

ARTICLE XVI

SUBSIDIES

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I. TEXT OF ARTICLE XVI AND INTERPRETATIVE NOTE AD ARTICLE XVI

Article XVI*

Subsidies

Section A – Subsidies in General

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

Section B – Additional Provisions on Export Subsidies*

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

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

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

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

Interpretative Note *Ad* Article XVI from Annex I

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.

II. INTERPRETATION AND APPLICATION OF ARTICLE XVI

A. SCOPE AND APPLICATION OF ARTICLE XVI

Paragraph 1 of Article XVI was drawn from Article 25 of the draft Charter, and has remained unchanged since the original text agreed in 1947. Section B of Article XVI was drafted in the Review Session, drawing on Articles 26 through 28 of the Havana Charter. The principal sources concerning the drafting of Section B are the Report of the Review Working Party on “Other Barriers to Trade” and the documents of the Review Session.

1. Paragraph 1

(1) “*subsidy*”

In 1959-61, a “Panel on Subsidies” was established and undertook preparatory work for a review to be conducted on the operation of the provisions of Article XVI. The 1961 Report of this group on “Operation of the Provisions of Article XVI” notes that it “considered that it was neither necessary nor feasible to seek an agreed interpretation of what constituted a subsidy. It would probably be impossible to arrive at a definition which would at the same time include all measures that fall within the intended meaning of the term in Article XVI without including others not so intended ... In any event the Panel felt that the lack of a precise definition had not, in practice, interfered with the operation of Article XVI”.¹

General criteria for the determination of the existence of a subsidy have been discussed in the Committee on Subsidies and Countervailing Measures and were discussed in the Committee on Trade in Agriculture.²

(2) “*including any form of income or price support*”

See Interpretative Note 2 *Ad* paragraph 3 of Article XVI; this note corresponds to paragraph 1 of Article 27 of the Havana Charter.

¹L/1442 and Add.1-2, adopted on 21 November 1961, 10S/201, 209, para. 23; see also MTN.GNG/NG10/W/4 at p. 49.

²See, e.g., SCM/35 and 36, and AG/W/5, para. 48.

(a) *Domestic prices fixed above the world price level*

The 1960 Report of the Panel on Subsidies on “Review Pursuant to Article XVI:5” examined the circumstances under which price support systems which fix domestic producer prices at a level higher than 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. Such purchases would need only to cover part of the production to involve a subsidy and, in determining loss on resale, such expenses as holding stocks should be taken into account. 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 a subsidy. One such case might be that in which a government fixes by law a minimum price to producers which is maintained by quantitative restrictions or a flexible tariff or similar charges. In such a case there would be no loss to the government, and the measure would not be governed by Article XVI.”³

(b) *Subsidies financed by a non-governmental levy*

See Interpretative Note 2 *ad* paragraph 3 of Article XVI; the last sentence of this note provides that operations under price stabilization schemes “shall be subject to paragraph 3 where they are wholly or partly financed out of government funds in addition to funds collected from producers in respect of the product concerned”. On the drafting history of this note, see Section III below.

The 1960 Report on the “Review Pursuant to Article XVI:5” also examined whether subsidies financed by a non-governmental levy were notifiable under Article XVI. The Panel noted that

“The GATT does not concern itself with such action by private persons acting independently of their governments except insofar as it allows importing countries to take action under other provisions of the Agreement. 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 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. In view of these considerations the Panel feels that the question of notifying levy-subsidy arrangements depends upon the source of the funds and the extent of government action, if any, in their collection. Therefore, rather than attempt to formulate a precisely worded recommendation designed to cover all contingencies, the Panel feels that the CONTRACTING PARTIES should ask governments to notify all levy/subsidy schemes affecting imports or exports which are dependent for their enforcement on some form of government action”.⁴

The 1958 Panel Report on “French Assistance to Exports of Wheat and Wheat Flour” concluded that the operation of the French system of price supports, which involved a tax on exporters to partially defray losses in the world market, resulted in the grant of export subsidies because, *inter alia*, governmental budgetary appropriations were necessary to cover at least part of the losses.⁵ See further below at page 453.

(c) *Export credit programmes as subsidies*

The question whether export credit programmes, when in conformity with an international arrangement on official export credits, are to be considered subsidies, was discussed in the Committee on Subsidies and Countervailing Measures during 1982-83. The view that granting of export credits at rates below those which actually prevailed on international capital markets constituted a subsidy to be notified under Article XVI:1 of the General Agreement, was disputed by some contracting parties.⁶

³L/1160, adopted on 24 May 1960, 9S/188, 191, para. 11.

⁴*Ibid.*, 9S/192, para. 12.

⁵L/924, adopted on 21 November 1958, 7S/46, 50-52, paras. 8-14.

⁶SCM/M/11-13, 16.

(d) *Internal transport charges*

It was agreed during the meetings of the Preparatory Committee at Geneva in 1947 that the granting of reduced internal transport charges on goods for export “would be subject to the provisions of Article [XVI] if it operates directly or indirectly to increase the exports of any product”.⁷

(e) *Tax exemptions*

It was agreed at Havana that the terms of Article 25 [XVI] were sufficiently wide to cover a system where methods of direct subsidization to domestic industries were not used but whereby “certain domestic industries were exempted from internal taxes payable on imported goods”.⁸ See also the reference to the Panel on “United States Tax Legislation (DISC)” below at page 449.

(f) *Multiple exchange rates*

See Interpretative Note 1 *Ad* Section B of Article XVI, which was added at the Review Session in 1954-55. The Report of the Review Working Party on “Other Barriers to Trade” notes, concerning the provisions added to Article XVI in the Review Session:

“A number of members of the Working Party were concerned as to the possible effect of the proposed additional provisions on the right of countries to use multiple exchange rates in accordance with the Articles of Agreement of the International Monetary Fund. The Working Party has therefore recommended an interpretative note to cover this case. It wishes also to record the fact that the draft provisions have been considered by the Working Party on the assumption that paragraph 9(a) of Article XV in the present Agreement will not be altered”.⁹

During the Review Session, Italy brought a complaint concerning action by Turkey providing export bonuses for certain agricultural products and levying special import taxes on certain goods deemed less-essential in order to provide the necessary funds for the bonuses. Italy stated that the export subsidies had not been notified as required by Article XVI:1 and that the import taxes were inconsistent with Article II:1(b). Turkey stated that as part of a reform of its foreign exchange system, it had established an Equalization Fund which was financed by the sale of import permits, and that this system had been approved by the International Monetary Fund. A representative of the Fund confirmed that the practices under question were multiple currency practices under the Fund Agreement and that in a Decision concerning Turkey the Fund had stated that it did not object to the temporary continuance of these practices and would remain in consultation with Turkey on these practices. The complaint was referred to the standing Panel on Complaints but was withdrawn later in the session.¹⁰

The 1960 Report on the “Review Pursuant to Article XVI:5” provides that: “The Panel noted that some contracting parties had interpreted approval by the International Monetary Fund of multiple exchange arrangements as absolving them from the obligation to notify such arrangements under Article XVI. The Panel wished to record its view that interpretative note 1 to Section B of Article XVI was intended not to preclude the use by a country of multiple exchange rates which were approved by the International Monetary Fund, but that there was a clear obligation to notify to the CONTRACTING PARTIES multiple exchange rates which have the effect of a subsidy”.¹¹

See also Article XV:9 and the material on it in this Index. See also Note 2 to paragraphs 2 and 3 of Article VI, which provides that “Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under [Article VI:3] or can constitute a form of dumping by

⁷EPCT/127, p. 1; EPCT/B/SR.22. p. 5-6.

⁸Havana Reports, p. 107, paras. 11-12.

⁹L/334 and Addendum, adopted on 3 March 1955, 3S/222, 226, para. 21.

¹⁰L/214 (complaint); SR.9/7 (discussion of complaint, statements by Italy, Turkey and the Fund, referral to Panel on Complaints); W.9/8 (written statement by Turkey); SR.9/40 (withdrawal of complaint).

¹¹L/1160, adopted on 24 May 1960, 9S/188, 192, para. 13.

means of a partial depreciation of a country's currency which may be met by action under [Article VI:2]. By 'multiple currency practices' is meant practices by governments or sanctioned by governments".¹²

(g) *Border tax adjustments and duty drawback*

See the general Interpretative Note *ad* Article XVI. This note, added in the 1954-55 Review Session, was drawn from paragraph 2 of Article 26 of the Havana Charter, the text of which appears below at page 465. The records of the Havana Conference note the understanding 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".¹³

The relevance of Article XVI to border tax adjustments was examined by the Working Party on "Border Tax Adjustments" in 1968-71; the 1971 Report of the Working Party notes that "It was agreed that GATT provisions on tax adjustment applied the principle of destination identically to imports and exports".¹⁴

The 1977 Report of the Working Party on "Suspension of Customs Liquidation by the United States" examined the compatibility with Article VI:4 of the Japanese practice of exempting exported products from domestic consumption taxes and noted that "All but one member of the Working Party ... agreed that the Japanese tax practices in question were in full accord with the provisions of GATT, its established interpretation as well as established practice of the GATT. They also agreed that ... if countervailing duties were imposed, the imposition of such duties would be in contravention of the provisions of the GATT including Article VI:4 and the note to Article XVI ...".¹⁵

(3) *"directly or indirectly"*

The New York Report notes, with regard to the draft Charter provision corresponding to Article XVI:1, "It will be observed that the provision in this sentence as now drafted applies to cases in which the subsidy operates, 'directly or indirectly', to increase exports or reduce imports of any product and can thus not be interpreted as being confined to subsidies operating directly to affect trade in the product under consideration".¹⁶

(4) *"to increase exports ... or to reduce imports"*

The Report of the Working Party in 1948 on "Modifications to the General Agreement" notes that the Working Party agreed not to amend Article XVI:1 to incorporate the changes made to the corresponding Charter Article at the Havana Conference, *inter alia* in view of the understanding that

"The phrase 'increased exports' in [Article XVI:1] 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 a subsidy, as made clear in line 3 of Article 25 of the Havana Charter".¹⁷

The 1960 Report on the "Review Pursuant to Article XVI:5" provides:

"In the opinion of the Panel, it is not sufficient to consider increased exports or reduced imports only in a historical sense. In this connexion the Panel had in mind [the interpretation which appears directly above]. *Mutatis mutandis* this interpretation must apply to the effect on imports. The criterion is therefore what would happen in the *absence* of a subsidy. While the Panel agreed that in most cases such a judgment cannot be reached only by reference to statistics, nevertheless, a statistical analysis helps to discern the trends of imports and exports and may assist in determining the effects of a subsidy. The Panel considers it

¹²See also discussion of the drafting of this note at EPCT/A/PV/20, p. 34-36, EPCT/A/PV/24, p. 2-3.

¹³E/CONF.2/C.3/51, p. 4.

¹⁴L/3464, adopted on 2 December 1970, 18S/97, 100, para. 10.

¹⁵L/4508, adopted on 16 June 1977, 24S/134, 138, para. 15.

¹⁶New York Report, p. 26.

¹⁷GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 44.

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”.¹⁸

This finding was referred to in the 1990 Panel Report on “EEC - Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins”.¹⁹

The Panel Report on “United States Tax Legislation (DISC)” notes: “The Panel considered that, as it had found the DISC legislation to constitute an export subsidy which had led to an increase in exports, it was also covered by the notification obligation in Article XVI:1”.²⁰

(5) “it shall notify the CONTRACTING PARTIES in writing about the extent and nature of the subsidization”

In 1950 the CONTRACTING PARTIES made arrangements for the reporting of existing subsidies and for the notification of modifications therein and of new measures of subsidization.²¹ These arrangements were confirmed in the Report of the Review Working Party on “Other Barriers to Trade”.²² The questionnaire now used for the reporting of subsidies was established in 1960.²³ Procedures for Notifications and Reviews under Article XVI:1, which were adopted in 1962, provide for a new and full notification every third year and, in the intervening years, for a notification of the changes that have occurred.²⁴

The 1961 Report on “Operation of the Provisions of Article XVI”, examining the kinds of notifiable subsidies, the scope of the notification requirement and the adequacy of notifications received, noted:

“The rôle 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, 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”.²⁵

The question of notification of subsidies has also been examined at a number of meetings of the Committee on Subsidies and Countervailing Measures. The 1986 Report of the Committee on Subsidies and Countervailing Measures refers to a Note by the Secretariat reproducing all decisions by the CONTRACTING PARTIES with respect to notifications under Article XVI:1 of the General Agreement, and notes: “The decisions reproduced in this note are binding on all contracting parties and should be used as guidelines in the preparation of notifications under Article XVI:1”.²⁶

See also the general notification obligations in paragraphs 2 and 3 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979, which appear *in extenso* in the section on “Notification in GATT” under Article X.

¹⁸L/1160, adopted on 24 May 1960, 9S/188, 191, para. 10.

¹⁹L/6627, adopted on 25 January 1990, 37S/86, 131, para. 154.

²⁰L/3851, adopted on 7-8 December 1981, 23S/98, 114, para. 77.

²¹II/19.

²²L/334, adopted on 3 March 1955, 3S/222, 225 para. 16.

²³9S/193.

²⁴11S/58. The most recent full notifications under this procedure appear in the addenda to L/7162 of 11 January 1994 (updates in addenda to L/7375 of 11 January 1994 and L/7611 of 11 January 1975).

²⁵L/1442 & Add.1-2, adopted on 21 November 1961, 10S/201, 206, para. 19.

²⁶L/6089, 33S/197, para. 13, referring to SCM/W/98.

(6) “estimated effect”

The New York Report notes that the Drafting Committee changed the words “anticipated effect” to “estimated effect” “in order to remove the possible impression that the effect of a subsidy on export trade could be accurately predicted”.²⁷

(7) “serious prejudice to the interests of any other contracting party is caused or threatened”

The report of the Preparatory Committee on its discussions at London on the ITO Charter notes that, in revising the US Draft Charter, “Wherever the Draft Charter has words such as ‘injury to the trade of a member’, it was thought advisable to say ‘prejudice to the trade of a member’. It was felt that this wording would in practice facilitate application”.²⁸

In the 1979 Panel Report on “European Communities - Refunds on Exports of Sugar - Complaint by Australia”

“The Panel noted ... that the Community system for granting refunds on sugar exports and its application had contributed to depress world sugar prices in recent years and that thereby serious prejudice had been caused indirectly to Australia, although it was not feasible to quantify the prejudice in exact terms.

“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”.²⁹

In the 1980 Panel Report on “European Communities - Refunds on Exports of Sugar - 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”.³⁰

(8) “shall, upon request, discuss with the other contracting party or parties concerned”

The Report of the Working Party in 1948 on “Modifications to the General Agreement” notes that the Working Party agreed not to amend Article XVI:1 to incorporate the changes made to the corresponding Charter Article at the Havana Conference, *inter alia* in view of the understanding that

²⁷New York Report p. 26.

²⁸London Report p. 16.

²⁹L/4833, adopted on 6 November 1979, 26S/290, 319, paras. (g) and (h).

³⁰L/5011, adopted on 10 November 1980, 27S/69, 97, paras. (f) and (g).

“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”.³¹

This understanding was confirmed in the Report of the Review Working Party on “Other Barriers to Trade”³².

The 1961 Panel Report on “Operation of the Provisions of Article XVI” notes:

“If a contracting party decides that it wishes to consult with another concerning a subsidy it may, depending on the circumstances, have recourse to the specific consultation procedures of Article XVI:1 or the provisions of Article XXII or Article XXIII. At the Review Session it was made clear that consultations under Article XVI:1 can be initiated by a contracting party which considers that serious prejudice is being caused or threatened without necessity for prior action by the CONTRACTING PARTIES ...”.³³

Regarding the interpretation of “upon request”, see also the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.³⁴

(9) “the possibility of limiting the subsidization”

The report of the Preparatory Committee on its discussions at London on the ITO Charter notes that “The word ‘limiting’ ... 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”.³⁵

A Memorandum by Denmark of 1957 on “Export of Subsidized Eggs and Cattle from the United Kingdom” noted *inter alia* that “serious prejudice is being caused to Danish interests by the British subsidization which, moreover, involves questions of principle bearing upon the cooperation envisaged within the framework of the General Agreement. The Danish Government therefore requests that discussions take place with the CONTRACTING PARTIES in accordance with Article XVI with a view to limiting the effect of the subsidization”.³⁶ Following these discussions, the United Kingdom took measures to prevent exports of subsidized eggs from the United Kingdom to traditional markets of Denmark and the Kingdom of the Netherlands.³⁷

In November 1980, the Council requested the EEC to discuss with the CONTRACTING PARTIES the possibility of limiting the EEC subsidization of exports of sugar. The Report of the Working Party on these discussions notes the view of Australia that “the intention of the final sentence of paragraph 1 of Article XVI was... to obtain a statement from the subsidizing contracting party of what action it intended to take to remove the serious prejudice or the threat of prejudice”³⁸ as well as the view of the EEC that as to “undertakings on the level of internal support prices for sugar or on the limitation of quantities of sugar eligible for export refunds ... contracting parties have no obligation under Article XVI:1 to make such undertakings”.³⁹ In Council discussion on this matter, the representative of the EEC stated that if, following consultations under Article XVI:1, the respective parties did not reach agreement, “there existed no other possibility under Article XVI:1” and “only other provisions of the General Agreement could be invoked, such as Article XXIII”.⁴⁰

2. Paragraph 2: “undue disturbance”

In the 1983 Panel Report on “EEC - Subsidies on Export of Wheat Flour”, which has not been adopted by the Committee on Subsidies and Countervailing Measures, the Panel concluded, *inter alia*, that

³¹GATT/CP.2/22/Rev.1, adopted on 1-2 September 1948, II/39, 44, para. 29(b).

³²L/334, adopted on 3 March 1955, 3S/222, 225 para. 15.

³³L/1442 & Add.1-2, adopted on 21 November 1961, 10S/201, 206, para. 20.

³⁴DS38/R, dated 11 February 1994, paras. 152-153.

³⁵London Report, p. 16, para. (d).

³⁶L/627.

³⁷10S/208.

³⁸L/5113, adopted on 10 March 1981, 28S/80, 83, para. 11.

³⁹*Ibid.*, 28S/85, para. 22.

⁴⁰C/M/143, p. 7.

“The Panel 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”.⁴¹

3. Paragraph 3

For a survey of the drafting history and interpretation of Article XVI:3 in GATT practice see a 1983 Note by the Secretariat.⁴²

(1) “primary product”

See the definition of this term provided in Interpretative Note 2 to Section B of Article XVI. Article XVI:3 and its Interpretative Note 2 were drawn from the provisions of Articles 27 and 28 of the Havana Charter; see the discussion of the Havana Charter in section III below. Articles 27 and 28 applied to subsidies on “primary commodities”, and were linked to the provisions of Chapter VI on inter-governmental agreements on “primary commodities”. The definition of “primary product” in the present interpretative note to the General Agreement is the same as the definition of “primary commodity” in Article 56:1 of the Charter.

The 1958 Panel Report on “French Assistance to Exports of Wheat and Wheat Flour” considered wheat as well as wheat flour to be primary products.⁴³

A request of 24 July 1980 for consultations under Article XXII:1 of the General Agreement on “EEC - Export Refunds for Wheat Flour” states that “The United States considers that wheat flour is a non-primary product, on which no export subsidy may be maintained under Article XVI of the General Agreement”.⁴⁴ In the 1983 Panel Report on “EEC - Subsidies on Export of Wheat Flour”, which has not been adopted by the Committee on Subsidies and Countervailing Measures, the Panel examined the EEC subsidies in relation to Article 10 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, thereby treating wheat flour as a primary product in the sense of that Article. During the Panel proceedings, the United States had argued that wheat flour is a processed product and not a primary product within the meaning of the Code.⁴⁵

The 1983 Panel Report on “EEC - Subsidies on Export of Pasta Products”, which has not been adopted by the Committee on Subsidies and Countervailing Measures, noted 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”.⁴⁶

(2) “any form of subsidy which operates to increase the export of any primary product”

Interpretative Note 2 *ad* 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 essentially identical to the text of Article 27:1 of the Havana Charter, except for the addition of the final paragraph of the note, concerning operations wholly or partially financed out of government funds, which was drafted during the Review Session.

⁴¹SCM/42 (unadopted), paras. 5.6-5.7.

⁴²AG/W/4.

⁴³L/924, adopted on 21 November 1958, 7S/46, 52, para. 14.

⁴⁴L/5014.

⁴⁵SCM/42, para. 2.3.

⁴⁶SCM/43, para. 4.2.

The 1958 Panel Report on “French Assistance to Exports of Wheat and Wheat Flour” provides that “The Panel ... found that even if the French system had the characteristics described in paragraph 2 of [Interpretative Note 2 to Article XVI] the exemption provided from the provisions of paragraph 3 of Article XVI would be precluded if operations under such a system were ‘wholly or partly financed out of government funds in addition to funds collected from producers in respect of the products concerned’”. The Panel further found that the operation of the French system involved financial contributions from the government since part of the export losses was covered by Government funds. 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”.⁴⁷

(3) “more than an equitable share of world export trade”

The last sentence of Article XVI:3 was based on Article 28 of the Havana Charter, the text of which appears in section III below. Concerning the drafting of this text and the first interpretative note to Article XVI:3 in the Review Session Working Party on Other Barriers to Trade, the Report of the Working Party notes:

“A number of under-developed countries raised the question of whether the criterion concerning an ‘equitable share’ would prevent an exporting country which had no exports during the previous representative period from establishing its right to obtain a share in the trade of the product concerned. Accordingly, the Working Party adopted an interpretative note proposed by the representatives of Brazil and Turkey to cover the case.

“The Working Party also 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”.⁴⁸

The 1958 Panel on “French Assistance to Exports of Wheat and Wheat Flour” examined a complaint by Australia that as a result of subsidies granted by the French government on exports of wheat and wheat flour, French exports had displaced Australian trade in these products in Australian traditional wheat flour markets. The Panel found that the operation of the French price equalization scheme did result in the grant of subsidies under Article XVI:3 (see above). It then considered whether this had resulted in France obtaining more than an equitable share in world export trade for these products inconsistent with Article XVI:3. The Panel Report provides as follows:

“... The Panel noted that there was no explicit definition in Article XVI of what constituted an ‘equitable’ share of world export trade in these products. It was 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 in ‘world’ export trade of a particular product and not to trade in that product in individual markets.”⁴⁹

“The Panel noted that French exports of wheat and wheat flour began to rise in 1954 in absolute quantity to levels very substantially exceeding the quantities exported in any year since 1934 and have since remained considerably higher than in pre-war or early post-war years. This increase in the absolute quantities of wheat and of wheat flour exported by France also represents an increase in France’s share of world exports, especially as regards wheat flour. ... French exporters have been able to quote prices for wheat flour lower than those quoted by other exporters ... Moreover, judging from export unit values, the price charged by French exporters for wheat flour has in recent years barely exceed that charged for wheat ... In these

⁴⁷L/924, adopted on 21 November 1958, 7S/46, 51-52, paras. 8, 13, 14.

⁴⁸L/334, adopted on 3 March 1955, 3S/222, 226, para. 18.

⁴⁹L/924, adopted on 21 November 1958, 7S/46, 52, para. 15.

circumstances, it is reasonable to conclude that, while there is no statistical definition of an 'equitable' share in world exports, 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".⁵⁰

The Panel then examined French trade in particular markets (Sri Lanka, Malaysia and Indonesia) to consider whether French export subsidies had caused injury to Australia's normal commercial interests, and whether such injury represented an impairment of benefits accruing to Australia under the General Agreement. The Panel concluded that

"While other suppliers of wheat flour have recently begun to play a larger part in the Southeast Asian markets, and although it is difficult to estimate to what extent such incursions as these are displacing traditional exporters, it is nevertheless clear that French supplies have in fact to a large extent displaced Australian supplies in the three markets.

...

"Since it is obviously more profitable to export wheat flour rather than wheat, Australia has suffered a direct damage which could be evaluated by applying the price difference between wheat flour and wheat to the quantity of Australian exports that were displaced by French exports. It would, however, be difficult to assess this displacement quantitatively with any precision. In addition to this direct damage, there were other incidental adverse effects upon Australia which cannot be measured ...⁵¹

"The Panel then directed itself to the question of whether the damage apparent in recent years was likely to recur or be prolonged. ...

"Although the Panel recognized that the French Government's policy [to reduce subsidies] would tend to reduce the effects of the system on world trade, it considered, nevertheless, that the operation of the system was such that when climatic circumstances were favourable there might be substantial quantities of wheat in excess of normal consumption requirements. ... Also experience has shown ... there was no inherent guarantee in the system that it would operate in such a manner as to conform to the limits contemplated in Article XVI:3".⁵²

The 1967 Report of the Working Party under Article XXII:2 on "United States - Subsidy on Unmanufactured Tobacco" contains a discussion of the concept of "equitable share", particularly in relation to the trade of a less-developed country.

"The representative of Malawi stated that ... the concept of equitability in this context ... did not refer to the maintenance by the subsidizing contracting party of a predetermined proportionate share of a growing world market ... in view of the provisions of an Interpretative Note to paragraph 3 which allowed for the entry of new exporters, there were grounds for maintaining that 'equitable shares' could vary ...

"The representative of the United States said that ... the United States Government shared the view of the Malawi Government 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".⁵³

In the 1979 Panel Report on "European Communities - Refunds on Exports of Sugar - Complaint by Australia",

⁵⁰*Ibid.*, 7S/53 paras. 17-19.

⁵¹*Ibid.*, 7S/54-55, para. 23(c), 23(e).

⁵²*Ibid.*, 7S/55-56, paras. 24-25.

⁵³L/2925, adopted on 22 November 1967, 15S/116, 122-123 paras. 21-22.

“The Panel considered that its examination should be based not on the concept of ‘free market’ introduced by Australia in presenting its contentions but on the concept of ‘world export trade’ mentioned in Article XVI:3 of the General Agreement the Panel did not consider it necessary for the purpose of determining whether a market share was a ‘more than equitable share of world export trade’ to establish market shares in relation to concepts other than those of total world exports, taking into account the fact that a consideration of shares of the free market involved methodological difficulties that would make any comparison difficult.”⁵⁴

“The Panel noted that no definition of the concept ‘equitable share’ had been provided, and 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.”⁵⁵

“The Panel was of the opinion that the term ‘more than an equitable share of world export trade’ should include situations in which the effect of an export subsidy granted by a signatory was to displace the exports of another signatory, bearing in mind the developments in world markets. 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 should be taken into account in determining what would be ‘more than an equitable share of world export trade’.”⁵⁶

The Panel Report on “European Communities - Refunds on Exports of Sugar - Complaint by Brazil” examined a complaint submitted under Article XXIII. The Panel report provides:

“The Panel noted that no complete definition of the concept ‘equitable share’ had been provided, and neither had it in the past been considered absolutely necessary to have an agreed precise definition of the concept. 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.”⁵⁷

The Report analyses the concept “more than equitable share” in terms of, inter alia, market shares, displacement, “special factors” such as the entry into operation of export quotas under the International Sugar Agreement (1977) as well as other special trading arrangements, and the effects of the operation of Community regulations.⁵⁸

See also the provisions of Article 10 of the 1979 Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, which provides in paragraph 2:

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

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

“(b) with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining ‘equitable share of world export trade’.”⁵⁹

⁵⁴L/4833, adopted on 6 November 1979, 26S/290, 307, para. 4.9.

⁵⁵*Ibid.*, 26S/308, para. 4.11.

⁵⁶*Ibid.*, 26S/310, para. 4.17.

⁵⁷L/5011, adopted on 10 November 1980, 27S/69, 88, para. 4.6.

⁵⁸*Ibid.*, 27S/88-96, paras. 4.6-4.31.

⁵⁹26S/56, 69.

(4) “previous representative period”

The term “previous representative period” is also used elsewhere in the General Agreement. See discussion of base periods under Articles XI:2, XIII:2(d) and XXVIII.

The 1958 Panel on “French Assistance to Exports of Wheat and Wheat Flour” made no specific reference to “previous representative period” in terms of Article XVI:3. It reviewed trade statistics from the pre-war (1934-1938) and post-war (1948-1958) periods, including statistics available for part of the year in which the Panel had been established.⁶⁰

In the 1979 Panel proceeding on the complaint of Australia concerning “European Communities - Refunds on Exports of Sugar”, the appropriate “previous representative period” was at issue. The representative of Australia argued that its complaint concerned the post-1975 period (i.e. 1976 to 1978, preliminary data only being available for 1978) and that the entire period 1969-1975 should be considered as a “previous representative period”. Reference was also made to the “precedent of the Canadian lead/zinc case” interpreting Article XXVIII, in which case “the Panel did not consider that full statistics for the applicable base period had to be available at the very beginning of the negotiations, provided the data became available later on in the negotiations and that their submission was not unduly delayed”.⁶¹ “The representative of the European Communities considered that the years chosen as ‘previous representative period’ should reflect, if possible, a normal market situation ... one suggestion would be to compare the average for the years 1972-1974 with that for 1975-1977 ... the provisions of Article XVI:3 must be understood to mean that estimates for recent periods, forecasts or projections for future periods of whatever duration must not be used”.⁶² The Panel findings provide as follows:

“The Panel noted that the Australian complaint referred to the post-1975 period. ... In view of the difficulties involved in selecting what could be considered to be the ‘previous representative period’, the Panel felt it necessary to consider various alternatives and to make a set of comparisons”.⁶³

The Panel Report on “European Communities - Refunds on Exports of Sugar - Complaint by Brazil” notes the suggestion by Brazil to compare shares in two periods, 1973-75 and 1976-78.⁶⁴ The EC had proposed that the two reference averages be those for 1972-74 and 1975-77 and that the year 1978 be considered separately.⁶⁵ 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 fairly similar.⁶⁶

The 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement provides in paragraph 2(c) of its Article 10 that for purposes of Article XVI:3 of the General Agreement and paragraph 1 of Article 10, “‘a previous representative period’ shall normally be the three most recent calendar years in which normal market conditions existed”.⁶⁷

(5) “special factors”

The 1979 and 1980 Panel Reports on the complaints of Australia and Brazil respectively concerning “European Communities - Refunds on Exports of Sugar” took note of, as “special factors” affecting world sugar trade, the coming into operation of the 1977 International Sugar Agreement, in which Australia and Brazil were members but the EEC was not.⁶⁸

⁶⁰L/924, adopted on 21 November 1958, 7S/46, 52, paras. 15-17.

⁶¹L/4833, adopted on 6 November 1979, 26S/290, 298, paras. 2.22-2.23; reference is to the 1978 Panel Report on “Canada - Withdrawal of Tariff Concessions”, L/4636, adopted on 17 May 1978, 25S/42 (see material from this Report under Article XXVIII).

⁶²*Ibid.*, 26S/299, paras. 2.24-2.25.

⁶³*Ibid.*, 26S/307-308, para. 4.10.

⁶⁴L/5011, adopted on 10 November 1980, 27S/69, 74, para. 2.8.

⁶⁵*Ibid.*, 27S/74, para. 2.10.

⁶⁶*Ibid.*, 27S/89-90, para. 4.9.

⁶⁷26S/69.

⁶⁸26S/305, paras. 3.21, 4.13, 4.15; 27S/86, paras.3.21, 4.16, 4.17.

See also the 1983 Panel Report on “EEC - Subsidies on Export of Wheat Flour”, which has not been adopted.⁶⁹

4. Paragraph 4

Article XVI:4 was added as a result of discussions in the Review Session of 1954-55.⁷⁰ This paragraph does not specify a date for the entry into force of the first sentence and has entered into force only for the seventeen countries which have accepted the Declaration Giving Effect to the Provisions of Article XVI:4.⁷¹ See below.

(1) “shall cease to grant ... any form of subsidy on the export”

Article XVI:4 states in its first sentence that the cessation of certain export subsidies called for will apply “as from 1 January 1958 or the earliest practicable date thereafter”. The second sentence provides for a standstill on such export subsidies in the interim. The Interpretative Note to this provision states that “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”.

The Report of the Working Party in 1960 on “Provisions of Article XVI:4” reports on the consideration of what steps should be taken by the CONTRACTING PARTIES to implement this paragraph. It notes that “The only question which was ... left open in paragraph 4 of Article XVI was the date from which the prohibition on subsidies on any product other than a primary product should become effective. Since no agreement on that date has so far been reached by contracting parties, the standstill provision contained in paragraph 4 of Article XVI has ceased to be operative, but a number of contracting parties have agreed to extend it beyond that date by means of a declaration”.⁷² This same Working Party drafted the “Declaration Giving Effect to the Provisions of Article XVI:4”⁷³, which provides that the governments subscribing to it “agree that the date on which the aforementioned provisions of paragraph 4 of Article XVI come into force shall be, for each party to this Declaration, the date on which this Declaration enters into force for that party”.⁷⁴

Accordingly, the first sentence of Article XVI:4 entered into force on 14 November 1962 and is now in force for the seventeen contracting parties the governments of which have accepted this Declaration. Those contracting parties are Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, the United States and Zimbabwe.⁷⁵ The acceptance of the Declaration by the United States was made “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 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, consumed in the production of the processed product”.

The “standstill clause” contained in the second sentence of Article XVI:4, which had been extended by a number of declarations,⁷⁶ expired on 31 December 1967.

(a) Illustrative lists of export subsidies

The Report of the Working Party in 1960 on “Provisions of Article XVI:4” which prepared the Declaration Giving Effect to the Provisions of Article XVI:4 contains a “detailed list of measures which are considered as forms of export subsidies by a number of contracting parties ... the question was raised whether it was clear that

⁶⁹SCM/42.

⁷⁰See U.K. compromise proposal at W.9/240.

⁷¹9S/32.

⁷²L/1381, adopted on 19 November 1960, 9S/185, 186, para. 2.

⁷³9S/32.

⁷⁴9S/32, 33 para. 1.

⁷⁵Status of Legal Instruments, p. 11-4.1ff.

⁷⁶6S/24, 7S/30, 8S/25, 9S/33, 12S/50.

these measures could not be maintained if the provisions of the first sentence of paragraph 4 of Article XVI were to become fully operative".⁷⁷ With respect to this "1960 Illustrative List" of eight items, "The Working Party agreed that this list should not be considered exhaustive or to limit in any way the generality of the provisions of paragraph 4 of Article XVI. It noted that the governments prepared to accept the declaration ... agreed that, for the purpose of that declaration, these practices generally are to be considered as subsidies in the sense of Article XVI:4 or are covered by the Articles of Agreement of the International Monetary Fund".⁷⁸ The 1960 Illustrative List was based on a Decision of the Council of the Organization for European Economic Cooperation (OEEC) and was adopted in order to ensure that GATT obligations on export subsidies would match obligations under the OEEC.⁷⁹

The 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, Article 9 of which prohibits export subsidies on products other than certain primary products, contains an Annex with an Illustrative List of twelve items defined as export subsidies subject to this prohibition.⁸⁰

At its meeting in May 1980 the Committee on Subsidies and Countervailing Measures which was established under this Agreement set up a Group of Experts on the Calculation of the Amount of a Subsidy which drew up guidelines on various issues for adoption by the Committee. See the discussion of these guidelines under Article VI.

(b) *Tax deferral*

The Panel on "United States Tax Legislation (DISC)" examined legislation providing for deferral of the corporate income tax payable on export profits as long as such profits were held in a Domestic International Sales Corporation (DISC). The Panel Report⁸¹, which was adopted subject to an understanding, provides:

"The Panel noted that the DISC legislation was intended, in its own terms, to increase United States exports and concluded that, as its benefits arose as a function of profits from exports, it should be regarded as an export subsidy.

"The Panel examined whether a deferral of tax was 'a remission' in terms of item (c) or 'an exemption' in terms of item (d) of the illustrative list of 1960.

"The Panel was not convinced that a deferral, simply because it was given for an indeterminate period, was equal to a remission or an exemption. In addition, it noted that the DISC legislation provided for the termination of the deferral under specified circumstances. The Panel further noted, however, that the deferral did not attract the interest component of the tax normally levied for late or deferred payment and therefore concluded that, to this extent, the DISC legislation constituted a partial exemption which was covered by one or both of paragraphs (c) and (d) of the Illustrative List".⁸²

After this and the panel reports referred to below on French, Belgian and Netherlands tax practices were circulated in November 1976, discussions continued for some time, both in the Council and in the context of the negotiation in the Tokyo Round of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII. The Illustrative List of Export Subsidies annexed to that Agreement includes various kinds of tax deferrals (see items (e) and (h)). In Note 2 to item (e) of the 1979 Illustrative List, "The signatories recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected".⁸³

⁷⁷L/1381, adopted on 19 November 1960, 9S/185, 186-187, para. 5.

⁷⁸*Ibid.*

⁷⁹L/1260 (Proposal by France identifying the source of the list as OEEC document C(59)202); discussion on adoption, SR.17/3.

⁸⁰26S/56, 80-83. Concerning Article 9 see page 461 below.

⁸¹L/4422, adopted on 7-8 December 1981, 23S/98.

⁸²23S/112-113, paras. 69-71.

⁸³26S/82. The note also states that "noting in this text prejudices the disposition by the CONTRACTING PARTIES of the specific issues raised in GATT document L/4422" [the panel report on US Tax Legislation].

(c) *Taxation of transactions outside the territorial limits of the exporting country*

In 1976, the three Panels on “Income Tax Practices Maintained by France”⁸⁴, “Income Tax Practices Maintained by Belgium”⁸⁵ and “Income Tax Practices Maintained by the Netherlands”⁸⁶ examined corporate income tax systems. In the case of France and Belgium the corporate tax system examined was based on the territoriality principle, which in general taxes income earned domestically but not income arising abroad; in the case of the Netherlands, in effect a credit was provided for Dutch tax on foreign income. The Panel found in each case that the tax principles as applied “allowed some part of export activities, belonging to an economic process originating in the country, to be outside the scope of ... taxes. In this way [these contracting parties] had foregone revenue from this source and created the possibility of a pecuniary benefit to exports in those cases where income and corporation tax provisions were significantly more liberal in foreign countries.

“... however much the practices may have been an incidental consequence of [the contracting party’s] taxation principles rather than a specific policy intention, they nonetheless constituted a subsidy on exports because the above-mentioned benefits to exports did not apply to domestic activities for the internal market. The Panel also considered that the fact that the practices might also act as an incentive to investment abroad was not relevant in this context.

“The Panel also noted that the tax treatment of dividends from abroad ensured that the benefits referred to above were fully preserved.

“In circumstances where different tax treatment in different countries resulted in a smaller total tax bill in aggregate being paid on exports than on sales in the home market, the Panel concluded that there was a partial exemption from direct taxes. [...] The Panel further concluded that the practices were covered by one or both items (c) and (d) of the illustrative list of 1960”.⁸⁷

Note 2 to item (e) of the Illustrative List of Export Subsidies annexed to the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII also provides as follows:

“The signatories reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm’s length. Any signatory may draw the attention of another signatory to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the signatories shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of signatories under the General Agreement, including the right of consultation created in the preceding sentence.

“Paragraph (e) is not intended to limit a signatory from taking measures to avoid the double taxation of foreign source income earned by its enterprises or the enterprises of another signatory.

“Where measures incompatible with the provisions of paragraph (e) exist, and where major practical difficulties stand in the way of the signatory concerned bringing such measures promptly into conformity with the Agreement, the signatory concerned shall, without prejudice to the rights of other signatories under the General Agreement or this Agreement, examine methods of bringing these measures into conformity within a reasonable period of time.”⁸⁸

⁸⁴L/4423, adopted on 7-8 December 1981, 23S/114.

⁸⁵L/4424, adopted on 7-8 December 1981, 23S/127.

⁸⁶L/4425, adopted on 7-8 December 1981, 23S/137.

⁸⁷*Ibid.*, at 23S/125, paras. 47-50 (France); 23S/135, paras. 34-37 (Belgium); 23S/145, paras. 34-37 (Netherlands).

⁸⁸26S/82.

At its meeting on 7-8 December 1981, the Council adopted the four Panel Reports on “United States Tax Legislation (DISC)” and on income tax practices in France, Belgium and the Netherlands on the following understanding:

“The Council adopts these reports on the understanding that with respect to these cases, and in general, economic processes (including transactions involving exported goods) located outside the territorial limits of the exporting country need not be subject to taxation by the exporting country and should not be regarded as export activities in terms of Article XVI:4 of the General Agreement. It is further understood that Article XVI:4 requires that arm’s-length pricing be observed, i.e., prices for goods in transactions between exporting enterprises and foreign buyers under their or the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm’s length. Furthermore, Article XVI:4 does not prohibit the adoption of measures to avoid double taxation of foreign source income.”

“Following the adoption of these reports the Chairman noted that the Council’s decision and understanding does not mean that the parties adhering to Article XVI:4 are forbidden from taxing the profits on transactions beyond their borders, it only means that they are not required to do so. He noted further that the decision does not modify the existing GATT rules in Article XVI:4 as they relate to the taxation of exported goods. He noted also that this decision does not affect and is not affected by the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII. Finally, he noted that the adoption of these reports together with the understanding does not affect the rights and obligations of contracting parties under the General Agreement”.⁸⁹

A communication from the United States of 20 April 1982 stated that “in the light of the Understanding adopted by the GATT Council when it adopted the panel reports on DISC and the tax practices of Belgium, France and the Netherlands, the United States does not believe that the DISC is a subsidy”.⁹⁰ At the July 1982 meeting of the Council, the Chairman stated that “it was the opinion of the majority of the Council members that the United States should take appropriate action to ensure that the DISC legislation was brought into conformity with the General Agreement”.⁹¹ In July 1984 the United States announced enactment of a statute replacing the DISC tax provisions with Foreign Sales Corporation provisions.⁹²

(d) *Export inflation insurance schemes*

The 1977 Report of the Working Party on “Export Inflation Insurance Schemes” discussed certain export inflation insurance schemes of contracting parties. Several members of the Working Party held the view that export inflation insurance schemes under examination were subsidies in contravention of Article XVI:4 and should be notified under Article XVI:1. Several other members, especially those operating such schemes, considered that schemes operating in long-term financial equilibrium were not subsidies, and did not believe that any indication of dual pricing had been shown. The Working Party could not reach consensus on whether exchange rate guarantee schemes fell under its terms of reference.⁹³

The 1979 Panel on “Export Inflation Insurance Schemes” then examined, pursuant to Article XVI:5, and taking into account the 1977 Report, whether and under what conditions such schemes are export subsidies within the meaning of Article XVI:4. The Report of the Panel notes: “... The Panel agreed that a scheme charging premiums at rates which were ‘manifestly inadequate to cover its long-term operating costs and losses’ would be a subsidy within the terms of Article XVI:4”. The Report discusses criteria for evaluating whether such a scheme is an export subsidy.⁹⁴ Item (j) of the Illustrative List of Export Subsidies annexed to the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII classifies as an export subsidy “The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products

⁸⁹L/5271, 28S/114; see also Council discussion at C/M/154.

⁹⁰SCM/19.

⁹¹C/M/160 p. 9.

⁹²C/M/180 p. 5.

⁹³L/4552, adopted on 11 November 1977, 24S/116, conclusions 24S/125-126.

⁹⁴L/4813, adopted on 25 July 1979, 26S/330, 333, para. 14.

or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes.”⁹⁵

(2) “of any product other than a primary product”

“Primary product” is defined in Note 2 *ad* Article XVI, Section B, paragraph 2. The same definition of “primary product” appeared in paragraph 1 of Article 56 of the Havana Charter. See also the discussion of Article XVI:3 above.

Article 9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade provides that “1. Signatories shall not grant export subsidies on products other than certain primary products. 2. The practices listed in points (a) to (l) in the Annex are illustrative of export subsidies”. A footnote to Article 9 states that “for purposes of this Agreement ‘certain primary products’ means the 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’”.⁹⁶

The Panel Report on “EEC - Subsidies on Export of Pasta Products”, which has not been adopted by the Committee on Subsidies and Countervailing Measures, noted 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”.⁹⁷ See also the Panel Report on “Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC”, which has not been adopted by the Committee on Subsidies and Countervailing Measures.⁹⁸

As regards the possibility of subsidizing the primary product component of a processed product, the United States proposed at the Twelfth 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) 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.⁹⁹ The “Declaration Extending the Standstill Provisions of Article XVI:4 of the General Agreement on Tariffs and Trade”¹⁰⁰ 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, consumed in the production of the processed product”. This understanding was repeated by the United States when in 1961 it signed the “Declaration Giving Effect to the Provisions of Article XVI:4”.¹⁰¹ A discussion of the legal effect of this understanding appears in the Panel Report on “EEC - Subsidies on Export of Pasta Products”, which has not been adopted by the Committee on Subsidies and Countervailing Measures.¹⁰²

(3) “at a price lower than the comparable price charged for the like product to buyers in the domestic market”

In the three 1976 Panel Reports on income tax practices maintained by France, Belgium and the Netherlands, which were adopted on 7-8 December 1981,

“The Panel noted that the contracting parties that had accepted the 1960 Declaration had agreed that the practices in the illustrative list were generally to be considered as subsidies in the sense of

⁹⁵26S/81.

⁹⁶26S/68.

⁹⁷SCM/43 (unadopted), para. 4.2.

⁹⁸SCM/85 (unadopted), dated 13 October 1987.

⁹⁹SR.12/22, p. 192-194.

¹⁰⁰6S/24.

¹⁰¹9S/32.

¹⁰²SCM/43 (unadopted).

Article XVI:4. The Panel further noted that these contracting parties considered that, in general, the practices contained in the illustrative list could be presumed to result in bi-level pricing and that this presumption could therefore be applied to the [French, Belgian and Netherlands'] practices. The Panel concluded, however, from the words 'generally to be considered' that these contracting parties did not consider that the presumption was absolute.

"The Panel considered that, from an economic point of view, there was a presumption that an export subsidy would lead to any or a combination of the following consequences in the export sector: (a) lowering of prices, (b) increase of sales effort, and (c) increase of profits per unit. Because [France, Belgium and the Netherlands] were an important supplier in certain export sectors it was to be expected that all of these effects would occur and that, if one occurred, the other two would not necessarily be excluded. A concentration of the subsidy benefits on prices could lead to substantial reductions in prices. The Panel did not consider that a reduction in prices in export markets needed automatically to be accompanied by similar reductions in domestic markets. The Panel added that the extent to which tax havens existed was well known and that they considered this some evidence of the extent to which bi-level pricing had probably occurred.

"The Panel therefore concluded that the ... tax practices in some cases had effects which were not in accordance with ... obligations under Article XVI:4".¹⁰³

Similar findings were made by the Panel on United States Tax Legislation (DISC).¹⁰⁴

In the 1979 Panel Report on "Export Inflation Insurance Schemes",

"The Panel noted the conclusions of the Panels on United States Tax Legislation (DISC), on Income Tax Practices Maintained by France, by Belgium and by the Netherlands, as presented to the CONTRACTING PARTIES, according to which the contracting parties which had accepted the 1960 Declaration 'considered that, in general, the practices contained in the illustrative list could be presumed to result in bi-level pricing, and considered that this presumption could therefore be applied to' the DISC legislation and to the French, Belgian and Netherlands' practices, while concluding, however, that those contracting parties did not consider that the presumption was absolute. The Panel held the view that the presumption mentioned above applied equally to practices which were not contained in the 1960 list but which had clearly been identified as export subsidies".¹⁰⁵

(4) Developing countries

The Report of the Working Party on the "Accession of Venezuela" discusses, *inter alia*, Venezuelan export subsidies and the view of certain members of the Working Party that Venezuela should undertake specific commitments to observe all of Article XVI, and to eliminate its export subsidies, especially in sectors which in their view could not be considered as "developing" within the meaning of Article XVIII or the Enabling Clause. "Some members expressed concern with respect to the proposal aimed at the progressive elimination of all export subsidies granted by Venezuela ... The concept of sectoral development would deny the rights and obligations provided by the General Agreement for certain industries of developing countries. These members recalled that subsidies were governed in the main by Article XVI which does not include the concept of sectoral development. In their opinion there were no economic, legal or practical grounds for accepting the early application of the concept of sectoral development for developing countries even though some discussions were proceeding in the Negotiating Group on Subsidies in the framework of the Uruguay Round".¹⁰⁶ See also Article 14 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII.

¹⁰³L/4423, 23S/114, 125-126, paras. 51-53; L/4424, 23S/127, 135, paras. 38-40; L/4425, 23S/137, 145, paras. 38-40; all adopted on 7-8 December 1981 with understanding, L/5271, 28S/114.

¹⁰⁴L/4422, 23S/98, 113, paras. 72-74. See also paragraphs 25-26 and 51-59 of this report for a discussion of whether the burden of demonstrating bi-level pricing lies with the complainant country adversely affected by subsidies.

¹⁰⁵L/4813, adopted on 25 July 1979, 26S/330, 332, para. 12.

¹⁰⁶L/6696, adopted on 11 July 1990, 37S/43, 62-63, para. 62.

5. Paragraph 5

In 1958 the CONTRACTING PARTIES appointed a Panel to undertake the preparatory work for a review envisaged in paragraph 5. The Panel submitted three reports which were adopted by the CONTRACTING PARTIES in 1960 and 1961, but the conduct of the review was postponed and has never taken place.¹⁰⁷

The GATT Ministerial Declaration of November 1982 provided for the establishment of a Committee on Trade in Agriculture to examine, *inter alia*, “The operation of the General Agreement as regards subsidies affecting agriculture, especially export subsidies, with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of the General Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties. Other forms of export assistance will be included in this examination”.¹⁰⁸

B. RELATIONSHIP BETWEEN ARTICLE XVI AND OTHER GATT PROVISIONS

1. Article II

The Report of the Review Working Party on “Other Barriers to Trade” provides that “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 negotiations should not conflict with other provisions of the Agreement”.¹⁰⁹ See also the discussion on “Subsidies in Negotiations” in the 1961 Report on “Operation of the Provisions of Article XVI,”¹¹⁰ the material on negotiations on non-tariff measures under Article XXVIII*bis*, the material on concessions on non-tariff measures under Article II, and the material on modification or withdrawal of such concessions under Article XXVIII.

2. Article VI

See under Article VI.

3. Article XXIII

See the material on Article XXIII:1(b), and on the relationship between Article XVI and XXIII, under Article XXIII.

4. Part IV

See under Part IV.

5. Protocol of Provisional Application

By virtue of the “Resolution of 7 March 1955 Expressing the Unanimous Agreement of the CONTRACTING PARTIES to the Attaching of a Reservation on Acceptance pursuant to Article XXVI”¹¹¹ and the Declaration of 15 November 1957 on “Statements which Accompanied the Acceptance of the Protocol Amending the Preamble and Parts II and III”,¹¹² Part II of the General Agreement as amended by the 1955 amendments (which were effected by this Protocol) applies to the fullest extent not inconsistent with “existing legislation” on the relevant date. See the chapter on provisional application of the General Agreement.

¹⁰⁷9S/188, 10S/201.

¹⁰⁸Adopted on 29 November 1982, 29S/9.

¹⁰⁹3S/225, para. 14.

¹¹⁰L/1442 and Add.1-2, adopted on 21 November 1961, 10S/201, 209, paras. 24-28.

¹¹¹3S/48.

¹¹²6S/13.

The three Panel Reports on income tax practices maintained by Belgium, France and the Netherlands note the argument by the United States that the 1955 amendments to the General Agreement (including Article XVI:4), and the 1960 Declaration giving effect to Article XVI:4, as well as the Standstill Declaration, meant that the contracting parties adhering to the 1960 Declaration had an obligation to cease granting any subsidies whether or not the subsidies were granted pursuant to legislation existing in 1947, unless a specific reservation was made. The Panel reports state in this respect:

“The Panel considered that the fact that these arrangements might have existed before the General Agreement was not a justification for them and noted that Belgium [France, Netherlands] had made no reservation with respect to the standstill agreement or to the 1960 Declaration”.¹¹³

C. EXCEPTIONS AND DEROGATIONS

Article XVI has been the subject of a waiver under Article XXV:5 in one instance: “United Kingdom: Special Problems of Dependent Overseas Territories of the United Kingdom”.¹¹⁴

D. AGREEMENT ON INTERPRETATION AND APPLICATION OF ARTICLES VI, XVI AND XXIII

The Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement was negotiated in the Tokyo Round of multilateral trade negotiations, and entered into force for the parties thereto on 1 January 1980.¹¹⁵ The preamble of this Agreement expresses the desire “to apply fully and to interpret the provisions of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade only with respect to subsidies and countervailing measures and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation”. See also the Appendix table of acceptances of the Tokyo Round agreements.

In Council discussion of Brazil’s request for a panel on “United States - Denial of Most-favoured-nation Treatment as to Imports of Non-rubber Footwear from Brazil”¹¹⁶, in relation to a measure concerning which Brazil had earlier pursued dispute settlement under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, the representative of Brazil stated that

“a contracting party could not be prevented from seeking a remedy before the GATT Council because it had also sought protection of its interests under a particular Code ... this would mean accepting that the Code Committees somehow bound the Council and the contracting parties, many of which were not signatories to the Codes. ... To lend further support to his arguments, he quoted from a letter of 11 April 1979 sent by the Chairman of the Tokyo Round sub-group on subsidies and countervailing measures to a certain number of negotiators, as follows: ‘The provisions of the Agreement on Subsidies and Countervailing Measures interpret and apply the provisions of the GATT in Article XXIII as among signatories to the Agreement with respect to disputes concerning subsidies and countervailing measures under the GATT and in this connection will be used by these signatories to resolve any such dispute. However, delegations pointed out that in their view rights and obligations of the contracting parties under Article XXIII of the GATT are not limited thereby.’ He recalled that several other Tokyo Round Codes contained similar provisions under which parties were to complete the dispute settlement procedure under the respective Codes before availing themselves of any rights under the General Agreement”.¹¹⁷

In the panel proceeding on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” the EEC argued that as between the parties that signed it, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII created an expectation as to the criteria that would be used to judge a complaint of non-violation nullification or impairment of tariff concessions. The Panel Report adopted in 1990 provides:

¹¹³Reports adopted on 7 December 1981, L/4423, 23S/114,126, para. 56; L/4424, 23S/127, 136, para. 43; L/4425, 23S/137,146, para.43.

¹¹⁴3S/21, 22.

¹¹⁵Text of the Agreement appears at 26S/56. On the drafting history, see documents listed in TA/INF/1/Rev.8, p. 45-50.

¹¹⁶C/M/248, p.9.

¹¹⁷C/M/248, p. 15.

“The Panel was established to make findings ‘in the light of the relevant GATT provisions’; it therefore does not have the mandate to propose interpretations of the provisions of the Subsidies Code which the Community invokes to justify its position. However, the following may be noted in this respect. ... The Panel noted that the purpose of the Subsidies Code is, according to its preamble, ‘to apply fully and interpret’ provisions of the General Agreement. In the view of the Panel this speaks in favour of interpreting Article 8:4 in conformity with the decisions of the CONTRACTING PARTIES rather than, as the Community suggests, revising these decisions in the light of a particular interpretation of a Code accepted by a portion of the contracting parties”.¹¹⁸

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The provisions on subsidies in the Havana Charter were in Articles 25-28; in the US-UK *Proposals* in Chapter III D-1; in the US Draft in Article 25; in the London and New York Drafts in Articles 30; and in the Geneva Draft in Articles 25-29.

Havana Charter text and the GATT: Although many of the articles in the General Agreement were adapted directly from the corresponding provisions in the Geneva Draft Charter, Article XVI in the 30 October 1947 text of the General Agreement was drawn only from Article 25 of the Geneva Draft Charter, and included only one paragraph, the present-day Article XVI:1. The Geneva Draft Charter Articles 26 through 29, which dealt in more detail with export subsidies, were omitted from the General Agreement.

Article 25 of the Geneva Draft Charter, with some changes, became Article 25 of the Havana Charter. The text of Charter Article 25 reads “... which operates directly or indirectly to *maintain or* increase exports of any product from or to reduce *or prevent an increase in* imports ...”, the italicized words having been added at Havana because “it was felt that the Geneva text 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”.¹¹⁹ Also, at the end of Article 25 the words “it is determined that serious prejudice” were changed in the Charter text to “a Member considers that serious prejudice” because “it was thought that this change was consistent with similar changes in Chapter VI [of the Charter] and would expedite procedure”.¹²⁰

The Havana Charter also included Articles 26 through 28. Paragraphs 1 and 2 of Article 26 provided:

“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 terms and conditions 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 these products shall be considered as a case under Article 25”.

Paragraph 3 of Article 26 provided for Members to give effect to the provisions of paragraph 1 no later than two years from the entry into force of the Charter; paragraph 4 permitted export subsidies “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”.

¹¹⁸L/6627, adopted on 25 January 1990, 37S/131.

¹¹⁹Havana Reports, p. 108, para. 13.

¹²⁰*Ibid.*, para. 14.

Articles 27 and 28 applied to subsidies on “primary commodities”, which were defined in Article 56:1 of the Charter. Article 27 provided an exception to Article 26 for certain price stabilization schemes, and other provisions linked to the Charter chapter on negotiation of commodity agreements, including a standstill on new or increased export subsidies on a commodity during negotiation of a commodity agreement. Article 28 provided as follows.

“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 make that expansion difficult.”

Amendments: At the Second Session of the CONTRACTING PARTIES, after the close of the Havana Conference, a Working Party considered which of the changes made at Havana should be taken into the General Agreement in advance of the anticipated supersession of Part II which would take place under Article XXIX upon entry into force of the Charter. It was proposed that the changes made at Havana to Article 25 be inserted in Article XVI; the Working Party “agreed that the differences between Article XVI of the General Agreement and Article 25 of the Havana Charter are not of a substantive nature”¹²¹ and the text was kept unchanged in light of understandings reached concerning the meaning of “increased exports” and concerning the prerequisites for consultation under Article XVI, noted above at pages 448 and 450 respectively. It was also proposed that Articles 26, 27 and 28 of the Charter be taken into the GATT. The 1948 Working Party Report on “Modifications to the General Agreement” notes in this connection:

¹²¹Working Party Report on “Modifications to the General Agreement”, GATT/CP.2/22/Rev.1, adopted on 1-2 September 1948, II/39, 44, para. 29.

“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 the light of Article XXIX, paragraph 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”.¹²²

At the Review Session in 1954-55, various proposals were made for amendment to Article XVI, including conforming the text to Article 25 of the Charter, and incorporating the text of Articles 26, 27 and 28 into the GATT.¹²³ The outcome is discussed in the Report of the Review Working Party on “Other Barriers to Trade”.¹²⁴ Paragraph 3 of Article XVI was based on paragraphs 1 and 4 of Article 28; paragraph 4 was based on paragraphs 1 and 3 of Article 26; the general Note *ad* Article XVI was taken from paragraph 2 of Article 26; the first paragraph of Note 2 *ad* Article XVI:3 was drawn from paragraph 1 of Article 27; and the definition of “primary product” in Note 2 *ad* Section B was taken from paragraph 1 of Article 56 in the Charter chapter on commodity agreements. Paragraph 2 as well as Note 1 *ad* Section B and the final paragraph of Note 2 *ad* paragraph 3 were originally drafted in the Review Session, and the final text of Article XVI:4 and its interpretative note emerged as a compromise proposal during final adoption of the Working Party’s report.¹²⁵ See the proposals and documents listed below under the Review Session. These amendments were effected through the 1955 Protocol Amending the Preamble and Parts II and III of the General Agreement, which entered into force on 7 October 1957 and is in force for all contracting parties.

As noted above on page 457, under the Declaration of 19 November 1960 “Giving Effect to the Provisions of Article XVI:4”,¹²⁶ the prohibition of certain export subsidies in Article XVI:4 entered into force on 14 November 1962 and is in force only for the seventeen countries which have accepted the Declaration. These countries are Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Switzerland, United Kingdom, United States and Zimbabwe. The “standstill clause” contained in the second sentence of Article XVI:4, which had been extended by a number of declarations,¹²⁷ expired on 31 December 1967.

¹²²*Ibid.*, II/43, para. 24. See discussion at GATT/CP.2/SR.5, p. 4-5; GATT/CP.2/SR.6, p. 4.

¹²³See Note on “Subsidies”, W.9/20 dated 18 November 1954, summarizing initial proposals.

¹²⁴L/334, adopted 3 March 1955, 3S/222. See also discussion on adoption of the amendments to Article XVI, in SR.9/41, SR.9/43, and SR.9/47.

¹²⁵See W.9/240 (compromise proposal by the United Kingdom delegation), and discussion and adoption at SR.9/41, SR.9/43, SR.9/47.

¹²⁶9S/32.

¹²⁷6S/24, 7S/30, 8S/25, 9S/33, 12S/50.

IV. RELEVANT DOCUMENTS*London*

Discussion: EPCT/C.II/37
 Reports: EPCT/30

New York

Discussion: EPCT/C.6/23, 24, 46, 105
 Reports: EPCT/34 (p.25)

Geneva

Discussion: EPCT/EC/PV.2/22
 EPCT/A/PV/22+Corr.1-5,
 23+Corr.1-2, 26+Corr.1-3
 EPCT/B/SR.10, 11, 22
 EPCT/TAC/SR.11
 EPCT/TAC/PV/27
 Reports: EPCT/124, 127, 130, 135, 180,
 186, 189, 212, 214/Add.1/Rev.1
 Other: EPCT/W/64, 72, 81, 140, 182,
 185, 186, 188/Rev.1, 190, 201,
 207, 220+Corr.1, 272, 280, 301,
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Havana

Discussion: E/CONF.2/C.3/SR.26, 27, 36
 Reports: E/CONF.2/C.3/51

CONTRACTING PARTIES

Discussion: GATT/CP.2/SR.6
 Reports: GATT/CP.2/22/Rev.1

Review Session

Discussion: SR.9/17, 23, 24, 41, 42, 43, 47
 Reports: W.9/177, 220, 231
 Other: GATT/174, 183, 184, 187, 197
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