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## **1 ARTICLE XVI**

### **1.1 Text of Article XVI**

#### ***Article XVI\****

##### *Subsidies*

##### Section A - Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

##### Section B - Additional Provisions on Export Subsidies\*

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.\*

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.\*

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual

experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

## **1.2 Text of note *Ad Article XVI***

### ***Ad Article XVI***

The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

#### *Section B*

1. Nothing in Section B shall preclude the use by a contracting party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund.
2. For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

#### *Paragraph 3*

1. The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.
2. A system for the stabilization of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:
  - (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; and
  - (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.

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.

#### *Paragraph 4*

The intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement.

## **1.3 Article XVI:1**

1. The Panel in *US- Upland Cotton* found that because the term "serious prejudice" is used in Articles 5(c) and 6.3(c) of the SCM Agreement "in the same sense" as in Article XVI:1 of GATT 1994, its findings of "serious prejudice" under SCM Articles 5(c)/6.3(c) would also be conclusive for a finding of "serious prejudice" under GATT Article XVI:1:

"There is an explicit textual linkage between Article 6.3(d) and Article 5(c) of the *SCM Agreement*: the chapeau of Article 6.3 states that '[s]erious prejudice in the sense of paragraph (c) of Article 5 may arise where one of the following [including the elements in Article 6.3(d)] apply...'. "

Following that cross-reference to Article 5(c), we see that footnote 13 to Article 5(c) explicitly refers to Article XVI:1 of the *GATT 1994*. It states: 'The term 'serious prejudice to the interests of another Member' is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.'

As the term 'serious prejudice' in both provisions of the two agreements is used 'in the same sense', our findings of 'serious prejudice' under Articles 5(c)/6.3(c) of the *SCM Agreement* would also be conclusive for a finding of 'serious prejudice' under Article XVI:1 of the *GATT 1994*. That is, if the terms 'serious prejudice' are used 'in the same sense' in the two provisions, a finding of 'serious prejudice' under Article 5(c) must necessarily also constitute a finding of 'serious prejudice' also for the purposes of Article XVI:1. In addition, the remedies available under Part III of the *SCM Agreement* are at least as effective as those that would be available under Article 19.1 of the *DSU* in respect of an infringement of Article XVI:1 of the *GATT 1994*.<sup>1</sup>

#### **1.4 Article XVI:3**

2. The Panel in *US – Upland Cotton* found that "the text of Article XVI:3 itself itself indicates that the provision is limited to 'export subsidies' and does not address rights and obligations of Members relating to other types of subsidies"<sup>2</sup> and that it did "not believe that it is appropriate to apply a separate or different definition of 'export subsidies' under Article XVI:3 than that which is now applicable for the purposes of Articles 3.3, 8, 9, 10 and 1(e) of the *Agreement on Agriculture* and Article 3.1(a) of the *SCM Agreement*."<sup>3</sup> Based on the ordinary meaning of the text of Article XVI:3 read in its context and in light of the object and purpose of the Agreement on Agriculture and the SCM Agreement, as confirmed by the drafting history of the Tokyo Round Subsidies Code, the Panel found that "Article XVI:3 applies only to export subsidies as that term is now defined in the *Agreement on Agriculture* and the *SCM Agreement*".<sup>4</sup>

#### **1.5 Article XVI:4**

3. In *US – FSC*, the Appellate Body discussed the relationship between Article XVI:4 of GATT 1994 and the SCM Agreement in interpreting Article 3.1(a) of the SCM Agreement. See the Section on the SCM Agreement.

#### **1.6 Agreement on Agriculture**

4. See the Chapter on the Agreement on Agriculture. The Panel in *US – Upland Cotton* noted as follows regarding the relationship between Article XVI, the SCM Agreement and the Agreement on Agriculture:

"Article 21.1 of the Agreement on Agriculture stipulates: "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A of the WTO Agreement shall apply subject to the provisions of [the Agreement on Agriculture]." Accordingly, the provisions of the SCM Agreement and the GATT 1994 apply subject to the provisions of the Agreement on Agriculture. In the event of a conflict between the provisions of the Agreement on Agriculture and a provision of the GATT 1994 or another covered agreement pertaining to multilateral trade in goods in Annex 1A of the WTO Agreement, the rights and obligations in the Agreement on Agriculture would prevail to the extent of that conflict."<sup>5</sup>

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<sup>1</sup> Panel Report, *US – Upland Cotton*, paras. 7.1473-7.1475.

<sup>2</sup> Panel Report, *US – Upland Cotton*, para. 7.997.

<sup>3</sup> Panel Report, *US – Upland Cotton*, para. 7.1005.

<sup>4</sup> Panel Report, *US – Upland Cotton*, para. 7.1016; see the discussion in paras. 7.996-7.1015.

<sup>5</sup> Panel Report, *US – Upland Cotton*, para. 7.657.

## **1.7 SCM Agreement**

5. See the Section on the SCM Agreement.

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