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GATT RULES AND DISCIPLINES RELATING TO AGRICULTURE

Note by the Secretariat

Introduction

1. The present note has been prepared at the request of the Negotiating Group (NG5/13, paragraph 2(ii)) and is intended to provide an overview of the existing framework of rules and disciplines relating to agriculture as a contribution to the detailed consideration which the Group is to initiate at its 10-12 July meeting on more operationally effective GATT rules and disciplines.[1]

General Background

2. In broad terms the General Agreement establishes rules for the conduct of trade and for the protection of the body of concessions accumulated over a series of negotiations which have been directed, in substance, to the expansion of trade on a multilateral basis and to the elimination of discrimination.

3. When the General Agreement was being negotiated in tandem with the London and Geneva Sessions of the Preparatory Committee on the ITO Charter (1946-1947) the differentiation between agriculture or primary products on the one hand and the generality of traded products on the other, was not at the outset a matter of controversy so far as the individual provisions under consideration were concerned. The heterogeneity of the conditions under which agricultural production was conducted as between various countries and the nature of the support arrangements in some countries, particularly two-price systems, were acknowledged to have a bearing on the rules that were to govern trade in agriculture.

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[1] Reference should also be made to the following secretariat notes on the rules and disciplines relating to agriculture: CG.18/W/59/Rev.1; AG/W/4; AG/W/9/Rev.2 and 3.

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Access

4. From the outset there was fairly wide acceptance for exceptions along the lines of Articles XI:2(c)(i) and (ii) and for a provision under which restrictions on imports, imposed to match restrictions on domestic production, should not be such as to reduce the proportion of imports to domestic production. In line with the basic philosophy of the Agreement, this latter provision was described as being "in effect a national treatment clause" and there are references in the drafting history of Article XI to the "non-protective" character of its paragraph 2(c). Overall and apart from the inclusion of an additional exception to cater for the special situation described in paragraph 2(c)(iii), the direction taken was to contain and strictly limit the scope of exceptions. Thus proposals for exceptions related to the maintenance of domestic prices were rejected and certain proposals to extend the exceptions under what was to become Article XI:2(c) to non-agricultural products were dealt with under provisions relating to economic development.

5. Issues which continued to attract further and particular attention in relation to Article XI:2(c), after agreement had been reached on the text of the GATT in 1947, included, inter alia, the definition of "like product", the impact of domestic subsidies applied in conjunction with domestic supply controls, the scope for using nominal restrictions on domestic production to impose import controls, and the question whether restrictions under paragraph 2(c) were to be temporary in character. Although a somewhat broader definition of "like product" was adopted at Havana this was not subsequently incorporated into Article XI:2(c) of the General Agreement.

Subsidies

6. The provisions of the draft Charter and the General Agreement relating to subsidies were more problematic. The general provision corresponding to Article XVI:1 was widely accepted and was also taken as imposing relatively modest obligations with respect to possible corrective action by importing or exporting subsidizing countries. The problem area was export subsidies and the issue was whether "export subsidies" (subsidies on the exportation of a primary commodity which result in export prices lower than the domestic price, so-called "price dumping") should be subject to greater disciplines than other subsidies having the effect of maintaining or increasing exports or export shares. The lack of agreement on this matter in the 1947 Geneva Preparatory Committee, as well as other factors, precluded the possibility of including anything more than what today is Article XVI:1 in the original text of the General Agreement adopted in October 1947.

7. In the text under discussion in the Geneva Preparatory Committee subsidies on the exportation of any product, including primary commodities, were to be prohibited and eliminated within two years. There was an exception to this prohibition under which, provided the specified conditions were met and continued to be respected, no further significant obligations were imposed. This exception related to stabilization systems which resulted in export prices being both higher and lower than domestic

price and which met other criteria related to effective regulation of production and serious prejudice. A version of this exception survives today in the Note Ad Article XVI:3.

8. However, in certain circumstances procedures could be triggered under which, if it did not prove possible to conclude an international commodity agreement and if the commodity in question was determined to be in burdensome surplus, the use of export subsidies could be resumed. Prior approval was required, although this had to be granted provided it was determined, inter alia, that the subsidization would not be so operated as to stimulate exports unduly or otherwise seriously prejudice the interests of other countries. A further requirement, and this would only have applied to export subsidies as defined, was that "price dumping" export subsidies were not be used to acquire a share of world trade in excess of the share obtaining during a previous representative period. An amendment was introduced to extend this latter requirement to any subsidy affecting exports, with the sponsoring country reserving its influential position on this point as well as on the requirement for prior approval.

9. The central issue in all this was whether so-called "price dumping" export subsidies and associated two-price systems should be subject to tougher requirements than were applicable either to subsidies in general or to export subsidies that occurred as an adjunct to stabilization schemes. Most countries insisted that the basic distinction between domestic and export subsidies was sound and should be maintained. This discussion was replayed during the 1955 Review Session but against the background of a settlement at the Havana Conference under which, in effect, export subsidies could continue to be used without prior approval and under which all forms of subsidy were subject to the equitable share rule.

1955 Review Session

10. With the demise of the Charter it became necessary to review the General Agreement since, very broadly, many of its provisions had been applied provisionally in the expectation that the provisions of the Charter would ultimately subsume or supersede them. This review was undertaken by the CONTRACTING PARTIES at their Ninth Session (October 1954-March 1955). In the case of Article XI a number of agreed interpretative statements were approved but the Article itself was not amended. The main changes were to Article XVI where a new Section, "Additional Provisions on Export Subsidies", was introduced together with a number of interpretative statements relating to this Section and the Section on "Subsidies in General". In default of agreement on a proposed new Article on Surplus Disposal, a resolution on this subject was instead adopted by the CONTRACTING PARTIES. In the 1955 revision of Article XVIII the reference to "particular industries or particular branches of agriculture" was superseded by references to "a particular industry".

Tokyo Round Agreements

11. The Codes negotiated in the Tokyo Round between 1973 and 1979 represented a further stage in efforts to give greater precision and

operational effectiveness to the provisions of the General Agreement, including those related to agriculture. The Agreement on Interpretation and Application of Articles VI, XVI and XXIII (the Subsidies Code) which, as discussed in Section "B" below, attempted inter alia to clarify the "equitable share" rule, is of particular significance, but the possible relevance to certain agricultural trade issues of the Agreement on Technical Barriers to Trade should also be noted.

Specific Provisions of the General Agreement

12. Provisions of the General Agreement which related to agriculture as such or as primary products are contained in Articles VI, XI, XVI and XX. The following sections of this note outline the scope of these provisions, with Article VI:7 being considered in conjunction with Article XVI.

13. Provisions of the General Agreement relating to agriculture and industry alike are more than adequately dealt with in the secretariat note CG.18/W/59/Rev.1 as also are the provisions of the various Tokyo Round Codes. As requested at the May meeting of the Negotiating Group specific reference is made in the final section of this note to provisions relating to special and differential treatment.

SECTION A: ARTICLE XI

Article XI:1

14. The scope of paragraph 1 of Article XI is somewhat wider than its title "General Elimination of Quantitative Restrictions" would suggest. Since the drafting history would indicate that titles of Articles have no legal force, the question whether a particular measure is caught by Article XI:1 would be for determination in accordance with the relevant principles of interpretation. If the measure challenged is not caught by Article XI:1 then the country applying it is relieved from having to demonstrate that it complies with the conditions governing a relevant exception. The text of paragraph 1 is as follows:

> "1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

15. This means, on the face of it, that restrictions in the form of duties, taxes or other charges on the importation or exportation of products are permissible and that everything else is banned, unless the measure is in compliance with one of the exceptions under paragraph 2 of Article XI or with an exception under other relevant provisions of the General Agreement. In other words prohibitions, and restrictions other than duties, taxes or other charges, however they are made effective, are banned.

16. In principle the "duties, taxes and other charges" that constitute permissible forms of restriction would include ad valorem or specific customs duties and the other duties, taxes or charges imposed on or in connection with importation that are referred to in Article II:2. Namely, charges equivalent to an internal tax, antidumping and countervailing duties, and fees or other charges commensurate with the cost of services. Some measures that are not "duties taxes or other charges", such as automatic licensing for administrative purposes are generally not regarded as coming within the scope of Article XI:1, presumably because they are not restrictive. This would apparently be the case even where the issue of an import license is conditional on the lodging of a deposit as a security against failure to carry out the import transaction within a specified period (BISD 25S/68, at p.95).

Article XI:2(a) and (b)

17. The texts of these sub-paragraphs are as follows:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade.

18. Under sub-paragraph 2(a) export prohibitions or restrictions are permissible provided that the products in respect of which they are applied are essential to the exporting country and that they are temporarily applied with the objective of preventing or relieving a critical shortage of the product in question. "Foodstuffs" are specifically mentioned but the wording "or other products" effectively extends the scope of the sub-paragraph to any product that is essential to the exporting country. The judgement as to what products are "essential" is a matter which each country has the right to decide for itself (E/CONF.2/C.3/E/W.3). The limiting factors are that the shortage should be a critical one and that the measures be temporarily applied.

19. On both the foregoing points there are a number of interpretative qualifications involving, for example, Merino sheep and olive oil, which would suggest that measures could be temporarily applied to cope with the consequences of a natural disaster, or to maintain year to year domestic stocks sufficient to avoid critical shortages of products which are basic to the diet in the exporting country and which are subject to alternate annual shortages and surpluses. The latter point was incorporated in a note to the corresponding provision of the Havana Charter. At various stages in the drafting history it was also confirmed that sub-paragraph 2(a) would allow a country to impose temporary export restrictions applied to meet a considerable rise in domestic prices of foodstuffs due to a rise in prices in other countries. On this point the 1955 Review Session Working Party was of the view that to the extent that the rise in prices was associated with acute shortages of the products in question, as it normally would be, the action envisaged, whether affecting

foodstuffs or other products, would clearly be covered by the terms of sub-paragraph 2(a) (BISD 3S/191).

20. The provision corresponding to sub-paragraph 2(b) in the early texts of the Draft Charter was regarded as being open to abuse and conditions were added under which the ITO could request revision of standards (other than internationally agreed standards) that were considered to have unduly restrictive effects on trade.

21. Although there is no comparable provision in the General Agreement, the 1955 Review Session (BISD 3S/189) agreed that "the maintenance or the application of a restriction which went beyond what would be "necessary" to achieve the objects defined in paragraph 2(b) or 2(c) of Article XI would be inconsistent with the provisions of that Article. This is made clear in the text of these provisions by the use of the word "necessary". Restrictions related to the application of standards or regulations for the classification, grading or marketing of commodities in international trade which go beyond what is necessary for the application of those standards or regulations and thus have an unduly restrictive effect on trade, would clearly be inconsistent with Article XI (see L/6268). On the other hand marketing arrangement involving export licences and other orderly marketing arrangements would not be regarded as inconsistent with Article XI:2(b) provided they are necessary in the sense outlined and are not unduly restrictive in their effects on trade.

Article XI:2(c)

22. Paragraph 2(c) of Article XI establishes the conditions under which restrictions on the importation of agricultural and fisheries products, other than duties, taxes or other charges, however these are made effective, may be maintained. Restrictions applied in accordance with this paragraph are also subject to the provisions of Article XIII and in particular of paragraph 4 of that Article. The full text of paragraph 2(c) is reproduced in Annex B.

Paragraph 2(c)(i)

23. The strictness of the Article XI:2(c)(i) conditions is in part a reflection of the fact that, as with the other exception to paragraph 1 of Article XI, the onus is on the country applying a measure to demonstrate that all the conditions under Article XI:2(c)(i) and under the last paragraph of Article XI:2(c) are met (BISD 30S/140, 164; and L/6253, at p.60). In summary the conditions to be fulfilled are:

(i) the measure on importation must constitute an import restriction (and not a prohibition);

(ii) the import restriction must be on an agricultural or fisheries product;

(iii) the import restriction and the domestic marketing or production restriction must apply to "like" products in any form (or directly substitutable products if there is no substantial production of the like product);

(iv) there must be governmental measures which operate to restrict the quantities of the domestic product permitted to be marketed or produced;

(v) the import restriction must be necessary to the enforcement of the domestic supply restriction;

(vi) the contracting party applying restrictions on importation must give public notice of the total quantity or value of the product permitted to be imported during a specified future period; and

(vii) the restrictions applied under (i) must not reduce the proportion of total imports relative to total domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions.

24. Under the present GATT framework the tariff régime and the Article XI:2(c) régime co-exist. Although the former has an advantage over the latter from an international trading system point of view, both have the potential, depending on the nature and intensity of the support arrangements applied domestically, to displace imports or increase exports. In the case of the Article XI:2(c)(i) régime, limiting the potential for trade distortion and, more particularly, safeguarding the interests of exporting countries, is basically intended to be achieved through: (i) the restriction on domestic production which must effectively keep domestic production below the level it would have attained in the absence of restrictions; (ii) the minimum access ratio; and (iii) the limitation of the scope for applying restrictions to protect processed products. If the Article XI:2(c)(i) régime is to continue to co-exist with a tariff régime, or to survive as a transitional discipline, it is apparent that the disciplines in each of these areas should be re-enforced.

25. For instance, the minimum access provisions of the last paragraph of Article XI:2(c) establish a requirement which is a pre-condition to the introduction or continued maintenance of restrictions under Article XI:2(c)(i). A major difficulty with these provisions is that the point of reference for determining the appropriate ratio is a hypothetical one (the proportion that might reasonably be expected to exist between imports and domestic production in the absence of restrictions). At Havana it was considered (Report of Working Party No.8: E/CONF.2/C.3/E/W/17) that "price and delivery factors were obviously among the main factors which would determine the distribution of trade in the absence of import restrictions". Overall, it is difficult to see how the minimum access provisions could be made more operationally effective otherwise than through negotiations on the basis of guidelines which stipulate that the aim should be increase access levels and that in no case should access be less than a given ratio (see, for example, AG/W/9/Rev.3, Annex A-1, paragraph 6).

Article XI:2(c)(ii)

26. Sub-paragraph (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 principle of the last paragraph of Article XI:2(c). What would need to be demonstrated where this provision is invoked is that when the restrictions were imposed the surplus was "temporary" relative to the situation that had prevailed in previous years and that the surplus was "temporary" rather than simply part of a persistent or re-current surplus situation. In any event, it shall be noted that the relationship between Articles XI:2(c)(i) and (ii) has not been defined in any definitive sense. Some suggestions considered for improving the disciplines in this area are set out in AG/W/9/Rev.3, Annex A-1, at p.5, paragraphs 15 and 16.

Article XI:2(c)(iii)

27. This provision enables a country to limit domestic production of "animal products" by, for example, restricting imports of feeding stuffs under two specific conditions: that domestic production of the imported feeding stuffs is relatively negligible; and that domestic production of the "animal products" is directly dependent, wholly or mainly, on the imported feeding stuffs. Import restrictions are authorized on both the imported product on which domestic production is dependent as well as on the animal products themselves.

28. The expression "animal products" is not defined, though the meaning intended by the contracting party which proposed the text is on record (EPCT/T/A/PV/19, at p.33). This raises the question whether "animal products" could therefore cover a wide variety of possibilities for import restrictions on processed products. Presumably the Note Ad Article XI:2(c) "in any form" would operate to some extent as a limitation on the scope for such protection. It may also be noted that imported feeding stuffs considered separately would not meet the criterion that production of the domestic product should be dependent "wholly or mainly" on one of a number of imported feeding stuffs. At Havana it was agreed that "imported kinds of feeding stuffs could be treated as a single commodity". It was further agreed that "if the various imported feeding stuffs were in fact treated as a single commodity, import restrictions thereon should be applied globally on the total combined imports without allocating shares to the individual feeding stuffs. It was felt that, in cases where this procedure would not be practicable, the import restriction should take the form of an equal proportionate reduction in the amount permitted to be imported of each of the several feeding stuffs". (E/CONF.2/C.3/54, at p.7)

Permissible Scope of Import Restrictions

29. Under sub-paragraphs (i) and (ii) of Article XI:2(c) imports of agricultural and fisheries products "in any form" may be restricted provided, inter alia, the domestically restricted product and the imported products can be considered as "like products". The fact that two products are "directly competitive" does not as such make them like products (see Annex A). Imports can also be restricted if the imported product is

"directly substitutable" for a domestically restricted product provided domestic production of the "like product" is negligible.

30. The term "in any form" is defined in the Note Ad Article XI:2(c) as covering "the same products when in any early stage of processing and still perishable, which complete with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective". This note was revised at Havana to read:

> "The expression "agricultural and fisheries product, imported in any form" means the product in the form in which it is originally sold by its producer and such processed forms of the product as are so closely related to the original product as regards utilization that these unrestricted importation would make the restriction on the original product ineffective."

31. The report of the relevant Havana Committee (Havana Reports, p.93) records that the introduction of the term perishable, which was regarded as being inapplicable to many types of agricultural products, had unduly narrowed the scope of paragraph 2(c). It was emphasized that revision of the note was dictated solely by the need to permit greater flexibility in taking into account the differing circumstances that may relate to the trade in different types of agricultural products, having in view only the necessity of not making ineffective the restriction on the importation of the product in its original form, and was in no way intended to widen the field within which quantitative restrictions as a method of protecting the industrial processing of agricultural or fisheries products.

32. Thus the scope for restricting imports of further processed versions of the fresh product is circumscribed by the "early stage of processing and "perishability" requirements. In general it is reasonably clear that imports of products that are at least the same as, or practically identical to, the restricted domestic product ("like products") can be restricted together with such processed forms thereof as meet the criteria in the Note under discussion. In either case the restrictions on the importation has to be necessary to the enforcement of the governmental measures restricting domestic production or marketing of a fresh product. Furthermore, it would appear that import restrictions on products in an early stage of processing cannot be justified unless imports of the fresh product are also restricted.

Other points

33. By virtue of the Note Ad Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" and "export restrictions" include restrictions make effective through state-trading organizations. As already noted Article XI:1 relates to restrictions "other than duties, taxes and other charges" however these are made effective. The basic purpose of the Note relating to restrictions made effective through state-trading operations has been described as follows:

> "The basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations. This purpose would be frustrated if import restrictions were considered to be consistent with Article XI:1 only because they were made effective through import monopolies." (L/6253 at p.67)

SECTION B - ARTICLE XVI

Article XVI:1: Subsidies in General

34. This paragraph of Article XVI sets out general rules which apply to all subsidies and all contracting parties. For signatories to the Subsidies Code, additional general principles and rules are added by Article 8 of that Code. There are two main obligations under Article XVI:1. The first is to notify the extent, nature and effect of subsidies, including any form of income or price support, which operate directly or indirectly to increase exports or reduce imports. This obligation to notify applies to subsidies on agricultural and non-agricultural products alike. The notification requirements are detailed and extensive, and apply to all contracting parties (see BISD 9S/188 and BISD 11S/58). The question of what constitutes a notifiable subsidy has been discussed at length in several GATT bodies, including the Committee on Trade in Agriculture; see, e.g., document AG/W/5. In the absence of an agreed definition of "subsidy", contracting parties have at present considerable latitude as to their choice of measures to notify. Furthermore, only a minority of contracting parties regularly comply with the agreed notification procedures. In the agriculture sector non-commercial transactions (e.g. food aid) have not normally been notified; and there is a "grey area" concerning notification of transactions on special terms and transactions by state-trading organizations.

35. The other obligation under Article XVI:1 is for a subsidizing contracting party to discuss the possibility of limiting the subsidization in any case in which it is determined that serious prejudice to the interests of a contracting party is caused or threatened by such subsidization. CONTRACTING PARTIES have agreed that such consultations could proceed upon the request of a contracting party without a prior international determination of prejudice, though they did not amend the provision to make this explicit[2]. An important question regarding this obligation is whether a subsidizing contracting party need only discuss the theoretical possibility of limiting the subsidization, or whether more is expected from the party, by way of real action, to limit the subsidy in question.

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[2]BISD 3S/225, paragraph 15.

Article XVI:2 and XVI:3 - Export Subsidies on Primary Products

36. Section B of Article XVI, added in 1955 (see paragraph 10 above), specifically addresses export subsidies and introduces the distinction between primary and non-primary products which is explained in the Interpretative Note Ad Article XVI, Section B.

> "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".

This category of primary products was further limited in respect of the Subsidies Code by the footnote to its Article 9 (export subsidies on products other than certain primary products), which deletes the words "or any mineral" from the above text. Signatories to the Code shall not grant export subsidies on products other than certain primary products, thus defined. In the light of this provision, and since most developed countries are also prohibited from using export subsidies on non-primary products by Article XVI:4 of the General Agreement, the classification of a particular product as primary or non-primary can have significant consequences. Though no clear dividing line has been drawn among these products, panels have tended to find that the term encompassed agricultural products which were in the raw state or in the first value-added stage. A related unresolved issue is whether export subsidization of the primary-product component of a processed product is permissible under Article XVI of the General Agreement or Article 9 of the Code, taking into consideration also item (d) of the Illustrative List of Export Subsidies referred to in the latter provision.

The Equitable Share Obligation

37. Article XVI:3 specifies that a contracting party should seek to avoid the use of subsidies on the export of primary products, but if it does grant a subsidy "which operates to increase the export of any primary product ... 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". Because of the different wording of the two provisions, a subsidy on a primary product which is notifiable under Article XVI:1 may not necessarily be subject to the equitable share obligation under Article XVI:3. In fact, this provision contains a number of words which various GATT bodies have struggled to define or interpret in order to determine their scope or practical application: not only subsidy and primary product, but also equitable share, world export trade, representative period and special factors. The interpretation of these words has engendered new concepts whose meanings must be determined as well, such as market, displacement, and price undercutting.

38. The equitable share obligation has thus been both the core obligation concerning export subsidies on primary products and the most troublesome to apply. The Subsidies Code was intended to bring greater precision to this obligation through its Article 10, which reads:

"Export subsidies on certain primary products

1. In Accordance with the provisions of Article XVI:3 of the General Agreement, signatories agree not to grant directly or indirectly any export subsidy on certain primary products in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product, account being taken of the shares of the signatories in trade in the product concerned during a previous representative period, and any special factors which may have affected or may be affecting trade in such product.

2. For purposes of Article XVI:3 of the General Agreement and paragraph 1 above:

(a) "more than an equitable share of world export trade" shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets;

(b) with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining "equitable share of world export trade";

(c) "a previous representative period" shall normally be the three most recent calendar years in which normal market conditions existed.

3. Signatories further agree not to grant export subsidies on exports of certain primary products to a particular market in a manner which results in prices materially below those of other suppliers to the same market."

39. In practice the Code has not always been found to give clear guidance. Consequently a number of disputes involving the concept of "more than an equitable share" have not found a satisfactory solution and in some cases have provoked retaliatory subsidization. The case-by-case application of this concept has revealed its imprecisions and the fact that it largely refers to notions which escape objective criteria. There is, for example, sufficient imprecision in this concept to allow countries using export subsidies to argue that these subsidies do not result in obtaining more than an equitable share. Moreover it is not always possible to prove causality between the subsidy and the increased share. Furthermore, it is impossible to derive a consistent general line from the decisions of panels, some of which have given divergent interpretations. It has been relatively easy for panels to determine, on the basis of facts and statistics, whether a subsidy existed and whether there had been an increase in the market share of a country and a decrease in the market share of its competitors. However, divergent interpretations are possible as to the nature and relevance of the "special factors" (referred to in Article XVI:3 of the General Agreement and Article 10 of the Subsidies Code) and "normal market conditions", thus confusing the causality between

the subsidization and the increase in the market share. Furthermore, there is ambiguity also as to the question of price undercutting, the question of newcomers and the rôle of non-commercial sales, among others.

40. Document AG/W/9/Rev.3 (Draft Elaboration of the Recommendations of the Committee on Trade in Agriculture) notes, in paragraphs 48-50, a certain discordance between the obligations of Article XVI:1 and XVI:3 - i.e., between the obligation simply to discuss the possibility of limiting subsidization in case of serious prejudice on the one hand, and the more stringent equitable share obligation on the other. It goes on to observe that this discordance 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". The Draft Elaboration develops[3] a range of possibilities for strengthened and more operationally effective GATT rules and disciplines concerning subsidies which affect trade in agriculture. Following the CTA's mandate it does so along two lines of approach, one based on improvements to the existing framework of rules and disciplines (Option A) and one based on a new framework (Option B), i.e., a general prohibition subject to carefully defined exceptions, in conjunction with the improvements envisaged under Option A.

SECTION C: ARTICLE XX

41. Article XX provides for a number of exceptions to the General Agreement, of which some relate conceivably but not exclusively to measures on agricultural products.

42. All exceptions are subject to the proviso contained in the chapeau of Article XX which requires that "... such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restrictions on international trade ...".

43. Article XX(b) covers sanitary and phytosanitary regulations "necessary to protect human, animal or plant life and health". An examination of past GATT work and other relevant decisions by the CONTRACTING PARTIES in respect of these measures is contained in MTN.GNG/NG5/W/41 prepared by the secretariat at the request of NG5.

44. The record of the discussions at Havana in Committee Three on the corresponding provision in the Charter contains the following points of agreement (E/CONF.2/C.3/SR.35):

> "The Committee agreed that quarantine and other sanitary regulations as well as other types of regulations must be published under Article 37 [X] and that the provisions for consultation in Article 41

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[3] Paragraphs 42-65; Annexes B and C

> [XXII] required members to supply full information as to the reasons for and operation of such regulations.
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> The Committee agreed that quarantine and other sanitary regulations are a subject to which the organization should give careful attention with a view to preventing measures "necessary to protect human, animal or plant life or health" from being applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade and to advising members how they can maintain such measures without causing such prejudice.
>
> In view of this, the Committee assumes that the organization will establish a regular procedure with a view to investigating (in consultation, when it considers this advisable, with other inter-governmental specialized agencies of recognized scientific and technical competence, such as the FAO) any complaints that might be brought by a member as to the use of the exception in sub-paragraph 1(a)(iii) or Article 45 [(b) of XX] in a manner inconsistent with the provisions of the preamble to that paragraph."

45. Article XX(g) might have particular relevance to, inter alia, fishery management and conservation. The provisions of this paragraph have been examined by panels in recent instances (BISD 29S/91 and L/6268).

46. The Havana Charter contained a whole Chapter (VI) on "Intergovernmental Commodity Arrangements", but the only reference to such agreements in the General Agreement is to be found in Article XX:(h). Some non-agricultural products could qualify as commodities or primary products. In order for an Intergovernmental Commodity Agreement to be covered by Article XX(h) it must either: (a) conform to criteria submitted to the CONTRACTING PARTIES and not disapproved by them; (b) be itself submitted and not disapproved or; (c) conform to the principles approved by the Economic and Social Council in its Resolution 30(IV) of 28 March 1947.[4] No contracting party has ever formally complained that a measure taken in pursuance of a commodity agreement was inconsistent with the General Agreement.

47. Article XX(i) and (j) could apply both to agricultural products and to industrial products. The provisions of XX(j) seem to have been particularly relevant to the immediate post-war trade situation.

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[4] UN ECOSOC Resolution 30, UN document E/437. This Resolution urged members of the United Nations to adopt as a general guide in intergovernmental consultation or action with respect to commodity problems, the principles laid down in the chapter relating to intergovernmental commodity agreements contained in the London draft of the Charter for an International Trade Organization.

SECTION D: SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

48. Special and differential treatment is not specifically referred to in either Article XI, Article XVI or Article XX, the crux of the GATT framework for agriculture. However, Part IV of the General Agreement (Articles XXXVI and XXXVIII) applies to agricultural trade in the same way as to other sectors. It is noteworthy that when approving the text of Part IV, the CONTRACTING PARTIES agreed that the following statement should be placed on record in connection with Articles XXXVI:4 and XXXVIII:2(a):

> "The importance of trade in agricultural products to the less-developed contracting parties has been strongly emphasized throughout the discussions in the Legal and Institutional Committee. A proposal that there should be an appropriate paragraph in the commitments section [Article XXXVII] specifically referring to the policies which should be followed by contracting parties in this field was discussed."
>
> "The CONTRACTING PARTIES have agreed to seek solutions to problems of agricultural trade in the course of the Kennedy Round and have agreed "to deal with the rules to govern, and the methods to be employed in, the creation of acceptable conditions of access to world markets for agricultural products in furtherance of a significant development and expansion of world trade in such products". Moreover, it had been specifically agreed at Ministerial level that "in the trade negotiations every effort shall be made to reduce barriers to exports of the less-developed countries". It was therefore clear that the negotiations would reflect the great interest of less-developed countries in agricultural products."
>
> "Although a specific paragraph to cover all the specific concerns expressed by those less-developed contracting parties particularly interested in agricultural trade problems has not been included in Part IV, agricultural products are covered by the general provisions of Part IV. Moreover, it is understood that at a later stage and in the light of the results of the forthcoming trade negotiations interested contracting parties will be entitled to revert to this matter in the Committee on Trade and Development."

49. The principles and objectives agreed to and the commitments undertaken by developed contracting parties in Articles XXXVI and XXXVIII have been invoked in dispute settlement cases concerning both subsidies and access problems in agricultural trade, usually in conjunction with a complaint

under the provisions of Part II of the General Agreement.[5] In the most recent case the Panel[6] noted that:

> "the commitments entered into by contracting parties under Article XXXVII were additional to their obligations under Parts I-III of the General Agreement, and that these commitments thus applied to measures which were permitted under Parts I-III."

No such case has yet been considered solely on Part IV grounds.

50. Article 10 of the Subsidies Code, concerning subsidies on certain primary products (see Section B above) applies to all signatories. However in Articles 11 and 14 of the Code signatories recognize that subsidies are an integral part of the economic and social development programmes of developing countries; Article 14:4 in particular stipulates that:

> "There shall be no presumption that export subsidies granted by developing-country signatories result in adverse effects, as defined in this Agreement, to the trade or production of another signatory. Such adverse effects shall be demonstrated by positive evidence, through an economic examination of the impact on trade or production of another signatory."

51. The Agreement on Technical Barriers to Trade contains specific provision in its Article 12 for special and differential treatment of developing countries. This provision has a bearing on the agricultural trade of developing countries particularly in the area of sanitary and phytosanitary measures.

52. Also among the Tokyo Round agreements, the Arrangement Regarding Bovine Meat and the International Dairy Arrangement have special and differential treatment embodied in their objectives and operational provisions.[7]

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[5] E.g., Panel reports on: "EEC - Restrictions on Imports of Apples from Chile" (1980 - BISD 27S/98); "EEC - Refunds on Exports of Sugar" (1980 - BISD 27S/69); "United States - Imports of Sugar from Nicaragua" (1984 - BISD 31S/67).

[6] Panel report on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile" (1989 - L/6491)

[7] See: Arrangement Regarding Bovine Meat
Articles I(3); IV.2; and IV.4
International Dairy Arrangement
Articles IV.2; IV.4; V.1(a); V.1(b); and V.2
- Protocol Regarding Certain Milk Powders
  Articles 3.8; and 5.1
- Protocol Regarding Milk Fat
  Articles 3.7; and 5.1
- Protocol Regarding Certain Cheeses
  Articles 3.7; and 5.1

ANNEX A

Text of, and Interpretative Notes to, Article XI:2(c)

"2. The provisions of paragraph 1 of this Article shall not extend to the following:

.....

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted;

.....

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned."

An interpretative note ad Article XI (which, according to Article XXXIV of the General Agreement, is an integral part of that Agreement) specifies the following:

"Paragraph 2(c)

The term "in any form" in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.

Paragraph 2, last sub-paragraph

The term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artifically brought about by means not permitted under the Agreement."

ANNEX B

Text of, and Interpretative Notes to, 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.

Note 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.

ANNEX C

Text of, and Interpretative Notes to, Article XX

Article XX

General Exceptions

Subject to the requirement that such measures were not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

....

(b) necessary to protect human, animal or plant life or health;

....

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domesic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Note Ad Article XX

Sub-paragraph (h)

The exception provided for in this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.