

**GENERAL AGREEMENT ON
TARIFFS AND TRADE**

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ANALYSIS OF THE DRAFTING HISTORY OF ARTICLE XVI AND OF THE WORK
OF PAST PANELS AND WORKING PARTIES AS REGARDS
SUBSIDIES ON AGRICULTURAL PRODUCTS^{1/}

Note by the Secretariat

1. In order to assist the Committee of Trade in Agriculture in its examination of the operation of the General Agreement as regards subsidies, especially export subsidies, and including other forms of export assistance, the secretariat is providing the present analytical note which covers the drafting history of Article XVI^{2/}, and the interpretations of that Article as given by panels and working parties. This note attempts to illustrate (I) how Article XVI got to be written the way it was, and (II) what its provisions mean or have been said to mean, on the basis of available records.

^{1/} For purposes of this note, agricultural products are deemed to be the products falling within Chapters 1 to 24 inclusive of the CCCN, AG/1 p.2 para. 4

^{2/} The full text of which is provided in Annex I.

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Chapter I. Drafting History of Article XVI

A. US proposal for ITO Charter, 1946

2. Some of the wording of Article XVI of the General Agreement can be traced back to the proposal advanced in 1946 by the United States on a suggested Charter for an International Trade Organization of the United Nations.^{1/} One can find already in Article 25:1 of the US suggested charter, the obligations to notify the extent and nature of the subsidization as well as to discuss the possibility of limiting the subsidization which are contained in GATT Article XVI:1, though worded slightly differently.

3. Paragraph 2 of Article 25 of the US proposal provided for the general elimination of any subsidy on the exportation of any product, "which results in the sale of a product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market". The language of this paragraph is similar to the provisions of Article XVI:4 and the first sentence under Ad Article XVI of the Notes and Supplementary Provisions in Annex I of the General Agreement. However, the ban on export subsidies under GATT Article XVI:4 relates only to non-primary products, whereas the scope of the ban in the US draft covered more broadly "any product". The US drafted Article 25:2 further added that due allowance should be made for differences in conditions of sale, taxation or other differences affecting price comparability.

4. More interestingly, Article 25:3(a) of the US draft specified that "in any case in which it is determined that a specified product is, or is likely to become, in burdensome world surplus" interested countries were to consult "with a view to the adoption of measures to increase consumption and to reduce production through the diversion of resources from uneconomic production, or with a view to seeking, if necessary, the

^{1/} US Department of State Publication No. 2598, September 1946.

conclusion of an intergovernmental commodity agreement" as provided elsewhere in the suggested charter. Furthermore, paragraph 3(b) provided that if it is determined that the above measures "have not succeeded, or do not promise to succeed, within a reasonable period of time, in removing, or preventing the development of, a burdensome world surplus of the product concerned, the requirements of paragraphs 1 and 2 of this Article shall cease to apply ..."; that is, the obligations to notify, consult on and refrain from subsidization. No provisions similar to Article 25:3(a) and (b) are to be found in GATT Article XVI.

5. Article 25:3(c) specified that, notwithstanding the ban on export subsidies provided under paragraph 2 nor the waiver of this ban under the conditions set out in paragraph 3(b), "no member shall grant any subsidy on the exportation of any product which has the effect of acquiring for that member a share of world trade in that product in excess of the share which it had during a previous representative period, account being taken in so far as practicable of any special factors which may have affected or may be affecting the trade in that product". This language is similar but not identical to the requirements in Article XVI:3 regarding equitable share of world export trade, the latter being limited to primary products only. The US draft further provided that it would be the Member granting the subsidy which would initially select the representative period and make the appraisal of any special factors. The member would have to consult promptly upon request, "regarding the need for an adjustment of the base period selected or for the re-appraisal of the special factors involved".

6. During the discussion of Article 25 at the First Session of the Preparatory Committee in London, the US delegate explained that, under this Article in general, direct subsidies to producers would be permitted, subject to the undertaking to discuss the possibility of limiting them in case of serious injury. On the other hand, export subsidies, including any system which resulted in the export of a product at a price lower than the domestic price, would be generally prohibited under the US draft^{1/}.

^{1/} E/PC/T/C.II/37 pp.7-8

7. It is noteworthy that the initial US proposals sought to eliminate export subsidies on all products but recognized already that, under circumstances of world surplus in a product, resort to export subsidies might have to be made. While the draft did not yet single out commodities or primary products in this regard, (as subsequent drafts would), it is clear that such products readily come to mind as likely to be in surplus situations. The US proposed Charter exhorted its Members to take internal adjustment measures or conclude inter-governmental commodity agreements as a way to deal with surpluses. If this did not materialize or if the measures proved to be unsuccessful, then all were free to subsidize the export of the product, provided that previous market shares of trade were respected.

B. Preparatory Committee of the United Nations Conference on Trade and Employment, London 1946

8. The discussion in London of the US proposals regarding subsidies focused on: whether export subsidies were more harmful than production subsidies, the special problems with respect to primary products and income stabilization schemes, and the relation between subsidies and commodity agreements^{1/}.

9. The London Preparatory Committee revised in a number of areas the text of Article 25 of the United States' draft Charter^{2/}. As a result, the London text of the provision to discuss the possibility of limiting the subsidization reads as it is in GATT Article XVI:1 second sentence. In its report the Committee noted that the word "limiting" in the revised text "is used in a broad sense to indicate maintaining the subsidization at as low a level as possible, and the gradual reduction in subsidization over a period of time where this is appropriate".

10. A new paragraph was introduced to allow for the operation of a domestic stabilization scheme for a primary product, to meet the concerns of New Zealand and others. The language is similar to that which can be found in the interpretative note 2(a) and (b) relating to GATT Article XVI:3.

^{1/} E/PC/T/C.II/37 pp. 8-12.

^{2/} The Committee's report is to be found in E/PC/T/33.

11. Another amendment by the Preparatory Committee was to eliminate the provision in the US draft Article 25:3(a) for members to consult on adopting production or consumption measures to deal with a burdensome world surplus. The London draft provided instead that any case where a member considers that its interest is seriously prejudiced by subsidization of a "primary commodity" or where a member cannot meet the time-limit for eliminating its export subsidy, may be deemed to be a "special difficulty". A special study could be made which might lead eventually to the conclusion of an inter-governmental commodity agreement. If these measures proved unsuccessful at doing away with a burdensome world surplus, the obligations to notify, consult on, and refrain from subsidization would cease. Thus with the London draft of the Charter, the special situation of subsidies on primary products and the encouragement to resort to inter-governmental commodity agreements become more prominent.

12. The chapter relating to inter-governmental commodity arrangements in the US proposal was retained in the London draft. The Preparatory Committee suggested that the Drafting Committee examine the use of the terms "primary", "agricultural", "mineral", "commodity" and "product" throughout the Charter in order to ensure uniformity and consistency in their application. One delegate made a reservation that the term "agricultural products" in this context should not include fish or fisheries products.

C. Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, Lake Success, New York, 1947

13. The Drafting Committee made certain changes to the London text of the Charter, many of a formal nature.^{1/} Among these changes was the insertion of the words "directly or indirectly" as regards subsidies notifiable to make it clear that the provision "can thus not be interpreted as being confined to subsidies operating directly to affect trade in the product under consideration." The New York draft of the

^{1/}The Report of the Drafting Committee at New York can be found in E/PC/T/34.

Charter as regards the obligations to notify and discuss the possibility of limiting the subsidization is identical to the provisions of GATT Article XVI:1. The Committee noted that these obligations related to "subsidies of all kinds, whether domestic subsidies or export subsidies, if they affect exports or imports."

14. The Drafting Committee considered that where measures proved unsuccessful to deal with a burdensome world surplus (as the failure to conclude on inter-governmental commodity agreement), the obligations to notify and consult as provided above, should not be relinquished (see paragraphs 4 and 11 of this note). Accordingly the text was so amended. But the Committee retained the provision that the obligation to eliminate export subsidies should cease to apply under these conditions. The delegations of Canada and New Zealand reserved their position on this matter as they feared that this "might provide an escape for subsidizing countries, taking such an attitude that no agreement could be reached, in which case they would be free to act as they wished without regard to their obligation" to eliminate export subsidies. These representatives did not consider the provisions for respecting share of trade to be "an adequate safeguard against abuse".^{1/}

15. In addition, the Drafting Committee inserted the following definition under the chapter relating to inter-governmental commodity arrangements: "the term 'primary commodity' means any product of farm, forest or fishery, or any mineral, which enters world trade in substantial volume in a form customarily called primary, and may include such a product on which minor processing has been performed in preparation for export. The term may also cover a group of commodities, of which one is a primary commodity as defined above and the others are commodities (whether primary or non-primary) which are so closely related to the other commodities in the group that they can conveniently be dealt with in a single arrangement to make clearer the inclusion of products closely related to primary commodities within the scope of commodity arrangements". The latter sentence was included "to make clearer the inclusion of products closely related to primary commodities within the scope of commodity arrangements". The delegate of Norway reserved his position regarding the inclusion of fishery products in this definition.

16. While the Drafting Committee in New York was discussing the draft ITO Charter, a Sub-Committee on Tariff Negotiations was meeting to discuss the incorporation of certain articles of the draft charter into the General Agreement. The United States was in favour of incorporating the provisions regarding notifications and discussing the possibility of limiting subsidization (paragraph 1 of Article 30 of the draft charter) in the General Agreement. However, the US delegate pointed out that the executive authority of his government did not permit an undertaking with regard to export subsidies. It was agreed to incorporate paragraph 1 in the General Agreement and refer the rest of the Article for further consideration.^{1/}

D. Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Geneva, 1947^{2/}

17. Chief among the modifications to the New York text of the draft Charter that were made at this Geneva meeting, was the addition of a provision allowing any member to "subsidize the exports of any product to the extent and for such time as may be necessary to offset a subsidy granted by a non-member affecting the member's exports of the product". This was subject to an obligation to consult with the Organization or with any other member adversely affected by such action "with a view to reaching a satisfactory adjustment of the matter".

18. The Committee in Geneva also tightened what had up to then been a more or less automatic waiver from the ban on export subsidies in case of the failure to conclude an intergovernmental commodity agreement (see paragraphs 4, 11 and 14 of this note). The Geneva text requires any adversely affected member to apply to the Organization for exemption.

^{1/} E/PC/T/C.6/46, page 2

^{2/} Report of the Second Session of the Preparatory Committee in Geneva can be found in E/PC/T/186

19. The preparatory work for the original GATT continued at the Geneva meeting (see paragraph 16 of this note). An attempt by the delegates of Chile, China and Cuba to transfer into the General Agreement, other articles relating to export subsidies in the Charter in addition to the obligation to notify and consult was not successful. The Chairman of the Tariff Agreement Committee at that time stated that "most particular provisions while perfectly suitable for inclusion in the Charter, were not quite proper for inclusion in the GATT which dealt with imports into rather than exports from a given territory".^{1/} As further noted by the delegate of the United States, the requirement to notify and consult "was included because of the fact that a domestic subsidy for increasing domestic production could have a limiting effect on imports and therefore tend to nullify the effect of tariff concessions and therefore would be something which ought to be subject to consultation in order to protect our concession ... the further provisions of Articles 26 and 27 dealing with export subsidies get into the realms of competition between countries in markets of a third country. That is not the area which is covered by the General Agreement. The General Agreement covers the treatment of the commodities of each country in the markets of the other country."^{2/}

E. Havana Charter - Final Act of the United Nations Conference on Trade and Employment, Havana, 1948^{3/}

20. Article 25 of the Havana Charter contains the obligation to notify subsidies in general and to discuss the possibility of limiting the subsidization. Paragraph 13 of this note has already mentioned that Article 30:1 of the New York text of the draft charter was identical to Article XVI:1 of the General Agreement. However, a Sub-Committee at the Havana meeting, on the basis of a proposal by the United States delegation, made the following change to the first sentence of the earlier text which contains the notification obligation:

^{1/} E/PC/T/TAC/PV/11, page 13.

^{2/} Idem pages 14-15.

^{3/} The text of which as regards subsidies is provided in Annex 2.

"... which operates directly or indirectly to maintain or increase exports of any product from, or to reduce, or prevent an increase in imports of any product into ..." (Underlined words represent the addition made by the Sub-Committee).

It was felt that the previous draft of the Article "failed to cover subsidies which, whilst not increasing a member's exports nor reducing its imports might nevertheless affect a member's share of total trade".^{1/} The Sub-Committee also agreed to accept another proposal by the United States delegation to introduce in the last sentence (relating to the obligation to discuss the possibility of limiting the subsidization) the phrase "a member considers", in place of determination by the Organization that serious prejudice to interest is caused or threatened. It was thought that this change "was consistent with similar changes made in Chapter VI" relating to intergovernmental commodity agreements and "would expedite procedure."

21. Article 26 of the Havana Charter contains provisions for the general elimination of export subsidies in line with earlier texts of the draft Charter (see paragraph 3 of the present note). Paragraph 2 of Article 26 specified that "the exemption of exported products from duties or taxes imposed in respect of like products when consumed domestically, or the remission of such duties or taxes in amounts not in excess of those which accrued shall not be deemed to be in conflict with the provisions of paragraph 1"; that is, the general ban on export subsidies. It was understood that paragraph 2 "covers the case of remission of duties or taxes imposed on raw materials and semi-manufactured products subsequently used in the production of exported manufactured goods".^{2/}

^{1/} E/CONF.2/C.3/51, page 108

^{2/} E/CONF.2/C.3/51, page 109

22. Paragraph 3 of Article 26 provides that members should give effect to the ban on export subsidies not later than two years from when the Charter enters into force.

23. Paragraph 4 of Article 26 allows any member to subsidize any product in order to offset a subsidy granted by a non-member. This provision was identical to that contained in the Geneva draft charter (see paragraph 17 of this note).

24. Article 27 of the Havana Charter provides for "special treatment of primary commodities". The Sub-Committee agreed that references to primary commodities in this Article should be covered by the definition of "a primary commodity" contained elsewhere in the Charter, in the Chapter relating to intergovernmental commodity agreements. The latter provided that "the term 'primary commodity' means 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." This definition is somewhat different than that contained in the New York draft (see paragraph 15 of this note) but is the same as that for a "primary product" contained in the Interpretative Note regarding Section B of Article XVI of the General Agreement.

25. Paragraph 1 of Article 27 exempts domestic stabilization systems on a primary commodity from the general ban on export subsidies, as already envisaged in the London text (see paragraph 10 of this note). Article 27:1 is identical to the wording in the Interpretative Note 2(a) and (b) relating to GATT Article XVI:3.

26. A new paragraph was introduced at the Havana meeting, Article 27:2, to emphasize the responsibility of members granting a subsidy on a primary commodity to "co-operate at all times in efforts to negotiate" intergovernmental commodity agreements .

27. Paragraph 3 of Article 27 stated that "in any case involving a primary commodity, if a member considers that its interest would be seriously prejudiced by compliance with the provisions of Article 26, or if a member considers that its interests are seriously prejudiced by the granting of any form of subsidy, the procedures under Chapter VI may be followed". Chapter VI of the Havana Charter dealt with inter-governmental commodity agreements. A member which considers its interests to be thus seriously prejudiced is exempted provisionally from the ban on export subsidies but is still subject to an equitable share obligation as provided in Article 28 of the Charter. During the consideration of Article 27:3 by the Sub-Committee, the delegations of Argentina and Peru had proposed the deletion of this paragraph.

28. Paragraph 4 of Article 27 was added in Havana to permit a member to maintain a subsidy pending the outcome of a commodity conference but not "to grant a new subsidy or increase an existing subsidy".

29. The Havana Sub-Committee re-drafted the provision in the Geneva text regarding the waiver from the export subsidy ban in case of the failure to conclude an intergovernmental commodity agreement (see paragraph 18 of this note). The revised paragraph, namely Article 27:5 of the Havana Charter, permits "Members who consider their interests seriously prejudiced to apply or maintain export subsidies on primary commodities, without prior approval or a determination by the Organization, where Chapter VI procedure has failed or does not promise to succeed or where an intergovernmental agreement is inappropriate."^{1/} However, members were still subject to an equitable share obligation.

^{1/}E/CONF.2/C.3/51 p.111

30. The phrase "equitable share" was first used specifically in Article 28 of the Havana Charter. A similar concept referring to a representative share had been present throughout the draft texts of the Charter since the initial US proposal, although the drafters had vacillated between applying the obligation to primary or all products from one text to another (see paragraphs 5 and 14 of this note). In its report, the Sub-Committee in Havana explained that it had decided to strengthen the equitable share safeguards in light of the relaxation of other provisions which made it easier for a member to be exempted from the ban on export subsidies as regards primary commodities^{1/}. As opposed to GATT Article XVI:3, and earlier drafts of the Charter, paragraph 1 of Article 28 extends not only to export subsidies which operate to increase exports, but also to those which maintain exports at more than an equitable share level. By doing this, the Sub-Committee in Havana "intended to meet criticisms that the Article, as in the Geneva text, would tend to stabilize an existing trade situation to the detriment of under-developed countries", and in this respect, "go some way to meet the position of the delegation of Argentina expressed in its proposal to delete the Article"^{2/}.

31. A subsidizing member was obliged to consult with any other member which considered that serious prejudice to its interests was caused or threatened by the subsidization. But if no agreement was reached, it was the Organization that would determine what constituted an equitable share of world trade in the commodity. This determination by the Organization was binding on the subsidizing member. Paragraph 4 of Article 28 of the Havana Charter listed the factors to which the Organization should have particular regard in making its determination, including, inter alia, the country's share of world trade in the commodity during a previous representative period^{3/}.

32. As the ITO Charter evolved from the initial US proposals to the final Havana report, the particular situation for primary products became more evident as regards the provisions relating to subsidies. The obligations to notify and consult on subsidies were tightened up

^{1/} E/CONF.2/C.3/51 p.111

^{2/} E/CONF.2/C.3/5

^{3/} See Annex 2 for text of Article 28:4(a) through (e).

somewhat in the Havana Charter, at the same time as more exceptions to the general ban on export subsidies were provided for, in particular as regards primary products. Domestic stabilization systems on a primary commodity were not to be considered as involving a subsidy (under certain conditions). The failure of the negotiation of an international commodity agreement would release members from the obligation not to subsidize exports of the commodity (but they were still obligated to notify and consult on the subsidization under the Charter). To counter-balance this loophole it would seem, the Charter drafters tightened up the equitable share obligation. They specified that it would be the Organization that would determine what constituted such a share (according to specific factors) and that the subsidizing country would conform to this determination. As will be seen later in this note, Article XVI of the General Agreement at first contained only the obligations to notify and discuss the possibility of limiting the subsidization (as provided in paragraph 1 of Article XVI at present). Later, other provisions from the Havana Charter were incorporated into Article XVI, but not the references to the negotiation of international commodity agreements nor those to the determination by the Organization of what constitutes an equitable share of world trade, nor all the factors to take into account for the determination.

F. General Agreement on Tariffs and Trade, 1947

33. As noted earlier, the preparatory work for the original GATT considered it only appropriate to require contracting parties to notify and consult on subsidies, and to await the coming into effect of the International Trade Organization to impose further disciplines on export subsidies. Thus when a Final Act, including the text of the General Agreement was signed in November, 1947, Article XVI thereof relating to subsidies only included its present day paragraph 1^{1/}. (This was the New York/Geneva text of the provision concerned, the Havana meeting went on to amend this text and therefore the corresponding provision, Article 25, in the Havana Charter is different. See paragraphs 13 and 20 of this note).

^{1/} BISD Volume I/39-40.

34. In September, 1948, a working party established by the GATT CONTRACTING PARTIES considered the question of substituting immediately the corresponding articles of the Havana Charter into Part II of the General Agreement. The Brazilian representative proposed to include Articles 26, 27 and 28 of the Charter. "While agreeing in principle that insertion of these articles would be desirable, the majority of the working party felt that, in view of practical difficulties, they could not usefully recommend such inclusion at the present stage. It was of course understood that, in light of Article XXIX:1, the CONTRACTING PARTIES undertake to apply the principles of the Havana Charter relating to export subsidies to the full extent of their executive authority".^{1/} The Brazilian representative further proposed that the drafting changes adopted when Article 25 of the Charter was drawn up should be inserted into Article XVI (see paragraph 20 of this note). The working party agreed that the differences between the two were not of a substantial nature, and that accordingly:

"(a) The phrase "increased exports" in line 3 of Article XVI of the General Agreement was intended to include the concept of maintaining exports at a level higher than would otherwise exist in the absence of the subsidy, as made clear in line 3 of Article 25 of the Havana Charter; and

(b) The intent of the last sentence of Article XVI of the General Agreement is that consultation shall proceed upon the request of a contracting party when it considers that prejudice is caused or threatened and would not require a prior international determination."^{2/}

Article XVI of the General Agreement contained only its first paragraph until the contracting parties reconsidered the subsidy provisions in 1955.

^{1/} BISD Volume II/43 paragraph 24

^{2/} BISD Volume II/44, paragraph 29

G. Protocol Amending the Preamble and Parts II and III, 1955

35. At their Ninth Session in 1954/55, the CONTRACTING PARTIES again returned to the question of strengthening the subsidy provisions of the General Agreement. A Working Party III on Barriers to Trade Other than Restrictions or Tariffs was established to consider various proposals relating to Article XVI. Delegations were divided among those who would retain Article XVI in its existing form without any further provisions on export subsidies and those who would tighten those rules. There were considerable differences among those in the latter group as well. There were those who felt that all commodities should be treated alike, and those who felt that any exceptions to the rules should be limited to primary or agricultural commodities. There were those who believed that subsidies as such should be prohibited, subject to certain exceptions, and those who felt that subsidies should be judged entirely by their effects on the trade of other contracting parties. There was finally a difference between those who believed that the Organization should act only upon the basis of complaints and those who felt that it should play a more active role^{1/}.

36. Among the proposals submitted and discussed by the Working Party, the following can be mentioned as pertinent to the matters addressed in this note. South Africa proposed an amendment to Article XVI, to make it conform with the Havana Charter text of Article 25. The obligation to consult would thereby no longer arise from a determination by CONTRACTING PARTIES. It would suffice that a contracting party considered that serious prejudice to its interests is caused or threatened (see paragraphs 20, 33 and 34 of this note). Denmark proposed the total prohibition of all export subsidies after a transitional period. Australia and New Zealand favoured the incorporation of Articles 27 and 28 of the Havana Charter, relating to "primary commodities". Norway and South Africa proposed the incorporation of Article 27:1 of the Charter whereby a domestic price stabilization system would be considered not to be an export subsidy under certain conditions^{2/}. A United States' proposal provided for the prohibition of all export subsidies with the exception of agricultural products, to which an equitable share obligation would apply^{3/}. The

^{1/} W.9/102 page 4

^{2/} W.9/20

^{3/} W.9/103

United Kingdom accepted this equitable share concept but would apply it only to primary goods under a domestic price support programme and subject to prior approval by the Organization after a transitional period^{1/}. France felt that the concept of equitable share was a difficult one to apply and preferred a criterion that would provide that there should be no distortion of normal commerce. It also proposed that subsidized products should not be offered at below current market prices^{2/}. Australia proposed that internal subsidies be made the subject of negotiation and that recourse to Article XXIII be specifically provided in respect of the impairment of tariff concessions as a result of domestic subsidies^{3/}. Both Chile and Australia made separate proposals to insert a new Article in the General Agreement to deal with the liquidation of non-commercial stocks^{4/}. Australia also proposed an Article governing the disposal of agricultural surplus commodities^{5/}.

37. The Working Party recommended to retain the existing provisions of Article XVI (that is the present day paragraph 1 thereof), since it could not reach agreement on amending the obligation to consult, to make clear the intention that consultations could be initiated by a contracting party without the necessity for prior action by the CONTRACTING PARTIES^{6/}. So far as domestic subsidies were concerned, the Working Party agreed "that a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned. The Working Party also agreed that there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies which might affect the practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; provided that the results of such

^{1/} W.9.104

^{2/} W.9.102

^{3/} W.9/67 and 113

^{4/} L/272/Add.1 and W.9/78

^{5/} W.9/50

^{6/} BISD 3S/225 paragraph 15

negotiations should not conflict with other provisions of the Agreement.^{1/} The Working Party recommended that a new section be added to Article XVI entitled "Additional Provisions on Export Subsidies" and a number of interpretative notes thereto. The text of these provisions can be said to follow closely the United States' proposal (discussed above), as an exception for primary products was provided for, subject to an equitable share requirement. The representatives of France, supported by Australia, Canada, Dominican Republic, Italy and Uruguay, had proposed but later did not insist on, the addition of "individual markets" after "equitable share of world export trade in"^{2/}. In its report, the Working Party also recorded certain interpretations relating to equitable share. It agreed "that in determining what are equitable shares of world trade the CONTRACTING PARTIES should not lose sight of:

- (a) the desirability of facilitating the satisfaction of world requirements of the commodity concerned in the most effective and economic manner, and
- (b) the fact that export subsidies in existence during the selected representative period may have influenced the share of the trade obtained by the various exporting countries"^{3/}.

Finally, though a majority in the Working Party favoured the inclusion in the General Agreement of new articles governing the disposal of agricultural surplus commodities and the liquidation of non-commercial stocks, the United States was not in a position to agree to such formal commitments in the General Agreement. Accordingly, the Working Party recommended the adoption of Resolutions on the respective matters^{4/}.

^{1/} BISD 3S/224-225 paragraphs 13 and 14

^{2/} BISD 3S/227 paragraph 22 and SR.9/41 page 6

^{3/} BISD 3S/226 paragraph 19

^{4/} BISD 3S/229-230 paragraphs 30 to 40

38. In March, 1955 the CONTRACTING PARTIES adopted the report of this Working Party, noting the reservations expressed at the plenary meeting by certain delegations to the amendments to Article XVI^{1/}. The CONTRACTING PARTIES approved the Protocol Amending Part II and Part III of the GATT, thereby adding to Article XVI "Section B - Additional Provisions on Export Subsidies" (that is, paragraphs 2 to 5 of the present text of Article XVI) and also inserting Ad Article XVI of the Notes and Supplementary Provisions in Annex I of the General Agreement. The delegations of Cuba, Denmark, Italy, Norway and Sweden abstained on the vote on Article XVI. In addition, the CONTRACTING PARTIES adopted Resolutions on the Disposal of Surpluses and the Liquidation of Strategic Stocks^{2/}.

39. It may be noted that during the Ninth Session, the CONTRACTING PARTIES established "the Working Party on Commodity Problems to consider specific proposals for principles and objectives to govern international action designed to overcome problems arising in the field of international trade in primary commodities and to consider the form of an international agreement in this field, the relationship between such an agreement and the General Agreement, and the relationship between the parties to such an agreement and other competent international organizations".^{3/} The Working Party made an interim report, containing a text of a draft Agreement to govern international action in the field of commodity problems^{4/}. The negotiation of such an Agreement was never pursued.

^{1/} SR.9/41 page 10

^{2/} BISD 3S/50-51

^{3/} L/301

^{4/} L/320

H. Agreement on Interpretation and Application of Article VI, XVI and XXIII (Subsidies Code) 1979^{1/}

40. This Agreement was concluded pursuant to the Multilateral Trade Negotiations and is binding on signatories^{2/}. Just as Article XVI contains specific provisions for export subsidies on primary products, this Agreement which, inter alia, interprets that Article makes special reference to primary products by interpreting XVI:3. Article 10:2 of the Agreement attempts to give more precision to some of the terms used in XVI:3 by specifying that:

"(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."

In addition, Article 10.3 states that:

"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".

^{1/}As its title indicates, this Agreement is an inter alia interpretation of Article XVI. It has been included in this Chapter because its status is somewhat different from a panel or working party. Moreover, it was thought useful to make reference to the Agreement here, in order to complete the chronology of the written law about subsidies in the GATT. No attempt was made to provide a drafting history of this Code. References to the Code are made also in Chapter II where appropriate.

^{2/} See L/5517 for status of acceptances of the Agreement.

41. The Subsidies Code defines primary products, for purposes of the Agreement, as products referred to in Note Ad Article XVI of the General Agreement, Section B, paragraph 2, with the deletion of the words "or any mineral" (see paragraph 24 of this note). The Code also provides procedures for dispute settlement and consultation, without prejudice to recourse to the normal procedures of the GATT under Articles XXII and XXIII (cases raised under the Code procedures are discussed in the Chapter II of this note as appropriate).

Chapter II. Interpretations of Article XVI: Panels and Working Parties

A. Article XVI:1 first sentence^{1/}

42. This provision obligates contracting parties to notify the extent, nature and effect of subsidies they grant or maintain, which operate directly or indirectly to increase exports or reduce imports on any product, whether primary or not. It has already been noted that the phrase "increased exports" was intended to include the concept of maintaining exports at a level higher than would otherwise exist in the absence of the subsidy (see paragraph 34 of this note).

- Establishment of questionnaire

43. At their fourth session in 1950 CONTRACTING PARTIES established procedures for notifications of subsidies, and at their Ninth Session in 1955 adopted a questionnaire with a view to achieving a standardized reporting system. A revised questionnaire was adopted at the Sixteenth Session in 1960^{2/}. CONTRACTING PARTIES in 1962 decided that contracting parties should submit every third year new and full responses to the questionnaire and bring these up to date in the intervening year. The questionnaire, which still serves as the model for notifications at present, is reproduced in Annex 3 of this note.

- Measures notifiable

44. A Panel on Subsidies was established in 1958 to undertake the preparatory work for the review by CONTRACTING PARTIES of the provisions of Article XVI pursuant to paragraph 5. It was this Panel that drew

^{1/} See Annex I for text of this provision.

^{2/} BISD 9S/193

up the revised questionnaire adopted by CONTRACTING PARTIES discussed above. The Panel considered the extent to which subsidies and price support measures directly or indirectly affect exports or import, and are therefore notifiable under Article XVI. In the opinion of the Panel, it was "not sufficient to consider increased exports or reduced imports only in a historical sense", but rather "what would happen in the absence of a subsidy". The Panel considered "it fair to assume that a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, e.g. a consumption subsidy, either increase exports or reduce imports"^{1/}. "The Panel discussed the circumstances under which a system which fixes domestic prices to producers at above the world price level might be considered a subsidy in the meaning of Article XVI. It was generally agreed that a system under which a government, by direct or indirect methods, maintains such a price by purchases and resale at a loss is a subsidy... The Panel considered, however, that there could be other cases in which a government maintained a fixed price above the world price without resort to subsidy..." There might be other variations of price stabilization where the existence or non-existence of a subsidy would be more difficult to determine, and the circumstances of each case would have to be examined. Accordingly, the Panel felt that contracting parties should be asked to notify "all cases of price support, regardless of the precise method used"^{2/}.

45. The Panel examined the question "whether subsidies financed by a non-governmental levy were notifiable under Article XVI". "In general there was no obligation to notify schemes in which a group of producers voluntarily taxed themselves in order to subsidize exports of a product. On the other hand, there was no doubt that there was an obligation to notify all schemes of levy/subsidy affecting imports or exports in which the government took a part either by making payments into the common

^{1/} BISD 9S/191 paragraph 10.

^{2/} BISD 9S/191 paragraph 11.

fund or by entrusting to a private body the functions of taxation 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 depended upon "the source of the funds and the extent of government action, if any, in their collection" and that governments should be asked "to notify all levy/subsidy schemes affecting imports or exports which are dependent for their enforcement on some form of government action".^{1/} The Panel also recorded its view that "there was a clear obligation to notify to the CONTRACTING PARTIES multiple exchange rates which have the effect of a subsidy".^{2/}

46. The Panel thus tried to clear up the question as to what kinds of subsidies were notifiable. It considered it advantageous for contracting parties to be invited to provide information on subsidies irrespective of whether, in the view of individual contracting parties, they were notifiable under Article XVI. The Panel recommended that contracting parties who do not maintain subsidies covered by Article XVI, submit statements to that effect^{3/}. Quite clearly then, the Panel took a broad view of the notification obligation of Article XVI:1. It declared that:

"The role of Article XVI in providing the CONTRACTING PARTIES with accurate information about the nature and extent of subsidies in individual countries has been partly frustrated by the failure of some contracting parties to notify the subsidies they maintain. To the extent that this is based on the reluctance of contracting parties to expose themselves to charges of non-conformity with the Agreement, it reflects a misinterpretation of Article XVI. Moreover, a contracting party can be required to consult concerning a subsidy, whether or not it has been notified. There seems, therefore, to be no advantage to a contracting party in refraining from notifying its subsidies; on the contrary, notifications may dispel undue suspicions concerning those subsidies not previously notified"^{4/}

^{1/} BISD 9S/192 paragraph 12.

^{2/} BISD 9S/192 paragraph 13.

^{3/} BISD 9S/192-193 paragraph 14; BISD 10S/205 paragraph 15.

^{4/} BISD 10S/206 paragraph 19

- Recent notifications

47. Since 1981, 21 countries plus the European Communities and its member states (except Greece) have submitted notifications pursuant to Article XVI:l^{1/}. Nine of these countries reported that they did not maintain any measures within the meaning of Article XVI:l^{2/}. Four countries notified subsidies applying to the industrial sector only^{3/}. The remaining 16 countries and the EEC notified agricultural subsidies, most countries reporting the existence of industrial subsidies as well^{4/}.

48. The information received under Article XVI:l notifications of past years tended to indicate that most subsidies were concentrated in the agricultural sector. Recent notifications however, reveal a somewhat different picture, with more industrial subsidies in evidence. One cannot say whether this different picture reflects a changed reality: whether countries indeed have adopted new industrial subsidies or whether in fact, industrial subsidies in one form or another have always been given by countries, but they have only recently overcome their reluctance to report on them. Whatever the case, recent notifications have shed more light on subsidization in the industrial sector, demonstrating that subsidization is not the exclusive reserve of the agricultural sector. One cannot determine with precision that government outlays are lower for industrial subsidies than agricultural ones, or that subsidies account for a smaller component of the value added to any industrial as opposed to agricultural product in general.

^{1/} L/5102, L/5282 and L/5449 series.

^{2/} Chile, Denmark, Hong Kong, Ireland, Luxembourg, Malawi, Netherlands, Romania and Uruguay.

^{3/} Belgium, Brazil, Federal Republic of Germany and France.

^{4/} Austria, EEC, and Norway notified subsidies applied for the benefit of certain goods classified within Chapters 1 to 24 of the CCCN (deemed to be agricultural goods). Australia, Canada, Finland, India, Japan, Korea, New Zealand, Pakistan, South Africa, Spain, Sweden, Switzerland, United Kingdom and United States notified subsidies applied for the benefit of certain goods falling within and certain goods falling outside CCCN chapters 1 to 24.

This is partly because the industrial subsidies notified tend to involve tax credits or investment aids, for which no estimated costs are provided. Nevertheless, one can say that subsidization in the agricultural sector is certainly extensive and, compared to the industrial sector, tends often to be more product-specific and to entail more substantial government intervention in the production, price structure, and marketing of the products in question.

49. The kinds of agricultural subsidies that were notified recently include: price support through intervention purchases, deficiency payments, acreage diversion programmes, payment-in-kind programmes, income support, production aids, production controls, non-marketing premiums, underwriting schemes, price equalization schemes, aids to producer organizations, storage aids, loans, regional aids, structural aids, insurance subsidies, disaster relief, research and conservation grants, freight subsidies, contributions for advertising or other promotion, consumer subsidies, donations to the needy, subsidies on production inputs like feed, fertilizers or fuel, subsidies on raw agricultural ingredients used in processed products, export credit, export guarantees, and export refunds. Subsidies exist on many different agricultural products and are most prevalent for products in the grains, dairy products, livestock and meat, fruits and vegetables, sugar, and oilseeds sectors. These measures are applied with the often stated aims of guaranteeing fair incomes for farmers, stabilizing agricultural prices, and assuring adequate supplies. As mentioned earlier, agricultural subsidies are a part of broader agricultural support policies which usually involve government intervention in the production, pricing, marketing and distribution of agricultural goods. Governments also often establish intervention agencies or marketing boards to carry out their agricultural support objectives, and those enterprises may play a significant trading role. In this connection, it is important to read Article XVI:1 notifications in conjunction with those made pursuant to Article XVII:4(a).

50. It is apparent that not all contracting parties are fulfilling their obligations to notify under Article XVI:1. Among those countries who have notified, not all have provided complete information on the subsidies they grant, particularly as to their effect on trade. Moreover, there is a range of measures which may have the effect of subsidies, about which little or nothing is reported, for example, non-commercial transactions, price discounts, credit arrangements, long-term agreements, etc. Admittedly, the notification of all subsidies which operate directly or indirectly to increase exports or to reduce imports is a lengthy reporting job. But the obligation under Article XVI:1 is, and has been interpreted, to be very broad. Moreover, subsidies, including measures which may have the same effect as subsidies, appear to be a major factor in determining the flow of agricultural trade today.

B. Article XVI:1 second sentence^{1/}

51. 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.

- Determination of serious prejudice

52. As mentioned already in paragraph 34 of this note, the CONTRACTING PARTIES agreed that consultations should proceed upon the request of a contracting party when it considers that prejudice is caused or threatened, though they did not amend Article XVI:1 to make this explicit (see paragraphs 36 and 37). This is what the Havana Charter provided (see paragraph 20). A prior international determination of prejudice thus would not be required before the subsidizing contracting party had to consult on the possibility of limiting the subsidization.

53. Two panels established in 1978 and 1979 respectively to examine separate recourses by Australia and Brazil in respect of EEC refunds on exports of sugar, concluded that the Community system and its application constituted a threat of prejudice in terms of Article XVI:1.

^{1/} See annex I for text of this provision.

As regards the complaint by Australia the "Panel found that the Community system of export refunds for sugar did not comprise any pre-established effective limitations in respect of either production, price or the amounts of export refunds and constituted a permanent source of uncertainty in world sugar markets. It therefore concluded that the Community system and its application constitutes a threat of prejudice in terms of Article XVI:1"^{1/}. As regards the complaint by Brazil, the "Panel concluded that in view of the quantity of Community sugar made available for export with maximum refunds and the non-limited funds available to finance export refunds, the Community system of granting export refunds on sugar had been applied in a manner which in the particular market situation prevailing in 1978 and 1979, contributed to depress sugar prices in the world market, and that this constituted a serious prejudice to Brazilian interests, in terms of Article XVI:1. The Panel found that the Community system of export refunds for sugar did not comprise any pre-established effective limitations in respect of either production, price or the amounts of export refunds and that the Community system had not been applied in a manner so as to limit effectively neither exportable surpluses nor the amount of refunds granted. Neither the system nor its application would prevent the European Communities from having more than an equitable share of world export trade in sugar. The Panel, therefore, concluded that the Community system and its application constituted a permanent source of uncertainty in world sugar markets and therefore constituted a threat of serious prejudice in terms of Article XVI:1"^{2/}. Discussions were later organized under Article XVI:1 second sentence (see paragraph 58 of this note).

^{1/} BISD 26S/319 paragraph (h)

^{2/} BISD 27S/97 paragraphs (f) and (g)

- "Discuss the possibility of limiting the subsidization"

54. 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. As mentioned in paragraph 9 of this note, the drafters of the Charter at the London Conference reported that the word "limiting" should be "used in a broad sense to indicate maintaining the subsidization at as low a level as possible, and the gradual reduction in subsidization over a period of time where this is appropriate".

- Past consultations

55. The following discussions can be said to have taken place under Article XVI:1 as regards agricultural subsidization, though not all these consultations specifically referred to that provision. In 1952, Greece claimed trade damage due to lowered export prices as a result of the United States' export subsidy on sultanas^{1/}. The subsidy was reduced for the next season, but the Greek Government indicated that the reduction was unsatisfactory. The United States stated it would submit a progress report on the matter under the normal procedure of Article XVI^{2/}. In 1953, Italy claimed that United States' export subsidies on oranges and almonds prejudiced Italian trade in certain of its traditional European markets^{3/}. The matter was discussed periodically at GATT sessions, and the export payment on oranges was suspended, then re-introduced in 1954, and ultimately reduced in 1955^{4/}. In 1956, Denmark requested consultation with the United States in respect of the latter's export payment programme on poultry to the West German market under Public Law 480^{5/}. In 1957, Denmark claimed that the United Kingdom's internal subsidy on (guaranteed price) eggs caused prejudice to Danish interests since the subsidization resulted in Denmark's loss of the United Kingdom market as well as having to compete with

^{1/} L/39, L/146 and Add.1, L/148.

^{2/} SR.7/14, SR.8/12.

^{3/} L/122.

^{4/} SR.8//12, SR.9/6, SR.10/3

^{5/} L/586, SR.11/16

United Kingdom surpluses of these products on the European market. The United Kingdom's exports had a depressing effect on prices in those markets. Denmark noted that the United Kingdom had not previously been trading in these products^{1/}. The Danish complaint was supported by Belgium, the Federal Republic of Germany, the Netherlands, and Sweden. A Panel was appointed to examine the complaint but never met^{2/}. Following bilateral consultations, it was announced that the United Kingdom would apply licensing to exports of eggs and that licences would be granted only on unsubsidized eggs to Europe. The restrictions would be relaxed only when the risk of damage from subsidization to Danish and Dutch interests had ceased and there would be full consultation with those governments prior to any changes in controls^{3/}.

56. Following a Panel finding in 1958 that subsidies on wheat and wheat flour had resulted in France obtaining a share of world export trade that was more than equitable and had displaced Australian supplies in certain markets, the CONTRACTING PARTIES addressed certain recommendations to the French Government. France was asked to consider consulting with Australia before French exporters of flour entered into new contracts in Southeast Asian markets, "with a view to minimizing the impact of such contracts on normal Australian trade channels."^{4/} In April 1960, the two parties notified that they had an agreement following discussions held as a result of the recommendation by CONTRACTING PARTIES^{5/}. This agreement was renewed the next year for another year, and the two parties expressed "the hope that the harmonious conditions thus created will not be disturbed by operations of sporadic exporters which could lead to disorganization of the markets in question."^{6/}

^{1/} L/627

^{2/} IC/SR.31

^{3/} IC/SR.34

^{4/} BISD 7S/22-23

^{5/} L/1323

^{6/} L/1548

57. In 1967, following consultations under Article XXII:1 by Malawi, joined by Canada, India and Turkey, with the United States concerning the latter's subsidy on exports of unmanufactured tobacco, a Working Party was established to conduct consultations on the matter on behalf of the CONTRACTING PARTIES under XXII:2^{1/}. Certain members of the Working Party requested that the United States remove the subsidy. They also requested the United States to consult before taking action to extend the existing subsidy, with those governments whose export interests were chiefly affected^{2/}. The United States representative was not in a position to give any formal undertaking in regard to either request. The programme on tobacco was terminated on 29 November 1972^{3/}.

58. As mentioned above, pursuant to separate recourses under Article XXIII:2 by Australia and Brazil in respect of EEC refunds on exports of sugar, the Director-General organized in a Working Party, Article XVI:1 discussions between the EEC and the CONTRACTING PARTIES on the possibility of limiting EEC subsidization of sugar exports. The Working Party met during December-February 1981. In the Working Party, the EEC expressed the opinion that the measures taken in the field of prices and quotas, and the proposed inclusion into the EEC common market organization for sugar of a new fundamental element constituted by the total financial responsibility of producers for export refunds, gave a sufficiently large response to the request put to the EEC within the terms of Article XVI:1. In addition, the EEC offered to co-operate on price data in order to seek ways of making the world market more transparent and determining offer prices more objectively. Other participants in the Working Party, however, considered that the EEC régime for both production and subsidies available would continue as an open-ended one and consequently would remain a source of uncertainty in world sugar markets and continue constitute a threat of prejudice in terms of Article XVI:1^{4/}. In April 1981, the EEC approved new sugar regulations and intervention prices which were notified to the GATT^{5/}.
The Council

^{1/} L/2856, C/M/42

^{2/} BISD 15S/125 paragraphs 27 and 28

^{3/} L/3655/Add.14/Suppl.1

^{4/} L/5113

^{5/} L/5175

reviewed the situation in September 1981. At the Council meeting, the representative of the EEC stated that he felt that the Community had fulfilled its obligation contained in Article XVI:1; namely to notify and to discuss the matter. However, the representative of Australia did not consider that the EEC had fulfilled its obligations and had presented no measure which would remove the prejudice established by the GATT Panel. Australia and other Council members considered that the new EEC regime would not effectively reduce or limit either production, price, or the amounts of export refunds^{1/}. The Council decided to establish a working party which met in February 1982. There were significant differences among the members as to the scope of the review which the Working Party was supposed to conduct; i.e, whether the sugar policies of other contracting parties besides the Community should be examined as well. The Working Party went no further than to record the differing views^{2/}.

C. Article XVI:2 ^{3/}

59. This provision contains a recognition by contracting parties that the granting of export subsidies may have harmful effects on normal commercial interests and hinder the achievement of the objectives of the General Agreement. The Panel established under the Subsidies Code to examine EEC subsidies on export of wheat flour made reference to this provision in its conclusions. It stated that it was not convinced "that the application of EEC export subsidies had not caused undue disturbance to the normal commercial interests of the United States in the sense of Article XVI:2, to the extent that it may well have resulted in reduced sales opportunities for the United States. The Panel considered it desirable that the EEC, bearing in mind the provisions of Article XVI:2, make greater efforts to limit the use of subsidies on the exports of wheat flour. The Panel considered that there were a number of practical aspects of the application of the export refund which might be examined to this end."^{4/}

^{1/} C/M/150

^{2/} L/5294

^{3/} See Annex I for the text of this provision

^{4/} SCM/42 page 40 paragraphs 5.6 and 5.7

D. Article XVI:3 first sentence^{1/}

60. The first sentence of Article XVI:3 contains a general exhortation to contracting parties to avoid subsidizing exports of primary products. However, these subsidies are not prohibited, provided that the equitable share obligation of the second sentence of Article XVI:3 is respected. It would appear from an analysis of agricultural subsidies notified under Article XVI:1 that these remain widespread, and that the moral suasion of Article XVI:3 first sentence has not prevailed effectively on countries to forego such subsidies.

E. Article XVI:3 second sentence^{1/}

61. This sentence contains the equitable share obligation, which is the core obligation governing subsidies on primary products in the General Agreement. Export subsidies on primary products are tolerated under Article XVI. However, paragraph 3 second sentence seeks to narrow the loophole, by enjoining a country from achieving an unfair trading position through the use of subsidies. In so doing the provision attempts to preserve however imperfectly a certain amount of open international competition, which is central to the GATT ethic. In elaborating the equitable share principle, the drafters employed a number of words, which various GATT bodies thereafter have struggled to define or interpret in order to determine their scope or practical application. Such words include: subsidy, primary product, equitable share, world export trade, representative period and special factors. The interpretation of these words have in turn engendered new concepts whose meaning must be determined as well, such as market, displacement, and price undercutting.

- Nature of subsidies governed by equitable share obligation:
domestic stabilization system

62. A subsidy on a primary product which is notifiable under Article XVI:1 may not necessarily be subject to the equitable share obligation of Article XVI:3. The former provision speaks broadly of "any subsidy, including any form of income or price support, which operates directly

^{1/} See Annex I for text of this provision

or indirectly to increase exports ... or to reduce imports", whereas the latter governs "any form of subsidy which operates to increase the export of any primary product." A domestic subsidy then might be covered by the obligations to notify and consult under Article XVI:1 but if it does not operate to increase exports, nor indeed if exports do not take place, there is no equitable share obligation applicable to the subsidy. The equitable share obligation of Article XVI:3 applies to world export trade; that is, to competition in third markets. A domestic subsidy may affect competition between imported and domestic products, but the question of access to that domestic market is addressed elsewhere in the General Agreement (see, for example, paragraph 91 of this note).

63. It has already been mentioned that earlier on in the drafting of the ITO Charter (London) text, provision was made to allow for the operation of a domestic stabilization scheme for a primary product (see paragraphs 10 and 25 of this note). When paragraphs 2 to 5 of Article XVI were added by CONTRACTING PARTIES in 1955, the interpretative notes to Article XVI were inserted also (see paragraph 38 of this note). One interpretative note to Article XVI:3 specifies under what conditions a domestic price stabilization scheme on a primary product "shall be considered not to involve a subsidy on exports within the meaning of paragraph 3". It is the CONTRACTING PARTIES who are to determine that the stabilization system fulfills certain requirements, including that the system has resulted or is designed to result as well in the sale of the product for export at a higher price than on the domestic market and does not stimulate exports unduly. A scheme fulfilling the requirements then would not be subject to the equitable share obligation unless the scheme is "wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned".

64. On the basis of a complaint by Australia in 1958, a panel considered inter alia whether the operation of a French price equalization system for wheat and flour amounted to the grant of

subsidies on exports of those products. In the French view, the system was a scheme for the stabilization of domestic prices and returns to producers. The Panel found that even if the French system had the characteristics described in the interpretative note (discussed above), the exemption provided from the provisions of Article XVI:3 would be precluded if the operation of the French system involved financial contributions from the government^{1/}. The Panel noted that a portion of the revenue of the Office National Interprofessionnel des Céréales was contributed from Government funds. Even though the Panel could not assess with any precision the share of the budgetary appropriation in the financing of exports, it found that part of the export losses would have to be covered by Government funds^{2/}. Accordingly, "the Panel concluded that the operation of the French system did in fact result in the grant of subsidies on the export of wheat and wheat flour within the terms of paragraph 3 of Article XVI" and proceeded to apply the "equitable share" test to the system^{3/}.

65. Both the Panels that examined the EEC refunds on exports of sugar, on the basis of separate complaints by Australia and Brazil, found that "such refunds were granted to enable Community sugar to be exported and that the refunds thus granted were financed out of the European Agriculture Guidance and Guarantee Fund". The Panels thus considered this Fund to be a government fund of the type mentioned in the last sentence of the Notes and Supplementary Provisions relating to Article XVI:3^{4/}. The respective parties to the dispute were in agreement with

^{1/} BISS 7S/50-51 paragraph 8

^{2/} BISS 7S/52 paragraph 13

^{3/} BISS 7S/52 paragraph 14

^{4/} BISS 26S/305 paragraphs 4.2 and 4.3, and BISS 27S/86 paragraph 4.2

this interpretation^{1/}. The interpretation signified that the EEC refunds were subject to the equitable share obligation. The Community later modified its sugar régime, which was examined by the Council and a working party (see paragraph 53 of this note). The EC representative explained on those occasions that "apart from refunds paid on re-exports of ACP sugar, no refunds were financed out of public funds" and that "under present price conditions, the amounts collected from production levies would be sufficient to cover the expenses"^{2/}. However, the representatives of Australia and Brazil held the view that EEC refunds on exports of sugar continued to constitute a subsidy subject to Article XVI:3, since what was exported was 1.4 million tons of EEC sugar equivalent to the amount of the Community's ACP imports, with subsidies financed from the Community budget^{3/}.

66. The Agreement on Interpretation and Application of Articles VI, XVI, and XXIII (Subsidies Code) contains an illustrative list of export subsidies in its Annex. This list, however refers to Article 9 of the Agreement, which relates to export subsidies on products other than certain primary products. It may or may not serve as a guide to what could be considered as an export subsidy with regard to primary products under Article XVI:3 and therefore subject to the equitable share obligation therein.

67. A Panel established under the Subsidies Code to examine a complaint by the United States concerning subsidies maintained by the European Communities on the export of wheat flour, noted that such refunds were financed out of the EAGGF Guarantee Section and operated to increase exports of wheat flour. The Panel therefore concluded that the granting of such refunds "must be considered a form of subsidy and subject to the

^{1/} BISD 26S/306 paragraph 4.4 and BISD 27S/86-87 paragraph 4.3

^{2/} C/M/150 page 12

^{3/} C/M/150 page 18 and L/5294 page 5

provisions of Article XVI of the General Agreement as interpreted and applied by the Code"^{1/}. The Panel proceeded to examine the EEC refunds on exports of wheat flour under Article 10 of the Code which interprets Article XVI:3 of the General Agreement (more on the work of this Panel under sections which follow). Another Panel established under the Subsidies Code, to examine EEC export subsidies on pasta products manufactured from durum wheat, noted that the EEC system for granting refunds was financed from public funds and that it operated to increase exports of pasta products from the EEC. The Panel concluded that this system "must be considered a form of subsidy in the sense of Article XVI of the General Agreement"^{2/} (more on the work of this Panel under sections which follow).

- "Primary product"

68. Paragraph 2 under Section B of the Notes and Supplementary Provisions referring to Article XVI provides a definition of primary product as "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". An early version (New York text) of the ITO Charter contained a somewhat different definition (see paragraphs 15 and 24 of this note). The Subsidies Code, for purposes of that Agreement, defines primary products as those referred to in the above-mentioned interpretative note annexed to the General Agreement with the exception of minerals (see paragraph 40 of this note).

^{1/}SCM/42 page 28 paragraph 4.3. Note that the Panel report has not been acted upon yet by the Committee on Subsidies and Countervailing Measures.

^{2/}SCM/43 page 11 paragraph 4.3. Note that the Panel report has not been acted upon yet by the Committee on Subsidies and Countervailing Measures.

69. The Panel which examined in 1958 the Australian complaint concerning French assistance to exports of wheat and wheat flour, considered whether the French system resulted in France having obtained more than an equitable share of world export trade in these products in terms of Article XVI:3. The Panel thus considered, at least implicitly, wheat and wheat flour to be primary products (see paragraph 64 of this note). In 1982, the United States asserted in its presentation to the Panel established to examine the EEC subsidies on the export of wheat flour, that these were prima facie contrary to Article 9 of the Subsidies Code since wheat flour is a processed product^{1/}. The EC argued that since the US representative had not referred to Art. 9 in raising the matter in the Committee on Subsidies and Countervailing Measures, the question of whether Article 9 applied to wheat flour did not fall within the terms of reference of the panel^{2/}. The Panel "was of the opinion that this question did not constitute a part of the matter referred to the Panel by the Committee and therefore the Panel did not consider the substantive issue involved"^{3/}. However, since the Panel examined the EEC subsidies in relation to Article 10 of the Code, it can be said that the Panel considered, at least implicitly, wheat flour to be a primary product in the sense of that Article. Another Panel established under the Subsidies Code, noted in the matter before it that neither the United States nor the Community "had finally contended that pasta was a primary product." The Panel "was of the opinion that pasta was not a primary product but was a processed agricultural product."^{4/}

70. Moreover, a key question this Panel had to consider was whether the primary product component of a processed product may be subsidized: "The Panel was of the opinion that durum wheat incorporated in pasta products could not be considered as a separate (primary product) and that the EEC export refunds paid to exporters of pasta products could

^{1/} SCM/42 page 2 paragraph 2.3

^{2/} SCM/42 page 2 paragraph 2.4

^{3/} SCM/42 page 28 paragraph 4.2

^{4/} SCM/43 page 11 paragraph 4.2

not be considered to be paid on the export of durum wheat. In the Panel's view, the ordinary meaning to be given to the terms of Article XVI of the General Agreement, as interpreted and applied in Articles 9 and 10 of the Code, in their context and in the light of their object and purpose excluded the possibility of considering the export of a processed product in terms of the export of its constituent components, be they primary or processed products. The Panel therefore concluded that the EEC export refunds were granted on the export of pasta products and operated to increase exports of pasta products by refunding a part of the cost of these processed products."^{1/} One member of the Panel, however, disassociated himself from the conclusions of the majority that the EEC export refunds were granted on the export of pasta products. "He considered that - as long as the refund merely equalized the differential between the world market price and the domestic price of durum wheat - the practical effect and the intent of the refund was to enable EEC pasta manufacturers to use domestic durum wheat in the production of exportable pasta products. The refund thus improved the competitive position of the EEC durum wheat producers rather than the processing industry and should consequently be considered as a subsidy on durum wheat."^{2/}

- "More than an equitable share of world export trade"

- - "equitable share" : new exporters, traditional trade patterns,
meeting world needs, prior subsidies

71. In 1955 a Working Party on Other Barriers to Trade recommended, and CONTRACTING PARTIES agreed, to insert the additional provisions on export subsidies to Article XVI; that is, paragraphs 2 and 5, as well as the interpretative notes to this Article (see paragraphs 35-38 of this note). One interpretative note relating to equitable share

^{1/}SCM/43 page 12 paragraph 4.4

^{2/}SCM/43 page 15 paragraph 5.1

(initially proposed by Brazil) specified that

"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"

Moreover, the Working party recorded certain interpretations relating to equitable share that referred to the desirability of satisfying world requirements of the commodity concerned as well as the influence of export subsidies during a previous representative period on share of trade (see paragraph 37 of this note).

72. Further as regards the position of new exporters, in the Working Party established under Article XXII:2 in 1967 to conduct consultations with respect to the United States' export subsidy on unmanufactured tobacco, the representative of Malawi advanced the view that the concept of equitability "did not refer to the maintenance by the subsidizing contracting party of a predetermined proportionate share of a growing world market ... there were grounds for maintaining that 'equitable shares' could vary"^{2/}. The United States representative agreed "that it would not be desirable to assume that a particular country's share of a market should remain static. It was not the intention of the United States to "increase its share beyond an equitable level but it could not be expected to accept the continued erosion of its relative position".

^{1/} BISD 3S/226 paragraph 19

^{2/} BISD 15S/122 paragraph 21

He noted that the US share by 1965 declined in comparison with any previous 'representative period'^{1/}.

- - "world export trade" : individual markets

73. The Havana Conference spoke of "world trade" as opposed to "world export trade" as used in Article XVI:3. A key question in the interpretation of equitable share is whether total exports to the world should be considered, and/or trade in individual markets. At the meeting of the 1955 Working Party on Other Barriers to Trade, the representatives of France and Uruguay proposed, but did not insist on, the addition of the words "or individual markets for" after "world export trade in" (see paragraph 37 of this note). The Panel which examined the Australian complaint against French assistance to exports of wheat and wheat flour "recalled however, that at both Havana and the Review Session when the provisions of this paragraph were discussed it was implicitly agreed that the concept of 'equitable' share was meant to refer to share on 'world' export trade of a particular product and not to trade in that product in individual markets"^{2/}. The Panel proceeded to examine France's share of world exports, basing itself on trade statistics for the pre-war or early post-war years^{3/} (see paragraph 82 also). It examined export unit values to determine whether the increase in France's share could be attributed to the operation of the French subsidy system^{4/} (see paragraph 79 also). "In these circumstances", the Panel wrote, "it is reasonable to conclude that, while there is no statistical definition of an "equitable" share in world exports,

^{1/} BISD 15S/123 paragraph 22

^{2/} BISD 7S/52 paragraph 15

^{3/} BISD 7S/52 paragraph 18; BISD 7S/53 paragraph 17

^{4/} BISD 7S/53 paragraph 18

subsidy arrangements have contributed to a large extent to the increase in France's exports of wheat and of wheat flour, and that the present French share of world export trade, particularly in wheat flour, is more than equitable".^{1/} However, the Panel did examine French trade in particular markets (Ceylon, Malaya and Indonesia) to consider whether French export subsidies had caused injury to Australia's normal commercial interests. The Panel noted that French exports of wheat flour to these three countries had risen substantially and accounted for a growing share in France's total exports while Australia's exports to these markets had fallen substantially and their share in Australia's total exports had declined. French supplies represented a greatly increased proportion of total imports of wheat flour in the three Southeast Asian markets combined, while the share of Australian supplies therein had declined. The Panel noted that other suppliers of wheat flour were playing a larger part in the Southeast Asian markets but concluded that it was "nevertheless clear that French supplies have in fact to a large extent displaced Australian supplies in the three markets."^{2/} The Panel also found that "there was no inherent guarantee in the [French] system that it would operate in such a manner as to conform to the limits contemplated in Article XVI:3."^{3/}

74. Recent panels have tended to focus more closely on the trading situation in particular markets in determining equitable share. It will be recalled that the Subsidies Code provided that more than equitable share of world export trade shall include any case in which the effect of an export subsidy is to displace another signatory's exports. The Code also provided that signatories "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" (see paragraph 40 of this note). The Panel with respect to Australia/EC refunds on exports of sugar, which was not established under the Code but Article XXIII:2, "noted that no definition of the concept 'equitable share' had been provided, and

^{1/} BISD 7S/53 paragraph 19

^{2/} BISD 7S/54-55 paragraph 23.

^{3/} BISD 7S/56 paragraph 25

neither had it in the past been considered absolutely necessary to agree upon a precise definition of the concept. The Panel felt that it was appropriate and sufficient in this case to try to analyse main reasons for developments in individual market shares, and to examine market and price developments, and then draw a conclusion on that basis."^{1/} The Panel proceeded to examine five groups of markets. It noted that the Community share of world export trade in sugar had increased in certain years but Community exports "had directly displaced Australian exports only to a limited extent and in a few markets"^{2/} (The concept of 'displacement is discussed further in a following section.) "In the light of all the circumstances related to the present complaint, and especially taking into account the difficulties in establishing clearly the causal relationships between the increase in Community exports, the developments of Australian sugar exports and other developments in the world sugar market, the Panel found that it was not in a position to reach a definite conclusion that the increased share had resulted in the European Communities 'having more than an equitable share of world export trade in that product', in terms of Article XVI:3."^{3/}

75. Similarly in the Brazilian case against EC export refunds on sugar, the Panel "felt that it was appropriate and sufficient in this case to try to analyze main reasons for developments in individual market shares, and in light of the circumstances related to the present complaint try to determine any causal relationship between the increase in Community exports of sugar, the developments in Brazilian sugar exports and other developments in the world sugar market, and then draw a conclusion on that basis."^{4/} Though the complaint was raised under Article XXIII:2, the Panel took note of Article 10:2(a) and (b) of the Subsidies Code which had been accepted by the parties to the

^{1/} BISD 26S/308 paragraph 4.11

^{2/} BISD 26S/319 paragraph (d)

^{3/} BISD 26S/319 paragraph (f)

^{4/} BISD 27S/88 paragraph 4.6

dispute^{1/}. An examination by the Panel of individual markets: "did not provide clear and general evidence that Community exports had directly displaced Brazilian exports. There was simultaneously a decline in Brazilian sales and an increase in imports from the European Communities in only a few markets of minor importance. Therefore, in light of all the circumstances related to the present complaint and especially taking into account the difficulties in establishing clearly the causal relationships between the increase in Community exports, the developments of Brazilian sugar exports and other developments in the world sugar market, the Panel found that on the basis of the evidence available to it in this particular case, it was not able to conclude that the increased share had resulted in the European Communities 'having more than an equitable share of world export trade in the product', in terms of Article XVI:3."^{2/}

76. The Panel established under the Subsidies Code to examine the United States' complaint on EEC subsidies on export of wheat flour, found that the EEC share of world exports had increased considerably while the share of other suppliers had decreased. It examined trade in seventeen individual markets and concluded that market displacement in the sense of Article 10:2(a) was not evident therein.^{3/} (More on the work of this Panel regarding displacement, special factors, etc. is discussed in following sections.)

- -"world export trade" : non-commercial or special trade arrangements

77. Another problem in defining "world export trade" in a particular product is whether the term should be confined to the "free market" whatever that may mean, or encompass special or concessional sales as well. The representative of Australia argued before the Panel examining EC refunds on exports of sugar that it should be concerned with the "world free market" in sugar, the only market accessible to all exporters on the basis of open competition, as opposed to special arrangement trade.^{4/} The EC representative maintained, however,

^{1/} BISD 27S/88 paragraph 4.7

^{2/} BISD 27S/97 paragraphs (d) and (e)

^{3/} SCM/42 page 40 paragraph 5.4

^{4/} BISD 26S/297 paragraph 2.20

that the whole world market should be looked at without excluding any part thereof.^{1/} The Panel considered that its examination should be based not on the concept of "free market" introduced by Australia but on the concept of "world export trade"^{2/}. The United States argued in its case against EEC subsidies on the export of wheat flour under the Subsidies Code, it was appropriate to focus on commercial wheat flour transactions, rather than also including special transactions, such as PL-480 or food aid programmes of the EC and other countries.^{3/} The EC representative countered that concessional sales should be included in the concept of world trade^{4/}. For purposes of its examination of market shares, the Panel looked at global exports from all sources and to all markets. It considered "that it was difficult to exclude special transactions entirely, from an analysis of the market, and that in this case, it was not necessary, or appropriate, to do so in reaching a determination as to equitable share^{5/}.

- - displacement

78. The Panel that examined the Australian complaint against French assistance to exports of wheat and wheat flour, looked at the shares of these two countries in three Southeast Asian markets and concluded that French supplies had displaced Australian supplies therein (see paragraph 73 of this note). Among the precisions that the Subsidies Code attempted to bring to the interpretation of equitable share was the concept of displacement; that is, where the effect of an export subsidy is to displace the exports of another signatory (see paragraph 40 of this note). In their review of trade in individual markets, the Panels which examined respectively the separate Australian and Brazilian

^{1/} BISD 26S/297 paragraph 2.21

^{2/} BISD 26S/307 paragraph 4.9

^{3/} SCM/42 page 7 paragraph 2.10

^{4/} Idem page 13 paragraphs 2.14-2.16

^{5/} SCM/42 pages 28-29 paragraph 4.7

complaints against the EEC refunds on exports of sugar and the United States complaint against EEC subsidies on export of wheat flour, all considered whether market displacement had taken place (although the latter Panel was established under the Code). In no case did the Panels find sufficient evidence of direct displacement, though they did not rule out instances of reduced sales opportunities by the individual complainants, as a result of the subsidies (see paragraphs 74 through 76 of this note). In all these cases the Panels found other factors affecting developments on the world market than subsidies, though increases in the EEC's share of some world trade were in evidence. There were few if any instances where the Panel could determine clearly a direct causal displacement in individual markets.

- - Price undercutting

79. When it found the French assistance to exports of wheat and wheat flour resulted in more than an equitable share for France, the Panel based itself inter alia on yearly export unit values for France and other exporters. It also looked at import unit values recorded in the Southeast Asian markets concerned^{1/}. Another precision the Subsidies Code attempted to bring to the interpretation of equitable share was the concept of price undercutting, that is subsidies which result in prices materially below those of other suppliers to the same market (see paragraph 36 of this note). The two Panels (established under Article XXIII:2) that examined the EEC refunds on exports of sugar found that these had contributed to depress prices in the world market and thereby caused prejudice to Australia and Brazil^{2/}. However, the Panels could not conclude that the EEC had more than an equitable share of world trade. The Panel which examined the EEC subsidies on export of wheat flour found that "it had not sufficient ground to reach a definite conclusion as to whether price undercutting in the sense of Article 10:3 [of the Code] had occurred"^{3/}. It discounted the utility of export unit values in the case before it, given that wheat flour was not a homogeneous product^{4/}.

^{1/} BISD 7S/49 paragraph 7

^{2/} BISD 26S/319 paragraph (g) and BISD 27S/97 paragraph (f)

^{3/} SCM/42 page 38 paragraph 4.34

^{4/} SCM/42 page 38 paragraph 4.35

- "Previous representative period"

80. The term "previous representative period" is used elsewhere in the General Agreement; e.g., Article XIII:2(d). It has been customary in GATT to regard a previous representative period as normally the three preceding years for which trade statistics are available, and this is the usual period utilized for the re-negotiation of concessions under Article XXVIII.

81. It has been mentioned that the original US draft ITO Charter provided that the subsidizing country initially select the representative period for purposes of determining equitable share, subject to consultation upon request (see paragraph 5 of this note). The Havana Charter stipulated that it would be the Organization that would determine what constituted an equitable share, having regard inter alia to a country's share of world trade during a previous representative period (see paragraph 31 of this note). The Panel on Other Barriers to Trade, whose work led to the incorporation of paragraphs 2 to 5 of Article XVI, as well as the interpretative notes thereto, called attention to the fact that export subsidies during a previous representative period may have influenced the shares of trade (see paragraph 37 of this note).

82. The Panel which examined French assistance to exports of wheat and wheat flour, made no specific reference to previous representative period. It reviewed trade statistics from the pre-war (1934-1938) and post-war period (1948-1958) including statistics available for part of the year in which the Panel had been established^{1/}. The Subsidies Code attempted to bring precision to the interpretation of "previous representative period" by specifying that it should "normally be the three most recent calendar years in which normal market conditions existed" (see paragraph 40 of this note). Given the vagaries of climate and the penchant for governments to intervene, it has appeared difficult to determine what could be normal market conditions for a primary product. The representative of Australia had argued that its complaint relating to EEC refunds on exports of sugar concerned the

^{1/} BISD 7S/49

post- 1975 period (i.e 1976 to 1978, preliminary data only being available for 1978) and suggested the entire period 1969-1975 should be considered as a "previous representative period."^{1/} However, the EEC representative suggested comparing the average for the years 1972-1974 with that for 1975-1977, and argued that "estimates for recent periods, forecasts or projections for future periods of whatever duration must not be used."^{2/} In view of the difficulties involved in selecting what could be considered to be the "previous representative period" (since the Panel had doubts about whether 1974 and 1975 could qualify as fully representative) the Panel considered various alternatives as of 1971, and made a set of comparisons^{3/}. The Panel found "that the final result was very much the same whichever of the previous representative periods was used for comparison. In any case it appeared that the Community market share had increased in 1976 and 1977 compared to previous periods."^{4/} Brazil, in its complaint against EEC refunds on exports of sugar had compared shares in two periods, 1973-75 and 1976-78^{5/}. The representative of the EC had proposed that the two reference averages are those for 1972-74 and 1975-77 and that the year 1978 be considered separately^{6/}. The Panel considered the two periods 1971-73 and 1972-74 to qualify as previous representative periods and compared these with shares for the years 1976 to 1979 (preliminary data being available for 1979). The Panel found that whichever of the two previous representative periods was used for comparison, the outcome would be

^{1/} BISD 26S/297-298 paragraphs 2.22 and 2.23

^{2/} BISD 26S/298-299 paragraphs 2.24 and 2.25

^{3/} BISD 26S/307-308 paragraph 4.10

^{4/} BISD 26S/308-309 paragraph 4.12

^{5/} BISD 27S/74 paragraph 2.8

^{6/} BISD 27S/74 paragraph 2.10

fairly similar^{1/}. Finally, as regards EEC refunds on export of wheat flour, the United States had used as a reference period 1959/60 to 1961/62, the three marketing years preceding the establishment of the Common Agricultural Policy in 1962. The US also requested the Panel to examine the market trends during the entire period from 1959/60 to 1980/81^{2/}. The EEC representative, however, countered that the drafters of the Subsidies Code "had never intended to exclude as a previous representative period the years in which subsidies were granted, on the ground that the market would allegedly be functioning abnormally because of the existence of subsidies". Proposals to that effect had been made during the Tokyo Round, he stated, but had been opposed^{3/}. The Panel first compared world market shares in the three most recent crop years (though the Code refers to calendar years) prior to the US complaint; i.e. 1977/78, 1978/79 and 1979/80 with market shares in 1980/81^{4/}. However, the Panel was of the view that three most recent year period, while instructive, "did not in itself provide a fully satisfactory basis for determining 'equitable share'",^{5/} since market shares had been affected by export subsidies and other developments. The Panel examined a number of other possibilities and found "the fundamental picture of market developments tended to be consistent"^{6/}. "It is evident therefore that the EEC share of world exports of wheat flour had become larger over a time period when payment by the EEC of export subsidies was the general practice."^{7/}

^{1/} BISD 27S/89 paragraph 4.9

^{2/} SCM/42 page 3 paragraph 2.9

^{3/} SCM/42 pages 14-15 paragraph 2.17

^{4/} SCM/42 page 29 paragraph 4.8

^{5/} SCM/42 page 30 paragraph 4.11

^{6/} SCM/42 page 30 paragraph 4.12

^{7/} SCM/42 page 33 paragraph 4.15

- "Special factors"

83. Both Panels, which examined the EEC refunds on export of sugar on the basis of separate complaints by Australia and Brazil, took note of, as a special case or factor affecting world sugar, the coming into operation of the International Sugar Agreement in 1978 and the resulting contraction in members' sugar trade^{1/}. Brazil and Australia were members while the Community did not participate in this Agreement. The Panel which examined EEC subsidies on export of wheat flour took account of certain basic features of the world flour market together with a number of special factors, to consider whether they may have had a bearing on market shares. The Panel considered political developments, non-commercial sales, regular shipping lines, historical links, cultivation of "traditional" markets, particular taste or dietary demands, trade practices of respective traders, increased domestic milling capacity, transportation costs, and quality of wheat flour^{2/}. "In light of the highly artificial levels and conditions of trade in wheat flour, the "complexity of developments in the markets, including the interplay of a number of special factors, the relative importance of which it was impossible to assess, and, most importantly, the difficulties inherent in the concept of 'more than equitable share', the Panel found that it was unable to conclude whether the EEC had more than an equitable share in terms of Article 10 of the Subsidies Code ^{3/}.

- Summing up

84. Like beauty or pornography, determining what is an equitable share of world export trade in a primary product is a difficult matter and subject to the eye of the discriminating beholder. Although agricultural subsidies are widespread, there have been relatively few instances where a determination was sought from the GATT, that a

^{1/} BISD 26S/305 paragraph 3.21, page 309, paragraph 4.13, page 310 paragraph 415 and page 319 paragraph (e); BISD 27S/86 paragraph 3.21, page 92 paragraphs 4.16-4.17, pages 96-97 paragraph (c).

^{2/} SCM pages 34-36 paragraphs 4.17-4.25

^{3/} SCM/42 page 40 paragraph 5.3

subsidizing contracting party was not fulfilling its obligations under Article XVI. Of the five panel cases involving an agricultural product, all but one (relating to French subsidies on wheat and wheat flour) have been initiated after 1977. All have concerned products in the grains (or grain-based) or sugar sectors. Only the last two panels (relating to EEC subsidies on wheat flour and pasta products respectively) were established under the Subsidies Code, but in determining whether an equitable share obligation was being met, the other panels appeared to utilize concepts that are contained in the Code; namely, individual markets, displacement and price undercutting. If one attempted to generalize about the trend in panel interpretations of equitable share, it would appear that the panel in the earlier case (relating to French subsidies on wheat and wheat flour) determined that the obligation was not being met rather straightforwardly. It found that an export subsidy was indeed being granted. It noted that the exports of the subsidizing contracting party had increased and its share of world export trade as well. It considered that export and import unit values showed that the prices of subsidized exports were lower than those quoted by other exporters. Accordingly, the panel concluded that the subsidizing country's share of world export trade was more than equitable, and proceeded thereafter to examine trade in three individual markets. It found displacement therein on the basis of an increase of the subsidizing party's exports and market share and a decrease of the complaining party's over a four-year period. The Panel found that the complaining party had suffered direct and indirect damage to its trade interests. Recent panels, (relating to EEC subsidies on sugar and wheat flour), however, have tended to focus greater attention on factors other than subsidies affecting developments in world trade of the primary product in question. The earlier panel, finding the existence of a subsidy and an increase in world exports and share of the world market of the subsidizing party, more or less considered this as apparent evidence that subsidies had resulted in a more than equitable share, and concluded accordingly. The recent panels, having found the existence of a subsidy and an increase in world exports and world market share, were not able, however, to conclude that the increased share was more than equitable. This was due to the lack of clear evidence for them of a

causal relationship between the increase of the subsidizing party and a decrease in the complaining party's trade in a significant number of individual markets. It would thus appear that subsidies must not only be found to exist, but must be demonstrated to be the factor more important than any other factors taken together, that could account for the subsidizing country's increased share of world export trade. Finally it can be said that panels have considered "world export trade" to encompass all transactions, commercial or otherwise. They have demonstrated great flexibility in selecting time periods as representative, generally looking over long periods and utilizing several alternative averages for comparison.

F. Article XVI:4^{1/}

85. The first sentence of paragraph 4 of Article XVI stipulates that [as of 1 January 1958 or] at the earliest practicable date, contracting parties shall cease to grant either directly or indirectly export subsidies on any non-primary product which results in an export price lower than the price to domestic buyers. Article XVI:4 second sentence, provided for a standstill whereby contracting parties would agree not to extend the scope of subsidies existing as of 1 January 1955 nor introduce new subsidies. This standstill was originally in force until 1957 and extended several times until 1967. In the meantime, it was overtaken by a Declaration, which was made on 19 November 1960 and entered into force on 14 November 1962, giving effect to Article XVI:4^{2/}. Most industrialized countries have signed this declaration^{3/}. For those contracting parties which have not accepted the Declaration giving effect to Article XVI:4, the standstill provisions of Article XVI:4, which had been extended by a number of declarations and expired on 31 December 1967, are no longer in effect.

^{1/} See Annex I for full text of this provision

^{2/} BISD 9S/32

^{3/} They are: Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Southern Rhodesia, Sweden, Switzerland, United Kingdom, United States.

86. The Agreement on Interpretation and Application of Articles VI, XVI, and XXIII (Subsidies Code) specifies in its Article 9 that signatories shall not grant export subsidies on products other than certain primary products^{1/} Paragraph 2 of this Article refers to an "Illustrative List of Export Subsidies" provided in the Annex to the Agreement; the practices listed constituting the export subsidies that signatories pledge not to grant. The ban on subsidies in Article 9 does not apply to developing country signatories subject to certain provisions (Article 14).

87. In reviewing the application of Article XVI:4 to agricultural products, at least two questions should be addressed. The first concerns the definition of primary product and whether certain agricultural products should be considered not to be a primary product. The second question is whether the primary product component of a processed product may be subsidized. As regards the first question, an interpretative note defines "primary product" for purposes of Section B of Article XVI, which includes paragraphs 2 to 5 thereof (see paragraph 68 of this note). The Subsidies Code amended this definition for its purposes by deleting minerals therefrom, (see paragraph 41 of this note). It has already been noted that previous panels have considered wheat flour as qualifying as a primary product, but not pasta (see paragraph 69 of this note). If agricultural products are deemed to be products falling within Chapters 1 to 24 inclusive of the CCCN, then it would appear that only some of these products, for example, raw agricultural products or first-stage value-added agricultural products would qualify as primary products, while other agricultural products would not. Moreover, there are certain goods falling outside Chapters 1 to 24 of the CCCN which could be regarded as primary products.

88. As regards the possibility of subsidizing the primary product component of a processed product, the United States proposed at the 12th Session of the CONTRACTING PARTIES in 1957, that Article XVI:4 should not prevent a contracting party, in this particular case the United States, from subsidizing exports of processed products (cotton textiles)

^{1/} BISD 12S/50

if such subsidy was essentially the payment that would have been made on the raw material (cotton) used in the production of this processed product had the raw material been exported in its natural form. This interpretation was rejected by several contracting parties. The "Declaration Extending the Standstill Provisions of Article XVI:4 of the General Agreement on Tariffs and Trade" was accepted by the United States in November 1958 "with the understanding that this Declaration shall not prevent the United States as part of its subsidization of exports of a primary product, from making a payment on an exported processed product (not in itself a primary product), which has been produced from such primary product, if such payment is essentially limited to the amount of the subsidy which would have been payable on the quantity of such primary product, if exported in primary form, contained in the production of the processed product."^{2/} This understanding was repeated by the United States when it signed in 1961 the "Declaration Giving Effect to the Provisions of Article XVI:4"^{3/}.

89. During the examination of EEC subsidies on export of pasta products under the Subsidies Code, the parties to the dispute, the United States and the EEC, held differing views as to the status of the above-cited text by the United States. The Panel "was of the view that the US understanding was intended to limit the legal obligations of the United States under Article XVI:4 and had to be recognized as a reservation rather than an interpretation. This conclusion was confirmed by the history of this understanding, and in particular by the fact that it was referred to as a reservation by the Chairman of the CONTRACTING PARTIES at the 13th Session in 1958 as well as by four contracting parties and that these statements were not challenged by any other contracting party."^{4/} Moreover, "the Panel was of the opinion that the US reservation previously made to Article XVI:4 was not relevant to the US

^{1/} SR.12/22 pages 192-194

^{2/} BISD 6S/24-25

^{3/} SR.17/11 page 167

^{4/} SCM/43 page 13 paragraph 4.6

position under the Code since it could not be automatically carried over to the Code... The Panel also noted that the United States had recognized in its submission to the Panel that 'the United States gave up the legal right to engage in this practice when the United States signed the Subsidy Code without a reservation'" and "concluded that the United States was not stopped from challenging the EEC practice in question."^{1/} The Panel noted, however, that: "it was possible that some Signatories, when signing the Code, might have believed that they could continue their existing practices of subsidizing exports of some processed agricultural products to the extent that this subsidization was confined to the primary product components. The Panel, however, noted that these beliefs, if they existed, were never transformed into formal, legally effective statements and could not therefore have the effect of changing the meaning of the Code or obligations of Signatories under the Code."^{2/} However, one member of the panel disassociated himself from the conclusions of the majority of the panel (see also paragraph 70 of this note). He believed that the meaning of Article XVI had clearly been interpreted differently and for a long period of time, thereby making it far from clear what was meant by Article 9 of the Code^{3/}. This member "was of the view that the absence of any record of discussion or understanding regarding this specific aspect of the Code should not be interpreted as implying an intent of the drafters to change the then prevailing status quo, rather the contrary"^{4/}.

^{1/} SCM/43 page 13 paragraph 4.7

^{2/} SCM/43 page 13 paragraph 4.8

^{3/} SCM/43 page 15 paragraph 5.2

^{4/} SCM/43 page 15 paragraph 5.4

G. Article XVI:5^{1/}

90. This provision calls for a review of the effectiveness of the operation of Article XVI. The CONTRACTING PARTIES appointed a Panel in 1958 to undertake the preparatory work for such a review. Relevant extracts of the Panel's reports as regards agricultural subsidies and notifications have been cited elsewhere in this note (see paragraphs 44 through 46). The CONTRACTING PARTIES never conducted the review envisaged in Article XVI:5. The Committee on Trade in Agriculture has been charged by CONTRACTING PARTIES at their Ministerial Session in November, 1982, with examining the operation of the General Agreement as regards subsidies affecting agriculture in language similar to that of Article XVI:5^{2/}. This analytical note is provided to assist the Committee in that review.

H. Relationship with other GATT provisions

91. Even though a subsidy may be legal under Article XVI it may be applied in such a manner as to be inconsistent with other provisions of the General Agreement.

- Article II

92. It has already been noted that in 1955, the Working Party III on Other Barriers to Trade agreed that a contracting party that has negotiated a concession under Article II can be assumed to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the introduction of or increase in a domestic subsidy on the product concerned. There was also the possibility to negotiate on subsidies in the context of tariff schedules (see paragraph 37 of this note). Moreover, in its report in 1961, the Panel on Subsidies, which was established to prepare the review provided in Article XVI:5, noted that the expression "reasonable expectation" as used above had been qualified by the words "failing evidence to the contrary". "By this the Panel understands that

^{1/} See Annex I for full text of this provision

^{2/} L/5424 page 9

the presumption is that unless such pertinent facts were available at the time the tariff concession was negotiated, it was then reasonably to be expected that the concession would not be nullified or impaired by the introduction or increase of a domestic subsidy"^{1/}.

93. In a complaint under Article XXIII:2, the United States has alleged that the benefits obtained by it through tariff concessions under GATT Article II are being nullified and impaired by EEC production subsidies on canned peaches, canned pears and raisins^{2/}. The Panel established to examine this matter has not yet published its report.

- Part IV

94. During the consultations under Article XXII:2 conducted by a Working Party with respect to the United States' export subsidy on unmanufactured tobacco, the representative of Malawi referred to the provisions of Part IV. He suggested that Article XXXVI:3 "could be interpreted as meaning that the share of less-developed countries in world trade in a particular commodity could grow at a faster rate than world trade as a whole, and the rate of export growth by industrialized countries." Whilst noting that prior consultations were not explicitly required under Article XXXVII:3(c), the representative of Malawi, supported by other members of the Working Party, considered that consultations "would enable a less-developed country concerned to express its views which might not otherwise be known to the industrialized country contemplating action".^{3/} The United States representative stated that "the action taken by his Government was fully in conformity with the provisions of Part IV". As regards XXXVII:3(c) the United States had taken the special interests of developing countries into account during its examination of alternative remedies. This provision, in the U.S. view "did not obligate a contracting party to hold consultations prior to the introduction of the subsidy"^{4/}. The Chairman of the CONTRACTING PARTIES later noted "that the report of the

^{1/} BISD 10S/209 paragraph 28

^{2/} L/5306

^{3/} BISD 15S/123-124 paragraph 23

^{4/} BISD 15S/124 paragraph 24

Working Party contained no conclusive indication as regards damage to the trade interests of other tobacco producers arising from the existence of the United States subsidy. However, as it appeared that, to some extent, the provisions of Part IV were involved and as it was conceivable that the trade interests of other producers could be affected" he suggested, and it was so agreed, that CONTRACTING PARTIES urge the United States to give sympathetic and urgent consideration to the requests made by certain members of the Working Party^{1/}. They had requested that the U.S. remove the subsidy and consult before taking action to extend the existing subsidy (see paragraph 57 of this note).

95. In its complaint relating to EEC refunds on exports of sugar, Brazil argued inter alia that the Community system and its application were inconsistent with commitments under Part IV of the General Agreement, in particular Article XXXVI:2, :3, :4, and :9, and XXXVIII:2(a) and (e)^{2/}. The EC representative recalled the very considerable Community efforts made in favour of developing countries^{3/}. He also argued that "the provisions of Article XXXVI constituted principles and objectives and could not be understood to establish precise, specific obligations."^{4/} In its conclusions, the Panel stated that it "recognized the efforts made by the European Communities in complying with the provisions of Articles XXXVI and XXXVIII. It nevertheless felt that increased Community exports of sugar through the use of subsidies in the particular market situation in 1978 and 1979, and where developing contracting parties had taken steps within the framework of the ISA to improve the conditions in the world sugar market, inevitably reduced the effects of the efforts made by these countries. For this time-period and for this particular field, the European Communities had therefore not collaborated jointly with other contracting parties to further the principles and objectives set forth in Article XXXVI, in conformity with the guidelines given in Article XXXVIII."^{5/}

^{1/} SR.24/13 page 166

^{2/} BISD 27S/79-80 paragraph 24

^{3/} BISD 27S/80 paragraph 2.27

^{4/} BISD 27S/80 paragraph 2.28

^{5/} BISD 27S/97-98 paragraph (h)

Chapter III. Summary

96. Some of the wording of Article XVI of the General Agreement can be traced back to the proposal advanced in 1946 by the United States on a suggested Charter for an International Trade Organization of the United Nations. The US proposal sought to eliminate export subsidies on all products. To deal with a world surplus in a product, governments were to consult with the view to taking internal adjustment measures or concluding an inter-governmental commodity agreement. If these efforts produced no results, governments were free to subsidize, provided previous market shares of trade were respected. In the ensuing draft texts of the Charter, the particular situation for primary products became more evident. A domestic stabilization system was considered not be a subsidy under certain conditions. A definition of primary products was worked out. The Havana Charter made reference to equitable share and provided for the Organization to determine what constituted such a share of world trade on the basis of specified factors. Article XVI of the General Agreement at first contained only its present paragraph 1, as governments chose to await the coming into effect of the International Trade Organization to impose further disciplines on export subsidies. When it became apparent that this would not take place, attempts were made to incorporate other Articles of the Havana Charter into the General Agreement. In 1955, the CONTRACTING PARTIES added to Article XVI the present text of paragraphs 2 to 5, as well as Article XVI of the Notes and Supplementary Provisions. The new GATT provisions were based to a large extent on a proposal put forth by the United States. The CONTRACTING PARTIES also adopted at this time resolutions dealing with the disposal of surpluses. However, they did not pursue the negotiation of a draft agreement to govern international action on commodities. The Subsidies Code, concluded pursuant to the Tokyo Round, attempted inter alia to give more precision to the equitable share obligation for primary products.

97. The obligation to notify subsidies under Article XVI:1 is broad, but not all contracting parties are fulfilling this obligation. Recent notifications have indicated that subsidization is widespread in the agricultural sector, although it is not exclusive to that sector. Agricultural subsidies tend to be product specific and entail substantial government intervention in the production, price structure, and marketing of the products in question. There is a range of measures which may have the effect of subsidies about which little or nothing is reported, such as non-commercial transactions. 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. 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. Export subsidies on primary products are tolerated under Article XVI but are subject to the equitable share obligation of paragraph 3. 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: subsidy, primary product, equitable share, world export trade, representative period and special factors. The interpretation of these words have engendered new concepts whose meaning must be determined as well, such as market, displacement, and price undercutting. Although agricultural subsidies are widespread, there have been relatively few recourses to the GATT regarding them. Of the five GATT panels involving an agricultural product, all but one have been initiated after 1977. All have concerned products in the grains (or grain-based) or sugar sectors. Only the last two panels were established under the Subsidies Code^{1/}, but in determining whether an

^{1/}Note that the Committee on Subsidies and Countervailing Measures has not yet acted upon these Panel reports.

equitable share obligation was being met, the other panels appeared to utilize concepts that are contained in the Code. If one attempted to generalize about the trend in panel interpretations, one could say that raw agricultural products or first stage value added agricultural products have been considered to be primary products. Panels have felt that world export trade should encompass total transactions of the product in question, including non-commercial or special transactions. They have demonstrated great flexibility in selecting time periods as representative, generally looking over long periods and utilizing several alternative averages for comparison. An early panel, finding the existence of a subsidy and an increase in world exports and share of the world market of the subsidizing party, more or less considered this as apparent evidence that subsidies had resulted in a more than equitable share, and concluded accordingly. The recent panels, having found the existence of a subsidy and an increase in world exports and world market share, were not able, however, to conclude that the increased share was more than equitable. This was due to the lack of clear evidence for them of a causal relationship between the increase of the subsidizing party and a decrease in the complaining party's trade in a significant number of individual markets. Contracting parties are to cease to grant export subsidies on non-primary products under Article XVI:4. There is a question as to whether the subsidization of the primary product component of a processed product would be allowed under the declaration giving effect to this provision, as well as Article 9 of the Subsidies Code. Article XVI:5 calls for a review of the effectiveness of the operation of Article XVI. The Committee on Trade in Agriculture has been charged by CONTRACTING PARTIES at their Ministerial Session in November, 1982, with examining the operation of the General Agreement as regards subsidies affecting agriculture in language similar to that of Article XVI:5. Finally, even though a subsidy may be legal under Article XVI, it may be applied in such a manner as to be inconsistent with other provisions of the General Agreement; for example, Article II or Part IV.

ANNEX I

Article XVI of the General Agreement and Notes and
Supplementary Provisions Referring Thereto

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.

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.

Provisions of the Havana Charter Relating to Subsidies

Article 25

Subsidies in General

If any Member grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to maintain or increase exports of any product from, or to reduce, or prevent an increase in, imports of any product into, its territory, the Member shall notify the Organization 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 a Member considers that serious prejudice to its interests is caused or threatened by any such subsidization, the Member granting the subsidy shall, upon request, discuss with the other Member or Members concerned, or with the Organization, the possibility of limiting the subsidization.

Article 26

Additional Provisions on Export Subsidies

1. No Member shall grant, directly or indirectly, any subsidy on the export of any product, or establish or maintain any other system, which subsidy or system 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, due allowance being made for differences in the conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. The exemption of exported products from duties or taxes imposed in respect of like products when consumed domestically, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be in conflict with the provisions of paragraph 1. The use of the proceeds of such duties or taxes to make payments to domestic producers in general of those products shall be considered as a case under Article 25.

3. Members shall give effect to the provisions of paragraph 1 at the earliest practicable date but not later than two years from the day on which this Charter enters into force. If any Member considers itself unable to do so in respect of any particular product or products, it shall, at least three months before the expiration of such period, give notice in writing to the Organization, requesting a specific extension of the period. Such notice shall be accompanied by a full analysis of the system in question and the circumstances justifying it. The Organization shall then determine whether the extension requested should be made and, if so, on what terms.

4. Notwithstanding the provisions of paragraph 1, any Member may subsidize the exports of any product to the extent and for such time as may be necessary to offset a subsidy granted by a non-Member affecting the Member's exports of the product. However, the Member shall, upon request of the Organization or of any other Member which considers that its interests are seriously prejudiced by such action, consult with the Organization or with that Member, as appropriate, with a view to reaching a satisfactory adjustment of the matter.

Article 27

Special Treatment of Primary Commodities

1. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be considered not to involve a subsidy on export within the meaning of paragraph 1 of Article 26, if the Organization determines that

- (a) the system has also resulted, or is so designed as to result, in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity 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 prejudice the interests of other Members.

2. Any Member granting a subsidy in respect of a primary commodity shall co-operate at all times in efforts to negotiate agreements, under the procedures set forth in Chapter VI, with regard to that commodity.

3. In any case involving a primary commodity, if a Member considers that its interests would be seriously prejudiced by compliance with the provisions of Article 26, or if a Member considers that its interests are seriously prejudiced by the granting of any form of subsidy, the procedures set forth in Chapter VI may be followed. The Member which considers that its interests are thus seriously prejudiced shall, however, be exempt provisionally from the requirements of paragraphs 1 and 3 of Article 26 in respect of that commodity, but shall be subject to the provisions of Article 28.

4. No Member shall grant a new subsidy or increase an existing subsidy affecting the export of a primary commodity, during a commodity conference called for the purpose of negotiating an inter-governmental control agreement for the commodity concerned unless the Organization concurs, in which case such new or additional subsidy shall be subject to the provisions of Article 28.

5. If the measures provided for in Chapter VI have not succeeded, or do not promise to succeed, within a reasonable period of time, or if the conclusion of a commodity agreement is not an appropriate solution, any Member which considers that its interests are seriously prejudiced shall not be subject to the requirements of paragraphs 1 and 3 of Article 26 in respect of that commodity, but shall be subject to the provisions of Article 28.

Article 28

Undertaking regarding Stimulation of Exports of Primary Commodities

1. Any Member granting any form of subsidy, which operates directly or indirectly to maintain or increase the export of any primary commodity from its territory, shall not apply the subsidy in such a way as to have the effect of maintaining or acquiring for that Member more than an equitable share of world trade in that commodity.

2. As required under the provisions of Article 25, the Member granting such subsidy shall promptly notify the Organization of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected commodity exported from its territory, and of the circumstances making the subsidization necessary. The Member shall promptly consult with any other Member which considers that serious prejudice to its interests is caused or threatened by the subsidization.

3. If, within a reasonable period of time, no agreement is reached in such consultation, the Organization shall determine what constitutes an equitable share of world trade in the commodity concerned and the Member granting the subsidy shall conform to this determination.

4. In making the determination referred to in paragraph 3, the Organization shall take into account any factors which may have affected or may be affecting world trade in the commodity concerned, and shall have particular regard to:

- (a) the Member country's share of world trade in the commodity during a previous representative period;
- (b) whether the Member country's share of world trade in the commodity is so small that the effect of the subsidy on such trade is likely to be of minor significance;
- (c) the degree of importance of the external trade in the commodity to the economy of the Member country granting, and to the economies of the Member countries materially affected by, the subsidy;
- (d) the existence of price stabilization systems conforming to the provisions of paragraph 1 of Article 27;
- (e) the desirability of facilitating the gradual expansion 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 might retard that expansion.

ANNEX III

Questionnaire for Notifications Pursuant to Article XVI:1¹

Reports should be made in writing for individual commodities and under the headings listed below. A suggestion of the type of information which might be included under each heading is shown within brackets:

I. Nature and extent of the subsidy

(a) Background and authority

(The reason for the subsidy and the legislation under which it is granted.)

(b) Incidence

(Whether paid to producers, to exporters, or in some other way; whether a fixed amount per unit, or fluctuating; if the latter, how determined.)

(c) Amount of subsidy

(Total cost estimated or budgeted or, when this is not feasible, cost in preceding year.)

(d) Estimated amount per unit.

II. Effect of subsidy

(a) Estimated quantitative trade effects of the subsidy; and the reason why it is considered that the subsidy will have these effects.

(b) Statistics of production, consumption, imports and exports:

(i) for the three most recent years for which statistics are available;

(ii) for a previous representative year, which, where possible and meaningful, should be the latest period preceding the introduction of the subsidy or preceding the last major change in the subsidy.

¹ BISD 9S/193-194