would involve a prohibition on the granting, directly or indirectly, of any form of subsidy, including any form of price or income support, which operates to increase the export of any agricultural primary product. This definition of the scope of a general prohibition is adopted as a working hypothesis in the present context.

Possible exceptions

87. It is submitted that the principal exemption should be a provision whereby subsidies on the export of an agricultural primary product which are financed through a system of mandatory levies on producers, or under other mechanisms depending on the nature of the domestic price or income support arrangements involved, are considered not to be subsidies for the purposes of the general prohibition as defined. A provision along

these lines would be intended to constitute the fulcrum on which more effective disciplines on subsidies affecting exports would hinge. The underlying philosophy is that there would be a move progressively away from direct government financing of export subsidies, and that producers' returns would in general, i.e., subject to such arrangements as may be made to protect the incomes of marginal producers, reflect a weighted average of domestic and world market prices. The result would be that producers' decisions would tend to be more responsive to general supply and demand conditions, and that by virtue of such arrangements and of the general prohibition itself, there would be a more effective limitation on the use of export subsidies.

88. The suggested exemption would of course relate to producer financed export subsidy arrangements which would otherwise be subject to a prohibition as defined. The GATT status of producer financed subsidies was considered in 1960 in the context of a panel report on the Article XVI notification requirements (Ninth BISD, page 192, paragraph 12). In general the distinction drawn by the panel was between schemes "in which a group of producers voluntarily taxed themselves in order to subsidize exports of a product", and schemes "in which the government took a part either by making contributions into the common fund or by entrusting to a private body the functions of taxations and subsidization with the result that the practice would in no real sense differ from those normally followed by governments". The panel felt that the question of notifying levy/subsidy arrangements depended on the source of the funds and the extent of government action, if any, in their collection.

89. At present Note 2 to Article XVI:3 constitutes an exemption from the more than equitable share discipline in respect of producer-financed export subsidies under a domestic price or income support system which results in export prices being lower than the domestic price. It is suggested that this note might provide a basis on which to develop a producer-financed export subsidy exemption in the context of a general prohibition. At present the following three criteria must be fulfilled, with the first and second of these criteria being subject to determination by the CONTRACTING PARTIES:

- (a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market;
- (b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties; and
- (c) operations under the system are financed exclusively from funds collected from producers, i.e., such operations would not be entitled to the benefit of the exemption if they are wholly or partly financed out of government funds.

90. Furthermore, under Article VI:7 producer export subsidy arrangements are presumed not to result in material injury in terms of the requirements relating to anti-dumping and countervailing duty determinations under Article VI:6. The provisions of Article VI:7 are along similar general lines to those of Note 2 to Article XVI:3, one difference being that Article VI:7 does not include an explicit requirement that such export subsidy arrangements must be exclusively financed by producers.

Other possible exceptions

91. If producer-financed export subsidies were to constitute the main form of permissible export subsidization, then it is considered that specific exceptions, to which any contracting party fulfilling the stipulated conditions might have recourse, should be kept to a minimum. It is suggested that consideration might be given to the following:

(i) food aid transactions in respect of which the grant element is not less than [] per cent and which are not linked to commercial transactions, on the basis that such transactions would be deemed not to be export subsidies within the meaning of a prohibition;

(ii) subsidized export credits, export credit guarantees and export risk insurance on terms and conditions which are in conformity with the provisions of an intergovernmental agreement (to be negotiated) relating to the provision of such credits or export facilities by government agencies or by entities acting under governmental direction, control or favour;

(iii) the provision by governments or their agencies of utilities or services to the agricultural sector on a less than full-cost recovery basis, or the provision by governments of subsidies on utilities or services used in the production of agricultural primary products, which in either case are not contingent on export performance and which do not result in the sale of agricultural primary products for export at prices lower than the comparable prices charged for the like product to buyers in the domestic market.

92. Exceptions (i) and (ii) do not require special comment. The exception outlined in (iii) would be intended to exclude, on certain conditions, a range of governmental assistance to the agricultural sector whose inclusion would make the prohibition unnecessarily complex or even unmanageable. The categories of assistance in question would involve, for example, the provision on a less than full-cost recovery basis of inspection or advisory services, expenditure on research, infrastructure subsidies etc. While arguably such categories of assistance may indirectly increase exports, if they are not export performance related and do not result in export prices being lower than domestic prices, it is difficult to see why such measures should not be covered by an exception.

Possible ad hoc exceptions

93. Ad hoc exceptions would be intended to cover the situation in which recourse to the use of otherwise prohibited export subsidies might be permitted on a temporary basis. Ad hoc exceptions would be in derogation of generally negotiated transitional arrangements under which direct export and other subsidy practices would have to be brought into conformity with the producer-financed export subsidy system and with the other permanent exemptions or exceptions discussed above. The facilitation of the introduction of minimum access commitments under Article XI could be one situation in which a departure from these arrangements might be negotiated. Other possible situations could be where the specific characteristics of the production of a product in a particular country, or the relative importance of exports of a product to the economy of a particular country, are such that the negotiation of special transitional arrangements may be warranted.

Transitional arrangements

94. Under the approach outlined above the negotiations would consist in a first stage in which the object would be to reach substantial ad referendum agreement on the terms of: (i) the definition of the scope of the prohibition; (ii) the producer-financed export subsidy exemption; and (iii) the other possible exceptions. The scope of any ad hoc exceptions would be a matter to be considered at a later stage in the negotiating process. A second stage would involve the negotiation of the transitional arrangements, including time frame and review procedures, under which contracting parties would have to bring their export subsidy or assistance practices into conformity with the new framework. Some of the more important elements in such a negotiation would be the phasing down of government financial involvement in producer-financed subsidy arrangements, and the quantum of domestic production in respect of which guaranteed prices or income support could be payable. Following the end of the transition period export subsidy practices could only be maintained if they were in full conformity with an exception, or were being maintained temporarily under such possible ad hoc or special transitional arrangements as may have been negotiated on a case-by-case basis.

Special and differential treatment

95. There are a number of areas where, in the context of the negotiation of exceptions and transitional arrangements, differential and more favourable treatment might be considered. Whether in addition to such possible measures there might be a specific exception in favour of developing countries is a matter which is likely to be influenced, inter alia, by the extent of the commitments undertaken by other contracting parties in the framework of any general prohibition and vice versa.

96. In principle, there are three possibilities: a specific exception under which the use of export subsidies would continue to be permitted; the application of the prohibition to all contracting parties, subject to such special transitional and other arrangements in favour of

developing countries as may be negotiated; and, a qualified exception somewhat along the lines of the provisions of Article 14 of the Code on Subsidies. The last-mentioned possibility might, for example, involve an exception formulated in the following terms: export subsidies on agricultural primary products the use of which is not inconsistent with the demonstrable competitive and development needs of a developing contracting party and which are not applied in a manner which would compromise, or render more burdensome, the obligations of other developed or developing contracting parties in limiting and progressively reducing the use of prohibited export subsidies, provided however that developing contracting parties should endeavour to enter into commitments to reduce or eliminate the use of export subsidies on agricultural primary products.

Rules and disciplines governing the use of export subsidies under exceptions

97. There are two aspects to this question: the nature of the rules that should govern competition in third markets during the transitional stage, when existing export subsidy practices are being brought into conformity with the producer financed export subsidy exemption, and the rules which should govern competition thereafter. The rules that should govern competition in third markets in the post-transition stage should, it is submitted, be addressed on the basis of general GATT principles, since what in effect is at issue is a new permanent framework affecting general rights and obligations. The rules which might govern a transitional stage may need to be determined, taking account also of certain pragmatic considerations, in order to facilitate the transition.

98. In the post-transition, when a new framework would be fully operational, the use of export subsidies and other forms of export assistance would be subject to effective disciplines. Moreover the use of a prohibited export subsidy, or the use of a permitted export subsidy otherwise than in conformity with the terms and conditions of an exception to the prohibition, would constitute a prima facie case of nullification and impairment under Article XXIII. In these circumstances it is considered that it would not be necessary to continue to maintain the more than equitable share rule once a new framework had come into operation. On the other hand it is considered that export subsidies applied in conformity with the provisions of a new framework should continue to be subject to the general requirement that such subsidies should not be applied in a manner which causes serious prejudice to the trade or interests of other contracting parties. Whether this requirement should be linked to an obligation to discuss the possibility of limiting the subsidization in question, or whether it should be linked to an obligation in certain cases, such as displacement in individual markets, to take appropriate remedial action, are matters which would depend, inter alia, in the extent to which effective limitations on the use of export subsidies are negotiated.

99. In the transitional period itself it is suggested that the equitable share principle, reinforced as outlined, should apply in conjunction with the existing Article XVI:1 provisions on serious prejudice. It is considered that this régime would provide a reasonable framework to govern competition in third markets in a situation in which contracting parties would be adjusting to the general prohibition and in which progress in accordance with the negotiated transitional arrangements would be subject to regular review.

Export subsidies on incorporated agricultural primary products

100. A prohibition delimited as suggested in paragraph 86 above, would preclude the use of direct export subsidies on agricultural primary products incorporated in processed products. The supply by producers themselves of agricultural primary products to export manufacturers at prices which they would otherwise obtain on the world market, would obviously not be inconsistent with the prohibition. Somewhat different considerations could come into play where, for example, the proceeds of a mandatory export financing levy were to be used to subsidize the supply of inputs to export manufacturers. It is suggested that one approach would be to adopt the solution suggested in paragraph 81 above as an ad hoc transitional arrangement, with provision possibly being made thereafter for a progressively higher requirement in terms of the added value of the primary component.

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101. SANITARY AND PHYTOSANITARY REGULATIONS AND OTHER TECHNICAL BARRIERS

Text: "... under which (c) sanitary and phytosanitary regulations and other technical barriers to trade, including related administrative requirements, are brought within the ambit of improved procedures aimed at minimizing the adverse effects that these measures can have on trade in agriculture."

102. It is considered that the question of improved rules and disciplines on sanitary and phytosanitary measures might be approached from two not entirely separate angles. One would focus on improvements in consultation procedures with a view to minimizing adverse trade effects. The other would consist in the elaboration of disciplines designed to redress any imbalance that might arise where concessions are nullified as a result of action under Article XX(b).

103. Article XX(b) establishes certain requirements regarding the application of sanitary and phytosanitary measures. Such measures must be "necessary" for the protection of animal or plant life or health, and may not be applied in a manner which constitutes:

- (i) a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail;
- (ii) a disguised restriction on international trade.

104. In AG/W/9 paragraph 51 it was suggested that one possibility would be to seek to improve the existing procedures on the basis of an examination not only of whether in terms of Article XX(b) the measures in question are necessary or justified or are a disguised barrier to trade, but also on the basis of whether, accepting that the particular measures may be justifiable, the national interests involved can be protected in a way which is less harmful to the trade of third

countries. An approach along these lines could involve a contracting party having to justify, or accept some measure of review of, the grounds on which, for example, imported products are subject to more stringent rules or requirements than those applied to the domestic products, or the reasons for which imported products should be subject to unduly burdensome administrative procedures. Another example would be a situation where an importing country enforces requirements or procedures which are more onerous or exacting than those applied by other comparable importing countries in similar circumstances. These are no more than possible examples.

105. Any improvement in the existing procedures would appear to depend to some extent on whether the opinion of suitably qualified or experienced trade and technical experts could be brought to bear on such questions in a GATT dispute settlement or consultation context. Given not only the diversity and complexity of possible disputes, but also the fact that domestic administrative or financial considerations might be at issue, probably the most that could be envisaged would be a procedure under which a complainant could obtain an informal advisory opinion on the questions at issue. The existing counter-notification procedures, with appropriate improvements, might provide a basis on which a consultation procedure along these lines might be developed. Moreover a first step in this direction could be to initiate a further round of counter-notifications, in order to have a more precise idea of the problems confronting the trade of contracting parties and the appropriateness of possible improvements.

106. The second aspect mentioned in paragraph 103 above concerns situations where tariff concessions are effectively neutralized by Article XX(b) action. The question which arises in such situations, or in a situation where possible minimum access commitments might be affected, is whether some form of compensatory action should be required under the GATT. For example, if concessions or commitments on meat are nullified by sanitary measures, should the country concerned have an obligation to compensate with equivalent concessions on other products? From an operational point of view a country introducing or intensifying sanitary requirements in such circumstances could be induced to consider whether the measures could be applied in a less trade restrictive manner. An approach along these lines would be to treat the imposition of sanitary or phytosanitary measures "as if" they were a species of safeguard action. On the other hand the formal position is that measures taken consistently with Article XX(b) are in exception to the general GATT rules. One of the basic issues is whether, in order to achieve a better overall balance of rights and obligations with respect to all measures affecting access, some greater degree of commitment under GATT on sanitary and phytosanitary measures is possible.

107. REVIEW OF MEASURES AND POLICIES

Text: "2. The policies and measures of contracting parties should be subject to regular review and examination and that for this purpose the system of notifications introduced by the Committee should, with appropriate improvements, be implemented on a permanent basis in order to ensure fuller transparency with regard to all policies and measures affecting trade in agriculture."

108. Any review and examination within GATT of the measures and policies of contracting parties would have at least two general objectives. One would be to ensure fuller transparency regarding policies and measures affecting trade in agriculture. The unified system of notifications in the AG/FORMAT series in conjunction with fuller and more uniform compliance with the basic GATT notification requirements, with such modifications in either case as may be introduced, would provide the basic information on which such a review and examination might be carried out. A second objective of any multilateral review and examination process would be to keep a collective eye on whether national policies and measures are generally on course in terms of existing GATT commitments and of the commitments that might be undertaken in the context of future negotiations. Certain elements of the approaches outlined in this note envisage commitments and related transitional arrangements which would involve a reinforcement of the linkages between national policies and trade measures, and in respect of which procedures for multilateral review and examination in this general sense could be considered to be useful. Since the utility of such procedures would seem to depend very much on the character and extent of commitments that might eventually be undertaken, it is not possible at this juncture to comment otherwise than in rather general terms on scope and modalities of a multilateral review and examination of national policies and measures in the GATT.

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CONCLUDING REMARKS

109. As noted at the outset the present note is essentially concerned with how certain of the basic GATT rules and disciplines, notably those under Articles XI and XVI, might be developed, interpreted or more effectively applied in the context of elaborating an improved framework of rules and opportunities for trade in agriculture. In short, the note is intended as a contribution to the Committee's elaboration and in-depth examination of a basis for possible future negotiations.

110. The approaches outlined on the access issues are based on the premise that there should be equivalence of commitment under the GATT rules with regard to substantially all measures affecting trade. The key to this, or the common element, is the minimum access commitment in the case of quantitative restrictions or other assimilable or partly assimilable measures. At the same time the minimum access commitment is more than just a negotiating concept. It is linked to the manner in which the domestic policy measures, on the basis of which restrictions are invoked, are conducted. What would be involved is a reinforcement of the existing Article XI linkage in a way that more clearly defines the limits to the impact of domestic policies on trade.

111. Whether the approaches suggested for consideration would establish a framework within which the specific characteristics and problems of agriculture can be accommodated, is a matter for assessment. As noted in the paper the perspective adopted is one in which the specific characteristics and problems of agriculture should be dealt with on a case-by-case or transitional basis in the particular contexts in which these problems arise, and in the framework of an overall balance of rights and obligations under the General Agreement. Any improved road code has to make allowance for slower and faster traffic lanes.

112. Throughout the note a number of comments have been made on the scope for special and differential treatment. These are made in order to facilitate detailed consideration at the appropriate stage of such treatment in the contexts mentioned in paragraph 58 of AG/W/9, and bearing in mind that the achievement of an overall balance of rights and obligations is related to the extent to which commitments generally are undertaken.

113. Finally in this regard, the emphasis in this note on the approaches outlined on non-tariff measures tends to obscure the fact that for a significant range of products tariffs, bound or unbound, continue to constitute important barriers to trade. It is assumed that in any basis that might eventually be established for negotiations, the reduction and binding of tariffs would be an important objective.

114. The approaches outlined with respect to subsidies affecting exports provide some indication, in the case of Option A, of the limitations inherent in reinforcing existing disciplines that are based more on limiting adverse effects than on limiting the use of subsidies.

115. A new framework based essentially on the possible development of the existing producer-financed export subsidy provisions of Articles XVI:3 and VI:7, would appear to offer more scope for the negotiation of effective disciplines on both the use of export subsidies and their adverse effects. To the extent that a producer-financed export subsidy discipline makes possible a greater influence of world prices on producers' decisions, a new framework could lead to a greater degree of market-orientation in agricultural trade.

116. In the case of the suggestions outlined in the contexts of both access and subsidies affecting exports, transitional arrangements are essential ingredients, the assumption being that the implementation of an improved framework of rules and opportunities would have to be accomplished on a progressive or gradual basis.