AGRICULTURAL LIBERALIZATION: AN APPRAISAL OF THE PROVISIONS AND PRACTICE OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE IN THE CONTEXT OF EXPORT SUBSIDIES ON PRIMARY PRODUCTS

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Dissertation submitted to the University of Glasgow in part fulfillment of the degree of Master of Law.

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September 1984

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DEDICATION

To Helen, my wife, to whom this work is dedicated for her continual encouragement and support during this long period.

ACKNOWLEDGEMENTS

I would like to express my indebtedness to Dr J.A. Carty, Senior Lecturer of the Department of Public International Law, University of Glasgow, from whose sustained supervision, guidance, wide knowledge, valuable comments and experience I have greatly benefited in undertaking this research. Special thanks are due to Mr J.P. Grant, Head of the same Department for his encouragement to undertake this dissertation. A very special thanks to my sister-in-law, Dorothy Henderson, for her patience in waiting for the dissertation, correction of many grammatical errors and skill in typing. Last, but not least, many thanks to those officials whom listened patiently and provided valuable comments but whom I am unable to specifically name and thank.

PREFACE

This paper examines currently one of the most contentious provisions in international trade in agriculture: primary product export subsidies. The discussion is within the context of the General Agreement on Tariffs and Trade whereby I consider the provision which deals with this . In attempting to examine the export subsidy provisions of the General Agreement in a juristic study I consider two questions to measure the export subsidy provisions effectiveness. Firstly I consider the provisions nature and form so to understand the type of obligation entered into by the Contracting Parties.

Secondly, I consider the Contracting Parties utilization of export subsidies to see whether they honour the obligation and its effect on international agricultural trade.

The methodology is an analysis of the export subsidy provision in chronological order. It allows an overall appreciation of the structure finally chosen for the General Agreement, a method of comprehending the Contracting Parties view of the obligation and the elements which measure the obligation. This chronological approach also allows me discussion on the compatability of export subsidies with the aims of the General Agreement so that the paper

may comment on the structure for international trade in agriculture.

The analysis of the export subsidy provisions takes me back to an era in which agriculture received special treatment. I attempt to understand why this economic tool has been maintained as one of the prime national policies of many Contracting Parties although it is considered a major barrier to the principles of economic liberalism. The initial negotiations show the structure proposed to achieve a liberalization of agricultural trade and with the demise of the Havana Charter the only pillar really left to support such an aim is the discouragement of export subsidies in Article XVI:3 of the General Agreement and Article 10 of the Code on Subsidies. I discuss in very great detail the negotiations of the obligation so as to understand the nature of that obligation. Also, I discuss in great detail the elements which measure that obligation. This is an attempt to understand what the measure is supposed to achieve. The analysis of the measure of the obligation is extensive because from the form of the obligation it is difficult to unravel what it takes for an inequitable share to arise. Although the obligation lacks clarity of purposes and a precision in its language it has remained from the 1950's virtually unaltered. These negotiations show the conflicting approach not between North-South nations but traditional primary exporting nations and industrialized countries in the utilization of such measures. Contracting Parties of every hue use this form of intervention.

The paper then moves onto discuss types of intervention which have resulted in dispute settlement procedures under the General Agreement of Tariff and Trade. My analysis initially compares the position between the negotiations and the Panel's findings. This initial analysis also discusses the Panel's methodology in approaching complaints about export subsidy measures. Although support for the provision was well grounded in the initial complaints the results have been overstated. Latter analysis of Panel findings on complaints not only compares the negotiations with the findings but includes discussion on independent research on the primary commodity in question. That analysis shows up the problem of Article XVI:3 and Article 10 not being a norm capable of legally binding obligations. Since the norm is only a broad hortatory statement it requires not only further diplomatic negotiations but must accommodate the intervention which it sanctions. These latter Panel complaints question the possibility of Article XVI:3 and Article 10 to achieve a liberalization of international agricultural trade since the utilization of this type of intervention cannot be restructured under those provisions. This links to further discussion on whether liberalization can occur.

The paper finally questions whether agricultural liberalization can occur from such pillars as Article XVI:3 of the General Agreement and Article 10 of the Code on Subsidies by discussing a link. The

link is one of commodity surpluses generated by national autarkic policies which requires export subsidies to dispose of the surplus and results in trade restrictions. The trade restrictions affect particulary on the traditional primary product producers of all Contracting Parties and not the industrialized countries. This link is discussed and it does not lead to a conclusion that the pillar of Article XVI:3 and Article 10 achieve agricultural liberali ation but rather the Contracting Parties are still unable to deal in any framework with international agricultural trade. The operation of the export subsidies provisions of the General Agreement can provide a forum to establish an international framework but it cannot do so unless Contracting Parties wish it to occur. The effectiveness of the provision since it is a broad hortatory statement lies with the Contracting Parties.

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CHAPTER 1

The Havana Charter Negotiations on Export Subsidies

A. The Special Treatment of Agriculture

Agricultural trade has been singled out as deserving special treatment in the formulation of international trade rules. This discussion describes the reasons why agriculture received such special treatment. In this discussion I am relying heavily on commentators[1] who described the negotiations to the Havana Charter.

The inter-war years are described appropriately as the watershed years for agricultural special treatment. During the inter-war years a movement towards special measures of agricultural protection occurred[2]. Apparently this was not the case before the First World War where international trade in agricultural products was in the main not restrained by protection devises. An example is the cane and sugar beet trade which relied on the lowest cost to the consumer as the principle criteria for determining the supply of such a commodity. Cane and sugar beet has historically been one of the most important primary commodities traded internationally and so gives a good indication.

1. W.A.B. Brown: The United States and the Restoration of World Trade (1950); R. Gardner: Sterling-Dollar Diplomacy (1956); R.E. Hudec: The GATT Legal System and World Trade Diplomacy (1975); and C. Wilcox: A Charter for World Trade.
2. W.A.B. Brown supra p 39.

Brown noted that in a publication titled "A Post War Foreign Trade Program for American Agriculture", published by the United States Department of Agriculture in 1945, [illegible] the direction in which agriculture was moving as follows:

> "far reaching measures of government intervention were introduced in an effort to maintain or expand domestic production without regard to repercussions on other countries or on the world as a whole. In agricultural importing countries one strong motive for such policies was the desire for self sufficiency in basic foods incase of attack, and one result of this was to retard the production of protective foods in some countries ... most of the importing countries of continental Europe including France, Germany, Italy, Czechoslovakia, Sweden and Switzerland not only used tariffs to stimulate the production of agricultural staples in their relatively inefficient areas but also resorted to more rigid import limitations such as milling regulations, import quotas, licences, embargoes, and exchange discriminations. Some importing countries made less extensive use of direct trade restrictions, but protected their producers by other means which had a similarly restrictive effect on trade. The United Kingdom, for example, paid its farmers the difference between the market price and a goal price on the bulk of its marketing of grain and sugar. All such measures affected the exporting countries and encouraged

exchange depreciation and export subsidies on their part. Agricultural exporting countries also turned to agricultural price and income support measures which in some cases held domestic prices above world prices. Such support included, for example in Argentina, the offer of purchases of wheat, linseed and corn at fixed prices; in Brazil the cotton loan program; and in Australia the regulation of domestic price of wheat flour and the restriction of the quantities of domestic dairy produce and dried fruit salable in the home market. In some countries like New Zealand, government became monopoly buyers, reselling for export at a loss if this was necessary to maintain prices to producers".[3]

The movement towards protectionism was worldwide. We know that in Germany and Italy the policy of agricultural protectionism was the result of dictatorship which sought to retain a satisfied farmer. So the motive for those countries was political gain. Is this the motive for the governments of the United States and United Kingdom? In specific detail I will examine some of the measures introduced in the United States and the United Kingdom which brought about the special treatment.

3. supra p39-40.

In the United States agricultural production had expanded during the First World War to meet the drop of production in Continental Europe. With Continental Europe's production resuming normal levels in the 1920's the United States farmers found it increasingly difficult to dispose of their agricultural surpluses. Also the onset of the 1920's saw decline in agricultural prices which did not occur with industrial goods prices. American commercial policy was always characterized by tariffs and equality of treatment for foreigners[4] so the United States in order to protect agriculture and provide relief to farmers enacted protective tariffs through the Emergency Tariff of 1921, the Fordney-McCumber Act of 1922 and the Hawely Smoot Tariff in 1930[5]. Although the tariffs assisted United States farmers in their domestic market it did not assist them in their export markets or lead to a reduction of production.

During this period the United States administration were also actively lobbied by their farmers for assistance for their exports[6]. The various measures adopted by the United States administration of President Hoover included marketing measures and more importantly large scale American foreign lending through which the marketing organizations exported primary commodities. With the passage of the Hawely Smoot Tariff, the ending of large scale American foreign lending, the spread of protectionism across Europe and the onset of the depression; the disposal of American agricultural

4. C. Kreider: The Anglo American Trade Agreement (1943) p15.
5. see C. Kreider supra note 4 p17, pp219-236, and W.A.B. Brown supra note 1 pp21-36.
6. W.A.B. Brown supra note 1 p22.

surpluses was actute[7].

It is noticeable that the policy of the United States government in the 1920's did not include any form of production control, so impliedly we can conclude that the farmers were a very effective lobbying sector in the Administration. By the 1930's a production policy was inevitable with the actute problems facing the American farmer. The Roosevelt Administration therefore raised farmers returns by a combination of voluntary restraints on production coupled with cash payments to farmers, stronger import controls, export subsidies and a trade agreement program[8]. The reliance on production control and the export subsidies were the striking difference in that policy. The policies were enacted into the Agricultural Adjustment Act 1933 and the Soil Conservation Allotment Act 1936. The Agricultural Adjustment Act 1933 addressed the situation of a difference between the ... for a domestic market price and a world market price. If there was a difference those ... products exported would receive a subsidy. Section 12(b) of the Agricultural Adjustment Act 1933 provided that all funds appropriated under this Act, including all processing and related taxes, should be available (among other things) "for expansion of markets and removal of surplus agricultural products". In 1935 the authority to subsidize exports was expanded under Section 32 of the Agricultural Adjustment Act so that the Secretary of Agriculture could spend "30 per cent of the gross customs receipts of the country to encourage the export of

7. C. Kreider supra note 4 p220.
8. ibid p219-236.

agricultural commodities and to cover losses incurred in the export of those commodities". It was not only possible to subsidize the exportation of primary commodities but also such products as wheat flour and cotton textiles under Section 32 of the Agricultural Adjustment Act[9]. Under this legislation reportedly the items to receive export subsidies were wheat flour, cotton and cotton products, nuts, pears, prunes, butter and tobacco[10].

The first export subsidy occurred in 1933-34 on wheat, but only to limited markets. In 1936 the wheat export subsidy applied only to those exports to the Phillipines[11]. In 1938 a radical expansion occurred under the auspices of the United States Federal Surplus Commodity Corporation who bought wheat as a monopoly buyer and resold it to all exporters at a price which would ensure it moved abroad. The radicalization was that the scheme was extended worldwide rather than only selected markets[12]. Brown[13] notes that this export subsidy program continued for a reasonable duration, (occassionally it was suspended because of a domestic shortage of wheat either due to drought or that the surplus mountains had been disposed of). The export subsidy for wheat was defended on the grounds that practically every other wheat exporting country was using a subsidy program and that the United States Department of Agriculture thought it would be a convenient means of setting up an international wheat agreement[14].

9. ibid p220.
10. ibid p 220.
11. ibid p221.
12. ibid p221.
13. W.A.B. Brown supra note 1 p26.
14. C Kreider supra note 4 p225.

The second export subsidy program carried out by the United States executive was in cotton. In July 1939 an export subsidy of 1.5 cents per pound of cotton, later raised to 4 cents, and a similar subsidy on cotton products began. It was officially asserted that the purpose of this program was to "assure the United States its fair share of the world trade in cotton and to do so by restoring the normal competitive position of American cotton in world markets, the United States [having] no intention of seeking more than its fair share of cotton exports as measured by the traditional position which it has occupied in the cotton markets of the world".[15]

Within this paper mention must be made about the special measures of import restriction enacted in the United States as it puts into perspective the export subsidy program. Section 22 of the Agricultural Adjustment Act 1933 as amended in 1935 granted to the President authority to limit imports whenever any commodity was being imported in sufficient volume to interfere with the operation of any agricultural adjustment program. The only limitation imposed was that imports from one country could not be reduced to less than 50 per cent of the annual imports from that country for the period 1928-1933. This special piece of legislation will be mentioned in a later context.

The United States export subsidy policy was maintained after

15. ibid p26.

World War II yet the policy of acreage and production control was not. It was impossible to again seek a reduction in agricultural production after World War II because of the prominence of the farming sector in American politics. The agricultural policy after World War II was one of organised, sustainable and possibly unrealistic abundance[16].

The United Kingdom prior to the depression did not encourage domestic agriculture, with the exception of sugar and hops. Agriculture in the United Kingdom only provided $\frac{1}{3}$ of British food supply from 1924 to 1927[17]. The policy was to import cheap food rather than produce it. The United Kingdom government response to the depression was not to follow a relentless program of protectionism like in America because quite simply it did not have a surplus problem. It was not until the 1930's,when the Conservative Party was returned to power after electoral promises, did the United Kingdom government shift from this policy. The Conservative Party was concerned about the prosperity of the farmer. The policy shift was from free trade in agriculture to a protective system. The United Kingdom government introduced the Horticultural Products Act 1931 which provided a protection for domestic producers of fresh fruits, vegetables and flowers by the imposition of high tariffs.

16. W.A.B. Brown supra note 1 p23.
17. C. Kreider supra note 4 p108.

This abandonment of free trade was embodied by the preferences in the Ottawa Agreement Act 1932 between the United Kingdom and its Dominions. It established an elaborate and reciprocal system of trade preferences. Agricultural commodities of the Commonwealth were, for the most, exempt from duty on entering the United Kindgom while the United Kingdom government undertook to maintain duties at specified rates on food imports from foreign countries. It provided inequality of treatment to non-commonwealth producers. Finally the last instrument of protectionism was the Agricultural Marketing Act 1933 which provided for

(1) the imposition of quotas on imported primary products, and

(2) steps for the efficient reorganization of the industry by means of agricultural marketing schemes.

An export subsidy scheme was promoted in the United Kingdom. R.J. Hudson, the Minister of Agriculture, backed by the landed interests in the Conservative Party urged for agricultural expansion, even if it required resort to export subsidies[18]. The justification put forward for an export subsidy policy was national security. No legislation was promoted to effect an export subsidy scheme.

The special treatment given to agriculture in international trade is the result of the political, social and economic instability of the inter-war period. This brief analysis of the legal instruments which effected the special treatment for agriculture does allow me to draw conclusions. The United Kingdom

18. R. Gardner supra note 1 p34.

and the United States moved in the same direction - towards protectionism. Both cited the prime motive to be maintaining or raising the income of farmers and the rural population generally.

Is the utilization of export subsidies on agricultural products a legitimate response for such motives? I consider the utilization of export subsidies were not necessary to maintain or raise the income of the farmers and rural population. Tariffs in the United States and the United Kingdom did ensure for domestic producers protection against foreign imports and a rise of their income. With regard to the motive of self sufficiency and security of supplies export subsidies does not assist those objectives. The utilization of export subsidies was required only to move the actute surpluses. The motivation for this in the United States was the Administration not wishing to alienate its farming sector. Therefore political gain was the prime motive for export subsidy schemes in the United States as well as in Germany and Italy. One must also suspect that the concern for moving surpluses abroad had to do with receiving valuable foreign exchange. The commentators[19] do not at any point justify the moving of agricultural surplus by the policy of export subsidies, rather it is described as a short term measure until an alternative could be found[20]. The problem is that those export subsidy programs initiated to

19. W.A.B. Brown supra note 1 and C. Kreider supra note 4.
20. C. Kreider op. cit. p225.

overcome the fall in agricultural prices internationally become permanently integrated into the general fabric of society and on the whole have remained.

When it came to collaboration between the United Kingdom and the United States on international financial problems, during World War II, proposals to create an international trade policy after the war were considered. It was part of a larger effort to prevent a recurrence of the unstable world policies which had plagued the 1930's. The United States in the Anglo-American negotiations adhered to a policy of economic liberalism which was enunciated as foreign trade should be handled by free enterprises without government control. It was considered that agriculture, industry and monetary policies must be consistent with the requirements of economic liberalism[21]. The United States also had a moralistic approach to international trade policy. They considered a "free trader is an individual who believes that tariff protection is sufficient and that duties should be fairly stable and should be subject to the most favoured nation principle"[22]. So certain measures like tariffs were labelled as "fair" trade policy - for they worked in the price mechanism. On the other hand quantitative regulations were considered "unfair" because they were based on direct government intervention. This approach was reflected in the Atlantic Charter 1941 and the Mutual Aid Agreement 1942 where both countries agreed to move away from a protectionist stance to a multilateral one. Article VII of the Mutual Aid Agreement reflected the moralistic approach to free trade by stating definitive rules on, interalia, the reduction

21. K. Knock: International Trade Policy and the GATT 1947-1967 (1969) p7.
22. ibid p8.

of tariffs and other barriers and the elimination of all forms of discriminatory treatment. The extent to which Article VII objectives were to be tested concerns us in only two ways. First, there would be a process of tariff and preference bargaining with the results imbodied into a General Agreement on Tariff and Trade. Lastly, there were negotiations to complete a Charter of the International Trade Organization with a campaign to win approval of the International Trade Organization in both countries[23]. In the negotiations for agriculture, Brown[24] noted, that both the United Kingdom and the United States realised the problem of cyclical price fluctuations and high cost capacity would again cause world surpluses and unstable prices in primary commodities. Voiced by the United States was a concern that in accordance with the principles of economic liberalism all forms of government intervention had to be eliminated in the trade rules and if such intervention had to be tolerated it was to be within very restrictive constraints[25] so that the instability within the inter-war years could not occur again.

23. R. Gardner supra note 1 p159.
24. W.A.B. Brown supra note 1 pages 50 and 55.
25. K. Knock supra note 21 pages 33-34.

B. The Proposals for the I.T.O. Charter

Although special treatment in agriculture had occurred in the national policies of many countries during the inter-war years the intention of United Kingdom and the United States in the reconstruction of international trade in the post World War II years was that all international trade should be on the same footing. Gardner states that in the informal negotiations no special let out had been agreed upon for international trade in Agriculture[26]. Yet in the joint statement in 1945 under the title "Proposals for an International Conference on Trade and Employment" it provided an exception for agricultural trade internationally[27]. The insistance on an exception for agricultural trade came from the United States Department of Agriculture[28]. The Proposals were short in length, used very general language and were designed to reverse the trend of economic isolation. It affirmed the principle of an unconditional most favoured nation treatment and required rules of conduct on indirect protection. The perceived problem for international agricultural trade in the Proposals was with quantitative restrictions from which it was exempt.

The Proposals led to the formulation of a Preparatory Committee for United Nations Conference on Trade and Employment in

26. R. Gardner supra note 1 p149.
27. W.A.B. Brown supra note 1 p56.
28. R. Gardner supra note 1 page 149.

February 1946. A "Suggested Charter" was submitted by the United States Secretary of State Clayton. Secretary of State Clayton said in the foreword to the "Suggested Charter" that it was put forward simply as a basis for discussion and was designed to clarify possible obscurities in the 'Proposals'[29]. The "Suggested Charter" reflected the United States position towards trade policy for industry and agriculture. With respect to trade policy for industry it was typically a free trade approach, i.e. wanted trade to be competitive, efficient, progressive, non-discriminatory and non-political. However with respect to agriculture its stance was one of limited government intervention in the market to meet its national needs.

The Commercial Policy Chapter of the "Suggested Charter" dealt with agriculture in two methods:

(1) the agriculture exception to the ban on quantitative restrictions and a section on export subsidies;

(2) commodity agreements.

The "Suggested Charter" had a sharp distinction between export subsidies, which consisted of special payments or bonuses by a government in the sale of a product abroad at a lower price than the home price. Therefore it would capture markets which could not be obtained under ordinary competitive conditions. The other type of subsidy consisted of special payments, again by governments which would have the effect of increasing exports or diminishing imports, but not result in a difference

29. Gardner op. cit. p14.

between the selling price of the product on the domestic or foreign markets. At the Preparatory Committee the latter were referred to as domestic subsidies. This is called the two-price system and suited the special American support programs. The position of the United States delegation was that domestic subsidies were preferable to import restrictions or tariffs. If they cause serious injury to other countries there should be consultation. A determination of injury was therefore required in the "Suggested Charter" before consultation became obligatory[30]. Nothing beyond consultation was provided in the case of domestic subsidies.

The United States proposal[31] provided a ban on export subsidies for agricultural and non-agricultural commodities alike. In the consideration of the products export price, allowance had to be taken for differences in conditions of sale, taxation or other differences affecting price comparability. The "Suggested Charter" however provided an escape clause to suit the American dilemma with respect to agriculture. The "Suggested Charter" proposed that where a burdensome world surplus had developed or was likely to develop in a specific product, export subsidies were permitted. Those countries with a burdensome world surplus were initially required to consult on measures to increase consumption and, reduce production through the diversion of resources from uneconomic production. A commodity agreement was envisaged

30. According to Brown op. cit. p117-118 this was dropped in the Geneva draft.
31. U.S. Department of State Publication 2598, September 1946.

between the governments of those countries. However if this measure did not succeed or even appeared unlikely to succeed the obligation to notify, consult and refrain from subsidization was waived. The obligation in the United States draft was that domestic and export subsidies were required to be notified to the intended I.T.O. The escape clause was worded such that the obligation to consult on domestic subsidies was waived in a situation of world burdensome surplus.

Not withstanding the ban on export subsidies nor the waiver in the "Suggested Charter" the United States proposed that it was all subject to an undertaking that no one could use a subsidy to acquire a share of world trade in that product in excess of the representative period and account being taken of special factors. The United States draft provided that it was to be the member granting the subsidy whom would initially select the initial representative period and weigh the special factors. The member was only to consult promptly upon request in regards for an adjustment of the previous representative period and a re-evaluation of the special factors. The United States "Suggested Charter" envisaged all export subsidies should be eliminated after three years.

I consider the "Suggested Charter" proposals for export subsidies were not reconcilable with the espoused principle of economic

liberalism. The draft provision in recognising the reality of governments resorting to export subsidies in a situation of world surplus took account of how demand and supply in that primary commodity should be satisfied. The accounting of satisfying world requirements was by government intervention and no place existed for free competition, efficient production or non-discriminatory treatment towards such international trade. The satisfaction of world requirements was still left in the hands of governments of individual countries. Although the "Suggested Charter" did not expressly refer to primary products there can be no doubt that was the prime consideration of the United States in suggesting the proposal. According to Hudec[32], the United States considered that its problem with agricultural trade lay in the exception of where there was already chronic oversupply on world markets. Since the United States was subsidizing those exports then according to the escape clause it would be left to the United States to make the determination about meeting the requirement of more than an equitable share of world trade. So the subsidizing country was left to freely decide whether market conditions fitted the exception. Brown[33] says this was the major issue on export subsidies. Therefore the resolving of instability in international agricultural trade did not occur with the "Suggested Charter".

32. R.E. Hudec supra note 1 p15.
33. W.A.B. Brown supra note 1 p118.

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

At the London Conference in 1946, the Preparatory Committee considering the "Suggested Charter" were confronted on its primary commodity policy "with an effort by the Food and Agriculture Organisation to separate agricultural commodities from other commodities and commodity policy from trade policy by setting up a comprehensive buffer stock, surplus disposal and relief operation under a World Food Bank. It was the United States position that a common policy should apply to agricultural and non-agricultural commodities, and that commodity policy should be kept in relation with commercial policy under the I.T.O. This position was accorded general support by the Preparatory Committee".[34] The discussion in London was whether export subsidies were more harmful than production subsidies, the special problems with respect to primary products and income stabilization schemes, and the relation between subsidies and commodity agreements[35].

In relation to income stabilization schemes the Preparatory Committee accepted the proposal by New Zealand and other countries that domestic price stabilization schemes would be exempt from the definition of export subsidy so long as it did not result in export prices being lower than domestic prices. This was the main modification from the"Suggested Charter".

34. C. Wilcox: A Charter for World Trade (1949) p42.
35. United Nations Economic and Social Council, Report of the First Session of the Preparatory Committee of the Conference of Trade and Employment E/PC/T/C#/37 pp8-12.

At London, the special treatment for export subsidies in primary products became clear. The Preparatory Committee moved to eliminate the provision requiring members to consult on adopting production or consumption measures to deal with burdensome world surplus. The London draft provided instead that in any case where a member considered that its interest is seriously prejudiced by subsidization of a primary commodity or where a member cannot meet the time for eliminating its export subsidy, it would be deemed a "special difficulty". A special study was to be undertaken which could lead to a commodity agreement. However if this proved unsuccessful the obligation to notify, consult and refrain from subsidization would be waived. Therefore the drift in the negotiations for subsidies on primary products was to encourage inter-governmental commodity agreements.

The agriculture question was also an issue with respect to quantitative restrictions at the London Conference. The "Suggested Charter" proposed an exception to quota prohibitions for agriculture. This meant that the special exception of agriculture from quota prohibitions could be employed to shield a weak [agricultural system] from all competitive pressure. "This was particularly resented by less developed countries and other primary producing countries whom were themselves prohibited from using quantitative restrictions to protect their fledging industries, while industrial producers were allowed to use this devise to protect their local producers from the very type of imports most likely to be produced in less developed countries and primary producing countries"[36]. The

36. J.H. Jackson: World Trade and the Law of GATT (1969) p318.

United Kingdom supported those countries demands and pressed hard for the deletion of this reference. The United States would not move and its view prevailed.

D. Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, Lake Success, New York 1947 and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Geneva, 1947.

The Drafting Committee of the Preparatory Committee[37] made changes to the London Draft. Amongst the changes was the insertion of the words "directly or indirectly" as regards subsidies. This made it clear that the provision was not only confined to export subsidies per se in the trade of the product concerned[38]. Another change included a definition of the term "primary commodity". The main concern at the Lake Success meeting was to do with a "burdensome world surplus".

The Drafting Committee thought that where measures proved unsuccessful to deal with a burdensome world surplus the obligation to notify and consult should not be relinquished but that the obligation to eliminate export subsidies could be waived. The delegations of Canada and New Zealand reserved their position on this matter as they feared that this "might provide an escape for subsidizing

37. E/PC/T/34.
38. See Article 25, 26 and 28 of the Havana Charter and Article XVI GATT.

countries taking such an attitude that not agreement could be reached in which case they would be free to act as they wished without regard to their obligation"[39] to eliminate export subsidies. They considered the provisions for respective shares of trade to be open to abuse.

At the Second Session of the Preparatory Committee at Geneva Canada proposed that a member should not be allowed to regain its liberty to impose export subsidies on primary commodities except as a result of a determination by the Organisation that the subsidy was necessary, would not stimulate exports unduly and would not injure other members[40]. The United States on the other hand, proposed that the undertaking not to use subsidies to increase the member's share in world trade should apply to all subsidies and not export subsidies[41]. Other countries were not willing to give such an undertaking even if the United States accepted the Canadian proposal. Brown[42] considered this a manoeuver in a debate which was really concerned with the question of whether the Charter should deal more severely with subsidies chiefly employed by the United States (subsidies involving a two-price system). The United States position was

40. W.A.B. Brown supra note 1 p118.
41. ibid.
42. ibid.

that it could not go further than the London Draft in penalizing the particular form of subsidy used by itself. The other delegations pointed out that in the case of a burdensome surplus there was no limit in the London Draft on the extent to which importing countries could grant subsidies to maintain their production provided they did not export. Also if an export subsidy should occur as an adjunct of a price stabilization scheme it was permitted. In addition countries customarily exporting the bulk of their output of the production could at very little cost convert what was really an export subsidy into a domestic subsidy by subsidizing the entire output. All of these were subsidies used by other countries. They were subject only to consultation. In contrast a direct subsidy on exports only (the type used in the United States) was banned by the London Draft unless reinstated after efforts to reach a multilateral solution had failed. While attempts were being made to find a multilateral solution (preferably a commodity agreement) all countries were free to use subsidies to maintain or even increase their share in world trade, except countries using export subsidies. The United States[43] had accepted an obligation to refrain from using its type of subsidy till the multilateral effort had been given a fair trial. It would not agree to a further delay in order to obtain the consent of the Organization to a resumption of its liberty of action.

43. ibid.

Canada[44], vigorously supported by Brazil, insisted that the basic distinction between domestic and export subsidies was sound and should be maintained. Export subsidies, they maintained, were bad and gave rise to trade warfare. They gave an advantage to industrial countries since the countries most likely not able to afford to subsidize at all were exporters of primary commodities. Moreover when exports were only a small part of the total output it was easy to grant a very large export subsidy, whereas it was not so easy to subsidize the total output. These were the grounds put forward for a severe ban in the Charter on export subsidies by less developing countries and primary producing countries. The position of developing countries is worthwhile repeating again vis a vis the industrial countries of the North. The industrialised countries favoured domestic subsidies, per se, as a better means for economic development rather than quota restrictions or tariffs. Domestic subsidies were considered less objectionable to industrialized countries because inter alia, because the costs were more easily ascertainable, they were paid out of a general fund and the burden was more equitable[45].

The Committee tightened the waiver for export subsidies. The Geneva test provided that in the case of failure to work out a solution through the commodity agreement technique, a member desiring to continue a subsidy on a primary commodity in burdensome surplus should apply to the Organization for an extension. The

44. ibid.
45. C. Wilcox op. cit. p126 and W.A.B. Brown op. cit. p98-99

conditions under which the Organization would grant an extension were specified. Though prior approval was somewhat tempered it was prior approval nevertheless and on this point the United States entered its only formal reservation to the Geneva Draft[46]. The period of grace for the elimination of export subsidies was also shortened from three to two years.

E. Havana Charter: Final Act of the United Nations Conference on Trade and Employment, Havana, 1948.

The United States delegation considered that the defeat it suffered at the Geneva session would have great repercussions in Congress and therefore attempted at Havana to reverse the Charter section on export subsidies for primary commodities. The main feature of its proposal was a complete exemption for export subsidies on primary commodities from the limitation of the Charter. A representative of the United States Department of Agriculture justified this proposal in the Senate as follows:

> "We know the great effort which our government has devoted to the breaking down of the barriers to trade throughout the world. We also know that price supports for farm commodities here in the United States also requires a certain degree of protection through tariff or other trade barriers. Without

46. ibid.

them foreign producers might flood our domestic markets with our government buying the domestic production. In addition it tends to become difficult to export farm products without an export subsidy. These trade barriers are in conflict - although not wholly irreconcilably - with our repeated declaration of a national policy which seeks international co-operation in reducing trade barriers. As long as this conflict exists the best hope of reconciling it without increasing the burden on the United States taxpayer is in the possibility that international agreements can be negotiated for individual commodities concerned. Such agreements could recognise the special problems of such commodities and, in effect, lift them out of general consideration of international trade practices for the duration of the agreement. In this way they could preserve the principle of international economic collaberation without sacrificing agricultural interests"[47].

This statement is excellent in confirming the conflict which existed in the negotiations for rules on international trade in agricultural goods. The idea of a multilateral treaty which allowed the free interchange of commodities was a reaction to the depression between the inter war period and the two world wars. It was called economic liberalism and was based on growth to bring global prosperity.

47. Statement by Carl C. Farrington, Chairman Price, Policy and Production Adjustment Committee and Assistant Administrator of Production and Marketing, March 1948.

The concept of economic liberalism was supported by the United States Department of State, who along with the British, were pushing for an International Trade Code of Conduct. Associated with economic liberalism were the concepts of "free enterprise" and "free trade". For "free trade" the United States advocated a policy identical to its trade policy of the 1930's - tariffs protection and duties should be stable and should be subject to the most favoured nation principle rather than free trade in the laissez faire sense. The United States Department of State considered "free trade" should be universal in all trade, i.e. agricultural, industrial and monetary and it should be handled by free enter-prise. Thus the great debate on how much government intervention there should be in global trade. The United States Department of State were proponents of there being no role for government intervention but were unable to carry this proposal for agricultural trade. The Americans could not present a uniform view on a code of conduct for agricultural and industrial commodities.

The above statement confirmed that in the United States the Department of Agriculture's view prevailed when it came to trade rules for agriculture. Remembering that the level of intervention in the United States for agricultural products was of a high order. As a result of the farming lobby in the United States the Department of State was not able to affect any change of its status quo.

The Department of State wished to build multilateral trade on liberal economic principles but its own policy on agriculture was based on protectionism. The United States Department of Agriculture, from the above statement considered government intervention should play the role rather than free enterprise. All the methods they suggested are decisions not to be made in the market place but in politics. So the proposal for agricultural trade to be entirely through commodity agreements was a volte-face to the principles of economic liberalism in the Charter. It shows the depth of influence agricultural interests in the United States had. It was vigorously attacked in the United States by the Department of State. The United States Department of Agriculture also argued that domestic policy was a sovereign affair of the United States. It is worthwhile to note here that the kind of economic liberalism advanced in the multilateral negotiations never commanded universal consensus. The fact that there would be a compromise in the provisions relating to primary commodities only meant that the forces favouring such rules were on the balance stronger than those opposing such rules.

According to Brown[48] the United States did not actively participate in the Havana debate . Canada, which had led the forces arrayed against the original proposals of the "Suggested Charter" offered a way out of the dilemma. Canada agreed to reconsider the whole section which provide an effective release for the subsidies desired by the United States, provided that the following principles were observed: the exception should not be so wide as to permit serious harm to the interests of other exporting countries, it should be so formulated as to facilitate resort to commodity agreement techniques, and there should be safeguards so that no export subsidy could be used to expand trade beyond the share of a country in a reasonably expected period. It was on these principles that a draft acceptable to the United States was drawn up.

As the preceding review of the Charters negotiation on primary commodities export subsidies has shown the provisions are compromises. The Charter embodies three ideas, firstly, subsidies in general are not the appropriate means of dealing with the special problems of international trade in primary commodities. Second, that any subsidy affecting international trade is a matter of international concern. Thirdly, that subsidies on primary products shall be subject to an international standard.

48. supra Brown p146 - 147.

Article 25 of the Havana Charter contains the obligation to notify subsidies in general and to discuss the possibility of limiting subsidization. Article 26 of the Havana Charter contains the provision for the general elimination of export subsidies as proposed in the "Suggested Charter" by the United States. It is Article 27 which addresses the point of special treatment for primary commodities.

Article 27:2 of the Havana Charter imposes the general obligation on members granting a subsidy to "co-operate at all times in efforts to negotiate" commodity agreement. The three permitted exceptions for which members can grant export subsidies are:

(a) where a non-member grants a subsidy which affects a members exports of that product, a member may subsidize their export to offset it: Article 26:4. This was identical to the provision in the Geneva draft.

(b) in a case where a member "considers that its interest would be seriously prejudiced by compliance with Article 26, or if a member considers that its interest are seriously prejudiced by the granting of any form of subsidy the procedures under Chapter VI may be followed". Under Chapter VI of the Havana Charter, which deals with commodity agreements, a member can be exempted provisionally from the general ban on export subsidies but is still subject to the obligation in Article 28: Article 27:3.

(c)/

(c) a member who consider their interest seriously prejudiced may apply to maintain export subsidies on primary commodities without prior approval or a determination of the Organization where Chapter VI procedure has failed or does not promise to succeed: Article 27:5. This was the waiver provision that altered considerably from the Geneva draft on burdensome world supply. It is still subject to Article 28.

In the case of these three permitted exceptions members were under an obligation to promptly give notification and enter into consultations with other members and to seek agreement not to use such subsidies to obtain more than an equitable share of the world market[49]. If no agreement was reached the Organization had the power to determine what constituted an equitable share and the member would have to conform to this determination.

The phrase "equitable share" was first used specifically in Article 28 of the Havana Charter. A similar concept referring to representative share had been present throughout the draft texts since the United States Suggested Draft[50]. I found no explanation for the use of "equitable" in Article 28 of the Havana Charter and I only presume that the concept was required to allow for fluidity in primary commodity trade on the world market. This would mean that the world market share is not as

49. supra. Article 28(1), (2) and (3): Article 27(3).
50. E/conf 2/C3/51 p111.

rigid, as possible with the interpretation of "representative share", thus allowing for developing countries to obtain a share in the world market for commodities.

Article 28 of the Charter outlines what the Organization can take into account in determining what constitutes an equitable share. In general it can take into account any factor which may affect the world trade in the commodity. In particular it specifies such factors as:

(1) members share of world trade in a representative period.

(2) whether a members share is so small that its effect is to be of minor significance.

(3) degree of importance of the external trade in the commodity to economy of member granting, and to members materially affected by it.

(4) existance of price stabilization schemes which do not involve an export subsidy within meaning of Charter.

(5) desirability of gradual expansion of production for export in areas to satisfy world market requirements in the most effective and economic manner.[51]

The scope of these exceptions was dependent on how "prejudice" is defined. "In all of the three permitted exceptions the definition embraced two kinds of injury, and the exception therefore was a very broad one. It could be resorted to by a member that considers its interests would be seriously prejudiced

51. supra. Art. 28.

by compliance with the obligation to use export subsidies and second, by a member that considers its interests are being seriously prejudiced by any form of subsidy including export subsidies granted by another member"[52].

The estimate of injury did not have to be submitted to the Organization[53]. If the export subsidy continued they were however subject to the general rule of consultation and specifically to the requirement that they may not be used to gain for any member using more than its equitable share in world trade.

Two types of subsidies were excluded by definition from export subsidies. The first type is the use of proceeds of taxes levied on domestic products, but not like products when exported to make payments to the producers in general of the products[54]. The second type is the domestic stabilization scheme[55] which was in the London draft. The latter was however subject to initial approval by the Organization and upon the failure of the Havana Charter was to become important.

Comparing the Suggested Charter and the Havana Charter provisions on export subsidies we notice changes to the form and nature of the obligation. The Havana Charter permitted more exceptions from the general rule and excluded by definition a particular kind of scheme. The structure remained similar, except for the waiver, of intergovernmental consultations, internal adjustments

52. Brown op. cit. p216.
53. supra. Article 28(1), (2) and (3) and Article 25.
54. Article 26(2) Havana Charter.
55. Article 27(1) Havana Charter.

and commodity agreements. As to the nature of the problem (resolving upon principles of economic liberalism satisfaction of world requirements in a situation of surpluses) I consider the Havana Charter did achieve results. By this I mean that the Organization parameters in the prior determination of what is an equitable share included concepts based on efficient production and non-discriminatory treatment. Clearly there was no place in international trade in agriculture for free enterprise but on the other hand constraints were placed upon governments. The accommodation of government intervention was upon the basis of prior approval from the Organization. So in international trade for primary products the obligation for attaining stability was taken out of the hands of governments.

F. General Agreement on Tariff and Trade 1947 and the Non-ratification of the Havana Charter.

The GATT negotiations were an extension of the ITO preparatory sessions. In those negotiations the effective power of the United States, the United Kingdom and France meant that they were able to make GATT's substantive obligations a bit more to their liking than the parallel Havana Charter. This is because GATT was only intended to deal with the reduction of tariffs. The United States was unhappy with the manner in which export subsidies were dealt with in the Havana Charter, so those obligations were excluded from the first working draft of the General Agreement[56].

Brazil and New Zealand objected to the omission of the export subsidy obligations at the Lake Success meeting in February 1947[57]. Chile in September 1947, at the Geneva meeting attacked the omission of these rules - the United States argued that export subsidies involve only third country competition and had no place in a single tariff agreement. The matter was re-opened briefly at the post Havana meeting in March 1948. There the United States took the position that there had been an understanding at Geneva not to include subsidy provisions until the ITO came into force[58]. The GATT general provisions were to

56. R.E. Hudec supra note 1 p50.
57. supra page 49 footnote 19.
58. ibid.

be "temporary" and would be suspended by the ITO Charter provisions. The most important reason why the export subsidy was not carried into GATT probably was that the United States delegates did not have the executive authority from the government to permit any undertaking with regard to export subsidies.[59]

The various dissatisfactions of small countries coalesced around the proposal to omit all of the ITO Commercial Policy obligations from GATT, except for the most favoured nation clause and a general nullification and impairment provision to protect tariff concessions. In the second post Havana conference those smaller countries, after considerable concessions, succeeded in incorporating a commercial policy section into GATT.[60]

The Commercial Policy Section was incorporated into Part II of GATT which upon entry into force of the Charter was supposed to be suspended.

The initial Article XVI of GATT was much shorter than the Chapter provisions. There was no elaborate distinction betwen export and other subsidies and no special treatment of subsidies on primary commodities. Section A of Article XVI of GATT was only the general provision in Article 25 of the Charter except that in GATT a determination of injury must be made by contracting parties acting jointly, whereas, under the Charter, consultation could only be had by any member that considers its interests are prejudiced.

59. Jackson op. cit. p370.
60. Hudec op. cit. p51.

The Havana Charter was signed on the 23 March 1948 by United States Secretary of State Clayton but required ratification by the Senate and Congress. As noted earlier the conflict in the United States with its multilateral principles and agricultural program was eventually to lead to the downfall of the ITO.

As discussed earlier Section 22 of the Agricultural Adjustment Act 1948 (United States) authorised the application of quantitative restrictions to imports which threatened to interfere with domestic agricultural programs. The United States administration considered that Section 22 would conform with the ITO Charter and GATT and succeeded in getting Congress to amend the Section with the following words "... no proclamation under this Section shall be enforced in contravention to any treaty or other international agreement to which the United States is or hereafter becomes a party". However by 1949 Congress were again renewing and broadening price legislation and amended Section 22 such that virtually all agricultural commodities became subject to possible import controls. As a result the United States was soon applying quota's on the importation of a number of agricultural commodities which were not subject to equally restrictive domestic production or marketing limitations. Congress then removed the self-denying[61] ordinance and with the Magnusson Ammendment it provided eventually in Section 22 that "no trade agreement or

61. Gardner op. cit. p374.

other international agreement here to fore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this Section."[62] It also made the general declaration that the renewal of the Reciprocal Trade Agreement Act should "not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade"[63]. So renegotiation was required for the ITO Charter before it could be adopted before Congress, however not so for GATT.

As a result the protectionist philosophy of the agricultural sector of the I.T.O Charter was withdrawn Congress. In the meantime the United Kingdom government had not presented for Parliamentary approval the ITO Charter until action was taken by the United States.

Therefore the Charter was never put into operation. The Charter did not seek to oppose agricultural stabilization but merely to obtain commitments to minimize the discrimination and protectionism. It was now left to GATT, which both the United States and the United Kingdom had signed the Protocol of Provisional Application of GATT to deal with export subsidies.

62. Trade Agreements Extension Act of 1951 Section 8(b).
63. Section 10 of the Act 1948.

CHAPTER 2

The Rise of Article XVI:3 of the General Agreement on Tariffs and Trade

A. General Agreement on Tariffs and Trade 1947

As I mentioned in the last Chapter at the initial application of the General Agreement Article XVI[1] only contained its present day Section A of Article XVI[2]. This was the New York/Geneva text before it was amended at Havana. No elaborate distinction was made between export subsidies and other subsidies, there was no reference to special treatment for primary commodities and the resolution of a burdensome surplus required only notification and consultation if the subsidy threatened the interests of other Contracting Parties.

In September 1948, a Working Party was established to consider the question of substituting the provisions of the Havana Charter into Part II of the General Agreement. The Contracting Parties pursuant to Article XXIX:1 of the General Agreement had undertaken to apply the principles of the Havana Charter relating to export subsidies[3] to the full extent of their sovereign authority. Brazil at the Working Party proposed that the General Agreement include Articles 26, 27 and 28 of the Havana Charter. The Working Party "felt in view of the practical difficulties they could not recommend such

1. GATT BISID Vol. I p39-40.
2. GATT BISID
3. A GATT BISID Vol. I.

a move at this stage"[4]. What the Working Party agreed to was the drafting changes to Article 25 of the Havana Charter should be inserted. So the words "increase exports" in line 2 of Section A of Article XVI were included. The intention of this was to include the concept of maintaining exports at a level higher than would otherwise exist in the absence of a subsidy. The other change was that consultation would only proceed upon the request of a Contracting Party if prejudice was alleged[5]. Since there was no institution created there could be no prior international determination of prejudice.

Article XVI reflected the principles of economic liberalism that no differentiation should be made between agricultural and industrial goods. If global wealth was to succeed universally then the principles of economic liberalism should be the guiding principles multilaterally. This shows that in the negotiations towards GATT the powerful forces of the United States Department of State were working. So it is fair to assume that the balance of forces was for the elimination of export subsidies. This effects the Contracting Parties understanding of the extent of the obligation - does it have legal binding effect or is it a hortatory rule? This point is examined in greater detail in Chapters 3 to 5 when I discuss the complaints under Article XVI:3 handled by the Panel.

4. B GATT BISID Vol. II p43 para. 24.
5. GATT BISID Vol. I p44 para. 29.

Digressing for a short while, mention must be made of the United States agricultural waiver in GATT to understand why there was a lack of response to arguments to liberalize agricultural trade. As outlined in the previous chapter[6] the United States had various methods in its domestic legislation which could insulate its domestic market from agricultural imports. This domestic legislation affected the drafting of Article XVI and the quantitative exception for agriculture in Article XI of GATT. As described earlier Section 22 of the Agricultural Adjustment Act 1948 authorised whatever import restrictions necessary to prevent interference with any farm support measures, whether or not domestic production was being controlled. Whereas Article XI of GATT only allowed quotas on imports when domestic production was being restrained to the same extent. Section 22 of the Agricultural Adjustment Act 1948 was again amended in 1951 to establish precedence for domestic legislation. United States Congress realised with this amendment it might cause the United States to breach GATT. Therefore the United States undertook to obtain a waiver from the Contracting Parties of GATT in order to remove any possible inconsistency between the obligations of itself to GATT and that Section as to permit fulfillment of the Congressional mandate[7]. So at the 1954/55 Review Session the waiver was granted to the United States. The waiver, pursuant to Article XXV:5 waived United States obligations under Article II and XI to the extent "necessary to prevent a conflict with Section 22 of the Agricultural Adjustment Act 1948"[8].

6. see Chapter 1 Section B page 7.
7. GATT 3rd Suppl. BISID p142.
8. GATT 3rd Suppl. BISID 32 (1955). Decision of the Contracting Parties of GATT March, 1955.

The waiver did not specify a time limit or provide for its reconsideration after the elapse of a time period. The waiver required the United States to annually to report on the action it had taken pursuant to Section 22 of the Agricultural Adjustment Act 1948 and reserved for other Contracting Parties the right for consultation. The United States has retained the waiver to date and has had the benefit of it from the rules of GATT for a series of agricultural products, including dairy products, sugar, cotton and peanuts.

B. The 1954-55 Review Session

At their Ninth Session in 1954/55 the Contracting Parties again turned to a review of Article XVI of the General Agreement. A Working Party was established to consider proposals for Article XVI, surplus disposal of primary commodities and the disposal of non commercial stocks.

Among the interesting proposals submitted to the Working Party[9] were the following. South Africa proposed that the obligation to consult should no longer arise from a determination by "Contracting Parties". Rather a Contracting Party considering that serious prejudice to

9. GATT W9/104 p4.

its interests is caused or threatened would give rise to limiting the subsidy. This is the same point which was addressed at the Havana meeting, the 1948 Working Party (established by GATT) and goes to the prior determination of a prejudice by a subsidy. Whereas in the Havana Charter the International Trade Organization dealt with the prior approval no such obligations were included into Article XVI:1. Denmark proposed the total prohibition of all export subsidies after a transitional period. This was consistent with the United States Department of State ideology of international trade. Australia and New Zealand however favoured the incorporation of Article 27 and 28 of the Havana Charter, whereas Norway and South Africa only wanted to incorporate Article 27:1 of the Charter[10]. France proposed that subsidized products should not be offered at below current prices[11]. I have included these proposals to show the continuing diversity of opinion amongst the largest exporters of temperate primary commodities towards export subsidies. These proposals did not carry the weight of the United States.

The United States proposed a prohibition on all export subsidies with the exception of agricultural products to which an equitable share would apply[12]. According to Kung[13] the United States claimed that its export primary products had been discriminated against for a long period of time in most importing countries, and as a result its relative position in world trade had decreased. The

10. GATT W9/20.
11. GATT W9/102.
12. GATT W9/103.
13. see E. Kung Das Allgeneine Ab Komme Über Zölle and Handel (GATT) (1955) pp180-181.

United States demanded that this worsening of its position should be rectified and that export subsidies should be permitted at least for those commodities in which it had to struggle with surpluses. Kung[14] claimed that this was justified. The Contracting Parties agreed to the differentiation between primary and non-primary commodities. Rom[15] points out pertinently "that this argumentation seems strange since the rectification of a worsening of United States position requires an adjustment of a limited period, while the exception of primary products is a permanent one"[16]. The motive for the differentiation should follow from those same motives which gave rise to the defunct provisions in the Havana Charter. If Kung is correct in describing the reasons put forward for the United States proposals then surely the underlying motive is one of balance of payments rather than raising the income of farmers. During the inter war period the United States used the Agricultural Adjustment Act 1933 initially as a devise to export wheat and cotton from those displaced markets due to unfair import restrictions (the commentators make no reference to the use of export subsidies by any other country except Argentina wheat exports). The United States export program was continued when it was realised it improved their balance of payments. After World War II the Department of Agriculture espoused the continual use of export subsidies to firstly deal with balance of payments and secondly to dispose of surplus production. Agriculture had become to

14. E. Kung supra p180.
15. M. Rom "GATT Export Subsidies and Developing Countries" J.W.T.C. 1968 p544 footnote 32.
16. supra p544.

the United States a significant earner of foreign exchange and the Administration were not interested in any alteration to a successful program.

I think this conclusion can be drawn and it reflect the United States was only concerned about its own national interest. The United States proposal received support from the United Kingdom but only for primary goods under a domestic stabilization scheme and this was subject to the prior approval of the Contracting Parties after a transitional period[17]. West Germany totally supported the United States proposal. The Working Party remit was also about surplus disposal and the liquidation of non-commercial stocks. The negotiations towards the Havana Charter showed that export subsidies was only one part of a system to deal with liberalisation of agricultural products. Although the Working Party received proposals on the liquidation of non commercial stock[18] and surplus disposal[19] with the majority of the Working Party favouring inclusion of such articles, the United States was not in a position to agree to such commitments in the General Agreement. Although Resolutions on the Disposal of Surpluses and Liquidation of Strategic Stocks were adopted by the Contracting Parties[20] it never led to anything[21]. Therefore GATT was left with one portion of the intended proposal to deal with the liberalization of primary commodities. The Working Party report

17. GATT W9/104.
18. see Chile and Australia proposal in L272/Add 1 and W9/78.
19. see Australia proposal in W9/50.
20. GATT 2nd Suppl. BISID p50 - 51.
21. see GATT L/301 and L/320 which confirms that the progress of an interim Working Party report in the field of commodity agreements was never persued.

was adopted by the Contracting Parties, so thus the Protocol Amending Part II and Part III of the GATT was included in the General Agreement.

In stating I consider the General Agreement has only one portion of what was intended to be a comprehensive set of trade rules on agriculture, I discuss in Chapter 5 and 6 of this paper the consequences of this. I contend that there is a direct link between commodity surpluses and restrictions on trade. Since GATT only deals with export subsidies I question whether it is effective in dealing the problems of commodity surpluses and restrictions on trade.

C. Article XVI:1

The first obligation in Article XVI:1 upon the Contracting Parties is to notify the extent, nature and effect of subsidies they grant or maintain, which operate directly or indirectly to increase exports or reduce imports on primary products. As already mentioned in Section A that the phrase "increase exports" was intended to include the concept of maintaining exports at a level higher than would otherwise exist in the absence of the subsidy. A Panel on Subsidies established in 1958 was of the opinion that it is not

sufficient to consider increased exports or reduced imports only in a historical sense but rather what would happen in the absence of a subsidy[22].

The other obligation in Article XVI:1 is for a subsidizing Contracting Party to discuss the possibility of limiting the subsidization in any case in which it is determined that serious prejudice to the interests of a Contracting Party is caused or threatened by subsidization. As already noted in Section A of this paper it was agreed that consultations should proceed upon a request of a Contracting Party when it considers that prejudice is caused or threatened. Although Article XVI:1 was not ammended to make this explicit, this is what Article 25 of the Havana Charter provided. So a prior international determination of prejudice would not be required before subsidizing Contracting Parties had to consult on the possibility of limiting the subsidization. The consequence of this is whether a subsidizing Contracting Party need only discuss the theoretical possibility of limiting the subsidization or whether more is expected by way of action. At the London Conference of the Havana Charter the drafters reported that the word "limiting" should be "used in a broad sense to indicate maintaining the subsidization at as low a level as possible, and the gradual reduction in subsidization over a period of time where this is appropriate"[23].

22. GATT 9th Suppl. BISID p191 para 10.
23. United Nations, Economic and Social Council, Report of the First Session of the Preparatory Committee of the Conference on Trade and Employment. E/PC/T/33 (London 1946).

D. Article XVI:3

In order to achieve a discussion of Article XVI:3, adopted by the Contracting Parties[24] at the 1954/55 Review Session, I have approached the Article by firstly discussing those words like "primary products" and "subsidy" which go to the root of the Article. Then I approach the core obligation of the Article by initially analyzing the words "equitable", "world export trade", "representative period", "special factors" amongst other words.

- primary products

It was considered important at the Review Session to define the term "primary products" because of the permissive nature of the rules on export subsidies. An Interpretative Note to Article XVI[25] was added to clarify primary products as "any product of farm, forest or fishery, or any mineral, in its natural form or which had undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trace"[26]. The questions of when does a primary product become a processed product and whether the primary product component of a processed product may be subsidized were partially answered at the Review Session. The former question is answered by the compromise in the Interpretative Note. The United States had voiced the problem of its own cotton textile processing which it considered to be a primary product. Other Contracting Parties did not agree, so the compromise was

24. GATT supra note.
25. see GATT Ad. Article XVI.
26. ibid.

built in. Since cotton is sold in substantial volumes internationally other than textiles, textile would not be included in the definition. The United States subsequently appended its signature to the Declaration on the understanding that it would not prevent a continuation of its cotton export subsidies[27]. This shows that in the negotiation process that the United States is not prepared to accept any compromises on agricultural liberalization when it affected its own domestic sector. The Interpretative Note would be regarded by the United States as a hortatory statement therefore one doubts the attempt to define legally binding rules when there is no consensus about their applicability.

- subsidy and domestic stabilization scheme

What is the nature of "subsidy" in Article XVI:3? We know from Article XVI:1 that the term "subsidy" includes domestic, export and production subsidies because the provision states the nature to include "any form of income or price support, which operates directly or indirectly to increase exports ... or to reduce imports". Article XVI:3 however states that the nature "operates to increase the export of any primary product". The domestic subsidy is excluded from Article XVI:3 because the equitable share obligation applies only to world export trade. Whereas production and export subsidies affect international trade in primary commodities that lie within Article XVI:3. This follows Articles 27 and 28 of the Havana Charter. The exemption of a price stabilization scheme was reintroduced in Article XVI:3 in the 1954/55 Session.

27. Status of Multilateral Protocols of which Director General acts as Repository (1967) p42 - 01.

The exemption of a price stabilization scheme was initially opposed in the Havana Charter by the United States because it complained that there would be no limits on exporting countries. Article 27(1) of the Havana Charter provided that the ITO had a role in such equalization schemes. The ITO had to determine that the system resulted, or was so designed as to result at times in an export price higher than the domestic price. The ITO was also to determine that the system operated, or was so designed as not to stimulate exports unduly or seriously injure other members. The Havana Charter Article 27(1) obligation was a priori; that is, for the member to obtain approval for its price stabilization scheme from the ITO prior to its implementation. The Working Party in GATT adopting Article 27(1) of the Havana Charter changed the obligation to one being a forteriori. A new further clause was added which stated that if the price stabilization scheme is "wholly or partly financed by government funds in addition to funds collected from producers no exemption would apply". Contracting Parties no longer had to get prior approval for their schemes and such schemes could be altered to ensure that they were totally financed out of producer funds. A price equalization scheme can therefore be exempt regardless of whether it results in export prices which are lower than domestic prices at times or if it operates to stimulate exports and obtain a greater share of world trade so long as it is not financed from government funds. The role for Contracting Parties is substantially reduced in comparison to the ITO and further they have to work backwards from the effect to the cause of such a scheme. The Interpretative Note was fundamentally

different from Article 27 of the Havana Charter. Jackson[28] considers the Interpretative Note to be borrowed from the Havana Charter, hence he treats it in a descriptive manner. Dam[29] does not discuss the point. The exemption of domestic price stabilization shemes is of fundamental importance to the autarkic policies of Contracting Parties. The actual form which these schemes takes is discussed extensively in Chapters 3 and 5. In those Chapters I tie in the operation of these domestic stabilization schemes with the question of agricultural liberalization.

- equitable share

It has been suggested in some quarters that in negotiations for Article 28 of the Havana Charter the word "fair" was initially proposed in preference to "equitable" and that a difference exists between these two words. Those quarters suggest that "fair" was too absolute and did not provide a dynamic and flexible concept as "equitable". The same quarters have suggested that this debate was carried over to Article XVI:3. All the primary source material available to myself and the commentators offer no suggestion of such a debate in either the General Agreement or the Havana Charter. As earlier noted the concept in the United States proposal was "representative share" but in the Havana Charter "equitable" was utilised to meet the arguments suggested against "fair" above. Wilcox in his treatise[30] on the Havana Charter

28. J.H. Jackson. World Trade and the Law of GATT (1969) p395.
29. K. Dam. The GATT (1970) p142 - 144.
30. C. Wilcox. A Charter for World Trade (1949) p129 - 130. This view is supported by J.H. Jackson, World Trade and the Law of GATT (1969).

discusses the two concepts as if they are interchangeable. Semantically a fair share is the same as an equitable one. The problem with norm is because it has to be dynamic it will be subjective. This point was raised by France who felt that the concept was difficult to apply. France proposed a criterion that would provide that there should be no distortion of normal commerce and subsidized products should not be offered at below current market prices[31]. The French basic point is valid. The criterion they suggested leaves open what is normal commerce in agricultural trade when supposedly every temperate agricultural exporter is using countervailing duties, export subsidies and quantitative restrictions. Whatever the label, the obligation cannot be rigid because the Contracting Parties did not wish to ban export subsidies on primary commodities. The concept of being dynamic does not lend itself to be legally binding since it has to follow the principles of economic liberalism which themselves are not clearly definite in nature and form.

- world export trade

The word "export" was inserted into the phrase at the behest of the United States. In Article 28(1) of the Havana Charter reference was only made to "world trade". France[32] in the Review Session proposed that the words "world trade" should be construed as meaning also individual markets because they thought Article

31. GATT W9/102.
32. GATT Doc. S.R. 9/41 p6 (1955).

XVI:3 would lose all value if it did not preclude such subsidies from destroying the position of another exporter in an individual market. This view was supported by major primary commodity exporters (Australia, Uruguay, Canada and Italy). Australia was particularly outspoken in supporting France on this concept. Australia went further and said that the phrase would be weak unless it referred to individual markets. Those Contracting Parties thought that the danger of export subsidies was greater in individual markets and it was possible to argue that not withstanding damage done by subsidization in individual markets a country's share of world exports was not increased. Australia forecasted considerable difficulty in securing any limitation of subsidies on primary products with the U.S. formula[33]. The United States refused to accept the individual market concept. Although no reason is offered why they refused to accept the concept, in looking back at the Havana Charter debate we can draw the reasons. With respect to their cotton exports program the use of a subsidy was defended on the basis of restoring the United States to its traditional position in the world. So if the United States had been displaced in a commodity in which there was no growth in trade, it would be unable to recapture a share of its exports since the effect would only be in the individual market. Further since it was earning large foreign exchange reserves from trade in agriculture it did not want its penetration dented. If the aim of Article XVI:3 is to restrict export subsidies then

33. supra p3.

the proposal of the other Contracting Parties was justified. That proposal would lead to the elimination of export subsidies because any increase in an individual market share would be unfair. Those temperate primary producers wanted penetration into individual markets upon the basis of free competition by efficient producers not upon the basis of government intervention. Jackson[34] is descriptive in his treatment on the use of this word "export" and offers no analysis at all on the conclusions of the Review Session. Even when Jackson puts it into the context of the French Assistance on Exports of Wheat and Wheat Flour[35] the analysis is again descriptive. Dam[36] in his analysis concludes that because of the drafting history, referred to in this paragraph, it is not conclusive that "export" does not refer to trade in a product in an individual market. Dam[37] makes no specific reference to the negotiations to making this point. I consider Dam's conclusion cannot be sustained on the basis of the negotiations at the Review Session. The conclusion from the negotiations was that in assessing market shares the only reference point for an equitable share was the export "world trade". This was the United States position.

- having

Dam[38] considers that there is a problem with the word "having" in the second sentence of Article XVI:3. Dam's argument is that

34. J.H. Jackson supra note 28 p394.
35. GATT 7th Suppl. BISID p46 (1955).
36. K. Dam. The GATT (1970) p143.
37. ibid.
38. K. Dam supra p142.

the term "having" suggests that an increase in the subsidizing Contracting Party's share need not be established if the subsidizing country preserves a larger share than it would otherwise have. Dam considers that this conclusion would follow "a fortiori from the accepted interpretation of the "increase exports" language in Section A [of Article XVI] which as we have seen, makes that which would happen in the absence of a subsidy crucial"[39]. Jackson[40] does not mention any problem with "having". I do not understand Dam's argument and express skepticism about it in light of the negotiations for the Havana Charter. I see no problem with "having".

- previous representative period

The term "previous representative period" is used also in Articles XI and XII of the General Agreement. It has been understood that the period with Articles XI and XII is the three preceding years for which trade statistics are available. The suggestion was that with regards to Article XVI:3 that period should also be the three preceding years. At the Review Session a number of developing countries expressed concern that the concept "previous representative period" might lead to a rigid status quo. Brazil and Turkey stated that the criteria could prevent an exporting country, which had no exports during the previous representative period from establishing

39. ibid.
40. J.H. Jackson supra note 28 Chapter 15 p365-399.

its right to obtain a share in the trade of the product concerned. An Interpretative Note was adopted which provides "the fact that a Contracting Party has not exported the product in question during the previous representative period would not itself preclude that Contracting Party from establishing its right to obtain a share of trade in the product concerned"[41]. For the developing countries it is pragmatic that they be shown some flexibility if global economic growth is the aim of the General Agreement. This would accord with free trade principles which would allow changes to occur in a dynamic market. The problem of the Interpretative Note as adopted is that it applies to all newcomers - whether developed or developing countries. Is this justified in free trade principles? The answer has to be yes. Where does it end, for example, a newcomer might be the United States in the export of butter. There is no end to such questions. Hence the application is widened beyond the proposed parameters.

- special factors

At the 1954/55 Review Session no discussion took place between the Contracting Parties on what the Working Party considered to be "special factors". The Working Party said that in determining what are "equitable shares", sight should not be lost of:

(a) the desirability of facilitating the satisfaction of world requirements of the commodity concerned in the most effective and economic manner, and

41. see GATT Ad. Article XVI para 3.

(b) the fact that export subsidies in existence during the selected represented period may have influenced the share of trade obtained by various exporting nations[42].

Point A of the "understanding" comes from Article 28:4(e) of the Havana Charter but omits substantial portions. Article 28:4(e) addresses the situation of expansion in demand for primary commodity in the world market. The International Trade Organization, in determining what an equitable share for a Contracting Party subsidizing exports, in an expansionary market had to consider whether that expansion was sustainable. If the expansion was sustainable then it was only to be met through the most effective and economic manner. Point A addresses a different situation - that is the meeting of world demand in a commodity by efficient and economic methods. By being different I mean, it addresses the satisfaction of world requirements in all situations, i.e. if the market is expanding, stable or declining. The world demand has still to be met by efficient and economic methods. This goes to the root of the arguments for economic liberalization of agriculture. The argument of economic liberalization is that export subsidies lead to an inefficient allocation of the world's agricultural resources. This is the standard component in analyses of agricultural liberalization by the advocates for free trade. Thus according to Point A, to meet world requirements it should be satisfied not by export subsidies. This would make sense from the negotiations of the Havana Charter, the proposals put forward to the Working Party in 1954/55 and the concept of economic liberalism.

42. GATT 3rd Suppl. BISID at 226 para 19 (1955).

Also omitted from Article 28:4(e) was the words "therefore of limiting any subsidies or other measures which might make that expansion difficult". Phegan says that these omitted words from Point A constituted a "reinforcement of the general aim of eliminating export subsidies when such subsidies distort an exporting country's share of world trade, without these words the clause could have opposite effect"[43]. Phegan makes no explanation of this point and says in his footnotes that this has not happened in actual practice[44]. What does Phegan mean? I agree that these words in Article 28:4(e) did constitute a reinforcement of the general aim of eliminating export subsidies. But that was obvious from the phrase. Those omitted words from Article 28:4 spelt out in plain English that export subsidization and other measures which might artificially meet the expansion in world demand were not entitled per se to claim a share of that expanding market demand if it would create difficulties. Of course according to the principles of economic liberalism it would always create difficulties since it was an inefficient allocation of resources. Without those omitted words from Article 28:4(e) Point A should not have an opposite effect because of the principle of economic liberalism. What Phegan is wrong in is admitting that this has not happened in practice. Point A was not included in the Interpretative Notes[45] and was only a statement by the Working Party of the 1954/55 Review. If under

43. C. Phegan "GATT Article XVI:3: Export Subsidies and Equitable Shares" Journal of World Trade Law (1982), p251 at p154.
44. ibid.
45. see GATT Article XVI Ad.

the consultation procedures of Article XVI:1 or dispute settlement procedures of Article XXIII no notice was taken of Point A then satisfaction of world requirements by subsidized production would occur. This is what has happened in practice as evidenced in my discussion in Chapter 4. Another point about the omission of those words from Article 28:4(e) of the Havana Charter is that it outlines a matter-of-fact criterion for determining what share each subsidizing member should have in the exemption and exceptions. These omitted words were redundant because the General Agreement makes no a priori determination and only discourages all export (or production) subsidies which obtain a more than equitable share of world trade. Jackson[46] and Dam[47] again simply outline Point A and treat it in a descriptive manner.

Point B of the Working Party Understanding also comes from the Havana Charter. As mentioned earlier[48], Article 26:4 of the Havana Charter permitted members to subsidize their exports in primary products to offset export subsidies of non-member countries. Dam[49] and Jackson[50] have no opinion about this Working Party Understanding and treat it descriptively. Phegan[51] is of the opinion that Point B is of the equivalent to Article 26:4 and states "that it is an invitation to multiply trade restrictions by implicitly exempting subsidization where it has been employed to counterbalance the same practice on the point of others"[52].

46. J.H. Jackson supra note 28 p396.
47. K. Dam supra note 36 p143.
48. see Chapter 1 Section E p29.
49. K. Dam supra note 36 p143.
50. J.H. Jackson supra note 28 p296.
51. C. Phegan supra note 43 p294.
52. ibid.

Since Phegan does not justify his opinion in terms of a non-Contracting Party-Contracting Party situation I do not think he is correct. GATT would not support an all out trade war situation of the type envisaged by Phegan. The General Agreement has provisions which provide for consultation and dispute settlement if serious prejudice arises. This would continue to receive support from all Contracting Parties. Also, I do not think it is a simple re-write of Article 26:4 of the Havana Charter because non Contracting Parties can, as of right, subsidize exports. I am of the opinion that Point B addresses the situation of the use of export subsidies by a number of Contracting Parties, but a complaint is only brought against one Contracting Party. The fact that other Contracting Parties are utilizing export subsidies should be taken into account. GATT cannot be seen to restrict the practice of the Contracting Party complained about yet disregard all other Contracting Parties practices. This would not be acting in accordance with mutual and reciprocal benefits.

This is one of the problems in the sugar subsidy debate[53] discussed in Chapters 5 and 6 later on. We have a situation where the European Economic Community subsidizes sugar exports and complaints were brought against it by Australia and Brazil[54]. I consider that in the background many other Contracting Parties were using similar practices but not the type of domestic stabilization scheme utilized by the European Economic Community, e.g. Australia had

53. see GATT BISID 26th Suppl. p290 and BISID 27th Suppl. p69.
54. ibid.

probably in its tied sales discounted the contract price[55]. I do not know the answer that follows from Point B and this hypothetical situation but I do know the result - trade restrictions on agricultural products. If Contracting Parties ignore one of the more important General Agreements aims to co-operate "in developing the full use of the resources in the world" which in terms of "economic liberalism" is understood to be free trade and free enterprise then the consequences are restrictions on trade. This is what the United States did in the sugar subsidy dispute by imposing quotas on sugar imports against the background of surpluses generated by the European Economic Community subsidies[56]. I think in regards to my discussion my opinion of Point B is more logical even though you do not know the result from it.

55. GATT BISID 26th Suppl. p290.
56. see Chapter 6.

E. The Theory of International Trade to GATT

GATT's impetus to international trade was maintained on account of the worldwide depression in the 1930's. To ensure a repetition of that would not occur, global wealth was considered a necessary consequence. This was to be achieved by applying the concept of economic liberalism to international trade[57]. The solid principles behind the concept of economic liberalism, to advance international trade, were "free enterprise" and "free trade". The axiom of "free enterprise" has to do with the non-interference by governments in the market place. Similarly with "free trade" the axiom is understood to be associated with the non-interference by governments in the increase of volume of trade by "free enterprise". Thus the theory of international trade would mean "that domestic output will by maximized if resources are allocated through private market transactions to locations where the highest value is placed upon them"[58]. These axioms were considered by the promoters of the Havana Charter and the General Agreement of Tariffs and Trade to bring global wealth[59]. It has to be constantly remembered that to prevent a repetition of the worldwide depression the concept of economic liberalism was advanced. The preamble to the General Agreement sets out the legitimate aims of the promoters of economic liberalism to be:

"in the field of trade and economic endeavour [relations] should

57. see W.A.B. Brown: The United States and the Restoration of World Trade (1950); R.N. Gardner: Sterling-Dollar Diplomacy (1969) p12-23; R. Hudec: The GATT Legal System and World Trade Diplomacy (1975) p4-5; K. Knock: International Trade Policy and the GATT 1947-67 (1969) p5-9.
58. W.F. Schwartz & E.W. Harper: "Subsidies Affecting International Trade" Michigan Law Review, Volume 70 p831 (1972).
59. see the preamble to the Havana Charter and the General Agreement.

by conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods ... "[60].

The preamble of the General Agreement outlines the contribution of Contracting Parties to these objectives shall be made by:

"entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce ... "[61].

The promoters categorically stated that agricultural trade was to be subject to economic liberalism[62] but as mentioned earlier, agricultural trade has always been the subject of special treatment in government policies[63]. The principal reason for not treating trade in agriculture more leniently, both in the Havana Charter and the General Agreement, is related to the national support programs. Since government interference was widespread in agriculture the Havana Charter approach was to recognise that intervention and try to impose reasonable limits upon it. The policies of the Havana Charter were intergovernmental commodity agreements, restrictions on quantitative restrictions and export subsidies. In the General Agreement the policies of quantitative restrictions and export subsidies were only considered for inclusion.

60. GATT BISID Volume I.
61. ibid.
62. see Chapter 1 Section A pages 10-12.
63. see Chapter 1.

Earlier discussion has told us that export subsidies were associated with raising the income of producers, ensuring rural population had a reasonable standard of living and continuing employment, increasing production for national self sufficiency and national security. These are similar to the aims in the preamble of the General Agreement. Thus why are export subsidies not a concept acceptable to economic liberalism? According to the theory of international trade (in terms of the axiom of free trade) subsidies lead to an inefficient allocation of world resources[64]. This is the standard thinking of economists[65]. Economists regard subsidies as inefficient since they "divert resources to producing subsidized goods rather than other goods of great real value"[66] and such distortion reduces the opportunity of global wealth. With export subsidies being associated with the legitimate aim of economic liberalism, countries have not been prepared to give up this tool of economic policy - thus we have in Article XVI:3 of the General Agreement a moderate response by the promoters to reduce government intervention.

The question remains how can real international free trade in agricultural products be achievable. The answer I consider lies in the acceptance of the obligation in Article XVI:3 of the General Agreement, the interpretation of the negotiations and the Working Party recommendations.

64. W.F. Schwartz & E.W. Harper supra note 58 p845.
65. see W.F. Schwartz & E.W. Harper supra note 58, footnote 45, and p 846; also H.A. Malmgren: International Order for Public Subsidies, Thames Essays No. 11 (1977) p30-69.
66. W.F. Schwartz & E.W. Harper supra note 58 p840.

F. Article XVI:3 in its entirety

The Working Party which drafted Article XVI:3 had to utilise phrases from the Havana Charter simply because there was no support from the Contracting Parties for the elimination of export subsidies to achieve the liberalization of agricultural trade. When you consider that the proposals for the disposal of surpluses and the liquidation of non-commercial stocks never resulted in any binding obligations then for the promoters of agricultural liberalization they were lucky to achieve a trade rule on export subsidies. Even the promoters of Article XVI:3 were no longer concerned with the liberalization of agricultural trade per se in terms of economic liberalism. The problem with the utilization of those phrases from the Havana Charter, in my opinion, was that they were out of context, provided no structure to tackle agricultural liberalization and the purpose of the phrase was never identified.

The phrase which is out of context is "an equitable share of world export trade". The Havana Charter provisions of three permitted exceptions and one exemption by definition, was however subject to the criteria in Article 28 of the Havana Charter that they were entitled only to an "equitable share of world trade".

Export subsidies are now accommodated as a trade rule for agriculture. The foundation of the rule is now a criterion from the Havana Charter which limited the permitted exceptions

and exemption by definition. The rule no longer addressed the question of the overall consequences of such practices. The consequences had to be suffered by the Contracting Parties. The other concept out of context was the inclusion of the domestic stabilization schemes exemption by definition. Since the trade rule already accommodated the practice of export subsidies surely then the domestic stabilization schemes should also be subject to the general rule. By its exemption it provided a vehicle for no control over the practice of export subsidies.

In stating there is no overall structure for trade in agriculture to be liberalized I mean that the General Agreement only addresses export subsidies and quantitative restrictions. The result from government interference in the use of a nations resources is the generation of surpluses which export subsidies tries to dispose of. Article XVI:3 neither limits government interference in the utilization of a nations resources nor limits the restrictions on trade which flow from export subsidies.

The structure of Article XVI:3 is for more government interference in a nations agricultural resources. The result must be more restrictions on trade in agriculture internationally.

Finally neither the Working Party nor the Contracting Parties addressed the question of what is the purpose of Article XVI:3. In

terms of the preamble of the General Agreement, is Article XVI:3's purpose to "raise standards of living, ensuring full employment and steadily growing volume of real income", or is it to be concerned with "developing the full use of resources of the world". Thus achieving the purposes of global wealth. In other words is Article XVI:3 attempting to stabilize returns to producers or is it attempting to stabilize the market for the consumer.

Is my pessimism justified? The drafters of Article XVI:3 were surely aware of the consequences of the provision. This would go to explain the lack of clarity and precision in Article XVI:3. Phrases like "equitable share", "world export trade", "previous representative period" and "special factors" all allow different interpretations and flexibility in application. The drafters of Article XVI:3 must have considered that in the process of consultation and dispute settlement Contracting Parties would settle one way or the other [illegible] liberalization of agricultural trade. The obligation of Article XVI:3 did not require political backing, since it was the followed status quo. Could it eventually lead to agricultural liberalization on solid principles? These questions could be answered by the support the norm of Article XVI:3 received.

CHAPTER 3

A Surprise for GATT

A. Past Consultations

A number of consultations have taken place under Article XVI:1 but for a variety of reasons, political and practical, they have not resulted in the eventual use of the dispute procedure under Article XXIII of the General Agreement.

Consultations under Article XVI:1 concerning agricultural subsidization have occurred since 1952. In 1952 the United States export subsidy on sultana's was called into question by Greece[1]. In 1953 United States export subsidies on oranges and almonds were claimed to have prejudiced Italian trade in Europe[2]. In 1956 Denmark requested consultation with the United States in respect of the latter's export subsidies on poultry to the West German market[3]. In 1957 Denmark claimed United Kingdom's internal subsidy on eggs caused prejudice to Danish markets in the United Kingdom and Europe[4]. In all these consultations the results were unsatisfactory, often in many cases the subsidy was withdrawn only to be reintroduced later on. Possibly for these reasons, Contracting Parties who suffered prejudice started to consider the possibility of using Article XXIII of the General Agreement to solve the dispute about export subsidies

1. GATT L/39, L/146 and Add. 1, L/148, SR 7/14, SR 8/12.
2. GATT L/122, SR 8/12, SR 9/6, SR 10/3.
3. GATT L/586, SR 11/66.
4. GATT L/627, IC/SR 31.

by claiming nullification and impairment of benefits.

B. French Assistance to Exports of Wheat and Wheat Flour[5]

The first and probably the most notable ever dispute settlement for a complaint under Article XVI:3 occurred with Australia lodging a complaint, that as a result of subsidies granted by the French government on export of wheat and wheat flour, they had displaced Australian exports and obtained an unfair share of world export trade.

France operated a domestic stabilization scheme and thus Australia had to show that the scheme was not exempted by definition from the provisions of Article XVI:3. In the French view, the system was one of stabilization of domestic prices and returns to producers. The scheme was operated by the Office Nationale Interprofessional des Cereales (ONIC) in which a domestic price was guaranteed to the producers for a "maximum quantum" of wheat[6]. The production in excess of the "maximum quantum" was still purchased by ONIC but not at the guaranteed price, for this the producer received only the price ONIC could obtain by selling on the world market or at concessional prices on the domestic market[7]. The calculation by ONIC for the "maximum quantum" included not only domestic consumption but a margin in excess for export. The producer did not receive all the guaranteed price; deductions included taxes, storage and other

5. GATT BISID 7th Suppl. (1958) p46.
6. supra p47 para 4.
7. ibid.

expenses plus a surplus disposal tax. The surplus disposal tax was to cover ONIC's losses on the disposal of the wheat surpluses. ONIC also received payment for wheat delivered in excess of the "maximum quantum". At this stage the scheme has in theory the characteristics described in the interpretative note[8].

The crucial point was what happened when the wheat sold from the "maximum quantum" for export returned a price lower than the guaranteed price? ONIC would be in deficit, so where did the finance for the deficit come from? The Panel considered the 1957-58 cropping season[9]. In 1957-58 the guaranteed price for wheat was 3,622 francs per quintal. ONIC was only able to receive, on export of wheat 1,800 francs per quintal. So ONIC was paying to each producer 1,566 francs per quintal for wheat in the "maximum quantum". The 1957 harvest yielded an excess over domestic requirements of 30 million quintals, of which 21 million quintals were exported as either wheat or wheat flour[10]. ONIC was in deficit for that harvest and funded the deficit 20 per cent from the surplus disposal tax and 45 per cent from the repayment of wheat produced inexcess of the "maximum quantum"[11]. The balance, 35 per cent, was budgetary appropriations, that is from government funds. The Panel said it would be difficult to apportion or link ONIC's revenue directly with items of expenditure or assess with any precision the share of budgetary appropriations in financing the exports. Since 35 per cent of payments on exports were derived from government

8. GATT Ad. Article XVI.
9. GATT supra note p51 para 9.
10. supra para 10.
11. supra para 12.

funds some of the losses would have to be covered by the latter. Therefore the domestic price equalization scheme of the French could not be within the exemption to paragraph 3 of Article XVI[12]. There is no problem with this finding. It does illustrate how easy it is to fall outside the Interpretative Note of Article XVI:3. All that France had to do was ensure ONIC's deficit was entirely met by producer funds in the future. Financing export subsidies by a non-governmental levy similar to ONIC's also meant that there was no obligation to notify other Contracting Parties of the scheme. This would make it very difficult for other Contracting Parties to become aware of a domestic stabilization scheme.

The Panel then had to consider the causation question: did the French subsidy result in them obtaining an inequitable "share of world export trade" in wheat and wheat flour. The Panel noted the difficulty with the concept of "equitable share" but recalled with clarity all the previous negotiations at Havana and the 1954/55 Review Session to assist them with the factors that should be taken into account[13].

Firstly to examine the French trade statistics. The Panel considered that the "previous representative period" to be the pre-war period of 1934-38 and the post-war period of 1948-58 and included those statistics for the part of the year in which the Panel had been established[14]. The Panel used 1934 as the base year for the

12. supra paragraph 13.
13. supra p52-53 paragraph 15.
14. supra p53 para 17 and 19, and p49.

consideration of the question, why 1934? On[15] my analysis if you took the total of the French world exports of wheat and wheat flour over the representative period the mean average is around 3.2 per cent and 6.6 per cent respectively for those products. This is comparable to the actual figures of 1934 and seems reasonable. When[16] you view the average mean of world export of wheat and wheat flour against the complaint period a rise in French exports is seen but the percentage difference is no more than 8 per cent points. In absolute quantities[17] the difference was phenomenal - an increase of over 200 per cent points for wheat and wheat flour over the complaint period. For wheat flour this percentage gain was consistent, whereas not so for wheat. The Panel were unable to hold on the basis of these historical world trade figures that the share was inequitable but that it did warrant further investigation especially for wheat flour[18].

The Panel then looked at the export unit value[19] and at the import unit value[20] raising the point of price undercutting to assist in the determination of an "equitable share". On the export unit value the Panel looked at France's and other exporting nations f.o.b. and c.i.f. figures. The French export unit value for wheat flour barely exceeded their one for wheat. By contrast Australia, Canada and the United States export unit value for wheat flour exceeded their export unit value for wheat by 40 per cent[21]. For import unit values the Panel also found that France had been undercutting exporters in

15. see Table 1 of the Panels Report supra p49.
16. ibid.
17. ibid.
18. supra p53 paragraph 18.
19. supra paragraph 18.
20. supra paragraph 7.
21. supra paragraph 18.

Ceylon, Malaya, Singapore and Indonesia[22]. As I have mentioned earlier, the concept of price undercutting came from the Havana Charter and the 1954/55 Review Session. The concept was initially proposed in the United States Suggested Charter[23] but was amended at the London Conference for non-primary goods as outlined in Article 26 of the Havana Charter[24]. A similar concept was proposed at the London Conference for inclusion in the domestic stabilization scheme exemption[25]. This was carried into the Notes of Interpretation of the General Agreement at the 1954/55 Review Session[26]. Although the concept of price undercutting in the Notes is not as clear or precise as Article 26 of the Havana Charter and Article XVI:4 of the General Agreement, when considered with the understanding that "satisfaction of world requirements of the commodity concerned [should be] in the most effective and economic manner"[27], such use by the Panel is justifiable. It is further justifiable for the Panel on the principles of economic liberalism which were outlined in the Preamble of the General Agreement. One last point about the use of price undercutting - it was proposed by France at the Working Party for the 1954/55 Review Session for inclusion into Article XVI[28].

The last consideration of the Panel to determine the causation question was that of "special factors". Here the Panel considered the effect of the International Wheat Council[29] which was an inter-governmental commodity agreement. What weighting would have resulted

22. supra paragraph 7.
23. see Chapter 1 Section B page 14.
24. see Chapter 1 Section C page 19.
25. see Chapter 1 Section C page 18.
26. see GATT Article XVI Ad.
27. see Chapter 2 Section D page 55.
28. see Chapter 2 Section D page 52.
29. supra note 1 p53 paragraph 16.

from France belonging to this commodity agreement? In the Havana Charter much importance was given to commodity agreements for achieving agricultural liberalization. Although these provisions were not carried over into the General Agreement it still was a satisfactory method to achieve agricultural liberalization. Article XVI:3 was never intended to be the only pillar to lead to agricultural liberalization in the General Agreement. The Working Party of the 1954/55 Review Session considered sight should not be lost of satisfying world requirements[30], which impliedly must refer to commodity agreements. Australia belonged to the International Wheat Agreement, so the balancing of that must be equal. Although the discussion of the International Wheat Council is at a minimum the Panel did note that France's position as a traditional producer was not reflected in their export quota's of the commodity agreement[31]. Presumably this led the Panel to consider the French claim that it was entitled to increase its world export share reasonably but by how much? This was answered by the world trade figures as discussed above.

The Panel concluded that the "subsidy arrangements have contributed to a large extent to the increase in French exports"[32] and accordingly found it was more than equitable. The Panel later on went to say that "there was no inherent guarantee in the [French] system that it would operate in such a manner as to conform to the limits contemplated in Article XVI:3"[33]. Is this latter finding starting

30. see Chapter 2 Section D page 55.
31. supra note 1 p53 paragraph 16.
32. supra page 53 paragraph 19.
33. supra page 56 paragraph 25.

what I think it might, that is, the type of domestic stabilization scheme utilized by France will always be marginal in terms of compliance with Article XVI:3, and these types of schemes will inevitably have to be the subject of consultation by the Contracting Parties. If so, the Panel is in terms of the debate on agricultural liberalization stating preference for "developing the full use of resources"[34] and agreeing that the purpose should be stabilizing markets rather than returns to producers. This would make more sense when one compares the situation of Article XVI to industrial goods and the initial aim of the promoters for economic liberalization to affect all international trade.

What is interesting about the finding of an inequitable share is the methodology of the Panel. The Panel, takes the point which I mentioned earlier[35] and asks the crucial question of what happens in the absence of the subsidy. With regards to the historical world export shares it cannot answer the question.

Those figures only record what has occurred. Since world trade figures can be influenced by so many factors, for example, weather conditions, they are also unreliable. One methodology to answer the question is to see if price undercutting has occurred. If so then without the subsidy those export unit values could not have competed with non-subsidizing Contracting Parties.

34. Preamble of GATT BISID.
35. see Chapter 2 Section C p46 and Section D page 54.

The Panel then moved on to illustrate its finding with reference to individual markets. The particular market being South-east Asia. Australia complained that the exports of France had displaced its normal exports to markets in South-east Asia, especially Ceylon, Malaya (including Singapore) and Indonesia. France argued that Australia's deteriorating position was due to her inability to supply wheat flour to the market due to consecutive shortage of crops[36]. The Panel agreed that Australia could not have maintained her combined exports of wheat and wheat flour at normal levels in 1957-58 however Australia would have maintained her traditional supplies of wheat flour, despite those failures[37]. French exports of wheat flour to the three South-east Asian countries rose substantially from 13 per cent in 1953-54 to 34 per cent in 1957-58. Australia's exports to these markets during this period declined substantially from 64 per cent to 50 per cent respectively. Further French supplies as a percentage of total imports of wheat flour accounted only for 0.7 per cent in 1954 and 46 percent in the first half of 1958. The share of Australian supplies, on the other hand, fell from 83 per cent in 1954 to 37 per cent in the first half of 1958. The Panel considered the individual market share movements a disequilibrium of the South-east Asia wheat flour market in total.

The French delegate[38] later complained that too much emphasis was placed on the regional markets to the neglect of the world market.

36. supra page 54 para 22.
37. supra page 55 para 23(d).
38. GATT 7th Suppl. BISID p22 (1959).

The French stance here is completely at odds with its statement in the Review Session of 1954/55[39]. The Panel in dealing with the individual and regional markets showed it was prepared to deal with the concern voiced by primary producing countries at that 1954/55 Review Session. Although it was not prepared to conduct its enquiry by equating world market with individual market it was prepared to substantiate its conclusion with reference to individual or regional markets. This reflects the negotiationsof Article XVI:3.

The final recommendation only affected the South-east Asia market where both parties eventually concluded a bilateral agreement on that market. After all, the amounts of French exports were insignificant so the Panel recommendation would not be perceivable on world export trade. The Panel did not achieve a reduction in France's world export share but just a reallocation of the South-east Asia to preserve the status quo. Be that as it may, the Panel's methodology is [illegible] the clearest of all Reports. The Panel address the issues clearly, succinctly applies the norm of Article XVI:3 (which it regards as legally binding on the Contracting Parties) and does not fuzz the conclusion from its analysis.

C. United States Tobacco Complaint by Malawi

The next complaint was between Malawi and the United States[40]. A

39. see Chapter 2 Section B p 52 where the French delegate argues that the enquiry into "world trade" should be construed as individual markets as well.
40. GATT 15th Suppl. BISID p116 (1967) United States Subsidy on Unmanufactures Tobacco.

Working Party was established to conduct consultations about an export subsidy introduced by the United States on unmanufactures tobacco. Since the Working Party's mandate was only consultation it could not make any definitive recommendations but the argument concerning equitable shares are worthwhile discussing.

Malawi stated that it was difficult to define the concept of equitability but the concept certainly did not refer to the maintenance by the subsidizing country of a predetermined share of a growing world market. Malawi noted that the Interpretative Note[41] from the Review Session of 1954/55 allowed for entry of newcomers and so there were grounds for maintaining that an "equitable" share could vary. The United States exports had proportionately declined against total world trade yet its volume had increased. Other Working Party members made general comments on paragraph 3 of Article XVI without relating it to the complaint. It was emphasised that the pattern of supply to world markets could not particularly, in the spirit of GATT, be regarded as static and should allow for changes in relative competitive positions. The basis of this argument is rooted in economic liberalism. That meant world trade is supposed to be dynamic. The United States argued that it was not going to accept the erosion of its share. So here we have an admission that although the United States preaches economic liberalism (free trade and free enterprise) to all [illegible] when the chips are down with respect to agriculture it is not going to allow such principles affect their

41. GATT Ad. Art. XVI.

ability to have a reasonable share in world trade.

Such a statement is the product of the underlying economic problem: that domestic agriculture policies have been given special treatment since the 1930's depression. Until the problem of how agricultural trade is going to occur in the future, i.e., the principles which should govern the meeting of supply and demand, governments will not respond to rules like Article XVI:3. Article XVI:3 is shown here not to be a legal norm capable of binding Contracting Parties yet this does not mean that it will have no value at all.

Article XVI:3 value may be hortatory, so it is entitled to a commitments of some form. The 1954/55 Review Session gave commitments to Malawi as a developing country and a newcomer to agricultural trade that the phrase "equitable share" would be dynamic. The United States here refused to accept such a commitment. Why?

The market for unmanufactured tobacco was stagnant. The United States claimed it initially carried the burden for maintaining an equilibrium between supply and demand. The United States claimed whilst it was doing such, other countries were expanding production. Although the United States did not claim that other countries were using export subsidies, it must be implied because if so, the United States would claim pursuant to the Working Party of the 1954/55 Review Session Point B it was able to use

the same practice to counter balance the practice used by others. The problem for the United States was that the complaint by Malawi was pursuant to Article XXXVII:3(c) of Part IV of GATT. Article XXXVII:3(c) required the United States to have due regard to the interests of Malawi, as a developing nation. The United States by using the argument that it could not determine the extent of its obligation therefore avoided any obligation to Malawi.

The Working Party Report confirmed a fear aroused at the Havana Charter negotiations. The fear was industrialized countries in a trade war situation will subsidize their exports and since they could afford the cost the advantage would be with them. Developing countries did not have the resources to compete with those industrialized countries. Without the safeguards of the Havana Charter and the lack of an institutional process in the General Agreement it means reliance can only be placed on the Contracting Parties not to utilize unfair trade practices. Chapters 5 and 6 discusses whether this reliance was sustainable or a total breakdown of the General Agreement for agriculture has occurred.

D. Summary

The reason I have included the GATT Panel Report and GATT Working Party Report is because they reflect the international commitment to agricultural liberalization. The reflection is one of see-sawing movements. The French Assistance to Wheat and Wheat Flour Exports case[42] was a high-tide mark for the application of the obligation of Article XVI:3. The complaint enquiry was extremely comprehensive in discussing the actual words of Article XVI:3 and all past negotiations on export subsidies. The Panel was also consistent in terms of applying the interpretation of the phrases to the actual events. Thus the obligation did obtain a result. The type of support for the norm of Article XVI:3 by both Contracting Parties indicates that the result is a diplomatic compromise. The Panel applied the measure and found the French system not consistent with it. The result was not one of achieving a liberalization of trade in wheat and wheat flour internationally but a carving up between both Contracting Parties of a particular region. A few years later the United States Unmanufactured Tobacco Working Party Report[43] reflected the low-tide mark on the possible application of Article XVI:3. The low-tide mark was because the United States was not prepared to discuss the norm of Article XVI:3, enter into diplomatic compromises or abide the logical consequences of arguments based on the principles of economic

42. supra note 5.
43. supra note 40.

liberalism. The low-tide mark is a serious development against effecting liberalization of international agricultural trade. What the Working Party Report indicated was that the pillar may not sustain global wealth for primary producing nations. My discussion in Chapters 5 and 6 assumes a greater significance, for if this trend I perceive is correct, then will international agricultural trade be again protectionist like with the government intervention in the 1930's.

CHAPTER 4

An Opportunity for GATT to act again

Although the discussion of the Tokyo Round is in chronological order of the complete "law" on subsidies the reasoning for this is different. To discuss the sugar subsidy debate a slight problem arose in the Complaint by Brazil against the European Economic Community on exports of sugar subsidies[1]. Although the complaint to GATT was filed under Article XVI:3 by the time the Panel were ready to proceed the results of the Tokyo Round of Multilateral Trade Negotiations were clear. Therefore the Contracting Parties agreed to accept the results of the Tokyo Round as it affected Article XVI:3[2]. The Panel Report on the Brazil Complaint[3] proceeded on the result of the Tokyo Round: Agreement on Interpretation and Application of Articles VI, XVI and XXIII (Code on Subsidies)[4]. Thus the reason for the chronological order so that "law" on subsidies is clear for my discussion on the sugar subsidy debate in Chapters 5 and 6.

A. The Reason for Movement on Article XVI:3

As the title to the Chapter suggests GATT Contracting Parties were again motivated to move on Article XVI:3. GATT on many

1. European Economic Community - Refunds on Exports of Sugar - Complaint by Brazil. GATT 27th Suppl. BISID p69 (1980).
2. supra p88 paragraph 4.7
3. ibid.
4. GATT 26th Suppl. BISID p56 (1979).

occasions after the 1954/55 Review Session[5] had reconsidered the agricultural provision but no action occurred. Not until the 1970's did the Contracting Parties expressed a willingness to take "action" was at the Tokyo Round of Multilateral Trade Negotiations: why?

One of the reasons for this action can be attributed to the United States. The United States had gained an advantage in mass produced cereals which it successfully traded internationally. extent of the United States success in cereal production is shown by soya beans. American exports of soya beans to the European Economic Community from 1960 to 1970 rose by 50 per cent[6], between 1974 to 1982 those exports rose by a further 65 per cent[7]. In absolute quantities from 1960 to 1982 soya bean imports from the United States to the European Economic Community rose from 6 million tonnes to 19 million tonnes respectively[8]. What made the United States join major primary producing nations and developing countries in a call for enlarged agricultural access was the realization that the European Economic Community Common Agricultural Policy would lead to self sufficiency in cereals for itself. The United States only had to glance over its shoulder to the sugar subsidy dispute, as discussed later in Chapters 5 and 6, to see the effect of such policy. The Common Agricultural Policy would undermine the secure export market of the United States and

5. see Haberler Report: GATT. Trends in International Trade (1958/59). GATT 7th Suppl BISID p28 (1959); 8th Suppl BISID p121 (1960); 9th Suppl BISID pp110, 185, 189 (1961); 10th Suppl BISID pp135, 201 (1962). GATT The Kennedy Round of Multilateral Trade Negotiations L/2813 and L/2814 (1967).
6. N. Butler "The Plough Share War Between Europe and America" Foreign Affairs 1983 p110.
7. J. Marsh, C. Mackel and B. Revell "The Common Agricultural Policy" Third World Quarterly 1984 p131 at page 143.
8. ibid.

create surplus in the world markets for cereals. I think you can draw the opinion that the impetus from the United States was motivated by domestic concerns. That did not represent any change of position by the United States as seen in Chapter 1, but it did represent a significant weight to the call for trade in agriculture to be liberalized.

B. The Tokyo Declarations and the Proposals for Article XVI:3.

In the period between the 1954/55 Review Session and the start of the Tokyo Round a significant shift had occurred in the weight of the major economic powers. The European Economic Community had grown to be the world's largest trading entity, while Japan was close behind. As a result the United States no longer held a dominant position in international trade. These three would now have to agree on the direction, pace and content of trade liberalization in agriculture.

The United States proposed in the preparatory negotiations that there should be no distinction between primary commodities and non-primary commodities in export subsidies and these negotiations should lead to the liberalization of agricultural trade by increased access to foreign markets for efficient producers[9]. I think that the United States could not have realistically hoped that this proposal would be the basis for the

9. GATT The Tokyo Round of Multilateral Trade Negotiations. Report by the Director General of GATT. Volume 1 p19 (1979).

negotations at the Tokyo Round. Since it still retained the benefit of the waiver from GATT for agricultural commodities[10] the proposal lacked creditability. The extent of domestic legislation in the United States which had the protection of the waiver included support measures for milk, wool, wheat, maize, soya bean, rice, sugar, cotton and peanuts[11] (all being temperate products in which major primary producers had a vital concern with). If the United States was interested in the liberalization of agricultural trade by increased access to foreign markets for efficient producers why did it not propose to drop the waiver? Then their proposals would have received creditability. Undoubtedly the United States aim was to ensure its existing agreements with the Communities on access for its products, especially for soya beans, was safe[12]. As to export subsidies it had to bring change to the provisions to ensure the output trends of the Communities primary product sector did not threaten their export markets. No longer could the United States export markets be taken for granted.

The Communities position was that the "objectives of the agricultural negotiations should be the expansion of trade in stable world markets, in accordance with existing agricultural policies by means of appropriate international agreements"[13]. With regards to existing "agricultural policies" this implied that the Communities

10. see Chapter 2 Section A pages 3 and 4.
11. European Economic Communities Commission. Memo No. 138. "EEC and the U.S. views of the CAP: Myth and Reality" page 1 (1982).
12. supra note 6 pages 110 - 112.
13. supra note 9 p20.

Common Agricultural Policy was not negotiable. What was implied by "stable world markets" in terms of international agreements was a "form of managed markets, which included international agreement on prices, stock piling procedures, phasing of exports, consultation and so on"[14]. To achieve this the Communities argued that agriculture should be dealt with separately by GATT. In an essence the Communities approach mirrored its own internal policies - of government intervention to ensure security of supply and price stability for its producers. This approach was more concerned with stabilizing returns to the producer than attempting to stabilize the market and achieve a basis on which trade in agriculture could lead to global prosperity. It is a continuation of the classic debate from the 1954/55 Review Session of how much government intervention should be permitted in global economic affairs. The Communities approach involved extensive government intervention, whereas the primary produce exporters(attempting to achieve development "of full use of resources"[15]) favoured no intervention. There was no way the Communities were going to allow a substantial revision of the rules on export subsidies. The Communities were prepared to be interested in intergovernmental commodity agreement only because it involved the diplomatic process of compromise. This time the United States had an opponent of comparable size in the negotiations. Given that also most of the world utilized export subsidies as a tool of achieving national policy the proposals of the United States according to the Communities were a <u>non sequitur</u>.

14. supra note 9 p20.
15. GATT Preamble.

The Tokyo Declaration of 1973[16] represented a trade off for agriculture. To get the trade off the United States had to agree to restructure the scope of its unilateral action under its countervailing duty law[17]. The Communities compromised to have negotiations on the review of export subsidies[18]. The Declaration also made provision for negotiations in agriculture to take account of the special characteristics and problems of the sector[19].

The substantive negotiations on Article XVI:3 did not begin until 1978 because the United States and the European Communities could not agree over the extent of the review for export subsidies. Further compromise resulted, particularly from the United States. The concession which concerns us is that the United States eventually agreed the review of export subsidies would be limited to building upon the existing rules. The impetus was again lost to achieve liberalization of agricultural trade per se, the rhetorical calls were only left[20]. The negotiating balance had swung entirely against the United States. Intervention was already accommodated in Article XVI:3 and it was there to stay.

16. supra note 9 p185 Annex B.
17. R.R. Rivers and J.D. Greenwald "The Negotiation of a code on subsidies and Countervailing Measures: Bridging Fundamental Policy Differences" Law and Policy in International Business p1453 (1979).
18. supra note 9 at p186.
19. supra p186.
20. GATT did act on two primary commodities: Dairy Products and Bovine Meats in which international agreements were concluded. The juxtaposition between liberalisation and stabilization continued and they only provided a basis for continual consultation between exporters and importers: see supra note 9 page 143-146. Negotiations did start on an agreement on grain but with the work by UNCTAD in the International Wheat Council, the negotiations came to a conclusion: supra p25-26.

The United States negotiators considered that their task was now to make Article XVI:3 more effective and applicable. The approach decided upon was to bring further clarification and precision to phrases in Article XVI:3. This approach was at odds with what I concluded as a hope to achieve liberalization. I concluded[21] that it must have been the intention of the drafters of Article XVI:3 at the 1954/55 Review to leave the phrases imprecise and subjective. Since Article XVI:3 did not require political backing, it gave opportunity for consultation and dispute settlement procedures to advance the cause. The French Assistance to Wheat and Wheat Flour Exports case[22] justifies this conclusion yet it could not be sustained[23]. It did not mean that the phrases were incapable of been applied just that unless they received support from the Contracting Parties they remind only broad statements. I consider the negotiators of the United States could not progress the applicability of the norm any further. Their approach to make Article XVI:3 more effective was a concentration on the phrases "more than an equitable share of world export trade" and " a previous representative period". Such changes would not ensure that Communities exports would be threaten by United States exports.

The United States initially suggested that an inequitable share of

21. see Chapter 2 Section F pages 64-67.
22. see my discussion in Chapter 3 Section B pages 69 to 76.
23. see my discussion on the United States Unmanufactured Tobacco case in Chapter 3 Section C page 80 and my latter discussion on the Australia Complaint against the European Economic Communities Chapter 6.

the world market for primary commodity would "exist whenever a country increased its share of any natural market for such a commodity"[24]. In other words it is saying that any increase in a country's share would be unfair. This is a prohibition on export subsidies and of course was totally rejected by the Contracting Parties not only because intervention was now already acceptable but also since it froze the world market share and did not allow it to be dynamic. It has also been suggested that this proposal would be impossible to regulate because of the difficulty in obtaining precision in world figures of sales[25].

The United States proposals on price cutting and displacement followed the French Assistance Wheat and Wheat Flour Export case[26]. Naively the United States thought both concepts were demonstratable because their own producers had utili ed the concepts in the drafting of complaints to GATT on wheat exports. These proposals were of course negotiable to the European Economic Communities since the result would require further diplomatic intervention.

24. supra note 17 p1477.
25. supra p1478.
26. GATT 7th Suppl BISID (1958) p46.

C. The Code on Subsidies[27]

The Code on Subsidies is only binding on signatories[28]. Article 10:1 of the Code on Subsidies reproduces Article XVI:3 in a condensed form retaining the "more than equitable share of world export trade". Article 10:2 is an attempt to give more precision to some of the terms of Article XVI:3 by stating that:

> 2. For the purposes of Article XVI:3 of the General Agreement ...
> (a) "more than 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 the 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 situated shall be taken into account in determining "equitable share of world export trade".
> (c) A "previous representative period" shall normally be the three most recent calandar years below those of other suppliers to the same market.

In addition Article 10:3 atates that:

> 3. Signatories further agree not to grant export subsidies on

27. supra note 4.
28. As at the 31st December 1982 out of 51 Contracting Parties to GATT only 15 have accepted unconditionally the Code on Subsidies, a further 2 have accepted it conditionally.

exports of certain primary products to a particular market in a manner which results in prices materially below those to other suppliers on the same market.

The first thing about Article 10, as already mentioned in this chapter, is that it merely adopts the concepts of "market displacement" and "price undercutting" from the French Assistance to Wheat and Wheat Flour Exports case[29]. Although the concept of "displacement" is adopted, the Code on Subsidies has changed the methodology of its enquiry. The French Assistance case[30] used individual markets to illustrate its finding that an inequitable share had risen. This approach was taken by the Panel to reflect the negotiations of the 1954/55 Review Session[31]. So the methodology prior to Article 10 was that the determination had occurred before individual markets were discussed. Article 10:2 changes this methodology. The concept of individual markets is promoted into the determination enquiry. No longer can individual markets illustrate a finding, it is now a factor for inclusion in the decision making process. This was the position of the major primary producers in the 1954/55 Review Session[32] which the United States successfully opposed[33]. Otherwise no changes occurred to the phrase from Article XVI:3.

If I am correct, and this is the only substantial change from Article XVI:3 how could it be justified to primary product nations

29. supra note 26.
30. see my earlier discussion in Chapter 3 Section B p 76.
31. ibid
32. see Chapter 2 Section D p 53 and Chapter 3 Section B p 76
33. ibid

in order to secure their ratification of the Code on Subsidies. The change for Article XVI:3 must have been more subtle. I perceive the only subtlety which secured their ratification is that the purpose of Article 10 was advanced towards one of stabilizing world markets rather than stabilizing the returns to national producers. As discussed earlier, Article XVI:3 was not clear about its purpose. The concepts of displacement and price undercutting progress the aim of "developing the full use of resources" to stabilize world markets rather than return to producers. If I am correct then the aim of Article 10 of the Code on Subsidies should be apparent in the discussion on the sugar subsidy debate.

The other change to Article XVI:3, to make it more effective, resulted in provisions on consultation, conciliation and dispute settlement being detailed in the Code on Subsidies[34]. These Articles in the Code on Subsidies are supposed to result in the timely resolution of a dispute and to bring to a halt the prejudice or impairment to the economies of Contracting Parties.

D. The summary

Not surprisingly the Tokyo Round neither assisted the call for liberalization of trade in primary products nor made the provisions dealing with export subsidies on primary products any more effective.

34. supra note 4 Articles 12, 13, 17 and 18.

Article 10 of the Code on Subsidies only hints, very subtlety, that the aim for trade in agriculture should be upon the basis of stabilizing world markets rather than to maintain incomes for farmers. The change of direction for the aim of Article 10 was not expressly stated. Thus the provisions of Article 10 still contains "grey" areas. Only the methodology of the dispute settlement and the apparatus for consultation and dispute settlement received any support at the negotiations, probably because it involved no political backing and preserved the status quo - as in the 1954/55 Review Session. Article XVI:3 relies heavily on the manner in which Contracting Parties perceive their obligation. I now move to the discussion of the two panel cases which is of greater significance for the aspiration of primary producer nations.

CHAPTER 5

The Sugar Subsidy Debate - Round One

A. Initial Comments

In this discussion I consider the question of GATT's effectiveness in liberalizing trade in the primary commodity of sugar. Sugar is of interest because it easily shows the conflict between government intervention and economic liberalism. That conflict results in restrictions on trade and I hope to show that there exists a direct link between such restrictions, export subsidies and commodity surpluses. The link between export subsidies and commodity surpluses is made in this chapter. Chapter 6 will make the link between the commodity surplus and restrictions on trade. Before discussing the sugar subsidy dispute I shall outline briefly the features of the world market in sugar which put into perspective the discussion. These features shall be discussed in more depth during this chapter.

One feature is the manner in which sugar is traded internationally. One method includes preferential arrangements. In the 1960's these preferential arrangements included more than 50 per cent of the total world exports in sugar[1]. The prominent arrangements in the

1. GATT Committee II Report on the Programme for Expansion of International Trade and Agricultural Protection - Sugar. 10th Suppl. BISID pages 162 - 163 para. 1 (L/1461).

1960's included the United States Sugar Act, the Commonwealth Sugar Agreement and the bilateral arrangements between Cuba and the Soviet Union and the Comecon Countries. By the late 1970s and early 1980's those sales in the preferential market (tied sales) had reduced as a proportion to 20-30 per cent of total world exports. The sales of sugar not under preferential arrangements occurred in a residual market (called the "world free market"). These two markets account for all sugar traded internationally. The remaining prominent tied sales since the late 1970's are between Cuba and the Soviet Union and the Comecon countries, and between the Communities and the African, Caribbean and Pacific (ACP) countries under the Lomé convention. The Commonwealth Sugar Agreement expired around 1974 with the entry of the United Kingdom into the Communities. The ACP countries under the Commonwealth Sugar Agreement retained their preferential sales with the exception of Australia, thus making the impact of the Lomé convention minimal. With the advent of the International Sugar Agreement the United States allowed its quota system under their Sugar Act to lapse de facto. The other arrangement which affects international trade in sugar is the intergovernmental commodity agreement called the International Sugar Agreement. The International Sugar Agreement attempts to regulate returns to producers and security of supply. The International Sugar Agreement tries to regulate trade in the world free market but not all major exporters belong to this commodity arrangement. The major exporter not belonging is the Communities. In 1973 of the 57 per cent of total world sugar traded on the world free market

15 per cent was accounted for by the Communities[2]. By 1981/82 it was estimated that the Communities would account for around 30 per cent of all sales on the world free market[3].

Another feature is the nature in which sugar is sold. Sugar is produced in three forms - cane, sugar beet and high fructose maize syrup. High fructose maize syrup is the produce of developed countries and although is restricted by production quotas in such countries to protect domestic cane sugar and sugar beet producers it does affect exporters[4]. High fructose maize syrup is an alternative sweetener and does not affect my discussion of cane sugar and sugar beet. The production of cane sugar is mainly in developing countries, particularly the Latin America, Caribbean, Indian and the South Pacific. However it is also the product of two developed countries - Australia and the United States. The production of sugar beet is the crop of the developed countries of Continental Europe. Since sugar is mostly a product consumed in developed countries an inevitable clash has occurred between these two types of producers. The clash concerns the degree of intervention by governments to protect the producers. This has occurred continuously since the 1930's. As I mentioned earlier the clash is about economic liberalism versus protectionism[5]. Sugar beet is considered a high

2. J.E. Nagle. Agricultural Trade Policies (1976) p103.
3. GATT. European Communities - Refunds on Sugar Exports - Communication by Australia, 12 September 1981 (L/5185).
4. I. Smith "Prospects for a New International Sugar Agreement" Journal World Trade Law, 1983 p308 at p310.
5. see my discussion particularly in Chapter 1 Section A pages 11-12, Chapter 2 Section E and Chapter 4 Section A which address this point.

cost crop and required subsidies for production and export unlike cane sugar[6]. The problem is that cane sugar is not an annual crop and therefore cannot meet immediately shortfalls in production[7].

My last feature of world trade in sugar is the production and consumption patterns. Historically consumption has kept pace with increases in production[8]. Consumption rapidly increased in developing countries around the early 1970's such that by 1973/74 there was a shortfall in production[9]. As a result of this shortfall developed countries increased their production, as they were able to meet this shortfall immediately by increased sugar beet production. By 1975 consumption had levelled off or declined but production was still increasing. This very brief description of production and consumption figures leads me into the Panel cases. As a result of surpluses generated by the agricultural policies of the Communities a clash occurred about these policies within the context of GATT which was supposed to accommodate trade in agriculture on the principles of economic liberalism.

6. see the discussion on the United Kingdoms policy of importing sugar by S. Harris and I. Smith "World Sugar Markets in a State of Flux" Trade Policy Research Centre (1973) p80.
7. ibid.
8. From 1950 to 1970 only 1963 was the exception to the rule when a shortage of sugar occurred: supra note 1 page 164 para. 5.
9. supra note 2 page 99.

B. The Complaint by Australia[10] and Brazil[11]

Australia's main complaint about the European Economic Communities (Communities) export subsidies for sugar was that the system resulted in the Communities having more than an equitable share of world export trade, which was based on Article XVI:3[12].

Brazil's complaint against the Communities was similar to Australia, that is, under Article XVI:3[13]. However Brazil also complained in detailed terms that the effect of the subsidy measure had resulted in serious prejudice: reduced sales opportunities and diminished export earnings. Brazil as a developing country claimed generally that the Communities had not carried out their obligations under Part IV of GATT. As I mentioned earlier, Brazil in the Panel hearing altered the basis of its complaint to be pursuant to Article 10[14] of the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII (Code on Subsidies)[15]. This does not make a difference to my discussion because as I have noted earlier there was very little change in the substance of Article XVI:3 of the General Agreement and Article 10 of the Code on Subsidies[16].

10. European Communities - Refund on Sugar - Complaint by Australia. GATT 26th Suppl. BISID page 290 (1979).
11. European Communities - Refund on Sugar - Complaint by Brazil. GATT 27th Suppl. BISID page 69 (1980).
12. Supra note 10 p291 para. 2.1
13. supra note 11 p70 para. 2.2
14. supra p88 para. 4.7
15. GATT 26th Suppl. BISID P56 (1979)
16. see my earlier discussion in Chapter 4 Section C p90-92.

C. The Domestic Stabilization Scheme

The Communities in accordance with the Common Agricultural Policy ran a system of support for sugar.[17] The objectives of this support system were to guarantee employment, a reasonable standard of living for the Communities growers and security of supplies for the entire Community[18]. The objectives of this policy do not represent any departure from any national policies of countries in respect of agriculture since the 1930's as I mentioned earlier[19]. To achieve these objectives the Communities reserves the domestic market for its producers by imposing a levy on sugar which crosses the external frontiers and set a relatively high internal price for sugar[20].

In order to regulate production the Communities operates a quota system for each member country. The quotas are supposed to operate as inhibitors of production to ensure a burdensome surplus did not accumulate. As will be shown the system does not provide a quota on production but rather operates a sliding scale of price inhibitors on production over and above domestic requirements. This means that surpluses readily accumulate. The Communities to ensure

17. The System was established by Regulation (EEC) No. 1009/67 which came into force on the 1st July 1968. The Regulation has been amended on various occasions but it has not altered the structure of the system.
18. supra note 10 page 301 para. 3.3 and supra note 11 page 81 para. 3.3
19. To confirm this point of view see my discussion in Chapter 1 Section A pages 1 - 12 where these policies were outlined.
20. supra note 18 ibid

domestic self sufficiency is met have a basic quota (Quota A) which guarantees a price and market for that production. Quota A is 100 per cent of the Communities estimated total consumption. Production in excess of Quota A is also guaranteed up to a certain point (originally 135 per cent of Quota A), and this is known as Quota B. Quota B is guaranteed a market and price - although a lower price than Quota A. Production in excess of these two quotas is known as Quota C sugar and has to be sold outside the Communities at the growers' own risk (unless the Communities suffer a shortage).[21]

The second part of the system which supposedly regulates over-burdensome surpluses is one of prices. The price system is made of three components: (i) a target price for white sugar, (ii) an intervention price, and (iii) a threshold price which sets the minimum import levies for imported sugar. The target price is determined by the Community region having the lowest price. From the target price the intervention price is set to guarantee a market for Quota A and Quota B production (this is lower than the target price). The threshold price is also derived from the target price but includes the domestic transport charges for the area of the greatest surplus (Northers France) to the most distant deficit area (Southern Italy)[22]. An example of the pricing mechanism is in 1972/73 the Communities target price was 245.5 units of account[23],

21. This system is described more fully in the Panel Reports: supra note 10 pages 302-302 para. 3.7 to 3.10, and supra note 11 page 82 para. 3.7 to 3.10.
22. ibid
23. A unit of account was equal to the United States dollar at a fixed price.

the intervention price was 233.4 units of account and the threshold price was 276 units of account - all per ton of white sugar[24]. The world market price for that period was estimated around 69 units of account per ton of white sugar[25]. This is what I mean, when I say the system is not one of production controls but is a scale of price inhibitors on production over and above Quota A and Quota B. Production of Quota A and Quota B can be subject to a production levy to meet the cost of disposing of the excess domestic sugar requirements onto the world market. It is this sugar which was the basis of the complaint by Australia and Brazil. If the production levy does not cover the difference between the intervention price and the price prevailing on the world market, to dispose of it would require an export subsidy. The question is where does this export subsidy come from? It terms of the General Agreement provisions it can not come from central government funds[26].

Australia argued in 1978: the London Daily price for white sugar was United States $206 per tonne, the intervention price in the Communities was above US$612 per tonne. If the production levy in 1978 was 30 per cent of the intervention price[27] then a subsidy equivalent to US$403-428 per tonne occurred[28]. The Communities exported with refunds in 1978 2,708,000 tonnes[29], so

24. S. Harris and I. Smith supra note 6 pages 61 and 62.
25. I. Smith "The European Community and the World Sugar Crisis" Trade Policy Research Centre Staff Paper No. 7 p5 (1974)
26. see GATT Ad. Article XVI:3 BISID volume IV p68.
27. It is reasonable to use this figure as it was mentioned in the complaint without a date of application: supra note 10 page 302 para. 3.8
28. supra page 293 para. 2.7
29. supra page 317 Table 6.

the total subsidy involved was US$ 1,126 million. Australia argued that this total export subsidy was met by government funds.

The Panel considered the refunds in the system could not be the subject of budgetary limits[30], if the appropriations originally allocated to the European Guidance and Guarantee Fund proved insufficient, the Communities had recourse to a supplementary budget. Therefore the budget had no legal limits for refunds on the export of sugar[31]. Accordingly the system involved government funds and was within the obligation of Article XVI:3[32]. Australia and the Communities were in agreement with this finding[33].

Brazil did not have to argue this point as the Communities were in agreement that the system was subject to the obligation in Article XVI:3[34]. The effects of the subsidy scheme are discussed later on in this Chapter.

30. supra page 929 paragraph 2.7
31. supra page 319 paragraph 4.34
32. supra page 305 paragraph 4.3
33. supra page 306 paragraph 4.4
34. supra note 11 pages 86-87 paragraph 4.2 and 4.3

D. World Export Trade - Is it the same as World Free Market?

The Panel were presented with an argument by Australia, that when looking at the disposal of the surplus sugar generated by the Communities support system, it should only consider the trade in which that surplus was sold[35]. In other words Australia requested that "world export trade" should be read as "world free market"[36]. Australia based its argument upon the basis that whereas it traded in both markets (the world free market and the tied sales market) the Communities only traded in the world free market. Since the world free market was accessible to both on the basis of competition then it was appropriate to use that market. Another general argument is that since this was the market that felt the effects of the Communities system it was important that the measure of the obligation be against that market[37]. I understand this argument did present a problem to the Panel although this is not reflected in their discussion or findings[38]. There is merit in the argument and so I shall discuss it as some depth because it also goes to the general question of whether GATT can liberalize agricultural trade.

The Communities quite rightly argued that the words "world export trade" referred to world trade in a commodity and that meant the entire market not just a portion of it, even if it was a large part[39].

35. supra note 10 page 297 paragraph 2.20
36. ibid
37. ibid
38. supra page 307 paragraph 4.9
39. supra page 297 paragraph 2.21

I shall come back later to the balance of the Communities argument for this, I consider a most important point.

As I have mentioned before trade in sugar occurs in two markets. So what is the nature and extent of the "tied sales market"? The trade figures available to the Panel show the breakdown for both markets between the years 1969 and 1977[40]. 1969 was the first year of operation of the Communities Common Sugar Policy. 1977 I am of the opinion represents a normal year of trade in sugar. In 1969 of the 18.5 million tonnes of sugar traded internationally, 16.35 million tonnes entered the world free market. In 1977 of 28 million tonnes of sugar traded, 21.7 million tonnes entered the world free market[41]. The tied sales market for 1969 and 1977 is 2.15 million tonnes and 6.3 million tonnes respectively. Thus we see 75 - 88 per cent of sugar traded occurs on the world free market. This does represent a change from 1950-60 where 50 per cent or over of sugar traded occurred on the tied markets[42]. This change accords with reality in terms of tied sales for the only remaining major preferential sale agreement is between Cuba and the Soviet Union and Comecon countries[43]. In terms of the Commonwealth Sugar Agreement it ceased to have effect and Australia was excluded from the Lome Convention between the Communities and African, Caribbean and Pacific States. The United States around this period lifted its quota policy and bought directly from the world free market.

40. supra page 304 paragraph 3.18
41. ibid
42. Committee II 3rd Report on Programme for Expansion of International Trade and Agricultural Protection. GATT 10th Suppl. BISID p163 paragraph 1.
43. I. Smith "Prospects for a New International Sugar Agreement". Journal of World Trade Law 1983 page 308 at p313.

Further the International Sugar Agreement still ceased to have effect because of the rise in prices and the inability to balance supply and demand on the world free market.

Moving from those statistics it shows tied sales only occur significantly between Cuba and the Soviet Union and Comecon countries. Trade figures from 1965-70 for that markets puts tied sales at an average of 2.0 million tonnes per annum and for 1981-82 an average of 3.8 million tonnes per annum[44]. If I assume for 1969 those sales amounted to 2.0 million tonnes and 1977 somewhere around 3.0 million tonnes then that is the major share of world tied sales, especially for 1969. In 1977 that markets tied sales would represent around 50 per cent of all world tied sales. Being conservative, if I presume that all of Australia's sales to Group III in Table 4 of the Panel's Report[45] were tied in 1969 it would amount to 0.96 million tonnes and in 1977 2.2 million tonnes[46] of world tied sales. No account of the special arrangements under Lomé Convention has been taken. I conclude that the tied sales market was dominated by the relationship between Cuba and the Soviet Union and Comecon countries. Australia's tied sales represented as a proportion of traded world sugar in 1969 0.05 per cent and in 1977 0.07 per cent.

The first point to be said about Australia's argument that world export trade statistics should be those of the world free market

44. ibid.
45. supra note 10 p311.
46. ibid.

concerns the Communites export subsidy programme. Since that support policy only occurs in the world free market then it is reasonable that it should be the basis for the statistics. Australia's tied sales are a special factor, which is part of the weighing of the obligation, and are not relevant to the statistics on world export market. The second point to be said of the world export trade argument is that the enquiry is within the context of GATT. The Soviet Union and some Comecon countries are not Contracting Parties to the General Agreement. The Havana Charter had a provision which dealt with competition against non member using export subsidies - the General Agreement did not carry over that provision[47]. The General Agreement Preamble does state that the objectives in the field of trade are to be entered into on a "reciprocal and mutually adventageous arrangement". Accordingly if the Soviet Union and Comecon countries are not prepared to enter into GATT upon that basis why should their tied sales, which represents the large percentage of that market, be allowed to diminish the share of Contracting Parties to GATT to the detriment of the complainant.

The Communities also argued that in referring to "world export trade" it meant the entire market for sugar and not an individual market. The Communities said support for this was found in the French Assistance to Wheat and Wheat Flour Exports[48] case and the negotiations

47. see my discussion in Chapter 2 Section D page 59-61 on Point B of the "Understanding" of the Working Party in regards to Article 26:4 of the Havana Charter.
48. GATT BISID 7th Suppl. (1958) p46.

in the Havana Charter and the 1954/55 Review Session. With regards to the Havana Charter there is no support for the Communities argument[49]. The 1954/55 Review Session[50] did discuss individual markets but that was in relation to displacement not world export trade. The argument of displacement in individual countries and the world export markets was carried over into the French Assistance to Wheat and Wheat Flour Exports case[51].

The Panel rejected Australia's argument[52] and accepted the Communities argument; that world export trade meant the free market and the tied sales markets. The Panel referred to the 1954/55 Review Session and the French Assistance to Wheat and Wheat Flour Exports Case as supporting this finding. As I mentioned in the above paragraph there is no support for such a point. It was not foreseen that two markets could deal with the trade in a commodity and so no negotiations took place on the point. Since the definition of trade means the exchange of a commodity the Panel should have examined the question of the extent and nature of both markets to see the result. I consider a case was made out for the analysis of the world free market and do not think the Panel's conclusion is justified. In the rejection of this argument the possibility of Australia showing an increase of the Communities sugar was due to export subsidies diminished.

In the Brazilian complaint[53] the question of what was to be the

49. see my earlier discussion Chapter 1 Section B page 13-18 and Section E pages 24-35.
50. see my discussion Chapter 2 Section D pages 52-54.
51. see my discussion Chapter 3 Section B pages 69-77.
52. supra note 10 page 307 para. 4.9
53. supra note 11 page 89.

"world export trade" was not raised since it had been settled in the Australian complaint[54]. Therefore world export trade included the market figures for the free market and tied sales. Brazil, unlike Australia, only traded on the world free market for the complaint period. Therefore it competed evenly with the Communities in the same market. By the Panel adopting its prior conclusion, the presentation of the statistics did not show the real influence of the Communities export subsidy program. The importance of the Communities share as a result of their system diminished again.

The consequences of this lumping together two separate markets in my opinion, goes against the aims of the General Agreement. The world free market is very susceptable to enormous price fluctuations and therefore was of little use to exporters interested in stable renumerative prices or market conditions, or to importers interested in security of supply(this reads like the objectives of the Communities Common Sugar Policy). Possibly the world free market prices had no relation to the costs of production because it was only regarded by entities like the Communities as a dumping grounds for the surplus generated by its system. Therefore the residual nature of it, to some exporters, meant the market did not have a lot going for it. So this market is at odds with the aims of economic liberalism. By the Panel lumping together both markets it can be said that it supports the type of speculation and instability which

54. supra note 10.

the General Agreement is supposed to rule against. If the Panel had used the world free market to consider the measure of the obligation, it would have given an indication to primary producer nation, like Australia and Brazil, that it was prepared to take on the effects of a system generating surpluses upon autarkic grounds rather than the "full use of resources". Thus it would have encouraged a movement to a stable market system. This may not be the tied market but a reformation of the free market.

E. The Representative Period

Australia complained about the exports of the Communities between 1975 to 1978[55] (preliminary data only available for 1978) and suggested that the entire period of 1969 to 1975 should be the representative period[56]. The Communities suggested comparing the averages of 1972-74 with that of 1975-77 and argued against "estimates for recent periods, forecasts or projections for future periods of whatever duration must not be used"[57]. The years 1974/1975, because of the vagaries of sugar trading, were regarded with suspicion by the Panel and so were discounted[58]. The Panel then took the years 1971 to 1973 and 1972 to 1974 as the representative period. The Panel did not use the period 1969 to 1971 and no

55. supra note 10 page 292 para. 2.7
56. supra page 298 paras. 2.22 and 2.23
57. supra page 298 paras. 2.24 and 2.25
58. supra page 307 - 3`8 para. 4.10

justification was offered for their exclusion. Did this make a difference?

Australia had argued that the reason for selecting 1969 to 1975 was firstly that 1969 was the first year of the operation of the Common Sugar Policy and 1968 was the first year of the operation of the International Sugar Agreement. Secondly, because of the volitile nature of sugar it was desirable to achieve a true historical picture by a long representative period[59]. In general terms these arguement seem to be reasonable. A further argument for the use of 1969 is that it would show the Communities exports without the influence of the Common Sugar Policy. 1970 should be the first cropping year under that program. Unless 1969-1971 were abnormal[60] years there seems to be no justification for their exclusion. No specific case was made out by Australia for this period. I am of the opinion with the Panel starting the representative period in 1971 it its an unfair comparison of exports.

If the task of the Panel is to measure the exports subsidy against the obligation then 1969 to 1971 should have been used to give a better comparison.

Brazil's complaint concerned the exports of the Communities between 1976 to 1979[61] (preliminary data only available for 1979) and suggested

59. supra p298 para. 2.22 The latter point is supported by the French Assistance to Wheat and Wheat Flour Exports case supra note 48 which used the periods 1934-38 and 1948-58.
60. which they were not. See S. Harris and I. Smith. Supra note 6 p54-55.
61. supra note 11 page 74 paras. 2.12 and 2.13

that the representative period be the comparison between 1973-75 and 1976-78[62]. The Communities suggested that the two reference periods be 1972-1974 and 1975-77[63]. The Panel did not apply Article 10:2(c) of the Code on Subsidies literally and took the periods 1971-73 and 1972-74 as the previous representative period to compare with the shares of 1976 to 1979[64]. The Panel considered these periods to show the normal market years. If the Panel was prepared to go this far why did it not go back to 1969 which was the start of the Communities Common Sugar Policy?

The following table which I have compiled shows the market shares from the inception of the Communities Common Sugar Policy in comparison with the previous representative period and the period of complaint.

TABLE 1/over

62. supra p74 para. 2.8
63. supra p74 para. 2.10
64. supra p89 para. 4.9

TABLE 1

Trade in Sugar (thousand tons, raw value)

Period	Australia		Brazil		European Communities	
	Average export total	Percentage of world export	Average export total	Percentage of world export	Average export total	Percentage of world export
1969-1971	1661	8.95	approx 2000	10.78	1091	5.95
1971-1973	2072	9.5	approx 2336	10.4	1708	7.8
1977	2965	10.5	approx 1888	8.8	2699	9.6
1978	2002	8.1	1960	7.8	3566	14.4
1979	2164	8.2	2112	8.0	3722	14.1

Sources: supra note 10 page 308 Table 2 and page 311 Table 4; supra note 11 page 73 Table 1 and page 89 Table 4; I. Smith and S. Harris supra note 6 p56 Table 1 and I. Smith Prospects for a New International Sugar Agreement, Journal World Trade Law 1983 p308 Table 1.

Table 1 shows how the selective use of previous representative periods may distort the historical picture. A conclusion I can draw from Table 1 is that 1969-1971 worked against the Community. Since the Panel could not provide a justification for 1969-1971 it is open to speculation. One could speculate that the Panel was prejudiced in favour of a major trading entity. After all the General Agreement was drawn up to preserve those major trading nations status quo.

F. The Measure of the Obligation

- equitable share

The Panel in both the Australian[65] and Brazilian[66] complaints noted that the concept had no complete definition nor had it been considered absolutely necessary to have a complete definition of the concept. This follows from the negotiations of Article XVI:3[67] and Article 10[68]. As I mentioned earlier, all it means is that the concept is fluid and reflects the dynamic nature which should flow from the principles of economic liberalism in the preamble to the General Agreement.

Australia to prove its complaint, based its case along similar lines to the French Assistance to Wheat and Wheat Export Case[69], and argued that any increase in the Communities share would be attributable to the export subsidy for without it they would not have been able to export[70]. To prove the share was inequitable Australia argued market share[71], displacement[72], price undercutting[73] and special factors[74].

65. supra note 10 page 308 para. 4.11
66. supra note 11 page 88 para. 4.6
67. see my earlier discussion in Chapter 2 Section F pages 65-68.
68. see my earlier discussion on Article 10 of the Code on Subsidies in Chapter 3 Dection D and E.
69. supra note 43.
70. see my earlier discussion on the methodology of this case in Chapter 3 Section B.
71. supra note 10 page 295-296 para. 2.15
72. supra ;age 299 para. 2.26
73. supra page 296 para. 2.16
74. supra page 292-294 paras. 2.7 to 2.9

Brazil, following the findings on the Australian complaint, and the Code of Subsidies, was left to argue market share[75], displacement[76], price undercutting[77] and special factors[78]. Brazil's methodology to the equitable share oblibation changed as a result of Article 10 of the Code on Subsidies as I mentioned earlier in Chapter 4. Although it affects the determination the substance of the arguments are the same.

- world market share

The following table presents the relative shares of world export trade to assist my enquiry in the market share.

TABLE 2

Shares of World Export Trade in Sugar (in percentage points of world total)				
	European Communities	Australia	Brazil	Others
1991-73 (average)	7.8	9.5	10.4	72.3
1972-74 (average)	7.5	9.5	12.0	71
1976	8.3	11.6	5.5	74.6
1977	9.6	10.5	8.8	71
1978	14.4	8.1	7.8	69.7
1979	14.1	8.2	8.0	69.7
Source: Table 4 supra note 11 page 89 and my Table 1 Chapter 5 Section E page 113.				

75. supra note 11 page 72-74 paras. 2.6 to 2.9
76. supra page 74-76 paras 2.12 to 2.15
77. supra page 78 para. 2.22
78. supra page 77-79 paras 2.18 to 2.19 and para. 2.22

The claim by Australia that the Communities had increased their market share by export subsidies was weakened by the exclusion of 1969-71 from the representative period and the accumulation of the world free market and tied sales market[79]. Table 1[80] and Table 2 do show that the Communities increased their share during the operation of the system. The extent of the increase for 1977 compared to 1972-74 was at 2.1 percentage points[81] and in 1978 compared to 1972-74 was 6.9 percentage points[82]. The relative increase was not significant in comparison to the French Assistance to Wheat and Wheat Flour Exports case[83] where the difference was 8 percentage points[84]. Yet in comparison to the Brazil market share, at least Australia was able to point to the Communities increasing consistently their share of exports[85]. In absolute terms the increase in this complaint met the French Assistance to Wheat and Wheat Flour Export case[86] at around a 200 percent increase.

The Panel in the Australian complaint were prepared to use the 1978 figures with some reservation[87] to conclude that the increase by the Community justified more thorough examimination[88]. The Panel was not

79. Chapter 5 Section D and Section E.
80. Chapter 5 Section E page 112.
81. supra note 10 page 309 para. 4.12
82. supra p310 para. 4.14
83. supra note 48
84. see my discussion in Chapter 3 Section B pages 71 and 76.
85. I refer to my following discussion on Brazil's market share where in comparison the Communities share peaked in 1978 and then declined in 1979.
86. supra note 48
87. supra page 309-310 paras. 4.13, 4.15 and 4.16
88. supra page 310 para. 4.16

prepared to go as far as the French Assistance to Wheat and Wheat Flour Export case[89] (French Assistance case) and conclude that the entire increase was attributable to the subsidy system. I question whether the reasoning to the finding is correct. I shall come back to this point after discussing the same argument in the Brazilian complaint.

Brazil, also suffering with the findings in the Australian complaint on the world free market and the exclusion of 1969-71 from the previous representative period, considered that they had a strong case that the Communities share had increased as a result of the system. Brazil had argued that the increase in the complaint period was significant[90] but from Table 2 we see that this maximum relative increase in 1977 amounted to 1.3 per cent, 1978 it amounted to 6.6 per cent and by 1979 it was 6.1 per cent. The relative increase is neither as strong as the Australian complaint nor the French Assistance case[91]. The Panel discounted 1976 in favour of Brazil[92]. The relative increases for 1977-79 cannot be considered a significant gain if we use the French Assistance case figure of 8 percentage points as a bench mark. With 1979 preliminary figures showing a decline of the Communities share it also does not indicate a pattern of maintaining an increase in exports. In terms of absolute share, from Table 1, the increase of the Communities exports were only in excess of 1 per cent of Brazil's absolute share of total world exports. Only the trade figures for 1978's absolute share justified further

89. I refer to my discussion on this case in Chapter 3 Section B page 72.
90. supra note 11 page 72 para. 7.2
91. see my discussion in Chapter 3 Section B pages 71 and 76.
92. supra note 1 page 90 para. 4.10

the examination. The Panel in the Brazilian complaint said 1977 could not justify further examination but the figures for 1978 and 1979 could[93]. This is similar in terms of the Australian Complaint[94]. The Panel then went on to state that " [it] was evident that the increase in the Communities sugar exports had been affected through the use of subsidies"[95]. This admission was the same conclusion as in the French Assistance case but it cannot be justified in terms of the Panels discussion on market share. Using the French Assistance case as a bench mark, then the logical extension of that finding is that the Communities increase in sugar exports is inequitable. If this is a correct understanding then surely Australia should have had a similar finding because its case on this point is stronger than Brazil's.

The questions which has to be then posed is, whether the Australian findings on market share is correct from the French Assistance case methodology[96].

Brazil in the presentation of its case on market share referred to two more substantial points; firstly, the Communities by unrestrained subsidies had displaced more efficient producers at a time of overproduction and lastly, although other countries (Cuba and Thailand) had increased their exports it was not at the expense of Brazil[97]. These points were neither addressed explicitly

93. supra page 90 paras. 4.10-4.11
94. see the above discussion
95. supra note 11 page 90 para. 4.11
96. supra note 48.
97. supra note 11 page 72 paras. 2.6 and 2.7

by the Panel[98] nor replied to by the Communities[99]. These further arguments were not stated in the French Assistance[100] case by Australia but were referred to by the Panel expressly[101].

Brazil's argument about the unrestrained Communities subsidies which had displaced more efficient producers at a time of over-production must be the justification for the Panel's finding[102]. This argument addresses the point of accommodating the principles of economic liberalism for international trade. Brazil does not argue the principle of comparative advantage but rather in terms of the General Agreement preamble "full use of resources" by efficient producers. The argument is often made out that trade in agriculture should be on the basis of comparative advantage but you will note in my earlier discussion I have made no reference to this principle[103]. The General Agreement does not make out an argument that trade should be on the basis of comparative advantage but rather makes an argument against the inefficiency of the allocation of world resources to achieve global wealth[104]. The export subsidy provisions of the General Agreement and the Code on Subsidies do not contradict this rather they acknowledge that in agricultural trade the tools of economic policy will accommodate for national autarky. The problem in the liberalization of agriculture is that in attempting to achieve a "full use of resources"

98. supra page 89090 paras. 4.8 to 4.11
99. supra page 74 paras. 2.9 to 2.11
100. supra note 48
101. I refer to my discussion in Chapter 3 Section B pages 71 and 72
102. supra note 11 page 90 para. 4.11
103. see my discussion in Chapter 2 Section E and Chapter 4 Section B and D.
104. see ibid.

it has to be done by the principles of free trade and free enterprise. This is where the conflict has persistently occurred and the question still remains open at this stage. So Brazil's argument had to be taken cognizance of because it addresses the problem in a nutshell of what Article XVI:3 and Article 10 have to solve. It is an underlying theme that producers utilizing full use of resources in a period of overproduction are entitled not to have their exports displaced by the policy of export subsidies. This theme runs through the Havana Charter[105], the 1954/55 Review Session[106], the French Assistance to Wheat and Wheat Flour Exports[107], the Unmanufactured Tobacco case[108], the the Code of Subsidies[109]. Therefore I consider the Australian finding on market share[110] an abberation from the methodology of the French Assistance case.

105. I refer to my discussion in Chapter 1 Section E pages 29-30 where on attempting to prohibit export subsidies it allows 3 permitted exceptions upon this basis.
106. I refer to my discussion in Chapter 2 Section D on "equitable share", "world export trade", "previous representative period" and the "special factors".
107. see my discussion in Chapter 3 Section B pages 74 and 75.
108. I refer to my discussion in Chapter 3 Section C. An argument has been made about this case that it supports the view that according to Article XVI:3 a subsidizing country share does not have to be a predetermined portion but that it should be dynamic. This does not however fairly represent the Working Party Report. Malawi agreed that in a growing market a subsidizing Contracting Party share need not be static and could vary. The Working Party agreed with this proposition not one applied to a static market. Support for this argument is found in the 1954/55 Working Party recommendations about special factors in Chapter 2 Section D.
109. I refer to my point about the subtlety required to achieve ratification of the Code on Subsidies by major primary producing nations which hints in favour of this argument against the one of national security and self sufficient and raising the income of farmers: Chapter 4 Section C.
110. supra note 10 page 310 para. 4.16

The finding should have been that the Communities system of subsidies had contributed to an increase in their exports but whether it could be extended to conclude that an unfair share had arisen was uncertain. Although this might appear a tautology on the Panel actual finding I consider it essential that GATT panels be seen to be adopting a similar methodology to the complaints for the dispute settlement process. The Australian finding is inconsistent with the French Assistance case and the Brazilian complaint.

- displacement

It will be recalled that in the French Assistance case[111] the Panel, illustrated its finding that the French share was inequitable by discussing the effect of the subsidy in regional and individual markets[112]. This is what is meant by displacement. As I mentioned earlier, the Code on Subsidies altered the methodology of the enquiry into the measure of the obligation by including displacement as one of the factors [113]. The Australian complaint was not established under the Code on Subsidies rather Article XVI:3 of the General Agreement[114]. By precedence this Panel should have followed the same methodology in the French Assistance case[115]. The problem was that the Panel did not . The Panel utilized displacement in regional and

111. supra note 48.
112. see Chapter 3 Section B page 76.
113. see Chapter 4 Section C page 90.
114. see my earlier discussion in this Chapter Section B page 98.
115. In all previous discussion on Article XVI:3 Panels have made reference to previous Panel Reports, the 1954/55 Working Party negotiations and the Havana Charter negotiation. So it is reasonable to assume this.

individual markets to assist in the determination of the measure of the obligation rather than illustrate the finding[116]. The Panel had no legal basis to do this. The 1954/55 Review Session negotiations made it clear that the primary question was world export trade and so individual markets could not enter into the weighing of that determination[117]. The Panel in the French Assistance case reflected those negotiations, but not so in this Australian complaint. I do not think you can take this point any further and I propose to discuss displacement in the terms outlined by the Panel.

The Panel in the Australia complaint examined in detail the displacement of Australian exports by dividing all markets up into groupings: markets in which the Communities and Australia directly competed, traditional markets and new markets[118]. A further market was Australia's exports to the Communities but this had declined with the termination of the Commonwealth Sugar Agreement.

With respect to the traditional markets both Australia and the Communities had tended to maintain those markets without any infringement upon their shares[119]. So that left Australia to show displacement in the remaining markets.

116. see supra note 10 pages 310-315 paras. 4.17 and 4.28
117. see my discussion in Chapter 2 Section D pages 52-53.
118. supra note 10 page 310-312 para. 4.20 and see Table 4 at page 311.
119. supra pages 312 to 313 paras. 4.23 and 4.25

The market in which Australia and the Communities directly competed showed growth in 1976 and 1977 but declined in 1978[120]. The individual market which showed a discrepancy in this proportional movement was China. Communities exports to China were apparently negligible until 1978[121]. The Panel thought that partial displacement of Australian sales came from other sources[122]. The Panel concluded there was not sufficient evidence of displacement in this grouping to constitute clear evidence even though the Communities could have replaced some of China imports[123]. The Panel noted that the proportional decline in 1978 for Australian markets were China and United States . Yet Australia in 1978 also showed a decline in exports to the United States whereas the Communities increased[124]. The drop in Australia's exports to China amounted 6 per cent of absolute market share, one can conclude that the Communities increased its exports by somewhere around 3 to 5 per cent of absolute market share. The Panel did not present any figures on the Communities increase of exports to the United States for 1978. I have calculated that total imports of sugar to the United States in 1978 was 4,000,000 tonnes. If Australia maintained its share from 1968 at 5 per cent of the absolute market that in 1978 would amount to 200,000 tonnes[125]. This would mean the Communities exports increased by about 20,000 tonnes. Total exports to this group in 1978 by the Communities increased by 10 per cent

120. supra page 312 para. 4.21
121. ibid.
122. ibid.
123. supra page 313 para. 4.26
124. supra page 312 para. 4.21
125. This calculation is from figures in the Brazilian complaint supra note 11 page 91 para. 4.14 and F.O. Lichts International Sugar Report. Problems and Prospects of a new International Sugar Agreement. Special Edition 1977 p41.

in absolute terms against Australia. In terms of the French Assistance case in the Indonesia market alone French export rose from nothing to 49.2 per cent and Australian shares dropped from 89 per cent to 47 per cent.[126] The displacement of Australian sugar exports in comparison with the Communities is insignificant. The Panel regarded it as insufficient[127].

The remaining argument for direct displacement concerned new markets. These were opportunities in the Mediterranean, Middle East and Africa[128] - the group which had shown a dramatic increase in consumption in the 1970's. According to the statistics of the Panel this market was dominated by the Communities[129]. The increase of exports to those countries in 1976 to 1978 by the Communities was not a result of their subsidies but rather a lack of marketing by Australia. Australia's exports in 1972 were to Algeria, Tunisia and Morocco, and none thereafter[130]. I understand from some quarters that this was not a fair presentation of the statistics and Australia did have exports to these markets after 1972. No statistics were presented by those quarters. Again there is no evidence presented by Australia of displacement in terms of the French Assistance case in this market.

126. supra note 48 page 59 Table B. The Indonesian displacement was the minimum drop suffered by Australia.
127. supra note 10 page 313 para. 4.26
128. supra page 313 para. 4.24
129. supra page 311 Table 4 and page 313 para. 4.24
130. ibid.

The Panel then considered the possibility of indirect displacement against Australia as a result of the Communities only exporting white sugar[131]. My discussion on indirect displacement overlaps with price undercutting so I will move beyond a discussion on the statistics[132]. Suffice to say although indirect displacement had occurred the Panel found that with the "re-export of raw sugar imported by the European Communities under special arrangements" it meant that could not constitute clear evidence[133]. As I have already mentioned, this special arrangement was one of the remaining insignificant tied sales[134]. The Communities under the Protocol to the Lome Convention had provided preference for 1.4 million tonnes of raw sugar to cross its frontiers without paying the same levy as other third country exporters. The Communities had argued that they were entitled to re-export an equivalent amount of sugar[135] and it seems that the Panel agreed with them. I cannot understand what the Panel means by referring to the re-export of ACP sugar. The only way the Panel could consider such an argument was if this re-export occurred with an export refund after refining from raw sugar into white sugar. Australia's argument was concise - it was of no concern to them how exports from the Communities were generated but rather what support such exports received[136]. Australia is inconsistent on this point. It is concerned about the generation of the surplus

131. supra page 313 to 315 paras. 4.27 to 4.28
132. supra page 314 para. 4.28 and Table 5.
133. ibid.
134. see my discussion in this Chapter Section D page 104.
135. supra note 10 page 296 para. 2.18
136. supra page 296 to 297 paras. 2.18 and 2.19

otherwise it would not have complained under the General Agreement. Yet to the inquiry the possibility ACP sugar was re-exported is irrelevant. Further I understand that in "practice ACP sugar has never been intervened and has never been re-exported. Under EEC Regulations ACP sugar is not entitled to export refunds"[137]. This was not appreciated by the Panel[138]. The Panel conclusion on indirect displacement I consider cannot be justified. Indirect displacement had occurred.

Brazil was very confident that it could produce clear evidence of displacement, in accordance with the Code on Subsidies. The Panel undertook a similar type of analysis as with the Australian complaint by looking at regional markets grouped as traditional or new opportunities[139]. Unfortunately the Panel was not prepared to name all the countries which consisted the regional markets in the presentation of its conclusion. So I can only address those individual markets mentioned by the Panel in detailed discussion.

The Panel found for a number of regional groupings a reversal of position had occurred between the Communities and Brazil[140]. In terms of the French Assistance case this would have been the

137. I. Smith "GATT: EEC Sugar Export Refunds Dispute" J.W.T.L. 1981 page 532 at pp542.
138. In the 1982 Working Party Report on Sugar the Chairman stated ACP sugar was not re-exported and the Communities agreed with this: GATT 29th Suppl. BISD page 87.
139. supra note 11 page 90 para. 4.12
140. supra page 91 para. 4.13

equivalent to the finding on the Southeast Asia market[141]. The Panel then moved onto consider individual market to see if this displacement was systematic and produced the same conclusion[142].

The Panel considered the United States market as an illustration[143]. Brazil exports to the United States(in absolute terms) were in 1968 615,200 tonnes; 1973 445,584 tonnes[144]; 1978 approximately 500,000 tonnes and 1979 1,000,000 tonnes[145]. The Panel obviously thought that this rise in exports to the United States was the basis for the Communities' exports rising to other markets. Brazil took the opportunity to increase its sales in the United States for sound commercial reasons - the payment was quicker than would have been the case in the Middle East/Africa and it resulted in better prices because of less transport charges. The Panel merely took this statistic as basis for its conclusion on displacement. Without the 1979 United States market statistics it is impossible to draw any conclusion.

I know from the Australian complaint that the Communities had increased their exports by 20,000 tonnes from 1972

141. The French had increased its exports from 0.7 per cent in 1954 to 46 per cent in 1958 with the Australian percentage of exports decreasing by exacting the same proportion, supra note page 54 and 55, paragraph 23(a) and (b). The Communities share in the regional markets had increased from 6.5 per cent in 1971-73 to 13.9 per cent in 1979. Brazil suffered a decrease of similar percentage points: supra page 91 Table 5. Australia did not suffer a reversal of position with the Communities: supra note 10 page 311 Table 4.
142. page 91 para. 4.14
143. ibid.
144. supra note 123 page 41.
145. supra note 11 page 91 para. 4.14

to 1977[146]. Yet in 1978 the Communities increased their exports to that market by 157 per cent on 1977[147]. Some conclusions I can draw are that 1977 to 1979 saw the United States increased its imports of sugar, that the increase was spread beyond the International Sugar Agreement producers and the Communities. I consider the Panel's discussion on this market lacks depth. I consider it also impossible to conclude that if Brazil had not persisted with the 1979 trade figures in that market the Panel would have found displacement.

Brazil in the presentation of its argument on displacement in the new opportunities market divided it into 2 groups. One was Chile, China, Egypt, Iran and the U.S.S.R. Export to this group from 1972-1975 totalled from an annual average 729,400 tonnes yet in 1976-1978 fell to an annual average 549,000 tonnes[148]. The relative market share decrease was from 16.7 per cent to 7 per cent for the respective period[149]. The Communities had increased their absolute share from an annual average 270,400 tonnes to an annual average of 798,000 tonnes and their relative share from 0.8 per cent to 9.4 per cent for the respective period. Although it is not the representative period, the reversal of trade statistics are not of the same magnitude as the French Assistance case[150]. The Communities

146. supra note 10 page 314 Table 5.
147. ibid.
148. supra note 11 page 75-76 para. 2.13
149. ibid.
150. see my discussion on this point in this Section page 122 and 123.

justified this increase in exports on the very weak grounds that there was no connection[151]. They did not refer to the United States market.

The other group of markets which Brazil presented statistics on were Algeria, Iraq, Israel, Kuwait, Lebanon, Spain, Sudan, Syria and Tunisia[152]. Brazil exports in 1972-1975 totalled an annual average of 193,900 tonnes yet 1976-1978 it had fallen to an annual average of 78,800 tonnes[153]. The relative market share drop was from 17.2 per cent to 5.7 per cent[154]. The Communities increased their absolute share from an annual average of 270,400 tonnes to one of 798,900 tonnes; and relative market share from 24.8 per cent to 56.4 per cent for the respective period[155]. The Communities stated that the Brazilian decrease was accounted for by 2 countries - Algeria and Iraq. Further their share in those markets also decreased[156] and developments in Sudan and Syria was the result of other competition[157]. The Communities justified their increase in Tunisia and the other markets because of their special commercial relationships.

We see unlike the French Assistance case where the Panel addressed the markets of Southeast Asia and its individual countries the net for regional and market displacement is cast wider. The net is

151. supra note 11 page 76-79 para. 2.17 and 2.19
152. supra p75 para. 2.13
153. ibid.
154. ibid.
155. ibid.
156. supra p70 para. 2.15
157. supra p77 para. 2.16

cast so wide that it accounts for 44 per cent of Brazil markets in 1977-1978[158]. This amounts to a revision of the market share with an emphasis on significant displacement in every type of market. The French Assistance case just referred to one region for illustration. The Panel said in other words, that displacement had occurred in the Lebanon, Morocco, Sudan and Tunisia but it was not attributable to the Communities[159]. So the Communities system did not show clear and general evidence of displacement[160]. The entire Panel's discussion on displacement in the Brazil complaint is cursory. This is unlike the discussion in the Australian complaint where the Panel's findings were justified[161]. In terms of the French Assistance case the Indonesian absolute market figures of increased French exports went from 0 tonnes to 65,000 tonnes whereas Australia's fell from 98,000 to 62,000 tonnes[162]. In Lebanon the absolute market figures in 1972 were 11,000 tonnes and 1976 36,000 tonnes, 1977 150,000 tonnes and 1978 72,000 tonnes.[163] Similar increases occurred for Communities exports to Morocco and Tunisia[164]. Thus we see that in an absolute market share comparison Brazil decline been of similar proportions. If it was significant to constitute clear evidence in the French Assistance case it should be sufficient for this complaint. I consider that the Panel was too heavily influenced by the 1979 figures of trade between the United States and Brazil and their discussion thereafter was not analytical.

158. supra page 77 paras. 2.18 and 2.19
159. supra page 91-92 para. 4.15
160. ibid.
161. see my discussion on the Australian displacement in this Section.
162. supra note 48 page 59 Table B.
163. supra note 10 page 314 Table 5.
164. ibid.

- Price Undercutting

The Australian complaint presented the same argument as in the French Assistance to Wheat and Wheat Flour exports case, that is to assist in bringing precision to the interpretation of equitable share, price undercutting should be looked at[165].

Australia argued that the Communities' subsidies had resulted in prices below those of other suppliers to the same market. It is a technical argument concerning the nature of sugar sold on the world market[166]. Australia sold its sugar in the form of cane sugar which required further refining, whereas the Communities sugar did not require such. The difference in the cost of refining should have meant that the Australian sugar to importer should have been lower than the price of the Communities white sugar. As discussed earlier[167], the Communities system did not result in the subsidized sugar being sold below world market price. So if there was no difference in prices to reflect these additional costs of production the Communities were dumping onto the world market. Australia also argued that since the Communities was the largest exporter of white sugar it could manipulate the world market price. Once the Communities announced the Quota's A and B, for the incoming year the importers could set the market price. Australia was able to show that in 1977 the

165. see supra note 10 pages 292-294 paras. 2.7 to 2.12 and page 299-300 paras. 2.26 to 2.28
166. supra
167. see my discussion in this Chapter Section C and H

Communities price for white sugar had on occasions dropped below raw sugar prices and the margin in no cases covered the cost of refining[168]. The Communities on the price difference said there was nothing unusual about this, for it happened when world market prices were low[169]. The Panel agreed with Australia that Community exports to its traditional importers had expanded due to the small margin existing between the price of raw sugar and white sugar[170].

The Panel agreed that the Communities surplus with its unlimited export refund could well depress the price on the world market[171].

Brazil presented similar arguments to Australia about how price undercutting occurred as a result of the Communities system[172]. Brazil stated that as a result it had lost sale opportunities in the markets which had shown rapid expansion and those countries with which it had a special relationship[173]. The reduced sales opportunities had arisen because Brazils cane sugar exports were replaced by the Communities white sugar ones. As a result the number of outlets had reduced from 52 in 1972-75 to 34 in 1977-78. With regards to those countries with which Brazil had a special relationship (LAFTA countries) it adversely affected them[174].

168. supra note 10 page 291 para. 2.9
169. supra page 294 para. 2.12
170. supra page 318 para. 4.37
171. supra page 318 para. 4.38
172. supra note 11 page 79 para. 2.24
173. supra page 77 paras. 2.18 and 2.19
174. ibid

The Panel noted that the export refunds corresponded to the difference between the intervention price at the f.o.b. stage and average spot quotations for white sugar on the Paris Exchange[175]. From 1975 to 1978 the refund exceeded the difference and so the Panel found the premium for white sugar had diminished and at times had been quoted at prices lower than those quoted for raw sugar[176]. The Panel was not prepared to go any further and say that as a result of price undercutting the Communities had increased their share. This was due to the 1979 trade figures which showed that Brazil exports to the United States had doubled. Brazil had sold all it could and so was not affected by the aggressive exports of the Communities.

In comparing both the Australia and Brazil complaint with the French Assistance case this price undercutting is not of the same magnitude due to an alteration in the domestic stabilization scheme. The price undercutting on wheat flour was in excess of 40 per cent points but the point is that price undercutting occurred. The Panels in both complaints were not prepared to state that this could have led to an increase in the Communities exports.[177] A problem for Australia and possibly Brazil was that although they were prepared to outline their special arrangement contract prices doubt was placed on those because it was suspected rebates had occurred. Doubt was placed on Australia's special arrangement with Japan where the contract

175. supra page 95 para. 4.28
176. ibid
177. supra note 10 page 319 para. (g) and supra note 11 page 97 para. (f).

price could not reflect the actual transaction price. Therefore the Panel was correct not to place too much emphasis on price undercutting affecting the traditional importers of sugar from Australia and Brazil.

- Special Factors

In comparison with the French Assistance case in which the only special factor discussed was the International Wheat Council the complaints by Australia and Brazil appear very complex. I consider the special factors which surface in the Reports to tied sales, the International Sugar Agreement and the possibility of other Contracting Parties exporting sugar by subsidization. Interwoven with this has to be a discussion on the desirability of facilitating the satisfaction of world requirements. The Panel in the Australian complaint were not as structured on special factors as in the Brazil one. The reason for this I presume is the effect of the tied sales in conjunction with the International Sugar Agreement. I intend to approach the special factors in the same manner as in the Brazil complaint.

Our concern with the International Sugar Agreement only dates back to 1968. The 1968 International Sugar Agreement is an intergovernmental

commodity agreement with a short life span and is renegotiated after an interval of 5 years. The International Sugar Agreement is aimed inter alia at bringing world production and consumption into a closer balance and maintaining a stable price for sugar which will be remunerative to producers, but which will not encourage further expansion of production in developed countries. It also had as an objectives to raise the level of international trade in sugar, particularly to increase the export earning of developing countries. Remembering that the International Sugar Agreement only operated in the world free market so to achieve such objectives it had a system of export quotas coupled with a price mechanism and backed by a minimum and maximum stock provision[178]. The 1968 system was suspended in 1972 owing to rising prices on the world market, when the basic export tonnage levels were raised and the reserve stocks released[179].

In the renegotiation of the International Sugar Agreement in 1973 and 1977 there was no consensus on the provisions of price range, supply and procurement (as in the 1968 Agreement) since importers and exports being unable to agree[180]. The 1974 Agreement preserved the International Sugar Organization but little else.

The first point to be made by the Panel in Australia's complaint special factors concerned market share. The Panel considered that

178. supra note 123 page 14.
179. supra note 10 page 304 para. 3.20
180. J.E. Nagle supra note 2 page 105.

trade in sugar was modified by the International Sugar Agreement starting operation in 1978[181]. Australia had agreed to limit its exports in accordance with that Agreement, whereas the Communities were under no obligation[182]. Thus the Panel considered 1977 an abnormal year in trade in sugar[183]. Since exporting nations pursuant to the Agreement had agreed to limit their exports at a level of 80-85 per cent of basic export tonnage in 1978, in 1977[184] they sold heavily. Further importers brought heavily because of the possible affect of rising prices which would occur in 1978 (especially the United States[185]). In the Brazil complaint the Panel made also the same point about 1977[186] being abnormal. Yet the Panel did note that the world market exports continued unabated in 1978 and 1979[187] without refferring back to 1977.

The following table shows net world exports of sugar from 1969 to 1983 to assist in understanding the point made by the Panel.

TABLE 3/

181. supra note 10 page 309 para. 4.13
182. supra page 310 para. 4.14
183. supra page 304 para. 3.21
184. ibid
185. supra page 296 para. 2.16
186. supra note 11 page 92 para. 4.16
187. supra page 92 para. 4.17

TABLE 3

World Sugar Net Exports (million metric tons, raw sugar)	
Period	Total net exports
1969-1976	21.28
1977	28.00
1978	26.7
1979	24.5
1980	26.4
1981	26.5
1982	27.5
1983	26.5
Source: supra note 10 page 296 para. 2.16 and I. Smith "Prospects for a New International Sugar Agreement". Journal World Trade Law. Table 1 p310, 1983.	

Table 3 shows us that 1977 was more representative of sales from 1977 to 1983 than 1969-1976 The result of operating the International Sugar Agreement in 1978 was a 5 per cent decrease in exports. Therefore the trade figures of 1977 should have been used to analyse market share.

The second point implied, by the Panels, about the International Sugar Agreement was in weighing the measure of the obligation Australia and Brazil had already agreed what was for them an equitable share. The Panel said Australia in 1978 had a world market

share of 8.1 per cent, yet pursuant to the International Sugar Agreement, Australia had agreed that its world free market share would be less than this percentage. Therefore why should Australia complain against the Communities when they have exceeded this undertaking. Surely the Communities had not interfered with their share but other International Sugar Agreement producers[188]. The same arguments were repeated by the Panel in the Brazil complaint as well[189]. No comparison is possible with the French Assistance case because France belonged to the International Wheat Council along with Australia, therefore equal weight was given to both even though France's share of world exports was slightly less than what it should have been on a historical trading basis[190].

Taking account of my earlier discussion on the Havana Charter and the negotiations towards the General Agreement[191], intergovernmental commodity agreements were to be another pillar in the liberalization of agricultural trade. The extent to which the International Sugar Agreement regulated trade on the world free market was in 1973, 80 per cent. That sugar which amounted to 85 per cent of total world gross exports[192]. By 1981-82 the International Sugar Agreement

188. supra note 10 page 312 to 313 para. 4.23
189. supra note 11 page 92 para. 4.17
190. Chapter 3 Section B page 74.
191. see Chapter 1 Sections B and E and especially Chapter 2 Section D p 77-59 where the 1954/55 Working Party consider that to meet world requirement in an effective and economic manner commodity agreements accommodate government intervention in meeting these requirements of economic liberalism.
192. J.E. Nagle supra note 2 page 105

regulated less than 50 per cent of that sugar. The Communities in 1981-82 accounted for 50 per cent of world free exports[193] which was 75 per cent of total non members supplies to that market[194]. The Communities share in the world free market had risen from 7.8 per cent in 1969-1975 (7 year average) to 22.8 per cent in 1978[195]. Thus in light of these statistics it was not unrealistic that traditional exporters should break ranks with the International Sugar Agreement from 1976 onwards. Simplistically problems with this commodity agreement emanate from the Communities not joining. If the Panel attached weight against members of the International Sugar Agreement for breaking their obligations then surely it should consider why the Communities did not join.

The absence of the Communities from the 1968,1973 and 1977 International Sugar Agreement was publically understood to be dissatisfaction with the method of intervention. The Communities argued against an export quota system to intervene on the world free market on the grounds that it failed to stabilize prices. This is ironic when you consider their domestic common sugar policy is based on a quota system. The Communities wanted a buffer scheme. It was generally understood that the Communities were dissatisfied with its export quota - which was based on historical production[196]. Smith

193. supra note 11 page 92 para. 4.7
194. supra note 10 page 295 Table 1.
195. supra note 10 page 295 Table 1.
196. I. Smith: supra note 184 p104 (1981) and "Elements of an International Agreement" F.O. Lichts International Sugar Report. Special Edition 1977, p25 at 28. J.E. Nagle supra note 2 page 104.

understood the Communities were offered an export quota of 2.1 million tonnes which he considered not unreasonable in relation to their past performance[197]. The offered export quota was close to the 1976-1977 Communities exports[198] and therefore took account of changes to the common sugar policy in 1974. By the Communities refusal to accept an export quota it meant instability for other sugar exporters[199]. If commodity agreements are the only real method to accommodate a satisfaction of world requirement then a refusal of a major exporter to join must mean that the commodity agreement will not achieve its purpose. This is what has happened to the sugar commodity agreement. I consider the Panel unfairly places an extra burden on Australia and Brazil. The weight in a balancing situation should go to members of a commodity agreement.[200]

My reasons for stating that an unfair burden was placed on Australia and Brazil is because it is at odds with the purposes of economic liberalism. The General Agreement in trying to achieve a liberalization of agricultural trade accommodates government intervention within Article XVI:3 and Article 10. The International Sugar Agreement also accommodates government intervention by proposing pricing, supply and procurement mechanism. So by the Panel only supporting the intervention in the General Agreement it allows destabilization to occur from that measure;

197. I. Smith supra note 184 p104. We also see that the negotiations towards a new International Sugar Agreement were not rigid to historical patterns per se, but reflected changing production patterns.
198. supra note 11 page 84 Table 3.
199. The Communities did however give an undertaking to operate parallel restrictions on its exports in accordance with those accepted by the developing countries to the International Sugar Organization.
200. see my earlier discussion in Chapter 3 Section B page 73 where the weight was equal due to both belonging to the International Wheat Council.

that is to the Contracting Parties' farmers income, employment and standard of living, destabilization to achieve the "full use of resources" by countenancing one form of intervention. The Panel should weigh heavily against destabilization. This would mean the Panel should not have regarded Australia and Brazil's share of sugar exports as fixed and rigid but rather in dynamic terms.

The Panels discussion on tied sales related to displacement[201] and price undercutting[202]. In those discussions on price undercutting tied sales were used to redress the balance of the argument that the Communities were not increasing its share unfairly by export subsidies. The Panel did not enter into a weighing of tied sales as a special factor explicitly. The main objection from the Communities to this form of sale was that it protected the Australian exporters from free competition on the most favoured nation principle of the General Agreement.[203] Aside from the obvious reply that the complaint was against the Communities export subsidy policy of sugar the point was that the Communities were no more than half hearted exporters of sugar. By this I mean the common sugar policy was the only method by which the Communities could generate surpluses. Without

201. supra note 10 pages 312 to 313 para. 4.23
202. supra page 315 para. 4.28
203. It could be argued that the Communities Mediterranean Policy constituted a special arrangement similar to tied sales. The Communities by entering in bilateral relationships with Lebanon, Iran, Morocco, Tunisia, expected for the preferences given to their markets reciprocal preferences. This could have taken the form of sugar imports from the Communities because all those countries changed their sugar trading patterns on the implementation of that policy in 1976.

that intervention, Communities producers could only compete in odd years against traditional exporters of sugar. So international trade in sugar by the Communities had nothing to do with free competition. Further trade in agricultural products has never been internationally on the most favoured nation principle. So the Communities objection had no validity. I consider the Panel were not sure how to deal effectively with these tied sales as a special factor. This is seen by the contradictory treatment towards tied sales . Expressly, the Panel considered that the Communities subsidized sugar exports could affect those tied sales under Article XVI:1[204]. As I mentioned earlier, internationally those tied sales were insignificant in absolute terms and the only major contract was to Japan for 2 milliontons (raw value) annually[205]. The Australian tied sales were principally to those countries with which it had Commonwealth ties, except for Japan. It was unlikely that the Communities would penetrate this market and further as they were based on the importation of raw sugar and so would have sugar refineries they would not want those closed. Australia, by the entry of the United Kingdom into the Communities, lost .9. market of around 350-400 thousand tons annually or raw sugar. That displacement was met by the internal adjustment measures of the Communities. The loss of

204. supra note 10 page 315 para. 4.28
205. see my discussion in this Chapter Section D page 104 where I analyse the significance of all Australia's tied sales. Details of the Japanese sales are mentioned by J.E. Nagle supra note 2 page 122.

that market was made up by additional sales to its Commonwealth links and Japan[205A]. If the tied sales accommodated the loss of the United Kingdom market as I suggest then how do I weigh them? In this situation of an oversupply of sugar, the Communities have not been excluded specifically from those markets just because they were tied sales but rather because of special ties. Further the Communities have been able to increase their exports to other markets due to its special relationships. Therefore I would consider tied sales should be given no weight at all.

The last special factor considered by the Panel was the possibility that other Contracting Parties were subsidizing sugar, yet a complaint was only levelled at the Communities. I understand that Australia could have subsidized their tied sales exports by charging instead of the contract price a discounted price (similar to the world market price)[206]. The Panel were obliged to consider the 1954/55 Working Party "Understandings" that other Contracting Parties may have utilized export subsidies in their share of exports. This consideration must be one of the prime factor in the Panel not being prepared to find against the Communities.

It would have been unfair on the Communities to find against them for an increase in sales due to their system of support when other Contracting Parties utilized different systems of support. However

205A. supra note 10 page 311 Table 4.
206. see J.E. Nagle supra note 21 page 106 discuss Japan and Canada concern about price movement.

it still does not deal with the problem of resolving the generation of surplus by the Communities common sugar policy which led to it dispose of that surplus by export subsidies.

The Special factor which I consider did not receive discussion by the Panels was the one of "satisfying world requirements in the most effective and economic manner" from the 1954/55 Working Party recommendations. We have in the sugar subsidy debate clear evidence that production surpluses are continuing, no internal adjustment measures have been taken by major sugar exporters and a failure of the International Sugar Agreement to bring about corrective measures due to the non-membership of the Communities. In this situation the negotiations for the International Trade Organization[206A] and the 1954/55 Reveiw Session[206B] favoured the argument that the utilization of export subsidies should not be allowed to meet world demand if it was creating difficulties. This is in line with the principles of economic liberalism that export subsidies are an inefficient allocation of the worlds resources. However those negotiations were directed to an expansionary market and not a stable or diclining market as now with sugar. If the negotiations show that Contracting Parties were harsh against export subsidies in an expansionary market then logically it should be harsher in the present sugar market. This would mean that this special factor should be weighted against the Communities should the liberalization of agriculture still be an aim of GATT.

206A. see my discussion in Chapter 1 Sections B and E.
206B. see my discussion in Chapter 2 Section D pages 57-59 and Section E.

G. The Balancing of the Obligation

The Panels application of Article XVI:3 and Article 10 have been extensively discussed with respect to these two complaints since it is the only indication of whether GATT still hopes to achieve a liberalization of agricultural trade internationally. Since I consider the norm is a broad statement capable only of resulting in diplomatic compromises I now weigh the measures of the obligation to see whether it is capable of such.

Firstly, with respect to the Australian complaint, in weighing the measures of the obligation I shall follow the methodology of the French Assistance case rather than the defacto application of Article 10 by the Panel which has no legal basis. I consider that the Communities system of subsidies had contributed to the increase in their exports but whether it was an unfair share required further examination since the world market share figures could not support Australia obtaining a finding. In considering price undercutting I found that Australia could not show substantial price undercutting by the Communities. It was evident that Australia was discounting on its tied sales so it was not effected by such a practice. In the element of special factors the membership of Australia to the International Sugar Agreement I consider was weighted incorrectly by the Panel, the tied sales I considered should have been neutral, the possibility of other Contracting Parties subsidizing

sugar was correctly weighed by the Panel and lastly the satisfaction of world requirements should have been weighted against the Communities. The special factor elements prime weighting should be on the possibility that other Contracting Parties are subsidizing sugar. Since the norm is a hortatory one, the satisfaction of World requirements, should go against Australia. The other elements of special factors I consider would not balance the negative weight. Therefore I consider there is not sufficient support for a finding that the Communities have increased their market share unfairly.

With respect to the Brazilian complaint the analysis of weighing of the measure is simpler. In the world export trade market share Brazil had clear and sufficient evidence (except for 1979) that the Communities increase in their exports by subsidies was a reversal of trade figures. The regional and individual market displacements caused a lot of problems for me to weigh simply because the Panel did not present sufficient statistics to discuss their conclusions. On this displacement I conclude that it should be left open I then move to the remaining elements. The element of price undercutting would be on the positive list for Brazil since Brazil sold on the world free market. The weighing of special factors elements only includes

the International Sugar Agreement, the possibility of other Contracting Parties subsidizing and satisfying world requirement. The International Sugar Agreement was incorrectly weighed and should count for Brazil as with the satisfaction of world requirements. These two elements should, I consider, balance with the possibility of other Contracting Parties subsidizing. So in total I would consider the Communities system of subsidized sugar exports had resulted in them having an inequitable share of the world export trade.

Assuming . in weighing the measures of the obligation (I am correct,) then why have the Panel found in Brazil's complaint that the Communities share is equitable. In my opinion it has to do with something outside the application of the norm and goes back to the Code on Subsidies negotiations. As I mentioned earlier, the Communities have made it quite clear that the Common Agricultural Policy is not negotiable[207]. Since it is not negotiable it can be expected that if the Panel found that the system had to be changed the Communities would block the adoption of the Panel Report at the GATT Council of Ministers. This would have resulted in no action arising

207. see my discussion in Chapter 4 Section B pages 84 and 85.

from the Panel Report at all let alone any further diplomatic negotiations. This would result in a similar stance of the United States in the Working Party Report on Unmanufactured Tobacco[208]. Hence I consider the Panel must have considered their finding of the Communities share equitable would lead to discussions and consultations. The application of Article 10 had nothing to do with the finding. I now move on to a short discussion on the effect of the system which gave rise to the points for diplomatic discussion and consultation.

H. The Effect of the System

The Communities system it was argued by Australia and Brazil "caused or threatened to cause serious prejudice" to their interest and also affected the world sugar market to the detriment of other Contracting Parties[209]. Since the Communities system did not control production or marketing of sugar because of: (a) the price structure applied to Quota A and B; (b) the price assurred for excess production to domestic consumption up to a set limit; and (c) the freedom of

208. see my discussion in Chapter 3 Section C pages 78-80 where the United States stance was one of not accepting at all the norm of Article XVI:3 in consultations.
209. supra note 10 page 299 para. 2.26 and supra note 11 page 78 para. 2.22

producers to produce more than Quota A and B it generated surpluses. From the alteration in 1974 to the common sugar policy, production increased from 1975 to 1977 by 135 per cent whereas consumption declined by 9 per cent[210]. The alteration in 1974 to the Communities policy on sugar was a result of the world shortage and a concern about security of supply for sugar.

Quota A production level was lifted and Quota B was expanded to 145 per cent of Quota A[211]. Further the production levy was abolished from 1975 to 1977 and the intervention price was increased. So the Communities had set a production target of 13.25 million tons, with a consumption level of 10.3 million tons for 1975[212]. The Commission of the Communities in order to assist the world shortage of sugar, due to the nature of sugar beet, proposed no restrictions on Quota C sugar but in the event of the shortage coming to an end a Quota C would be restricted by production controls[213]. These changes did not flow into actual production levels untin 1977 because of climatic conditions. The reason why the Communities had to encourage its own high cost production of sugar beet rather than rely on importing sugar goes back to the world shortage. The shortage particularly in the United Kingdom occurred because of the diverting away of shipments by the Commonwealth Sugar Agreement producers

210. I. Smith: "EEC Sugar in an International Context". Journal World Trade Law 1981 p95 at pp98 Table 1.
211. I. Smith: "The European Community and the World Sugar Crisis". Trade Policy Research Centre Staff Pager No. 7 p10 (1974).
212. ibid.
213. ibid.

onto the world free market[214] to get higher prices. Also because of the world shortage it led to panic buying in the United Kingdom[215]. Smith states that the Communities overreacted to a temporary crisis[216]. Thus the overreaction was put at the doors of traditional suppliers whom broke long term arrangements and decided to seek higher prices. I understand that the putting of the blame back onto those traditional suppliers is an oversimplification. With the entry of the United Kingdom into the Communities in 1973 the Commonwealth Sugar Agreement producers (excluding Australia) were uncertain about their future. Britain under the Treaty of Accession had agreed to safeguard the interest of those producers but by 1974 these had not been translated into specific committments on price and quantity[217]. So when it came to renegotiate the Commonwealth Sugar Agreement in 1974 the United Kingdom was only able to put forward unrealistic proposals in terms of price to those producers[218]. Thus because of the uncertainty of the Communities market to those producers they diverted shipments.

Australia[219] in its arguments under Article XVI:1 for more consultation because of the prejudice it had suffered argued on general grounds. Brazil[220], in detailed argument, argued that the Communities had depressed

214. I. Smith supra note 184 p97 and 98 (1981).
215. ibid.
216. ibid.
217. I. Smith supra note 184 page 3.
218. ibid.
219. supra note 10 page 299 para. 2.26
220. supra note 11 page 78 para. 2.22

world prices and diminished its export earnings. The Communities' reply was that it could not be responsible for world market prices[221], and in the case of Brazil its calculations were unfounded and irrelevant[222].

The Panel could only consider whether the surplus which received the export refunds depressed world prices since that was the subject of the complaint. The only way the Panel could ensure this was to consider the method by which the Community sold that surplus onto the world market[223]. If the Communities sold this sugar in terms of normal commercial practice then it could not have depressed the world price. The Communities sold that sugar in 2 ways: tender and periodic sales[224]. The periodic sales method was determined by taking into account the situation on the world market, the Community intervention price, transport costs, trade expenses and quotations on the world market, and fixing the refund[225]. Under the tendering method tenders were invited with the refund being determined on the minimum tender price[226]. The periodic sales should have been the normal commercial transaction with the tender sales the exception. Under the periodic sales the Communities would have fixed the refund to make surplus Quota B sugar compete on the world market. That would be the difference between the intervention price and the world price. Where with the tender

221. supra note 10 page 299-300 para. 2.27
222. supra note 11 page 79 para. 2.23
223. supra note 10 page 316 para. 4.33 to 4.34 and supra note 11 page 94 para. 4.24 to 4.25
224. supra note 10 page 303 to 304 paras. 3.15 to 3.17 and supra note 11 page 83 to 84 paras. 3.15 to 3.17
225. ibid.
226. ibid.

sales exporters make an artificially low bid in order to price undercut other exporters. The Communities sold substantially all of the Quota B sugar under the tender sales method[227]. Therefore the Panel was only left to say the inevitable that the system had no element in its application which would prevent it from obtaining a more than equitable share[228]. Thus the surplus exported with the refund constituted serious prejudice in depressing world prices[229]. The intervention of the Communities was on a vast scale and certainly outside the financial budgets of traditional exporters of sugar.

Although Australia and Brazil could only complain about the subsidized sugar, the Quota C sugar of the Communities must have been of concern to them. The Communities system was generating what is regarded as high cost surplus yet it was able to dispose of Quota C sugar without support and at no risk to their producers. I consider that the Communities were only able to dispose of Quota C sugar on occasions of short fall in world production without receiving support. This would have occurred in 1973 to 1975, when the prevailing world market price was equivalent to the cost of production . . How could the disposal be achieved without support in a situation of where the world market price was below the cost of production.

227. supra note 10 page 316 and 317 para. 4.33 and Table 6, and supra note 11 page 94 para. 4.24
228. supra note 10 page 316 para. 4.35, and supra note 11 page 94 para. 4.26.
229. supra note 10 page 319 para. (g) and (h), and supra note 11 page 97 para. (f) and (g).

To show how the disposal of Quota C sugar could occur in the latter situation I will utilize the prices from the system in 1973 and 1978. If we take the cost of production, transport and marketing of Quota C sugar as being the equivalent of the intervention price, it is a highly conservative figure, it will allow me to prove a point. In 1978 the intervention price was around US$ 612 per tonne of white sugar. If the producer got a 10 per cent profit margin from such a sale it would reduce the intervention price to US$ 550 per tonne. This figure of US$ 550 per tonne in 1978 represents all the cost of production, transport and marketing for Quota C sugar. The world market price in 1978 was US$ 206 per tonne. If the Communities producers pushed all or part of their cost for Quota C sugar onto Quota's A and B sugar then they would be able to dispose of this sugar. Similarly with 1973, if the cost of production, transport and marketing was around 233.4 units of account and the world market price was 69 units of account it is the only way such sugar be disposed of. The Communities Quota C sales in 1973 were 282,000 tonnes and in 1978 858,000 tonnes. It can be the only explanation for such disposal of high cost production. Even if only part of the total costs are pushed across onto Quota's A and B there would be marginal reductions in receipts from the "Unsubsidized" exports so long as it did not represent a sizeable proportion of their total production. The Panels could only consider the complaint as between the parties and not all Contracting Parties to the General Agreement. The Panels

agreed that the system had no legal limits to the size of production but only economic ones. The Panels did discuss Quota C sugar generally[230] but were unable to make any conclusion on that sugar production since it received no export subsidy[231] according to them.

I. Summary

At the start of this chapter I stated that I hoped to show a system which links commodity surpluses with export subsidies. I consider that this link has been made out with the Communities common sugar policy. We saw the operation of a system designed and developed to satisfy autarkic policies. The inhibitators of the system were price controls rather than production controls. The result been the increasing generation of sugar beet production which required export subsidies to dispose of the surplus. The effect of the subsidy was destabilizing on traditional sugar producers. The common factor between the generation of such surpluses and the need for export subsidies was the Communities intervention. This intervention is accommodated within the provisions of the General Agreement and the Code on Subsidies.

230. supra note 10 page 315 para. 4.29, and supra note 11 page 93 para. 4.18
231. supra note 10 page 316 para. 4.33, and supra note 11 page 94 para. 4.24

The intervention of the Communities system was legitimate in terms of the provisions of Article XVI:3 and Article 10 according to the Panel. The Panel I contend did its function. By this I mean that it examined the complaint, considered the measures for the obligation and finally, weighed that obligation. It could do no more under the General Agreement or Code on Subsidies. My discussion which agrees in the main with the Panel's findings in the Brazil complaint follows the Panel's methodology and examined that process. With respect to "world export trade" I contended that the Panel's discussion on this definition was not thorough and could not justify their conclusions. With the "previous representative period" the Panels vacillated in using some periods against not using others. Again there was no justification for this fluctuating methodology. The measure of the obligation I consider was approached in the Australian complaint in a defacto manner. The Panel's discussion on world market share revealed inconsistencies between the findings in Australian and Brazilain complaints. The discussion on displacement, especially Australian indirect displacement and Brazilian individual markets, show the Panels utilization of facts was either incorrect or insufficient information was presented for the findings. Special factors also revealed the Panels lack of thoroughness in the discussion on the International Sugar Agreement to justify their conclusions. My discussion, by its very nature, would not agree with all the Panels discussion but I am unable to get around the conclusion that the Panel could go no further with the complaints. Only in the Brazilian complaint is it evident that the findings were

not based on the measure of the obligation but on pragmatic consideration of whether anything could be achieved should the Panel give a finding against the Communities system.

The Panel was effective in what it could do to achieve a liberalization of sugar trade with only one pillar of a structure. It could not enforce a finding against the Communities, so pragmatically it went to Article XVI:1 and found serious prejudice had occurred to Australia and Brazil. This would result in more consultations and discussions. But for how long? There are no defined parameters for the discussion of serious prejudice under Article XVI:1 and with the general climate of increasing protectionism it is unlikely that the Communities would take a broad view for such discussion and consultation.

More can be drawn on the findings about the liberalization of international trade in agriculture. The obvious point is that the countries so far involved in the push for liberalization of international trade in agriculture at the GATT level have only been industrialised countries, major temperate primary product producers and new industrialised countries. Developing/less developed countries have not yet been participants in this "process". So the debate for greater liberalization currently encompasses only the North versus the North. This offers hope for those South countries, GATT must achieve a significant change before the competitiveness of such trade overtakes them. Another point is that the regulation of agricultural trade is not

totally within the GATT system. The International Sugar Agreement is under the auspices of the United Nations Committee on Trade and Development. So the intended structure of the Suggested Proposal for the International Trade Organization is now fragmented under various international agencies. A final point which might be drawn is that the provisions of Article XVI:3 of the General Agreement and Article 10 of the Code on Subsidies have not received support from the major trading nations.

The Panel's in their finding on Article XVI:3 and Article 10 have shown concern with the aims of the General Agreement but it has not resulted in the identification of the purpose for the Articles. The Panels' showed concern for raising the living standards for the Communities producers but did not show the same concern for Australia and Brazil's producers. The Panels' did not concern itself with satisfying the world requirements for sugar because they were unable to affect any change. As for concern that sugar production should be the most effective and economic use of resources the Panel's countenanced the Communities form of intervention against the intergovernmental commodity agreement. The lack of clarity and precision in the Articles which was supposedly to allow for flexibility of application and the dynamic movement of primary commodity trade has only resulted in the practice of export subsidies scheme being encouraged. It must be discouraging for primary producing nations which do not have the resources like the Communities to see such a result . No longer does the

norm discourage such price stabilization schemes. The continuance of this disarray for liberalization of agricultural trade internationally and the discouragement of such schemes is disquieting. The final chapter considers the consultation process of GATT which resulted from the serious prejudice findings and also links the generation of sugar surpluses and export subsidies with restrictions on trade.

CHAPTER 6

The Sugar Subsidy Debate: Round Two

A. GATT Working Party Reports

- The First Working Party Report

The Communities, after the adoption of both Panel Reports[1] by the GATT Council of Ministers, were under an obligation to do something about the domestic stabilization scheme so not as to continue the serious prejudice and uncertainty on the world sugar markets. The question was the extent to which it could satisfy that hortatory obligations. In November 1980 the Communities outlined their proposals to a Working Party, established pursuant to the Panel's finding and their obligation under Article XVI:1 to discuss with Contracting Parties[2].

The Communities considered the Panels findings to say that they should alter those policies which had exported the surplus with subsidies[3]. The Communities were neither prepared to consider questions arising from the Panels conclusions nor allow examination of its common sugar policy outside the rights and obligations arising from the General Agreement[4]. Hence the consultations under Article XVI:1 would proceed on this basis[5]. Australia and Brazil were of course

1. European Communities - Refunds on Exports of Sugar Complaint by Australia. GATT 26th Suppl. BISID p290, and European Communities - Refunds on Export of Sugar Complaint by Brazil. GATT 27th Suppl. BISID p69.
2. GATT: European Communities - Refunds on Exports of Sugar. Article XVI:1 Discussions; Report to the Council. 20 February 1981 (L/5113).
3. supra note 2 Annex III page 16.
4. ibid.
5. ibid.

outraged [illegible]. Australia and Brazil were placing the problems of international trade in sugar onto the Communities and hence wanted the Communities to reduce total production, reduce the production of Quota B sugar, limit funds available for subsidies and remove the uncertainty in world sugar markets by joining the International Sugar Agreement[6].

The Communities proposed to achieve a reduction of exports with subsidies by: (1) fixing the intervention prices; (2) to co-operate with other sugar exporting nations to seek ways of making the world price more transparent and the method of determining offer prices more objective; (3) a reduction for Quota B production levels; and (4) all export refunds for sugar will be met by levies from the producers[7]. These proposals went back to the changes of the common sugar policy in 1974 to meet the world shortage. On the intervention price the Communities considered that since the 1974/75 change the intervention price had not kept pace with inflation and so it would not have stimulated production. The Quota B production level had been reduced to the 1974/75 level and so the Communities felt this did not stimulate production as well. Therefore the Communities considered the new element which would control production would be the production levy re-introduction on Quota B sugar[8]. Australia, Brazil and other Contracting Parties considered these proposals were still open ended in respect of production and subsidies and

6. supra note 2 Annex II pages 13 and 14.
7. supra note 2 Annex III page 18 to 20.
8. ibid.

serious prejudice would still continue[9]. There was no questioning of the right of the Communities intervention policy.

The Working Party reported in February 1981 to the Council of Ministers of GATT without coming to any definite conclusion.[10]

- The Communities new regime

The Communities regulations which came into force in July 1981 differed in several respects from the draft proposal. Firstly, the reduction in sugar production quota's was less than envisaged. Quota A was not reduced from its 1974/75 level. Quota B production for member states of the Communities was redistributed in favour of stronger producing nations[11]. Quota B was marginally reduced from 127.5 per cent to 123.5 per cent[12]. There was also provision for member states of the Communities to transfer up to 10 per cent of Quota B sugar between producers under certain conditions. The net result will be minimal short fall of production and stabilization at a higher level[13]. The second respect in which the 1981 Regulation differed from the draft proposal was in the co-responsibility levy; it was set at a lower level because the cost of exporting in 1981 was going to be minimal with high prices on the world free market. The levy was initially set at 2.0 per cent of the intervention price but thereafter could rise through steps to 39.5 per cent of the intervention price[14]. Smith[15] doubted whether the co-responsibility

9. GATT European Communities - Refunds on Export of Sugar. Communication by Australia, 9 September 1981 (L/5185).
10. I. Smith "GATT: EEC Export Refunds Dispute" Journal World Trade Law, 1981 p535.
11. GATT supra note 9 p6 and I. Smith supra note 11 p541.
12. ibid.
13. ibid.
14. I. Smith supra note 11 p535 and supra note 9 p8.
15. I. Smith supra note 11 p535.

levy would actually ever cover the export refunds. When crop estimates for 1981/82 were known in April 1981 world market prices plummetted from 21.38 U.S. cents per pound then, to 11.5 U.S. cents per pound in September 1981. Australia calculated that the Communities would have export availability entitled to a subsidy at 3.7 million tons in 1981/82 (in 1978 it was 2.7 million tons)[16]. The total expenditure for the export of this would be 950 million EUA (635 million EUA in 1978, 685 million EUA in 1979) of which the production levies would only cover initially 405 million EUA and a further 181 million EUA by an additional levy of 7½ per cent in 1982/83. The Communities would have to provide 364 million EUA[17]. The co-responsibility levy did not generate a decrease of the production surpluses. In fact in 1981/82 production planting increased in the Communities by 10 per cent overall and 17 per cent in France[18].

The last difference concerned the intervention price and the tender price. The intervention price was increased by 8.5 per cent in 1981/82, the highest increase since 1974/75. So the subsidy required for 1981/82 was 279.99 ECU per tonne.This was 60 per cent of the intervention price and greater than the world price. In 1978 the subsidy required was 236 ECU per tonne and 1979 276 ECU per tonne[19]. This increase between the tender price and the intervention price is what the Panels based their finding of serious prejudice on.

16. supra note 9 page 8.
17. ibid.
18. supra page 9.
19. supra page 4.

We see that the Communities regulations had the effect of increasing the gap, so serious prejudice would still continue.

The Communities new regime carried a howl of protests from Australia, Brazil and other Contracting Parties (including the United States)[20]. These Contracting Parties claimed the new regime would have a similar effect as the 1974/75 Communities Regime[21]. The Council of Ministers of GATT agreed to set up another Working Party to review the situation.

- The Second Working Party Report

The Chairman of the Council of Ministers of GATT in agreeing to review the situation of the serious prejudice caused by the Communities system stated that it was to include "any element bearing on the matter relating to sugar"[22]. No longer was the review to proceed upon the basis of Article XVI and Article 10 findings.

The Communities took the position if there was going to be a general review then the sugar interventionist policies of other Contracting Parties would have to be examined simultaneously if it was going to allow a general examination of its own interventionist scheme[23]. Accordingly it produced in three questionnaires[24] detailed

20. see supra note 9 and European Communities - Refunds on Exports of Sugar Documents L/5186 and L/5189.
21. ibid.
22. GATT Council of Ministers 150 p22.
23. GATT Working Party - Sugar Report to the Council. March 1982 (L/5294) p82.
24. supra note 24 Annex I, II and III.

questions about the nature of the sugar policy of Australia, Brazil and the United States. The Community raised questions specifically about the nature and effect of those countries internal programs in relation to the world export trade.

In Annex I[25] the Community[26] asked Australia why its export production in 1980-81 exceeded their average tonnage between 1961-79, how it could be justified if domestic consumption remained stable, the effects of Australias long term contract prices on the world market price and why Australia's internal sugar regime effected imports of sugar. In Annex II[27] the Community questioned Brazil's regime of sugar. The Community[28] specifically asked whether the Brazilian domestic price of sugar was above the export price and if so was there not a similarity to the common sugar policy, why Brazil was moving into bilateral long term contracts for sugar exports and whether it used other export measures to obtain a larger share of the world export market. In Annex III[29] the Community[30] in questioning the United States centered on their agricultural waiver, its new import quota regime and the bilateral contract between the United States and the U.S.S.R.

The Communities in 1981/82 had stockpiled 2 million tonnes and it considered that it had attempted to do its fair share to stabilize

25. ibid.
26. supra Annex I p11.
27. supra Annex II p12.
28. supra p12-14.
29. supra p15.
30. supra Annex III p15-17.

the world market. By the vigorous nature of its question I think the Communities approach was correct. In attempting to reduce world production a concerted approach required all intervention policies of Contracting Parties to be declared. The Communities question implied that it too was interested in agricultural liberalization as long as the terms to achieve it were fair for all Contracting Parties. So no complaint can be levelled at the Communities for trying to effect a liberalization of sugar through the General Agreement. Unfortunately the Chairman of this Working Party did not agree with the Communities approach and adopted a restrictive view to the mandate[31]. He considered the review should continue the work on the Australian and Brazilian complaints and if the Community wished to examine both Australian and Brazilian sugar policy they should launch a complaint under the normal procedures. This position was steadfastly supported by Australia, Brazil and the United States. Australia, amongst others, was after the Communities to change the world sugar market problems by accepting morally that its intervention system changes in 1974/75 was the heart of the problem. It went on to blame the Communities for unilaterally blocking progress on achieving an overall solution to the over production[32].

Since a general review was impossible to achieve the Working Party had to report that no consensus on anything to discuss was possible. Therefore the Council of Ministers closed the Working Party and the complaints[33].

31. supra note 24 page 47 para. 19.
32. supra page 90 para. 32.
33. GATT Activities in 1982 page 69. A further complaint was filed in April 1982 by a group of ten sugar producing nations, requesting consultations with the Communities. The consultation has led to no change from my above discussion on the Second Working Party Report.

B. Restriction in Sugar Trade

I now discuss an example of the type of restrictions that have resulted from the Communities intervention system.

Sugar producers in the United States claimed that the sugar surplus generated by the Communities and the effect of their exporting such output had depressed world prices. The effect of this on the United States domestic producers was that the world market price fall had led to a fall in domestic prices in the United States such that it threatened their income, standard of living and employment. The domestic producers of sugar in the United States received support from the Commodity Credit Corporation whom found it could not support the domestic producers since it had run out of money[34]. The United States government lodged a complaint under Article 10 of the Code on Subsidies[35] but their domestic producers wanted immediate retaliation against the Communities[36].

The United States Sugar Act of 1971 controlled the domestic production and import of sugar to protect the growers and the consumers interest[37]. Imports were controlled by quotas to make up the internal deficit. The Sugar Act 1971 ceased in 1974 when the United States pursued a policy of "free trade" for sugar.

34. United States Senate: Hearing before the Subcommittee on International Trade on the Committee of Finance, 97th Congress Second Session. February 11th 1983.
35. supra page 126.
36. EEC: Memorandum No. 128 "EEC and U.S. Views of CAP: Myth and Reality" 1.12.1982 Appendix page 1.
37. J.E. Nagle. Agricultural Trade Policies, 1976, page 107.

The United States domestic producers called for protection and a abandonment of a "free trade" approach in 1982. By the use of the term "free trade" the United States purchased its deficit of sugar off the world free market and applied the International Sugar Agreement on a defacto basis. It instituted a quotas system only to members of the International Sugar Agreement on a percentage share of their market averaged from 1975 to 1981[38], from 1982 for future imports of sugar.

The result is that restrictions on entry have been erected to the United States sugar market. It will force the Communities, which prior to 1982 had exported sugar to the United States, to sell its surpluses onto a world market already dominated by itself. The continual sale of its surplus will not only continue to depress world prices, increase competition for reducing markets but cause more prejudice. This will result in further detriment to the traditional sugar producers because they do not have the available resources to compete on any terms with the Communities. So I consider I have made out the link between the generation of surpluses and its disposal by export subsidies which results in restrictions on trade in that commodity.

38. I. Smith "Prospects for a New International Sugar Agreement" J.W.T.L. 1983 page 308 at page 314.

C. Summary

This final chapter shows another side to the often repeated statements that GATT cannot deal effectively with a liberalization of agricultural trade. We saw in the last chapter that the Panel in the sugar subsidy debate took a pragmatic view towards the Communities system and by finding serious prejudice allowed the Contracting Parties to enter into consultations and discussions. The First Working Party Report defined the parameters for the discussion and the extent to which the Communities were prepared to move. After the implementation of the new regime with its continuance of serious prejudice to Contracting Parties, the Communities showed that it was willing to enter into the discussions. At the Second Working Party the Communities clearly offered the Contracting Parties an opportunity for a review of all intervention policies in the trade of sugar internationally to set up a framework to resolve the problems. This was the opportunity that the Contracting Parties should have seized in order to get a limitation on interventionist policies. The opportunity could have given rise to a liberalization of sugar trade internationally especially for those traditional exporters whom were dependent on sugar in toto. Thus GATT was effective in the utilization of one pillar of the structure from the Suggested Proposals for a Charter to get discussion on internal adjustment measures. I do consider this would not have led to a liberalization of sugar trade internationally since the International Sugar Organization was required for the structure to be complete. Yet if GATT was able to effect internal adjustment measures I do

consider it would have provided for the Communities to join the International Sugar Agreement.

This opportunity was missed because of the attitude of the Contracting Parties towards the obligation and the findings. Australia, Brazil and the United States consider Article XVI:3 of the General Agreement and Article 10 of the Code on Subsidies to have normative value, whereas my discussion has shown that it is only a hortatory statement. As a result of this those Contracting Parties considered the serious prejudice finding by the Panels should result in the Communities bearing the entire responsibility for the problem of sugar trade. Those Contracting Parties could not see why they should discuss their internal policies when the responsibility for the problem lay with the Communities.

The restrictions by the United States on its imports from 1982 onwards clearly arose out of the Communities common sugar policy, which generated high cost surpluses and required export subsidies to dispose of them. But those restrictions I contend are not attributable to the ineffectiveness of GATT in toto. The inability of Contracting Parties to understand the scope of Article XVI:3 of the General Agreement and Article 10 of the Code on Subsidies led to those restrictions. GATT attempted to bring resolution to the sugar trade but until governments are prepared to discuss their internal measures and make adjustments, or conclude intergovernmental commodity agreements that type of restriction will inevitably occur again.