Introduction

1. In accordance with the decision of the Committee at its 24 October 1985 meeting (AG/W/15, paragraph 30), the present note revises the Draft Elaboration (AG/W/9/Rev.1) so as to incorporate specific proposals and suggestions put forward or referred to in the course of the Committee's work in 1985. For presentational reasons and ease of reference, many of the proposals and suggestions have been included in annexes to the relevant sections of the note. The order in which proposals appear is not intended to imply that any particular proposal or suggestion has any greater standing than another. In general, the proposals are reproduced in the form in which they are recorded in the notes on the elaboration phase of the Committee's work (AG/W/12 to 15 refer).

2. The main focus of the present note is on the operative sections of the Recommendations relating to access, subsidies affecting trade, sanitary and phytosanitary measures, and review and examination of policies and measures affecting trade in agriculture. Rather than commenting further in the abstract on the general considerations mentioned in paragraph 3 of the Recommendations, reference has been made to these aspects, as appropriate, in various sections of this note.

Objectives (Chapeau)

TEXT: "The conditions should be elaborated under which substantially all measures affecting trade in agriculture would be brought under more operationally effective GATT rules and disciplines, with particular reference to improving terms of access to markets, to bringing export competition under greater discipline, to reinforcing the linkages under Articles XI and XVI between national policies and trade measures in a manner which more clearly defines the limits to the impact of domestic agricultural policies on trade, and to more effectively implementing in relation to trade in agriculture the GATT provisions providing for differential and more favourable treatment for developing
countries. To this end, and without prejudice to consideration of other approaches also aimed at improving the rules and achieving greater liberalization for trade in agriculture, approaches should be elaborated, as a basis for possible future negotiations, under which ..."
6. The second sentence of the Chapeau ("to this end ..." etc.) calls for approaches to be elaborated or developed, as a basis for possible future negotiations, which would be directed to achieving the broadly stated objectives in the first sentence. The elaboration of this inclusive approach is to be undertaken without prejudice to other possible approaches which are also aimed at improving the rules and achieving greater liberalization for trade in agriculture. It will be noted that paragraph 3 provides that full account is to be taken of the factors therein referred to in the elaboration of the various elements of the recommended approaches. Furthermore, as stated in paragraph 4 of the Recommendations it is in the framework of a general solution covering all problems relating to trade in agriculture as defined in the Ministerial Declaration, that the various approaches are to be considered.
ACCESS

TEXT: "... under which (a) all quantitative restrictions and other related measures affecting imports and exports are brought within the purview of strengthened and more operationally effective GATT rules and disciplines, including restrictions maintained under waivers and other derogations or exceptions, and the import and export activities of state trading and other related enterprises. Appropriate rules and disciplines relating to voluntary restraint agreements, to variable levies and charges, to unbound tariffs, and to minimum import price arrangements should be elaborated as part of this approach;"

7. In general two distinct strategies for bringing substantially all measures affecting access under more operationally effective disciplines can be said to have emerged in the course of the elaboration process. One would involve the introduction of tariffs as the sole or principal method of protection. The other would seek to establish an equivalence of commitment or discipline for each category of trade restrictive measures, with a range of approaches having been suggested as to how this might be achieved.

"Tariffs Only" Approach

8. The objective of this approach would be to allow market forces to operate to a much greater extent in order to liberalize trade and deal with serious current surpluses and avoid even more serious prospective surpluses. The approach may be summarized as follows:

(i) all non-tariff barriers maintained under protocols of accession, waivers, grandfather clauses, state trading, or measures not specifically provided for, such as variable levies and minimum import prices, should be phased out over some period of time;

(ii) Article XI, which was originally meant to provide for the general elimination of restrictions other than tariffs, should be amended by the deletion of all but paragraph 1 of that Article, so that tariffs would be the only permissible restriction on trade;

(iii) as unbound tariffs are a problem in agriculture, all unbound tariffs should be bound and should be the subject of a future negotiation.

9. Under this approach it is recognized that a transition to market-oriented agricultural policies would take time and that it would be necessary to identify the steps required to achieve such a transition.
Improved Rules and Opportunities

10. A number of approaches have been advanced as to how it might be possible to develop improved rules and opportunities for trade in agriculture. In some of these approaches, an improvement in the opportunities for trade is seen as being achieved through or in conjunction with an improvement in the framework of rules and disciplines. These approaches can in turn be distinguished according to whether they involve the retention, reinforcement, re-definition or modification of the relevant GATT principles and criteria. Some other approaches place greater emphasis on the negotiation of an element of bound access across-the-board, regardless of the particular measures applied. Certain other proposals are less easily classified.

11. In AG/W/9/Rev.1, the suggestion was elaborated that in order to bring substantially all quantitative restrictions and other related measures within the purview of strengthened and more operationally effective disciplines, an approach embodying three main lines of action would need to be developed.

12. The first line of action would consist in bringing under a reinforced Article XI those quantitative restrictions which at present escape the disciplines of that Article as a result of various derogations and exceptions (waivers, protocols of accession, grandfather clauses etc.), as well as residual quantitative restrictions. The second would consist in bringing all related or assimilable measures which are not explicitly provided for in the General Agreement, or which escape effective disciplines because of imperfect interpretation of the existing rules, under the disciplines of a reinforced Article XI, or if that is not appropriate, under equivalent disciplines within the framework of an appropriate GATT provision or an interpretative note or whatever (voluntary restraint agreements, variable levies and charges, unbound tariffs, MIPs). The third line of action would consist in a parallel endeavour to negotiate, as an integral element of the first and second lines of action, improved and more liberal opportunities for trade in agriculture in the framework of a negotiation that would also have as an objective the reduction and binding of tariffs on agricultural products generally.

Quantitative Restrictions

13. At present Article XI:2(c)(i) permits restrictions on imports (but not a prohibition of imports) under two basic conditions. One condition is that the restrictions are necessary to the enforcement of governmental measures which operate to restrict the quantities of the like (or directly substitutable) domestic product permitted to be marketed or produced. The second condition is that the import restriction shall not be such as to reduce the total of imports relative to the total of domestic production, compared with the proportion that might reasonably be expected to rule between imports and domestic production in the absence of restrictions. Thus the General Agreement intended that in any case where restrictions are imposed under Article XI:2(c)(i) to protect the operation of a certain class of domestic income or price support policies, a minimum level of access based, inter alia, on a ratio between imports and domestic production, should be respected for each and every product to which restrictions are applied.
14. In considering the adequacy of the existing Article XI:2(c)(i) criteria for the invocation of quantitative restrictions and the conditions under which substantially all quantitative restrictions might be brought under effective rules and disciplines, it is apparent that the maintenance or continued expansion of import access is more likely to be assured in an environment in which domestic production is effectively controlled. In general, if a criterion other than effective restriction or control of production were to govern the invocation of restrictions, not only would access under the last paragraph of Article XI:2 be less secure but the Article itself would be less of a deterrent to the imposition of new restrictions.

15. In practice, the range of quantitative restrictions applied in conformity with the existing Article XI:2(c)(i) criteria is not extensive. This, in itself, however, does not constitute a valid basis for relaxing the existing criteria, since to do so would involve the risk of merely legitimizing certain non-conforming measures at the expense of jeopardizing existing unrestricted tariff bindings. Such an approach could hardly be regarded as a strengthening of the linkages under Article XI between national policies and trade measures, or as a step in the direction of greater liberalization of trade in agriculture. On the other hand, if Article XI:2(c)(i) is to be more operationally effective, some better definition is needed of the domestic measures or policies in respect of which contracting parties may legitimately have recourse to quantitative restrictions.

16. The detailed suggestions made in AG/W/9/Rev.1 as to how such an approach might be elaborated on quantitative restrictions are set out in Annex A-I.

17. Other specific proposals or suggestions relating to quantitative restrictions, including approaches under which existing Article XI disciplines would be retained and other avenues would be sought for the liberalization of quantitative restrictions, are set out in summary form at Annex as follows:

Annex A-II

An approach whose objective would be to achieve more secure and predictable access by reinforcing the existing provisions of the last paragraph of Article XI:2 through the introduction of a more direct and dynamic relationship between the size of quotas and changes in domestic production.

Annex A-III

An approach whose aim would be strengthened and more operationally effective Article XI:2(c) disciplines on quantitative restrictions.
Annex A-IV

An approach based on the elaboration of viable and practical rules and disciplines on quantitative restrictions under given realities of trade in agriculture.

Annex A-V

An approach directed to taking account of specific characteristics and problems in the context of more operationally effective disciplines.

Annex A-VI

An approach aimed at developing the distinction between "restriction of production" and "effective regulation of production" in a way that would reflect the strictness and balance of Article XI in a more operational formulation of the minimum access concept.

18. In addition a number of variations have been mentioned as to how particular elements of these proposals or suggestions might be elaborated. These include, for example, temporary derogations and transitional arrangements for dealing with non-conforming measures and suggestions regarding the scope, applicability and calculation of minimum access commitments. With respect to the special needs of the developing countries it has been proposed that there should be greater flexibility with respect to the conditions and criteria to be developed on quantitative and other access restrictions, including the conditions and criteria relating to minimum access commitments. A possible approach referred to in this regard would involve a general declaration on the food deficits and development needs of developing countries.

State Trading and Other Related Enterprises

19. In the case of "state trading and other related enterprises" it has been suggested that the approach that might be elaborated should be directed to reinforcing the existing GATT rules and disciplines to ensure that the activities of these enterprises are conducted in a manner which is consistent with the obligations assumed by governments in respect of imports and exports. In addition to seeking greater transparency as regards the activities of such enterprises, one general objective should be to ensure that the obligations of governments with respect to import and export measures under the relevant GATT rules, including a reinforced Article XI.2(c), are not circumvented by the operation of state trading or other related enterprises. Thus minimum import obligations should have to be respected in cases where, although Article XI:2(c) is not as such invoked, the activities of such enterprises have the effect of quantitative or other related restrictions. In this regard, it is to be noted that the terms "import restrictions" or "export restrictions" in Article XI include restrictions made effective through state-trading operations.

20. Some other suggestions made are that state trading which does not operate as a tariff should be eliminated, and that negotiations under Article XVII:3 should be considered as an alternative to the application of Article XI:2(c) disciplines. The special role of state-trading organizations in the development process has also been stressed.
21. Another feature of any approach in this area should be to ensure that the proposed disciplines are respected in any situation where a monopoly of imports, or a controlling influence over whether imports may be carried out, is exercised by or through an entity in virtue of a formal or de facto relationship with governmental authorities. In other words, if the de facto situation is one in which control over imports is delegated to or exercised by a body or organization, even a producers' association, the proposed disciplines should be respected. Marketing Boards are already specifically covered under the Note to Article XVII:1.

22. An improved application of Article XI:2(c) obligations in this general sense would depend, in part at least, on an approach being adopted in negotiations under which the existence of a situation where imports are effectively controlled by a state-trading enterprise, or some other body or organization as described above, would be covered by negotiating procedures on minimum access commitments notwithstanding the fact that Article XI:2(c) may not have been invoked in respect of the product whose importation is controlled by virtue of the activities of such enterprises or bodies. This in turn would suggest that the existence and activities of such enterprises or bodies should be more extensively notified than would appear to be the case at present. One possibility in this regard might be to consider more comprehensive agricultural product-related notification procedures, either on an ad hoc basis for the purposes of any future negotiation, or as a general improvement in the notification and transparency procedures under paragraph 2 of the Recommendations. It has also been suggested that, in order to improve transparency, methods adopted in conducting tendering and purchasing operations should be more extensively notified.

23. In this connection, consideration might also be given to the modalities under which non-discrimination and national treatment requirements would be complied with, as appropriate, in all transactions.

Other Related Measures

24. The general prohibition in Article XI:1 relates to restrictions or prohibitions "other than duties, taxes or other charges". Paragraph 1(a) of the Recommendations refers, in addition to quantitative restrictions, to a number of other restrictive measures, such as voluntary restraint agreements, variable levies and charges, unbound tariffs and minimum import price arrangements. In calling for the elaboration of appropriate rules and disciplines on such measures the Recommendations are not intended to prejudge whether a particular measure not explicitly recognized in the General Agreement would be so recognized or legitimized (e.g. an appropriate rule on VRAs could be a provision declaring such measures to be illegal simpliciter). Nor does the formulation in paragraph 1(a) presuppose that it is necessarily under Article XI itself that a home should be found for one or other of these measures, although it would appear logical to do so.

25. Rather, the general philosophy developed in the course of the work of the Committee has been that in order to bring substantially all measures under more operationally effective rules and disciplines, and thereby bring trade in agriculture more fully into the multilateral trading system, it is necessary that the restrictive measures to which
countries can resort, whether or not they are explicitly provided for at present in the General Agreement, should also be subject to effective disciplines. If, for example, only the rules on quantitative restrictions were to be reinforced the tendency could be for countries to resort to other measures that are not subject to equivalent rules and disciplines or not subject to multilateral disciplines of any kind.

Voluntary Restraint Agreements

26. In the agricultural sector, at least, it does not appear that voluntary restraint agreements are a substitute for orthodox Article XIX safeguard action. From the information notified or available such agreements are not a temporary response to injury caused or threatened by a surge in imports. Instead they tend to be a political half-way house between Article XI:2(c) and Article XXVIII, with action under Article XI not being palpably justified and with recourse to Article XXVIII being unduly expensive in terms of compensation. For the importer a VER is a convenient and economic method of loosening the constraints which a bound tariff would otherwise impose on its freedom to pursue its domestic policies. For the exporter it is usually the least bad short-term alternative.

27. Whatever the motivations involved, VERs are generally inconsistent to one degree or another with the provisions of Articles XI, XIII or XIX. In these circumstances there are only two possible solutions: either they are specifically prohibited or they are authorized under certain conditions.

28. The basic elements of any prohibition on VERs would be (i) an interpretative note to Article XI:1 specifically providing that such agreements may not be resorted to, and (ii) the negotiation of procedures for phasing out existing VERs or bringing such restrictions into conformity with Article XI:2(c) and other relevant GATT provisions.

29. The elements of an approach aimed at bringing VERs under effective disciplines would depend to some extent on the nature of the conditions that would in future govern recourse to quantitative restrictions under Article XI:2(c)(i). The following suggestions are predicated on the basis that recourse to Article XI:2(c)(i) would continue to be governed by an effective regulation or management of production in terms that would not go beyond a moderate and controllable extension or better definition of the existing criteria.

30. On this basis it is suggested that there should be a requirement to submit voluntary restraint agreements to the CONTRACTING PARTIES who, on the basis of a negotiated set of criteria, would make a determination as to the agreement's conformity therewith. An agreement once concluded would remain in force unless disapproved by the CONTRACTING PARTIES. The criteria or conditions to be negotiated might include:

(i) a zero duty for suppliers from LDCs parties to such agreements;

(ii) conditions regarding transparency (notification, annual report, surveillance);
(iii) conditions regarding consistency of the restrictions with the provisions of Article XIII;
(iv) limitations as to duration;
(v) clauses allowing any party to such agreements to denounce them during the period of application;
(vi) automatic increase clauses concerning imports, carry-over, etc.

31. When examining these agreements the CONTRACTING PARTIES would not have to determine whether or not they are appropriate but would make a simple determination as to their consistency with the negotiated criteria.

Variable Levies

32. The question whether a variable levy is an unbound variable tariff, a variable minimum import price arrangement, a safeguard measure, or a restriction within the scope of the Article XI:1 prohibition, is unlikely to be resolved in any definitive legal sense. Some of the arguments and considerations relevant to this question are summarized in paragraphs 26 and 27 of AG/W/12. The fact of the matter is that a variable levy is a chameleon-like measure which compensates for changes in the relationship between international and domestic prices. Depending on the particular relationship between these prices, and also on the relationship between orientation prices and the prices ruling in the domestic market, the variable levy can theoretically have the characteristics of any one or more of the measures mentioned above.

33. In the present context the question is whether the variable levy should be treated as a measure to be negotiated on a formula or ad hoc basis, or whether, having regard to certain inherently restrictive features of variable levies, such measures should be subject to certain Article XI:2(c) disciplines, in particular the disciplines of the last paragraph of Article XI:2.

34. There would, it is submitted, be certain difficulties of a presentational nature in regularizing the GATT status of variable levies by treating such measures on the same footing as quantitative restrictions: that is, by prohibiting variable levies under Article XI:1 and then, in the same breath, treating them as an exception under paragraph 2 of that Article. To do so would be to fail to give adequate weight to the fact that variable levies are not per se prohibitive in all circumstances. If the status of variable levies under the GATT is to be regularized on the grounds, inter alia, that the use of variable levies has become, and is likely to continue to become, more widespread, then a separate GATT provision which associates such measures with the disciplines of the last paragraph of Article XI:2 is considered to be a more appropriate solution. If a variable levy system is applied in a not unduly restrictive manner, the proposed minimum access disciplines would not constitute a significant burden. On the other hand, if a variable levy system is applied in a generally restrictive or prohibitive manner, then the association of such measures with the disciplines of the last paragraph of Article XI:2 would seem to be appropriate.
35. Other elements of a possible GATT rule on variable levies might include provisions relating to their non-discriminatory application, to the manner in which they are calculated (transparency), and to the frequency and amplitude of changes in variable levies (e.g. the use of a three or six months moving average of a range of world market export prices as the basis for deriving levies).

Minimum Import Prices

36. Minimum import prices tend to be used in a variety of situations, either as an adjunct to other measures or as a form of trade regulation in their own right. In these circumstances, it is considered that a specific provision might be introduced under which minimum import price arrangements would be dealt with in terms of their trade effects. If minimum import prices are established at levels which prevent imports from any principal or developing country supplier from being commercially marketed at prices prevailing in the domestic market, they should be prohibited simpliciter. Minimum import price arrangements which do not operate as a prohibition but which are nevertheless restrictive of trade should be dealt with under Article XI:2(c). Such an approach would be consistent with the interpretation followed by a 1978 panel report which dealt, inter alia, with the application of Article XI:1 to restrictive minimum price arrangements (25 BISD 68, at p. 99).

Unbound Tariffs

37. It is one of the underlying principles of the GATT system that tariffs, as opposed to quantitative or other restrictions, should constitute the principal form of permitted protection. At the same time it is recognized "that customs duties often constitute serious obstacles to trade" and that "negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs ... in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities ... are of great importance to the expansion of international trade" (Article XXVIIIbis). The fact remains, however, that following seven rounds of trade negotiations many tariffs in the agriculture sector remain unbound or at levels which discourage trade. Some of the factors which have led to this situation are discussed in AG/W/5.

38. In essence there are two options for making further progress in the reduction and binding of tariffs in the agricultural sector. One is to conduct any future agricultural tariff negotiations on the basis of an across the board formula that would involve proportionately greater reductions in high unbound (and high bound) tariffs, and which would provide that where reductions on this basis were not feasible, the aim should be to negotiate bound tariff quotas, or duty free quotas, in line with the reinforced provisions in the last paragraph of Article XI:2.

39. The other option would be to establish a provision under which unbound tariffs in excess of a specified level would be associated with the minimum access provision of the last paragraph of Article XI:2. Appropriate negotiating procedures for the further reduction of bound and non-prohibitive unbound tariffs would also need to be developed, since the introduction of specific disciplines on high unbound tariffs would not mean that other tariffs should escape the negotiating net.
40. The second option would establish a substantive obligation to provide a minimum level of access as opposed to a commitment to negotiate, ad referendum, on a particular basis. Moreover, the second option in treating high unbound tariffs as quasi non-tariff restrictions, would be something of an innovation in terms of general GATT principles. On the other hand, in terms of a broader approach inspired by equivalence of commitment and disciplines relating to all measures affecting access, some departure from the orthodoxy of the past may be indicated, particularly if the basis for an overall balance of rights and obligations is to be achieved.

Other Suggested Approaches

41. Alternative or complementary suggestions as to how variable levies and/or minimum import price arrangements might be handled or brought under effective disciplines are:

(i) that as variable levies were variable minimum import price arrangements, they should be treated as non-tariff restrictions subject to Article XI disciplines relating to control of production and minimum access;

(ii) that variable levies should be phased out and replaced with bound tariffs through a gradual expansion of reduced or levy-free quotas;

(iii) that a maximum upper limit or bound ceiling should be established in order to limit the disparity between international and domestic prices and to remove the prohibitive element associated with high variable levies;

(iv) that rather than treating variable levies as quantitative restrictions, and in line with the GATT principle of reducing and binding fixed tariffs, a minimum amount of bound access, equivalent to at least the existing volume of trade, should be provided or negotiated in respect of variable levies and minimum import price arrangements. The effect would be that up to a certain level, imports would only be subject to a bound tariff: beyond that level, imports would be subject to the regular operation of the existing variable levy or minimum import price arrangement;

(v) that variable levies should be treated as unbound tariffs and be subject to whatever regime might be developed to deal with, or negotiate on, unbound tariffs.

Suggestions have also been made for linear or semi-linear negotiating formulas to deal with these measures and unbound tariffs, including provisions for cutting high tariffs or tariff equivalents, reducing tariff escalation and limiting the amplitude of fluctuations. Alternatively, it has been suggested that, having regard to domestic policy objectives and the specific characteristics of agriculture or of certain product sectors, request and offer procedures, based on reciprocity, would be more realistic and appropriate.
SUBSIDIES AFFECTING TRADE IN AGRICULTURE

TEXT: "... under which (b) all subsidies affecting trade in agriculture, including export subsidies and other forms of export assistance, are brought within the purview of strengthened and more operationally effective GATT rules and disciplines. With regard to export subsidies and other forms of export assistance, including subsidized export credits, both the following approaches should be elaborated in parallel:

- an approach based on improvements in the existing framework of rules and disciplines;

- an approach based on a general prohibition subject to carefully defined exceptions, in conjunction with improvements in the existing rules and disciplines and their application."

General

42. In broad terms the task of the Committee is to develop certain options with regard to strengthened and more operationally effective GATT rules and disciplines on subsidies affecting trade in agriculture generally and on export subsidies and other forms of export assistance in particular. Within the parameters of an approach, or approaches, aimed at improving the rules and achieving greater liberalization for trade in agriculture, the general objectives, in terms of the Chapeau, are to bring export competition under greater discipline, to reinforce the linkages under Article XVI between national policies and trade measures in a manner which more clearly defines the limits to the impact of domestic policies on trade, and to more effectively implement the GATT provisions providing for differential and more favourable treatment for developing countries. Furthermore, in the elaboration of the various elements of these approaches, full account is to be taken of the general considerations in paragraph 3 of the Recommendations.

43. The rules and disciplines of Article XVI are an integral part of the norms which underpin the operation of the GATT multilateral trading system. In agriculture, as in other sectors of international trade, the result would be little short of anarchy if countries were free both to prohibit or restrict imports and to subsidize exports. Accordingly, the nexus between the conditions under which agricultural imports may be restricted other than through tariffs under Article XI, and the conditions under which exports may be subsidized under Article XVI, assume a particular importance in considering possible approaches on subsidies affecting trade in agriculture. While the specific characteristics of agriculture may justify the tolerance of a lesser degree of obligation with respect to import restrictions than that generally applicable to trade in other sectors, the same reasoning would seem to apply with less force to the use of export subsidies.
44. In a situation in which export subsidies, and other measures having equivalent effect, are condoned or are not completely prohibited, the scope for better disciplines will depend on the extent to which more effective limitations on both the use of export subsidies and their adverse effects can be developed and ultimately negotiated. Each of the options in paragraph 1(b), the existing framework approach (Option A) and the new framework (Option B), are capable of being elaborated in a more, or in a less restrictive way. For the purposes of the present Note, it is assumed that the general objectives as described in paragraph 42 above are equally applicable to each of the approaches to be elaborated.

45. In essence the question to be addressed at the appropriate stage is whether, in the light of the results of an elaboration exercise, more effective disciplines on the use and effects of export subsidies, and of other equivalent measures, can best be negotiated within the existing framework based on equitable share and serious prejudice, or within a new framework based on a general prohibition with exceptions.

* *

OPTION A: IMPROVEMENTS IN THE EXISTING FRAMEWORK OF RULES AND DISCIPLINES

46. At the outset, it may be useful to address the normative question: "What specific objectives should improvements in the existing framework of rules and disciplines be designed to achieve?" In substance, paragraph 5 of Article XVI itself provides a reasonably unequivocal answer to this question: namely, promoting the objectives of the General Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties. Alternatively stated, the general objective should be to improve the effectiveness of the rules and disciplines in avoiding subsidization seriously prejudicial to the trade or interests of contracting parties in a manner which is consistent with, and contributes to, the trade liberalization objectives of the General Agreement.

47. Accordingly, if the rules and disciplines of Article XVI are to be more operationally effective in the general sense described above, then it is important that the improvements to be made should be such as to render the dispute settlement process more predictable, and to facilitate the task of contracting parties in seeking to avoid the use of subsidies on the export of agricultural products. This would suggest, particularly in the light of experience in applying the present rules, that there should be a decided preference in favour of more objectively ascertainable criteria or guidelines.

Discordance in the Existing Framework

48. It is to be noted that there is a certain discordance of exhortation and obligation in the existing provisions of Article XVI which, to a greater or lesser degree, needs to be addressed in improving the existing framework of rules and disciplines.
49. On the one hand, it is recognized (Article XVI:2) that export subsidies may adversely affect the normal commercial interests of other contracting parties, and that contracting parties (Article XVI:3, first sentence) should accordingly seek to avoid using subsidies on the export of agricultural products. On the other hand, contracting parties are not prevented from using such subsidies (Article XVI:3, second sentence). However, two apparently quite distinct results can ensue where a contracting party grants, directly or indirectly, any form of subsidy, including any form of income or price support, which operates to increase exports of an agricultural primary product:

(i) under Article XVI:1 (second sentence) there is an obligation merely to discuss the possibility of limiting the subsidy where it is determined that serious prejudice is thereby caused or threatened to the interests of another contracting party;

(ii) under Article XVI:3 (second sentence) there is an obligation not to apply any subsidy in a manner which results in the acquisition of more than an equitable share, the breach of which would give rise to a duty to take remedial action and, in default thereof, to the possibility of the affected contracting party or parties being authorized to suspend, or withdraw concessions under Article XXIII.

50. This discordance in the existing framework and the difficulties associated with the interpretation and application of a rule based on principles of equity or fairness, have contributed to the emergence of a situation where export subsidization tends to escape any real multilateral discipline. Whereas at an earlier stage in the life of Article XVI:3 it was possible for a dispute settlement body to determine that it was reasonable to conclude that subsidy arrangements had contributed to a large extent to an increase in exports and that the share of world export trade thus acquired was more than equitable, the more recent practice of panels has been to shy away from such findings and to resort instead to findings under the less coercive provisions of Article XVI:1, and even under Article XVI:2. When a system is under stress, as Article XVI has been because of the impact of domestic support policies on production and trade, pressure tends to concentrate itself at the weakest point in the system. If this situation is to be redressed, a greater degree of harmony needs to be established between the various disciplines of Article XVI, particularly if shares of world trade are in future to be determined less by ability to subsidize and more by ability to compete.

Suggested Improvement

51. One body of ideas advanced for improvements in the existing framework of rules and disciplines would involve the predetermination of equitable shares for all significant exporters who subsidize directly or indirectly. The objectives indicated would be to avoid getting bogged down in over-complex systems, to restore the operational character of Article XVI:3, and to enable the equitable share concept to act as a preventive discipline by enabling subsidizing exporters to ensure in advance that they do not thereby cause serious prejudice. These suggestions are set out in Annex B-I.
52. In AG/W/9/Rev.1 it was submitted that, as a general proposition, improvements should be sought: (i) which enable cases of specific serious prejudice to the normal commercial interests of other contracting parties to be dealt with under reinforced Article XVI:1 disciplines; and (ii) which enable the "more than equitable share" principle to operate as a broader safeguard or preventive discipline on the use of export subsidies and their more generalized effects on world export trade in a particular commodity. The following interrelated improvements, which are set out in detail in Annex B-II, have been suggested as a means of making the existing provisions of Article XVI more operationally effective as regards export subsidies and other forms of export assistance:

(i) the existing Article XVI:1 (second sentence) obligation to discuss the possibility of limiting subsidization which has been determined by the CONTRACTING PARTIES to cause or threaten serious prejudice should be converted into an obligation to take appropriate remedial action in cases involving displacement in individual markets;

(ii) a conventional and readily ascertainable indicator of what constitutes an "equitable share" should be introduced as a reference point for countries using export subsidies, together with general policy guidance for the determination in contested cases of whether a share acquired through the use of subsidies is, or should be treated as, "more than equitable" under Article XVI:3;

(iii) a particular regime should be considered on the subsidization of agricultural primary products which are incorporated in processed agricultural products.

53. A number of alternative or complementary suggestions have been put forward for developing operational criteria on serious prejudice as the principal form, or as one form, of discipline on competition in third markets. These include suggestions:

(i) that criteria should be developed to deal with serious prejudice in the form of global displacement and/or lower returns to producers which are dependent economically on access to, and prices prevailing in, world markets. Certain specific suggestions made in this connection are set out in Annex B-III;

(ii) that one possibility might be to relate subsidized exports to the import behaviour of the country concerned on the basis that a prima facie case of serious prejudice would exist where subsidized exports exceed a certain proportion of imports;

(iii) that in the context of an approach based on the exercise of moderation and a sense of responsibility and which was consistent with the objectives embodied in the Recommendations, including the specificity of agriculture, there could be value in exploring an obligation to adjust subsidies on the basis of an international finding, as well as in exploring the scope for clarifying the Article XVI:3 concepts.
54. With regard to criteria for determining "more than an equitable share", one suggestion made was that any indicative ascertainment should take account of both past performance and future trends, and that the resultant share should be expressed as a percentage of the world market rather than in quantitative terms. Another suggestion was that "more than an equitable share" should be interpreted to mean any share that could not be obtained without the use of export subsidies, either as a substantive rule or as a point of reference or criterion in any improved disciplines governing the use of export subsidies or other subsidies affecting exports.

55. A further approach proposed would involve an interpretative note to Article XVI:3 along the following lines (this approach is described in more detail in Annex B-IV):

"A share of world export trade will be deemed to be more than equitable where that share:

(a) exceeds the share that might reasonably be expected to prevail in the absence of the subsidy; and/or

(b) is inconsistent with the objective of satisfying world market requirements of the commodity concerned in the most effective and economic manner; and/or

(c) is acquired or is being maintained with the effect of depressing prices or preventing price increases that would otherwise have occurred; and/or

(d) otherwise contributes, through its existence or effects, to the hindrance of the objectives of the General Agreement, disturbance to the normal commercial interests of contracting parties, or serious prejudice to another contracting party."

56. In the course of the Committee's work various suggestions based on the ideas contained in SCM/53 have been put forward. The informal SCM/53 proposals, which are set out in Annex B-V, are aimed at a uniform interpretation and effective application of Articles 8, 9 and 10 of the Code on Subsidies as they related to agricultural and certain other primary products. In general terms SCM/53 provides:

(i) that serious prejudice to the trade or interests of another contracting party resulting from the use of any subsidy (except displacement) may be dealt with under the provisions of Article 8 of the Code, or in other words, as a case under the second sentence of Article XVI:1. Displacement in third markets resulting from subsidized exports would be dealt with exclusively as a case under Article 10 of the Code (Article XVI:3);

(ii) that a special regime be introduced as regards export subsidies on primary agricultural products incorporated in processed agricultural products (Code Article 9/GATT Article XVI:4);
(iii) that "special factors" (as distinct from commercial considerations or features characterizing specific markets) should only include those factors which are "exceptional or unforeseeable"; and that in all cases where, in the absence of proof that special factors (thus defined) are responsible, the share of a country granting subsidies on the export of a primary product has increased compared to the average share it had during the previous representative period and that this increase results from a constant trend over a period when subsidies have been granted, "more than equitable share" would be presumed to exist.

* *

OPTION B: A NEW FRAMEWORK FOR LIMITING THE USE OF EXPORT SUBSIDIES AND THEIR ADVERSE EFFECTS

57. The issues relevant to the elaboration of this approach can be subdivided under four main headings:

(a) the scope of a general prohibition;

(b) the nature of possible exceptions;

(c) the improvements in the existing rules and disciplines governing the use of subsidies permitted under exceptions;

(d) export subsidies on incorporated agricultural primary products.

Scope of the Prohibition

58. In principle the scope of any general prohibition should be broadly framed so as to cover all relevant export subsidy practices. One alternative would be a general prohibition on the granting of direct export subsidies, i.e., subsidies granted on the occasion of, or in connection with, the export of an agricultural primary product. This would avoid the necessity of prohibiting income or price support arrangements, as well as a host of other indirect or domestic subsidies which may or may not affect exports. Under this alternative, the adverse effects of indirectly subsidized exports would be subject to either the existing or reinforced disciplines of Article XVI relating to serious prejudice. A variant of this alternative would be to define a prohibition on the basis of an illustrative list of direct export subsidy practices.

59. Another alternative would be to simply extend the Article XVI:4 prohibition to agricultural primary products. This would involve a prohibition on granting, directly or indirectly, any form of subsidy on the export of any agricultural product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. This alternative would have the advantage of providing a reasonably ascertainable (price-related) yardstick both for delimiting the scope of a prohibition and for surveillance and enforcement purposes. However, certain deficiency payment arrangements would not necessarily be caught under an Article XVI:4 prohibition.
60. A broader prohibition would be one based on the terminology of Articles XVI:1 and XVI:3. This would involve a prohibition on the granting, directly or indirectly, of any form of subsidy, including any form of price or income support, which operates to increase the export of any agricultural primary product.

61. The following specific proposals or suggestions have been put forward in the course of the elaboration process (the detailed proposals are set out in the relevant Annex):

(i) that all existing export subsidies, including direct export credits and other forms of export assistance, should be prohibited, except food aid. Existing export subsidies would be permitted temporarily so long as a schedule and phase-out rules are established for each subsidy and the export quantity is gradually reduced (Annex C-I);

(ii) that the entitlement to use export subsidies should be linked to the creation of additional import access opportunities, on the basis of a phasing formula which would differentiate between occasional net exporters and consistent net exporters (Annex C-II);

(iii) that countries which subsidize their exports of agricultural products should negotiate self-sufficiency ratios, with their right to use export subsidies limited to a quantity directly linked to movements in domestic consumption (Annex C-III);

(iv) that a "producer-financed export subsidy" exemption should be developed on the basis of Note 2 to Article XVI:3, with other exceptions or disciplines to be negotiated in respect of food aid and non-commercial transactions, export credits and other related facilities, utilities or services provided by governments, subsidies on incorporated products, transitional arrangements and competition in third markets (Annex C-IV).

62. A common feature of several other suggestions made was that there should be a prohibition in respect of those subsidies, including direct export credits, which were specifically geared to exports and which were the most disruptive of trade in third markets. This prohibition would be coupled with strengthened Article XVI:1 disciplines on the adverse effects of domestic subsidies, and with clear rules on non-commercial transactions and export credits. An extension of the Article XVI:4 prohibition to agricultural products on the basis of an illustrative list of prohibited export subsidy practices, with the existing rules on two-price systems being retained, was also suggested.

Other Suggested Exceptions/Conditions

63. Each of the foregoing suggestions or proposals incorporates one or more exceptions, or defines the prohibition in terms of what may be described as generic exceptions. The following additional or complementary exceptions have been suggested:

(i) an exception in the case of small occasional exporters, linked to access performance and to responsible behaviour on international markets;
(ii) that the linkage between domestic policies and trade measures should form the basis for a category of exceptions which takes account of specific characteristics and problems of agriculture;

(iii) that in a practical negotiating sense, there should be scope for a trade-off between domestic policies which impose effective limits on domestic production and exceptions to a general prohibition;

(iv) that exceptions applicable to an agricultural product in its primary form should also apply to the same product when incorporated in a processed product;

(v) the absorption of a temporary surplus due to a sudden increase in imports of the product in question or possibly of a competing or substitutable product;

(vii) the absorption of a surplus of a product of animal origin, the domestic production of which is stimulated by, or is directly dependent, wholly or mainly on a product, imports of which have increased substantially;

(viii) the re-export of quantities of a product, in its natural or processed form, equivalent to quantities previously imported, such as imports from developing countries at prices above the normal market prices;

(ix) the implementation of a policy to restrict the domestic production of a product or to limit guaranteed support prices in respect of that product (exception applicable to substitutable or competing products);

(x) meeting the supply requirements of an importing country which is deprived of normal access to the international market or to certain supplying countries as a result, for example, of economic difficulties or certain other specific problems;

(xi) sales at prices or on terms which are in conformity with:

- commitments undertaken by virtue of a bilateral intergovernmental agreement relating to an agricultural primary product which is consistent with criteria submitted to the CONTRACTING PARTIES;

OR

- a multilateral international undertaking applicable to an agricultural product and with which at least a specified number of contracting parties are associated.
64. With regard to the conditions that might govern a producer-financed export subsidy exception (Annex C-IV, paragraph 9), the suggestion was made that it would be necessary to devise disciplines which would ensure that the protected domestic market could not be used to offset the impact of world market trends by, for example, increasing internal guaranteed prices or deficiency payments. One possibility mentioned in this regard was a "standstill", accompanied by suitable surveillance and enforcement arrangements, under which existing government-financed export subsidy levels might be frozen at the outset. This, it was suggested, could be complemented by a freeze, or some other form of restraint, on internal support prices or measures. In either case, the object would be to ensure that the international price would be borne by producers, rather than by consumers. With some such arrangements in place, there would be a basis on which to devise and negotiate a phase-out of government-funded subsidies over what would necessarily have to be a relatively lengthy period. An approach along these lines, it was submitted, would mean that producers would have to adjust progressively to world market conditions and, despite the scope for some degree of dumping or price averaging, it could lead to a real diminution in the disruption to international markets from subsidized exports. Another issue raised in this context was whether a producer-financed export subsidy scheme was to be accompanied by a parallel and real stabilization of world markets, including the problem of monetary fluctuations.

Rules and Disciplines Governing the Use of Export Subsidies Under Exceptions

65. This is a subject which is addressed in certain of the proposals and suggestions outlined above (see, for example, Annex C-IV, paragraphs 12 to 14). In general it is foreseen that Article XVI:1 (second sentence) reinforced as appropriate might, at least after a transitional stage, apply to the adverse effects in third markets arising from domestic subsidies and the use of export subsidies under exceptions.

* * *

SANTITARY AND PHYTOSANITARY REGULATIONS AND OTHER TECHNICAL BARRIERS

TEXT: "... under which (c) sanitary and phytosanitary regulations and other technical barriers to trade, including related administrative requirements, are brought within the ambit of improved procedures aimed at minimizing the adverse effects that these measures can have on trade in agriculture."

66. It is considered that the question of improved rules and disciplines on sanitary and phytosanitary measures might be approached from two not entirely separate angles. One would focus on improvements in consultation procedures with a view to minimizing adverse trade effects. The other would consist in the elaboration of disciplines designed to redress any imbalance that might arise where concessions are nullified as a result of action under Article XX(b).
67. Article XX(b) establishes certain requirements regarding the application of sanitary and phytosanitary measures. Such measures must be "necessary" for the protection of animal or plant life or health, and may not be applied in a manner which constitutes:

(i) a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail;

(ii) a disguised restriction on international trade.

68. One possibility suggested would be to seek to improve the existing procedures on the basis of an examination not only of whether in terms of Article XX(b) the measures in question are necessary or justified or are a disguised barrier to trade, but also on the basis of whether, accepting that the particular measures may be justifiable, the national interests involved can be protected in a way which is less harmful to the trade of third countries. An approach along these lines could involve a contracting party having to justify, or accept some measure of review of, the grounds on which, for example, imported products are subject to more stringent rules or requirements than those applied to the domestic products, or the reasons for which imported products should be subject to unduly burdensome administrative procedures. Another example would be a situation where an importing country enforces requirements or procedures which are more onerous or exacting than those applied by other comparable importing countries in similar circumstances. These are no more than possible examples.

69. Any improvement in the existing procedures would appear to depend to some extent on whether the opinion of suitably qualified or experienced trade and technical experts could be brought to bear on such questions in a GATT dispute settlement or consultation context. Given not only the diversity and complexity of possible disputes, but also the fact that domestic administrative or financial considerations might be at issue, probably the most that could be envisaged would be a procedure under which a complainant could obtain an informal advisory opinion on the questions at issue. The existing counter-notification procedures, with appropriate improvements, might provide a basis on which a consultation procedure along these lines might be developed. Moreover a first step in this direction could be to initiate a further round of counter-notifications, in order to have a more precise idea of the problems confronting the trade of contracting parties and the appropriateness of possible improvements.

70. The second aspect mentioned in paragraph 67 above concerns situations where tariff concessions are effectively neutralized by Article XX(b) action. The question which arises in such situations, or in a situation where possible minimum access commitments might be affected, is whether some form of compensatory action should be required under the GATT. For example, if concessions or commitments on meat are nullified by sanitary measures, should the country concerned have an obligation to compensate with equivalent concessions on other products? From an operational point of view a country introducing or intensifying sanitary requirements in such circumstances could be induced to consider whether the measures could be applied in a less trade restrictive manner. An approach along these lines would be to treat the imposition
of sanitary or phytosanitary measures "as if" they were a species of safeguard action. Another suggested approach was the adoption of a provision similar to that of Article II:3, which would require that no contracting party shall change health or sanitary regulations or procedures in such a manner as to cancel or diminish the value of concessions or minimum access commitments. This would provide for a standstill on existing regulations and a basis from which to compute compensation. On the other hand the formal position is that measures taken consistently with Article XX(b) are in exception to the general GATT rules. One of the basic issues is whether, in order to achieve a better overall balance of rights and obligations with respect to all measures affecting access, some greater degree of commitment under GATT on sanitary and phytosanitary measures is possible.

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REVIEW OF MEASURES AND POLICIES

TEXT: "2. The policies and measures of contracting parties should be subject to regular review and examination and that for this purpose the system of notifications introduced by the Committee should, with appropriate improvements, be implemented on a permanent basis in order to ensure fuller transparency with regard to all policies and measures affecting trade in agriculture."

71. Any review and examination within GATT of the measures and policies of contracting parties would have at least two general objectives. One would be to ensure fuller transparency regarding policies and measures affecting trade in agriculture. The unified system of notifications in the AG/FORMAT series in conjunction with fuller and more uniform compliance with the basic GATT notification requirements, with such modifications in either case as may be introduced, would provide the basic information on which such a review and examination might be carried out. A second objective of any multilateral review and examination process would be to keep a collective eye on whether national policies and measures are generally on course in terms of existing GATT commitments and of the commitments that might be undertaken in the context of future negotiations. Certain elements of the approaches outlined in this note envisage commitments and related transitional arrangements which would involve a reinforcement of the linkages between national policies and trade measures, and in respect of which procedures for multilateral review and examination in this general sense could be considered to be useful. Since the utility of such procedures would seem to depend very much on the character and extent of commitments that might eventually be undertaken, it is not possible at this juncture to comment otherwise than in rather general terms on the scope and modalities of a multilateral review and examination of national policies and measures in the GATT.

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Final Points

72. A body of informal proposals that were put before participants in a Non Paper by the Chairman are reproduced in Annex D.

73. It is recalled that the elaboration of the various approaches has been undertaken as a basis for possible future negotiations, and that this process has been undertaken "without prejudice to consideration of other approaches also aimed at improving the rules and achieving greater liberalization for trade in agriculture".
ARTICLE XI:2(c) RESTRICTIONS: POSSIBLE APPROACHES

SUGGESTED REINFORCEMENT EX AG/W/9/Rev.1

1. It is suggested that an approach that might be considered as a means of reinforcing the provisions of Article XI:2(c)(i), and bringing a wider range of quantitative restrictions under more operationally effective Article XI:2(c)(i) disciplines, would be: (i) to maintain the existing "restriction of production" criteria for the introduction of new import restrictions; (ii) to introduce effective regulation of production as a basis for the continued maintenance of existing non conforming restrictions; and (iii) to make the introduction or maintenance of restrictions under Article XI:2(c)(i) subject to the observance of bound minimum access commitments.

2. The formal requirement of Article XI:2(c)(i) is that restrictions imposed on imports should be necessary to the enforcement of governmental measures which operate to restrict the quantities of the domestic product permitted to be marketed or produced. Although not incorporated in the report on quantitative restrictions adopted at the 1955 Review Session (3 BISD at pp. 189-191), interpretations of the corresponding Havana Charter provisions indicate that the domestic restrictions on production must be effectively enforced, and that to "restrict" is to be understood in the sense that "the measures of domestic restriction must effectively keep domestic output below the level which it would have attained in the absence of restrictions".

3. The concept of the level which production would have attained "in the absence of restrictions" would appear to constitute either a rather strict standard (if it relates to the absence of both internal and import restrictions) or a somewhat elastic standard (if it relates only to the absence of the internal restriction). It may be useful in giving greater precision to Article XI:2(c)(i) if the requirements of the last paragraph of Article XI:2 were also to include a requirement that public notice be given of the quantities of the domestic product permitted to be marketed or produced. Consideration might be given as well to an interpretation of "marketing" which would be intended to make it clear that restrictions on quantities permitted to be marketed should be operated in a manner which prevents production in excess of the marketable quantity from entering indirectly into commercial sales.

4. With regard to "effective regulation of production" the question is whether governmental measures which do not as such impose restrictions on the quantities permitted to be marketed or produced, should nevertheless be entitled to Article XI:2(c)(i) cover if such measures in fact operate to restrict or effectively control production? There are two aspects involved: (i) the conditions underwhich import restrictions can be legitimately imposed in the first instance; and (ii) the conditions under which import restrictions once imposed can be maintained. The fact that at present import restrictions are sometimes imposed to enforce governmental measures which purport to restrict the quantities permitted to be produced but which may or may not result in domestic production being effectively restricted, would not appear to provide a sound argument for a "wait and see" approach regarding the imposition of new restrictions based, for example, on price-related governmental measures.
5. On the other hand it is considered that a case can be made for regularizing existing non-conforming import restrictions on condition that such measures operate to restrict or effectively regulate domestic production and that the minimum access provisions of the last paragraph of Article XI:2 are respected. For this purpose "effective regulation of production" might generally be taken to include:

"measures which operate, and which are demonstrably designed to operate, to stabilize or control domestic production so as to prevent an undue increase in production relative to trends in domestic consumption, and which are not operated inconsistently with commitments with respect to imports and exports under the General Agreement".

6. In order to give operational effect to the access obligations of the last paragraph of Article XI:2, it is submitted that restrictions imposed or maintained under Article XI:2(c)(i) should be subject to a minimum access commitment equivalent to [x] per cent of total domestic production, or the existing ratio of imports to domestic production, whichever is the higher. In practice, the level of the minimum access commitment would be for determination on a product-by-product basis in negotiations between the primarily interested suppliers and importers. The minimum access commitment, whether expressed as a proportion of domestic production or in quantitative terms, should also be consolidated as a tariff or zero duty quota in the Schedule of the contracting party applying restrictions under Article XI:2(c)(i). In accordance with general GATT principles minimum access commitments should be administered on a non-discriminatory basis and in accordance with such provisions for special and differential treatment as may be negotiated.

7. It is a moot point whether an import restriction maintained in conformity with the suggested "effective regulation of production" criteria should be subject to a higher minimum access commitment. Certainly there should be less tolerance of any deviation from any ratio established. Another aspect requiring comment is that, under the approach suggested, there could be a relaxation in governmental measures which currently restrict quantities permitted to be marketed or produced, thereby possibly prejudicing existing access under related Article XI:2(c)(i) restrictions. This would have to be assessed in the light of the protection afforded to existing access levels under the proposed reinforcement of the minimum access provisions of the last paragraph of Article XI:2, as well as in the light of the effectiveness of the particular domestic restrictions in terms of the existing and proposed criteria. It may be noted that only those non-conforming restrictions in force prior to a date to be negotiated, could be maintained on the basis of effective regulation of production.

8. The general objective of the approach outlined above would be to make it possible for a wider range of existing quantitative restrictions to be brought within the ambit of more operationally effective Article XI:2(c)(i) disciplines, while at the same time maintaining the present criteria governing the imposition of new restrictions. The essence of any negotiation along these lines would be to determine the standard minimum access or [x] ratio and the elements of an interpretative note relating to "effective regulation of production"
that would serve as a basis for the negotiation of a list of
governmental measures that would qualify a country to continue to
maintain import restrictions. Existing import restrictions which could
not be brought into conformity with the provisions of a reinforced
Article XI:2(c)(i), under transitional arrangements relating to minimum
access and to the effective regulation of production criteria, would
have to be phased out.

Other Criteria for Invoking or Maintaining Import Restrictions under
Article XI:2(c)(i)

9. The suggestion that, in effect, the criteria for the invocation or
maintenance of restrictions under Article XI:2(c) might be extended to
include exceptions based on regional development policies and food
security would appear to encounter certain objections, not the least of
which would be that the security of tariff bindings generally could be
undermined and that such an extension of the grounds on which
quantitative restrictions could legally be invoked or maintained would
difficult to reconcile with the broader objectives of the
Recommendations as they relate to access issues. The specific
characteristics and problems of agriculture are, of course, matters to
be taken into account but to do so on the basis suggested, rather than
on a case by case basis in the context of a reinforcement of the
existing Article XI:2(c) framework, could run counter to, or compromise,
the development of an improved framework of rules and disciplines aimed
at progressively achieving greater liberalization for trade in
agriculture over a medium to longer term time-frame.

10. There are, moreover, a number of general aspects relating to the
specificity of agriculture on which it might be appropriate to comment
in this context. Firstly, one of the basic objectives of the ideas
developed in paragraphs 1 to 8 above is to make the existing access
obligation of the last paragraph of Article XI:2 more operationally
effective. While the existing provisions of Article XI:2(c) do not
entitle a country to prohibit imports, the detailed rules governing the
determination of an appropriate proportionality between imports and
domestic production are less than precise. The concept of "the
proportion which might reasonably have been expected to prevail in the
absence of restrictions" would, in and by itself, suggest that the share
of imports should not be derisory. Furthermore, "special factors" to
which due regard shall be paid in determining this proportion include
"changes in relative efficiency as between domestic and foreign
producers but ... not changes artificially brought about by means not
permitted under the General Agreement". Thus, non-observance of the
provisions of Article XI:2(c), or the consequences thereof in terms of
lower levels of imports than might otherwise have prevailed, could not
be called in aid to support the proposition that recent or historical
import levels necessarily represent realistic minima.

11. Secondly, as a means of reinforcing the last paragraph of
Article XI:2, one suggestion is that, for practical as well as other
more general reasons, a minimum level of access might be introduced,
either as an integral element of a revision of Article XI:2 or as a
negotiating rule. One figure mentioned, by way of example, was a 10 per
cent minimum access ratio. In such a case one of the issues that would
need to be addressed is whether, as a general proposition, 90 per cent
self-sufficiency in a particular product would provide adequate scope for the realisation of national policy objectives in terms of food security, and for a less intensive, or more equitably distributed, pattern of domestic production in terms of environmental or regional development desiderata.

12. Thirdly, the purpose of an arbitrarily determined minimum access ratio would be to express the existing Article XI:2 obligation in more operational terms precisely in order to deal more effectively with difficult cases. It is submitted that the specific problems that would arise in particular cases might be addressed in the context of transitional measures or on the basis of negotiated interim arrangements.

Other Aspects

13. It may be noted that any reinforcement of the last paragraph of Article XI:2 along the lines suggested would involve some modifications of the Article XIII:4 procedures relating to the determination of the proportion between imports and domestic products. The existing procedures for notification of measures invoked under Article XI:2(c) might also need to be considered. The Article XI:2 requirement to give public notice has been construed by the CONTRACTING PARTIES as a requirement to also convey a copy of the public notice to the GATT. It is suggested in paragraph 3 above that the scope of this requirement might be extended. A further matter for consideration in the context of any reinforcement of Article XI:2(c)(1) as outlined in paragraphs 1 to 8, would be whether specific provision should be made for prior notification and consultation on new restrictions.

14. The extent to which restrictions on domestic production would entitle a country to restrict imports of like or processed products is an issue which will need to be examined in detail at the appropriate stage. The general approach, however, should be one which limits the scope for using quantitative restrictions as a method of protecting the industrial processing of agricultural products.

Temporary Surplus

15. Article XI:2(c)(ii) provides that restrictions may be imposed to enforce governmental measures for the internal disposal of a temporary surplus. Restrictions under this sub-paragraph are not subject to the proportionality provisions of the last paragraph of Article XI:2. While the precise relationship between sub-paragraphs (i) and (ii) of Article XI:2(c) does not appear to have been determined in any definitive sense, it seems to be reasonably clear that restrictions under one or other of these provisions but not both is permitted. It would be important to ensure, however, that the temporary surplus situation should not be used as an escape clause from the strengthened provisions proposed in connection with the use of restrictions under Article XI:2(c)(i). In other words, sub-paragraph 2(c)(ii) should not be used to make restrictions under sub-paragraph 2(c)(i) more restrictive.

16. It is suggested, therefore, that consideration might be given to an interpretative note which would provide that additional restrictions may not be applied under Article XI:2(c)(ii) on products in respect of which import restrictions are already in effect under Article XI:2(c)(i).
17. With regard to the substance of Article XI:2(c)(ii), one of the difficulties is to determine what is a "temporary" surplus as opposed to a "more than temporary" surplus. In theory, if not in practice, the temporary surplus exception could be relied on to justify quasi-permanent restrictions, thereby avoiding the disciplines that would apply if the restrictions were instead invoked under Article XI:2(c)(i). Two suggestions might be considered in this regard: (i) that the contracting party having recourse to the temporary surplus exception be required to notify its intention to invoke Article XI:2(c)(ii) and to consult with the CONTRACTING PARTIES regarding the measures proposed to avoid a recurrence of the surplus situation; (ii) that if the restrictions are not revoked within a reasonable period, the contracting party concerned should be required to invoke Article XI:2(c)(i) restrictions. It might be a matter for consideration whether the application of Article XI:2(c)(ii) with respect to seasonal restrictions in certain product sectors might be clarified.

Article XI:2(c)(iii) Restrictions

18. This provision enables import restrictions to be imposed as a special departure from the Article XI:2(c) "like or directly substitutable product" requirements. Thus where: (i) production of an animal product (e.g. meat) is directly dependent, wholly or mainly, on an imported commodity (feed grain); and (ii) domestic production of that commodity (feed grain) is relatively negligible: then import restrictions may be imposed on imported feed grain in order to enforce restrictions on the quantities of meat permitted to be produced. Since "feed grain" and "meat" could not be regarded as "like products" it would not be possible to impose restrictions on imported feed grain under sub-paragraphs (i) or (ii) of Article XI:2(c) in order to enforce a restriction on domestic production of meat. Apart from these explanations Article XI:2(c)(iii) would not appear to call for particular comment, except perhaps to note that the conditions governing its invocation are rather carefully circumscribed.
ARTICLE XI:2(c) RESTRICTIONS: POSSIBLE APPROACHES

ORIENTATION: to achieve more secure and predictable access by reinforcing the existing provisions of the last paragraph of Article XI:2 through the introduction of a more direct and dynamic relationship between the size of quotas and changes in domestic production:

(i) the existing criteria for invoking Article XI should remain largely as they are at present and should continue to be linked to the existence of demonstrably effective individual farm production quotas. It would be a major retrogressive step to loosen the existing provisions of Article XI to permit the legal invocation of QRs in support of simple price and/or income support programmes;

(ii) all new quantitative restrictions would have to be in full conformity with the existing provisions of Article XI;

(iii) all existing quantitative restrictions, including those maintained under waivers, derogations or exceptions, would be required to conform to the size of quota/change in domestic production relationship under Article XI:2, last paragraph;

(iv) existing quantitative restrictions not in support of effective supply management programmes, and therefore not in conformity with Article XI:2(c)(i), could be continued under an automatic derogation for a specified period (five or ten years) provided the size of the quota is linked to changes in domestic production and the base ratio established is significantly greater than that which would have prevailed had the quantitative restriction been in full conformity with Article XI. In other words, there would be a penalty in the form of a relatively higher access commitment associated with such derogations. Any extension of the derogation beyond the initial specified period would require the prior concurrence of contracting parties;

(v) in order to deal, in the case of long-standing arbitrarily fixed quantitative restrictions, with the practical problems associated with the determination of the proportion of imports relative to the total of domestic production which might reasonably have been expected to rule in the absence of such restrictions, recourse might need to be made to an arbitrary rule or formula. For example, for quantitative restrictions in conformity with Article XI:2(c)(i), but not in conformity with the proportionality provisions of the last paragraph of Article XI:2, the base ratio of imports to domestic production should be, say, 10 per cent or the existing ratio, whichever is the higher. It would also be necessary to devise appropriate rules on like and processed products.
ARTICLE XI:2(c) RESTRICTIONS: POSSIBLE APPROACHES

ORIENTATION: strengthened and more operationally effective Article XI:2(c) disciplines on quantitative restrictions:

(i) the categories or types of domestic production or marketing controls that entitle countries to apply quantitative restrictions should be more clearly defined, one possibility being the establishment of an illustrative or indicative list of such controls. For instance, whereas a system of production quotas combined with effective penal levies might qualify as a form of production control, this would not be the case where the purported control consists in maintaining or even reducing a guaranteed price to producers if imports are effectively excluded in one way or another;

(ii) the obligations in the last paragraph of Article XI:2 with respect to imports should be defined in a clear and operational manner. In particular, it would be necessary to devise a method for establishing what the effective shares of imports and domestic production would be in an unrestricted market. The relative shares of imports and domestic production should be determined, not by negotiation between unequal partners, but in accordance with the principle already embodied in Article XI that there should be equal sharing of the reduced opportunities involved in supply management as between imports and domestic production. In other words, this determination of relative shares should not simply be a matter for negotiation but should be based on the application of criteria embodied in a strengthened Article XI;

(iii) quantitative restrictions maintained under waivers and other derogations and exceptions should be phased out, with the initial level of access under the phasing programme being negotiable;

(iv) in no case in the future should derogations or waivers of unlimited duration be granted.
ARTICLE XI:2(c) RESTRICTIONS: POSSIBLE APPROACHES

ORIENTATION: viable and practical rules and disciplines on quantitative restrictions under given realities of trade in agriculture:

(i) the requirements of the exceptions to the Article XI:1 prohibition should be modified in the direction of indulging the conditions under which quantitative and other related restrictions are permitted, so as to accommodate all quantitative and other related measures under common GATT rules and disciplines;

(ii) as the existing requirements of Article XI:2(c) were unduly rigid and were not being extensively applied, and as the special conditions and characteristics of agriculture were not well reflected in the present provisions of Article XI:2(c), consideration should be given to modifying the existing Article XI:2(c) criteria and to the inclusion of exceptions related to regional development policies, and to food security in respect of a certain level of domestic production of basic foodstuffs;

(iii) an examination should be undertaken with a view to mitigating the rigidities of the unduly strict last paragraph of Article XI:2. The manner in which the access provisions of Article XI:2 are applied should be examined not only from the point of view of accommodating all measures maintained under derogations or exceptions, but also from a practical point of view by taking into consideration the objectives of the more extensive range of domestic measures in respect of which recourse to restrictions should be permitted under (ii) above.
ANNEX A-V

ARTICLE XI:2(c) RESTRICTIONS: POSSIBLE APPROACHES

ORIENTATION: specific characteristics and more operationally effective rules and disciplines.

1. Approaches for more operationally effective disciplines should be realistic and should take full account of the specificity of the agriculture sector, as well as of the other related elements contained in the Recommendations. An approach along these lines would be to modify the existing criteria governing eligibility to have recourse to measures under Article XI:2(c), so that restrictions outside Article XI could be brought within effective GATT rules and disciplines. The elimination of quantitative restrictions not recognizably in conformity with contracting parties' GATT obligations should also be focused on.

2. The need to guarantee food security, the impact of fluctuations in world market prices on domestic price and income policies, and the vulnerability and cyclical nature of agricultural production are among the factors which distinguish trade in agriculture from trade in other sectors. Many, if not most, of the trade measures maintained in the agriculture sector are intimately linked to the pursuit of national policy objectives in the areas mentioned and are themselves integral elements of such policies. The legitimacy of these objectives has to be taken as a point of departure in determining which rules should govern trade in agriculture. However, the specificity of agriculture should not constitute a general escape clause from GATT rules and disciplines, nor should it imply an increase in restrictions. Supply management has an important role to play in the linkage between domestic policies and trade measures. Within a more operationally effective framework of rules and disciplines, restrictions should be applied responsibly so as to minimize adverse trade effects and improve access, especially for products exported by developing countries.
ORIENTATION: to develop the distinction between "restriction of production" and "effective regulation of production" in a way that would reflect the strictness and balance of Article XI in a more operational formulation of the minimum access concept.

1. "Restriction of production" would be considered to occur whenever production is lowered below the level that would have prevailed under conditions of free trade, i.e., in full conformity with Article XI as it stands. "Effective regulation of production", on the other hand, would apply in those categories in which contracting parties give effect to minimum access commitments on the following basis. The minimum access commitment should incorporate two main elements: (a) an across-the-board minimum access opportunity - say 20 per cent of the domestic market - to be phased in over no more than eight years, and applicable to all contracting parties irrespective of the technicalities of the protective regime in place; (b) where the contracting party maintained internal prices above world prices and has a self-sufficiency ratio in excess of 100 per cent, an additional access opportunity would be required.

2. The additional access opportunity would be intended to reflect the fact that contracting parties in category (b) would be imposing a proportionately greater burden on world agricultural trade than others, and the fact that such overproduction could only have been achieved through avoidance of the dual disciplines of Article XI:2(c). It would therefore be appropriate that contracting parties in category (b) should undertake a correspondingly greater obligation consisting of the 20 per cent minimum access opportunity plus the percentage by which self-sufficiency exceeds 100 per cent.

3. A number of compensatory provisions would need to be considered in order to take account of the relatively greater adjustment that would be imposed on contracting parties in category (b). Such provisions could involve: (i) extending the phasing-in period for minimum access commitments from eight to twelve years; (ii) while obliged to meet the 20 per cent minimum access, such contracting parties could have the option of either meeting the "additional" minimum access opportunity corresponding to the margin by which their self-sufficiency exceeded 100 per cent, or of "offering", on an autonomous basis, to reduce domestic production by an amount corresponding to the margin in excess of self-sufficiency. This latter action would be voluntary and not subject directly to GATT disciplines. It would simply be the case that, in the absence of a reduction in domestic production to a level corresponding to 100 per cent self-sufficiency, the automatic increase in access would take place.

4. The foregoing suggestions are an illustration of how the minimum access obligations of Article XI:2 could be elaborated to achieve a variety of specific objectives, and of how the minimum access concept could be framed in a manner that basically reflects the structure and balance of the existing disciplines. An approach along these lines would also provide elements for the approaches on subsidies and for developing the linkage between Articles XI and XVI.
POSSIBLE IMPROVEMENTS IN THE EXISTING FRAMEWORK OF RULES AND DISCIPLINES

PRE-DETERMINATION OF EQUITABLE SHARES

The basic concept to be followed should reinforce the preventive aspects of the existing rules by establishing a number of objective criteria which would enable countries that grant subsidies or other forms of export assistance, to ensure in advance that they do not thereby cause serious prejudice. The following formulation is suggested: "In granting subsidies or other forms of assistance whose effect is to increase exports, the parties are agreed to endeavour to avoid the creation of prejudicial effects by taking the following preventive steps ..." These preventive measures should be aimed simultaneously at the quantitative and the price effects as described hereunder:

A. **Quantitative effect**

(a) The real (quantitative) increase in exports of the party granting the subsidy should be within the framework of a pre-determined market share ("equitable share") of the product concerned. To allow objective evaluation of that share, the latter would be determined on the basis of pre-established references: real past performance. In order to eliminate excessively wide conjunctural variations, performance would be expressed in the form of an average for the three most recent years.

To avoid any dispute as to the existence and impact of any export aids in exporting countries, it would be appropriate to calculate the equitable share of each exporter systematically and periodically (at the beginning of each three-year period), whatever the export modalities used.

(b) This traditional share could be established simultaneously at several levels:

- at the level of the world market;
- at the level of major geographical areas of destination (e.g. Middle East);
- at the level of certain countries of destination, which would be only the major importers of the commodity and would be identified on the basis of a pre-established list (e.g. for wheat: China, USSR, Egypt, Morocco ...).

The rule would be that within the limits of its traditional share (at three levels), each exporter would be free to use - or not to use - export aids of various kinds. On the other hand, from the moment when it exceeded that share and, in order to do so, applied any kind of export subsidy, it would have to be able to cite objective factors in justification of the excess (e.g. partial incapacity of other suppliers, supply difficulties on normal market terms for a particular destination ...).
B. Price effect

(a) The principle is to ensure that the use of export subsidies does not lead to pricing having a depressive effect on normal world market prices.

(b) This principle is easy to apply to commodities for which there are objective and recognized international quotations (e.g. the Chicago exchange for wheat).

The only problem is to determine where the relevant price is to be recorded: at the point of departure (f.o.b.) or at destination (c.i.f.)?

To avoid a situation where the export aid also covered transport costs, it would be preferable to use the f.o.b. price. In this case, the rule would be that the grant of export aids must not allow the quoting of export prices (f.o.b.) lower than international quotations for the commodity concerned (like quality), taking account of the costs incurred prior to the f.o.b. stage for putting-up, the price comparison being made on the basis of an average established over several months (four or five) in order to offset speculative evaluations.

(c) On the other hand, for commodities for which there are no objective and recognized international quotations, it is more difficult to select a "reference price":

- in the case of processed products for which there are no specific quotations, the effect of export subsidies, in terms of selling price, could be limited to simply offsetting the difference in costs of agricultural raw material on the world market and on the domestic market.

In order to allow an objective and transparent assessment, the processing co-efficient applied to evaluate the quantity of raw material input could be fixed by negotiation for the principal products and taking into account quality variations.

- in the case of other commodities not quoted internationally and which are not processed products in the strict sense, such as poultry or certain dairy products (cheese), a case-by-case approach could be envisaged.

The objective reference would be determined case-by-case, either in relation to the feedingstuffs or products used (assimilation to processed products), or in relation to certain selected national quotations (assimilation to primary products). Having regard, however, to the diversity of products or commodities, in particular in respect of quality variations which can imply substantial added value (e.g. cheese), it is clear that an objective reference price cannot be established in all cases. It would then be wise to provide that the price rule cannot be applied.
POSSIBLE IMPROVEMENTS IN THE EXISTING FRAMEWORK OF RULES AND DISCIPLINES

SUGGESTED IMPROVEMENTS EX AG/W/9/REV.1

1. It is submitted that the following interrelated improvements might be considered as a means of making the existing provisions of Article XVI more operationally effective as regards export subsidies and other forms of export assistance:

   (i) the existing Article XVI:1 (second sentence) obligation to discuss the possibility of limiting subsidization which has been determined by the CONTRACTING PARTIES to cause or threaten serious prejudice should be converted into an obligation to take appropriate remedial action in cases involving displacement in individual markets;

   (ii) a conventional and readily ascertainable indicator of what constitutes an "equitable share" should be introduced as a reference point for countries using export subsidies, together with general policy guidance for the determination in contested cases of whether a share acquired through the use of subsidies is, or should be treated as, "more than equitable" under Article XVI:3;

   (iii) a particular regime should be considered on the subsidization of agricultural primary products which are incorporated in processed agricultural products.

2. A reinforcement of the concept of serious prejudice under the second sentence of Article XVI:1 would be intended to establish a greater degree of harmony or equivalence of obligations within Article XVI as a whole. One advantage could be that matters relating to disturbance of the normal commercial interests of contracting parties in individual markets could be dealt with in that context, without the necessity of a dispute settlement body having to traverse the gamut of issues relating to the equitable or more than equitable character of a subsidizing country's overall share. In other words, if export subsidies are applied in a predatory manner thereby causing serious prejudice to another contracting party in an individual market, there should be a more effective remedy than exists at present, and this independently of possibly unrelated movements in the subsidizing country's share of total trade. Such an approach would also relieve a dispute settlement body of having to stigmatize a subsidizing country's entire global share as being more than equitable in order to make a finding that carries more weight than an obligation merely to discuss possibilities in relation to unfair competition in an individual market.

3. The corollary to confining complaints under a reinforced Article XVI:1 mainly to displacement in individual markets would be to deal with the less tangible but no less important categories of undue disturbance to normal commercial interests, or of hindrance to the achievement of GATT objectives, in the context of consideration, under Article XVI:3, of a subsidizing country's global share and of the impact
of that share on world markets. Thus, it is submitted that such matters as, for example, the depressive effect of a subsidized share of trade on world market prices, pre-emption of the growth in the world market, or uncertainty resulting from the open-ended nature of export subsidy arrangements, are all matters which it would be more appropriate to consider in the wider context of the impact of the acquired global share and in the context of the promotion of the objectives of the General Agreement.

**Serious Prejudice: Article XVI:1 (second sentence)**

4. In essence, what is suggested is that under a re-interpreted or modified Article XVI:1 (second sentence) serious prejudice to the trade or interests of another exporting contracting party in individual markets would be recognized as being caused by any form of subsidy which operates, directly or indirectly, to increase exports of any product in any of the following situations:

   (i) where the export subsidy in question is applied in a manner which results in displacement of the exports of a non-subsidizing contracting party in an individual market, or which hinders the normal evolution of the trade of such a contracting party in that market;

   (ii) where the export subsidy in question is applied in a manner which results in the displacement of the exports of another subsidizing contracting party in an individual market, or which hinders the normal evolution of the trade of such a contracting party in an individual market;

   (iii) where the export subsidy in question is applied in a manner which prevents developing country exporters from acquiring a share of a market (i.e., a market in which the developing country exporter has not participated in the preceding [three-year] period).

5. The provisions of Note 2 to Article XVI:3, with appropriate modifications, might provide a basis for defining the conditions under which, for the purposes of sub-paragraph (i) above, exports would be regarded as not being subsidized.

6. In any complaint under (i) and (iii) above, the onus would be on the complainant to establish a prima facie case that its exports to an individual market were being displaced or that the normal evolution of its trade in that market was being hindered. Having established such a prima facie case, the onus would then be on the subsidizing country to demonstrate, in respect of any special factors relating to that market or to the ability of the complainant to supply, that it would be unreasonable in the light of such factors that the dispute settlement body should determine that the subsidizing country should limit its exports to the individual market in question or modify the manner in which subsidies are applied on its exports to that market. Under (ii), which would normally involve cases between subsidizing exporters, no particular presumptions would arise in favour of one party or the other.
More than Equitable Share

7. As suggested above, the more than equitable share principle should operate as a broader discipline on the use of export subsidies and on the more generalized effects of the acquired share itself on world export trade. The main elements of this approach would be:

(a) to introduce a readily ascertainable indicator of what constitutes an "equitable share" to serve as a reference point for countries using export subsidies and to facilitate their efforts in seeking to avoid undue recourse to export subsidies. This would involve the calculation of shares of trade in quantitative terms. A subsidizing country's share of trade would generally be regarded as not being more than equitable if exports in any year do not exceed a specified average;

(b) to provide a dispute settlement body with a number of policy guidelines to assist in the determination of whether a more than equitable share should be considered to have been acquired.

Ascertainment of Equitable Shares

8. The purpose of any indicative ascertainment of equitable shares would be to provide contracting parties which have recourse to export subsidies with an objective point of reference, or quantitative reference level, beyond which a share acquired, if challenged, would be subject to certain evidentiary presumptions. An approach along these lines might be as follows:

(a) shares of world trade should be calculated and expressed in absolute or quantitative terms and should include all transactions other than donations and certain non-commercial transactions (where the grant element is more than an agreed percentage) provided such transactions are not linked to commercial sales;

(b) a subsidizing country's share of world trade should be considered to be not more than equitable provided its exports in any calendar year do not exceed a reference level equal to the average level of the immediately preceding [five]-year period;

(c) exports at a level which is necessary to facilitate the implementation of minimum access commitments under Article XI:2, on such temporary terms and conditions as may be negotiated, could be additional to the equitable share under (b) above;

(d) exports under a system in accordance with Note 2 to Article XVI:3 would continue to constitute an exemption from the provisions of Article XVI:3.

9. The proposed method of ascertaining shares would not be definitive or immune from challenge. Firstly, where the level of subsidized exports exceeds the reference level (i.e. the level calculated under (b) and (c) above), there would be an evidentiary onus on the subsidizing exporting country in any proceedings under Article XVI:3 to demonstrate
that the acquired share is not more than equitable having regard, inter
alia, to the general policy guidelines, and to establish that any
special factors invoked clearly outweigh other causative factors.
Secondly, in any case where the acquired share of a subsidising country
is claimed to be more than equitable, even though the reference level
has not been exceeded, there would be no such presumption.

10. The calculation of shares of trade in quantitative terms and by
reference to previous performance would be intended to avoid the
uncertainty inherent in the calculation of proportionate shares of total
world export trade. It may be objected that such an approach would tend
to legitimize existing shares acquired through relatively unfettered
subsidization. On the other hand, one result of calculating shares in
quantitative terms and by reference to previous performance, would be to
progressively reserve a larger share of the growth in world trade to
those countries that do not resort to export subsidization. Inordinate
fluctuations associated with the suggested method of calculating base
shares could be moderated by excluding the highest and lowest years from
the immediately preceding representative period.

11. An alternative approach would be to predetermine equitable shares
on the basis of negotiations amongst principal and other suppliers.
Possible disadvantages of such an approach are that the techniques
involved may not be applicable to more than a limited number of
commodities, and that in the event that negotiated arrangements were to
collapse the only fall-back would be the existing inadequate rules. In
these circumstances it would still seem to be necessary to consider
improvements in the existing framework, either to deal with export
subsidization on other agricultural products, or to cater for the
situation that would arise if such negotiated arrangements were to
collapse under the pressure of market forces or for other reasons.

General Policy Guidance in the Determination of More than Equitable
Share

12. The suggested improvements outlined in paragraphs 8 to 10 above,
concerning the indicative ascertainment of shares and the attribution of
the evidentiary onus could, it is submitted, contribute to making
Article XVI:3 a more operationally effective discipline. However, at
the end of the day a dispute settlement body is still going to be
confronted with determining whether the facts, established or not
rebutted, on undue disturbance to normal commercial interests and on
hindrance to the achievement of general GATT objectives, entitles it to
make a finding of "more than equitable share". In other words one of
the main problem facing a dispute settlement body is perhaps not so much
the range or complexity of the factors, special or otherwise, to be
taken into account, but the absence under the existing arrangements of
any effective policy guidance against which the complex range of issues
involved can be weighed and assessed.

13. A complementary approach would be to attempt to circumscribe the
role of special factors. To attempt to do so would, in effect, be to
arbitrarily preclude factors which could in fact have an important
bearing on the issues under consideration in a particular case.
Moreover, ex hypothesi, "special factors" will always remain intractable
or elusive from a definitional point of view: cut one special factor
off and two or three are likely to crop up in its place. Attempts to define "irrelevant" special factors are unlikely to be any more promising. In these circumstances it is submitted that what is needed is a set of policy guidelines that will assist a dispute settlement body in finding its way through the inevitable maze of factors to be taken into account, special or otherwise, and make its determination.

14. The equitable share principle was originally conceived of as being applied on the basis of general policy guidelines and, in fact, a limited measure of guidance was adopted in 1955 for the purposes of determining equitable shares under Article XVI:3. In essence the suggestion would be to graft a more substantive body of policy guidance onto Article XVI:3.

15. The following guidelines are not presented as a menu, but rather to emphasize the point that without some such general guidance, it is not surprising that it has not proved possible to effectively apply the uprooted version of equitable share in Article XVI:3 exclusively on the basis of causal linkages, particularly where more general forms of prejudice or hindrance are at issue in considering the impact of a given share of trade:

(i) the shares of individual contracting parties of world trade in the commodity concerned during a previous representative period and the recent trend of those shares;

(ii) the shares of individual contracting parties of world trade in the commodity concerned which might reasonably be expected to prevail in the absence of the subsidy;

(iii) the degree of importance of the trade to the economy of the grantor, and to the economies of the countries materially affected by the subsidy;

(iv) whether the share of world trade of the grantor is so small that the effect of the subsidy on the trade in question is likely to be of minor significance;

(v) the existence of pre-established limitations in the subsidizing country on the volume of its exports that can be subsidized (including limitations related to Article XI:2(c)(i) and Note 2(b) Ad Article XVI:3);

(vi) the effect of the subsidy on the level of prices in international trade;

(vii) the desirability of facilitating the gradual extension of production for export in those areas able to satisfy world market requirements of the commodity concerned in the most effective and economic manner, and therefore, of limiting any subsidies or other measures which make that extension difficult.
Subsidized Export Credits and other Related Forms of Assistance

16. As the existing Article XVI framework does not prohibit the use of, or discriminate between, particular categories of export subsidization, transactions which are less than fully commercial because they benefit from subsidized credit or insurance facilities, would simply be subject to the same disciplines as other directly or indirectly subsidized exports. On this basis, transactions benefiting from subsidized credit or insurance arrangements would be governed by any reinforced Article XVI:1 and XVI:3 disciplines. One approach might be to develop criteria to enable a dispute settlement body to more readily determine in particular cases whether export credit or insurance facilities should be regarded as being on less than fully commercial terms.

Non-Commercial Transactions

17. The extent to which reinforced disciplines under the existing Article XVI framework might apply to non-commercial transactions, is a matter which involves a number of general policy considerations. One approach would be to provide that, for the purposes of Article XVI:3, world export trade would include all transactions other than non-commercial transactions which are not linked to commercial sales and in respect of which the grant element is not less than an agreed percentage. In the case of Article XVI:1 (reinforced) consideration could be given to an approach under which a certain class of concessional transactions in least developed country markets might be excluded from the scope of the disciplines of any reinforcement of Article XVI:1, but that in other markets the suggested disciplines might apply where there is a linkage with commercial sales or where the complainant is able to demonstrate that FAO/CSD conditions relating to the non-commercial transaction have not been complied with.

Export Subsidies on Primary Products Incorporated in Processed Agricultural Product

18. By virtue of paragraphs 3 and 4 of Article XVI no export subsidy may be granted directly or indirectly on an agricultural product unless it is a primary agricultural product "in its natural form", or a primary agricultural product which has only undergone "such processing as is customarily required to prepare it for marketing in substantial volume in international trade". The prohibition of subsidies on the export of agricultural products other than primary agricultural products as defined, is unconditional. To consider sugar incorporated as an ingredient in biscuits as a primary product in its "natural form", or baking as a process customarily required to prepare sugar for marketing in substantial volume in international trade, would deprive the Article XVI:4 prohibition of any substance in relation to non-primary agricultural products.

19. One possible interpretation of paragraph (d) of the Subsidies Code illustrative list is that any agricultural primary product used as an input in the production of an exported product may, under certain terms and conditions, be subsidized to cover the difference between the domestic and world market prices of the input. Another possible interpretation would involve construing "commercially available on world markets to their exporters" to mean that the extent of the permitted
subsidization should be limited to the difference between the price of the internally produced input and the price at which the same input is in fact commercially available to export manufacturers, i.e. the landed duty paid price. That a drawback of duty may be granted to export manufacturers, which would at least favour international trade, is of somewhat doubtful relevance in the present context, as is the fact that export manufacturers in third countries, presumably as a result of more liberal import regimes, may happen to enjoy access to agricultural raw materials at subsidized world market prices.

20. However this may be, the basic issue is one that is not likely to be resolved by splitting legal hairs but rather by deciding whether the widespread practice of subsidizing, directly and indirectly, incorporated primary agricultural products should be permitted, prohibited or limited.

21. One approach involving elements of both limitation and prohibition would be to:

(i) limit the method of subsidization to the supply ex store of the agricultural primary product input to export manufacturers at the world market prices in respect of products for which recognized international price quotations exist;

(ii) subject processed agricultural exports subsidized in accordance with (i) above to the disciplines suggested in respect of a reinforced Article XVI:1 on the basis that serious prejudice would be deemed to exist, unless the subsidizing exporter is able to establish affirmatively that the domestically produced agricultural input has been supplied at a price which is not less than the ruling world market price;

(iii) prohibit the subsidization of agricultural primary product inputs to processed products in respect of which the "added value" of the input is less than [ ] per cent of the value of the processed product.

Other Aspects

22. The foregoing suggestions are set out in the form of possible improvements in the existing rules and disciplines under Article XVI:1 and Article XVI:3. It could well be that Article XVI:3, which relates exclusively to primary products might constitute a more appropriate framework within which improved disciplines on both serious prejudice and equitable share might be developed in respect of agricultural products. In general, the question of the form these or other suggested improvements might take (modification of the rules, additional interpretative notes, guidance to a dispute settlement body, or a code) is a matter which would have to be considered at the appropriate stage.
REINFORCEMENT OF ARTICLE XVI:1
SERIOUS PREJUDICE: OTHER SUGGESTED CRITERIA

1. The concept of global displacement and a linkage between prices and serious injury should be incorporated in any reinforcement of Article XVI:1 and of the related procedures for demonstrating serious prejudice. With regard to global displacement, the situation envisaged is one where, although there is a substantial increase in the overall level of subsidized exports, this is not necessarily reflected in specific markets. In such a case it should be sufficient, in order to establish prima facie serious prejudice, to demonstrate that there is subsidization and that there has been an increase in total exports. The onus of proof would then be on the respondent to show that the increase in exports was not the result of subsidies or assisted operations. In the absence of such a justification, global displacement of other exporters would be taken to have been established, with the result that there would be a concomitant obligation on the respondent to take immediate remedial measures.

2. With regard to a link between prices and serious prejudice it is evident that a decline in prices cannot be considered, in and by itself, as giving rise to an onus of proof. In these circumstances, a number of elements or indicators should be defined which, if established, either individually or together, would constitute prima facie injury through prices. These elements might include: an increase in subsidized operations in third markets; an increase in stocks associated with a price support system that is not geared to trends in domestic consumption; an increase in subsidies granted either globally or in relation to specific markets. Other indicators might need to be established. What is of fundamental importance, however, is to devise the means by which it would be possible to establish, within the framework of improved dispute settlement procedures, a link between adverse price effects and injury.

3. In the application of these indicators, a distinction would need to be made between traditional and sporadic suppliers and between subsidizing and non-subsidizing exporters. A reference period for determining trends (say three years) and criteria for determining relative prices would also need to be considered. For some products, the existence of recognized international commodity exchange quotations would enable a comparison to be made between subsidized export prices and competitive prices. For certain other products, the reference price might be calculated on the basis of a weighted average of the export prices of non-subsidizing suppliers, with the weighting formula also taking account of quality and other relevant factors. In situations where neither of these techniques could be used, and the market is supplied by subsidizing and non-subsidizing exporters, the onus of proof should be on the subsidizer to demonstrate that its export price to a specific market is reasonable.
1. With regard to the "policy guideline" approach the objective should be to elucidate and render operative the principles on which the existing equitable share discipline was based. The 1948 CONTRACTING PARTIES determination, the 1955 Working Party Report and the 1966 Review Panel, developed the core perception that the assessment of equitable share should be guided by the distinction between shares that are artificially acquired and those that are based on an economic basis. Drawing on the reasoning in these reports and determinations, four basic criteria should be laid down in an interpretative note to Article XVI:3 to serve as principles to be applied by panels in determining whether more than an equitable share has been acquired. In essence such an interpretative note would provide that:

"A share of world export trade will be deemed to be more than equitable where that share:

(a) exceeds the share which might reasonably be expected to prevail in the absence of the subsidy; and/or

(b) is inconsistent with the objective of satisfying world market requirements of the commodity concerned in the most effective and economic manner; and/or

(c) is acquired or is being maintained with the effect of depressing prices or preventing price increases that would otherwise have occurred; and/or

(d) otherwise contributes, through its existence or effects, to the hindrance of the objectives of the General Agreement, disturbance to the normal commercial interests of contracting parties, or serious prejudice to another contracting party."

2. A prima facie case of more than equitable share would be established if the subsidized share of a contracting party breached any one of the foregoing criteria. Such an approach would give decisive priority to the principle that trade should be conducted on the basis of rational economic principles, and that those who compete for markets should do so on an equal (unassisted) basis. In other words, "equitable share" should be defined on the basis of the elementary principle of equity that no party is given a privileged position. A basic common sense understanding should be applied in any strengthening of the equitable share criterion. To do otherwise would be to twist the meaning of "equitable" out of all relation to the well-established meaning of that concept.
ANNEX B-V

UNIFORM INTERPRETATION AND EFFECTIVE APPLICATION OF ARTICLES 8, 9 AND 10 OF THE SUBSIDIES CODE AS THEY RELATE TO AGRICULTURAL AND CERTAIN OTHER PRIMARY PRODUCTS (SCM/53)

Article 8

1. In order to avoid differing interpretations as to the scope and application of Article 8, the following interpretative decision could be taken:

(a) Article 8 (Subsidies - General Provisions) is applicable to primary and non-primary products.

(b) Paragraph 4 does not explicitly cover all potential adverse effects arising from subsidies.

(c) The meaning of footnote 28 is the following: concerning certain primary products if the effects of the subsidized exports are to displace the exports of a like product of another signatory from a third country market, then the determination of whether these effects are such as to result in nullification or impairment or serious prejudice should be done under Article 10. The emphasis is therefore on the displacement effect. Other possible effects are not affected by this footnote.

(d) For the above reasons and taking into account footnote 25, the limitation of application of Article 8, resulting from footnote 28, would not affect a finding of serious prejudice in the sense of Article XVI:1 under the Code when the effects of a subsidy on certain primary products are other than displacement from a third country market.

Article 9

1. The language of Article 9:1 seems to be clear, i.e., it prohibits the granting of export subsidies on products other than certain primary products. This prohibition is formulated in an unconditional way, i.e., it does not depend on other considerations, such as primary product component, methods of production or modalities of sale, etc.

2. If Article 9:1 were interpreted to allow the subsidization of primary product components then the scope and impact of Article 9 would be radically reduced as most processed products contain primary components.

3. There would, however, appear to be a certain contradiction between the flat prohibition in Article 9 and paragraph (d) of the Illustrative List. It has to be recognized that although paragraph (d) contains ambiguities it nevertheless allows an interpretation according to which not only primary components but any components used in the production of an exported product may, subject to certain conditions related to the
modalities of delivery, be subsidized to cover the difference between their domestic and world market prices. In particular the economic effects on the export market of a system consistent with paragraph (d) could be the same as the effects of the present practices of some signatories to subsidize primary product components of exported processed agricultural products.

5. There is also a certain grey area between Article 9 and Article 10. A country subsidizing exports of a primary product makes it available to foreign producers at a reduced price. It seems therefore economically unsound to refuse the same benefits to its domestic producers. It is also argued that one reason for subsidizing exports of primary products is the need to dispose of surpluses. It seems that the most obvious channel to be used in such a situation is to encourage their domestic consumption, i.e., to offer them to the domestic processing industry at competitive (in relation to the world market) prices.

6. If, however, subsidization of a primary component as such were allowed there would, under the existing provisions, be no discipline applicable to those subsidized primary products contained in exported processed products insofar as Article 9 and Article 10 are concerned.

7. There is a need to overcome problems identified above and to avoid possible interpretations which would allow unlimited subsidization on the basis that each processed product contains primary components. Furthermore, there is a need to bridge the gap between Articles 9 and 10 and to address the issue of economic parity in the treatment of domestic producers producing for export and of foreign producers using the subsidized primary products. It is therefore necessary to address certain solutions. The solution should preferably establish a general rule based on an agreed interpretation. If a general rule is not possible, the scope for exceptions should be clearly defined.

8. A solution may be sought through an interpretative decision on paragraph (i) of the Illustrative List. Such a decision could read:

"For purposes of Article 9 the Committee decides:

If the imports of a primary agricultural product are subjected to a system for the stabilization of the domestic price or the return to domestic producers, the following interpretation of paragraph (i) of the Illustrative List will apply:

(a) The domestic producer physically incorporating in a processed agricultural product a quantity of the domestic product equal to, and having the same quality and characteristics as, the product available to him on world markets, may obtain the remission or drawback of import charges (including variable levies) which would have been levied on the same quantity of imported product had he chosen to substitute the domestic primary component by the imported primary component.

(b) Any remission or drawback in excess of what was or would have been levied by way of import charges on the corresponding quantity of primary component that has been physically incorporated will be subject to the provision of paragraph (i) of the Illustrative List."
(c) In any case (including a situation where the domestic prices are maintained at a higher level not because of charges on imports but because of quantitative or similar restrictions), the remission or drawbacks shall not be higher than the difference between the domestic price and the world market price of the primary component.

(d) The calculation of the amount of the remission or drawback will be effectuated according to the criteria to be established by the Group of Experts and approved by the Committee.

(e) The Committee shall agree on measures to be taken so as to ensure full transparency regarding the actual amount of remission of drawbacks.

(f) Domestic primary components used in accordance with paragraph (a) above shall be considered as being "internally exported" and, for the purpose of Article 10:1, shall be added to the quantities of the primary product which have been effectively exported.

(g) The methods to be used for the calculation of the amounts "internally exported" shall be developed by the Group of Experts. The Group will also propose measures ensuring full transparency as to the quantities "internally exported".

Paragraph (d) of the Illustrative List of Export Subsidies

9. Paragraph (d) in its present form, and more specifically its last part starting with "... if (in the case of products) ..." opens a door for an unlimited subsidization. In order to avoid a too permissive interpretation of this paragraph the Committee may adopt the following understanding:

The last part of paragraph (d) of the Illustrative List of Export Subsidies, starting with "... if (in the case of products) ..." shall not be taken into consideration in any determination as to the existence of a prohibited export subsidy.

Article 10

10. There is a certain ambiguity resulting from the "effect-oriented" approach of Article 10. There is, for example, sufficient imprecision in the concept of "more than an equitable share" to allow countries using export subsidies to argue that these subsidies do not result in obtaining such a share. On the other side it is not always possible to prove causality between the subsidy and the increased share. Article 10 also contains other notions which might escape objective criteria, such as special factors, normal market conditions and price undercutting. Furthermore, there is a certain ambiguity as to the exact scope of Article 10, the question of newcomers and the role of non-commercial sales. Therefore clarification and agreed interpretations of some concepts and notions contained in this Article should facilitate its more effective application.
11. It seems that a more precise definition of special factors would be very helpful in the practical application of the notion of "more than an equitable share". One possible solution could be to make it clear that special factors are those which can be considered as exceptional and/or temporary and beyond the control of the country subject to the complaint, i.e., not present under normal market conditions. The following are illustrative examples of such special factors:

(i) embargo or similar quantitative limitation on exports of the given product from or imports from the complaining country;

(ii) decision by a state-trading country or a country operating a monopoly of trade in the product concerned to shift, for political reasons, imports from the complaining country to another country or countries;

(iii) natural disasters, crop failures or other force majeure substantially affecting quantities, qualities or prices of the product available for exports from the complaining country;

(iv) existence of a commodity arrangement limiting exports from the complaining country;

(v) significant voluntary decrease in the availability for exports of the product concerned in the complaining country;

(vi) significant non-commercial transactions\(^2\) by the complaining country in the market of the importing country/countries which lead the country/countries subject to complaint to subsidize in order to be competitive.

In assessing the relevance of special factors in each particular case an attempt shall be made to weigh their effects relative to the effects of the subsidy.

12. On the other side, there are other factors which, although they could be described as special features of a given market, are not exceptional or unforeseeable but are within the scope of the commercial considerations characterizing a specific market and therefore should not be considered as special factors within the meaning of Article 10:1. Some examples of such commercial and other considerations are as follows:

(i) historical links between the subsidizing and the importing country/countries;

(ii) changes in consumer taste in the importing country/countries;

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1 The fact that certain actions are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either the GATT or the Code.

2 Other than those referred to in paragraph 14(a) and (b).
(iii) particular taste or dietary demands in the importing country/countries;

(iv) difference in transportation costs and related factors between the subsidizing country and other countries in their exports to the importing country/countries;

(v) geographical and climatic situation of the subsidizing country;

(vi) marketing techniques of respective traders;

(vii) quality of the product in question;

(viii) technological changes or new or increased production capacities in the subsidizing exporting or importing country/countries.

13. The concept of "normal market conditions" plays an important role in selecting "a previous representative period". If in a given period the world market conditions were affected in a significant way by one or some of the special factors, then these conditions would hardly be considered as normal. The situation is much less clear if world market conditions are influenced by subsidies granted by one or many exporting countries. The ideal solution would be to seek a period when there were no subsidies. However, in practice, such an ideal approach may not always be feasible. It seems therefore that the fact that subsidies have been used during any period should not necessarily exclude this period as being representative. In selecting such a period one should not lose sight of the fact that export subsidies in existence during the selected representative period may have influenced the share of the trade obtained by the various exporting countries.

14. Special and concessional transactions, despite their apparent non-commercial nature, affect normal market conditions and could have the same practical effects as subsidized sales. This can be easily demonstrated in a situation where a country ties its non-commercial transaction (for example a grant) to a commercial sale of the equivalent amount of a product. The commercial effect of these two transactions would be the same as if the whole delivery were done on commercial terms but benefiting from a 50 per cent subsidy. There is therefore a need to include non-commercial transactions having obvious commercial effects in the volume of world export trade for purposes of Article 10:1. This should not, however, be done in such a way as to discourage their use for humanitarian and economic assistance purposes. One solution could be to agree that for purposes of Article 10:1 of the Code "world export trade" does not include non-commercial transactions in a given market if:

(a) there are no commercial sales at all from the same country to this market; or

1 As listed in Appendix F to FAO Principles of Surplus Disposal and Consultative Obligations of Member Nations.
(b) the exporting country can demonstrate that the non-commercial transaction has been notified to and found by the FAO Consultative Sub-Committee on Surplus Disposal to be likely to be absorbed by additional consumption in the importing country and where the FAO Usual Marketing Requirements provision contains adequate assurances against resale or trans-shipment.

Non-commercial transactions that do not meet the above conditions (or in cases where doubts may persist on whether these conditions have been met), may constitute subsidized sales and may result in the concerned signatory obtaining more than an equitable share and therefore should be examined on a case-by-case basis.

Detailed analysis of hypothetical specific cases would indicate that a certain amount of subjectivity may be involved in determining whether a subsidy has resulted in a country obtaining more than an equitable share. It seems that in order to reduce this subjectivity and to avoid some other difficulties which appeared in the past in relation to the concept of "more than an equitable share", the best approach available under the existing provisions would be to proceed on a case-by-case basis, taking into account agreed interpretations of special factors, normal market conditions, rôle of non-commercial transactions, etc. This approach could also be facilitated by the following understanding:

For purposes of Article 10:1 of the Agreement:

In all cases where, in the absence of proof that special factors are responsible, the share of a country granting subsidies on the export of a primary product has increased compared to the average share it had during the previous representative period and that this increase results from a consistent trend over a period when subsidies have been granted "more than an equitable share" will be presumed to exist.

For purposes of applying Article 10:1 it is recalled that there is consensus among contracting parties that the concept of increased exports in Articles XVI:1 and XVI:3 includes maintaining exports at a level higher than would otherwise exist in the absence of a subsidy.

As there may be some doubts as to the linkage between Article 10:1 and 10:2(a) it may be useful to specify that in order to determine "more than an equitable share" it is not necessary to examine what happens in individual markets.

In order to avoid that Article 10:2(b) be used in a manner inconsistent with other provisions of Article 10, an understanding could be reached that invocation of Article 10:2(b) shall not override other provisions of Article 10.

In respect to the question of newcomers to the world market it may be appropriate to recall that in accordance with Note 1 to Article XVI:3 the fact that a signatory has not exported the product in question during the previous representative period would not in itself preclude that signatory from establishing its right to obtain a share of the trade in the product concerned.
20. The question of price undercutting will certainly require further (more technical) examination and it may be possible to work out certain technical guidelines (for example on the basis of export values). However, one point seems relatively clear, namely that Article 10:3 should be applicable only in a competitive situation, i.e., where at least two unrelated suppliers have been selling to a particular market. The term "unrelated" should be interpreted to mean that they are from different signatories and that there is no market-sharing agreement between them.
ANNEX C-I

A NEW FRAMEWORK FOR LIMITING THE USE OF EXPORT SUBSIDIES AND THEIR ADVERSE EFFECTS

A GENERAL PROHIBITION ON EXPORT SUBSIDIES AND OTHER FORMS OF EXPORT ASSISTANCE EXCEPT FOOD AID

1. As there is extreme concern about present chronic surpluses and about the prospect of even more serious surpluses, efforts should be increased to prevent or reduce surpluses which represent a burden on national economies in terms of the economic resource and budgetary costs involved, as well as the adverse impact they have on international markets. In the past, stocking techniques and export subsidization have been used as means of dealing with surpluses. Stocking techniques, which are temporary measures predicated on the assumption that conditions would improve, have not worked well in the past. There is no reason to believe that stocking techniques would be any more effective in the future. Export subsidies on the other hand are unfair, particularly for developing countries, because they transfer the cost of domestic support programmes to other exporting countries.

2. All existing export subsidies should therefore be phased out and new export subsidies should be prohibited. For this purpose, export subsidies would also include direct export credits and other forms of export assistance. Under this approach, everything would be prohibited except food aid. Existing export subsidies would be permitted temporarily so long as a schedule and phase-out rules are established for each subsidy and the export quantity is gradually reduced. This proposal would establish a direct link between domestic programmes and export policies because the elimination of export subsidies would require adjustments in domestic price support programmes. Moreover, since surpluses are caused by domestic price support programmes, it would only be right that domestic programmes should be adjusted to remove these surpluses.
ANNEX C-II

A NEW FRAMEWORK FOR LIMITING THE USE OF EXPORT SUBSIDIES AND THEIR ADVERSE EFFECTS

GENERAL PROHIBITION WITH EXCEPTIONS LINKED TO THE CREATION OF ADDITIONAL ACCESS

1. A phasing formula might be considered in the context of an overall approach acceptable to all participants, including those for whom the specific characteristics of agriculture featured prominently, under which there would, from the outset, be some net improvement in trade opportunities as well as improvements in the GATT rules and disciplines.

2. The phasing formula would be one under which occasional net exporters might be permitted to subsidize exports up to, say, 50 per cent of additional access created. In the case of consistent net exporters the quantities in respect of which there would be an entitlement to use export subsidies would be gradually but progressively phased out in accordance with a basic formula. However, the quantity entitled to export subsidies could be supplemented by an additional export subsidy entitlement linked to the creation of additional import access. This supplementary or counterbalancing entitlement would itself begin to phase out whenever the level of import access remained static for more than, say, two years. The combined effect would be that a net exporting country which provides increasing import access would enjoy a relatively higher export entitlement and a lower rate of degressivity than would otherwise be the case under the basic phasing out formula.
ANNEX C-III

A NEW FRAMEWORK FOR LIMITING THE USE OF EXPORT SUBSIDIES AND THEIR ADVERSE EFFECTS

GENERAL PROHIBITION WITH EXCEPTIONS BASED ON SELF-SUFFICIENCY RATIOS AND A LINKAGE WITH MOVEMENTS IN DOMESTIC CONSUMPTION

1. There are two basic principles in the "prohibition with exceptions" approach being elaborated by the Committee: (i) that measures to restrict imports (or subsidize exports) would only be permissible under certain conditions (the exceptions principle); and (ii) that even where such exceptions apply, contracting parties' freedom to exercise such measures would be limited by their obligation to provide access (the proportionality principle of Article XI) and, by extension to Article XVI, to limit subsidized exports. Having regard to reservations concerning the effectiveness of a producer-financed subsidy exception in providing a "limit" on subsidized exports, an alternative option would be:

(i) a requirement that countries which subsidize their exports of agricultural products negotiate self-sufficiency ratios with their right to use export subsidies limited to a quantity directly linked to movements in domestic consumption;

(ii) this approach would require negotiation of a fixed percentage of domestic consumption which could be exported with subsidies. If domestic support prices were subsequently reduced and consumption increased then the quantity (not the percentage) which could be exported with subsidies would increase. If, however, support prices were increased and consumption declined, then the quantity which could be exported with subsidies would also decline;

(iii) this approach would have the advantage of placing an effective limit on subsidized exports consistent with the logic of the prohibitions with exceptions approach. It could also have the virtue of encouraging those countries operating high domestic support arrangements to bring the level of support down over time more into line with world prices. On the other hand, if such countries continued with a policy of high and increasing domestic support prices, it would protect other exporting countries from increasing quantities of subsidized product coming onto the market.

2. This alternative is an option in its own right which would apply to export subsidies in the sense of Article XVI:3. Self-sufficiency ratios would be negotiated on a commodity and individual market basis. The option is designed to apply as a ceiling limitation on all exports irrespective of whether they happen to benefit from direct export subsidies or other forms of support such as levies collected from producers to finance exports.
A NEW FRAMEWORK FOR LIMITING THE USE OF EXPORT SUBSIDIES AND THEIR ADVERSE EFFECTS

APPRAOCH SUGGESTED IN AG/W/9/REV.1

Scope of the prohibition

1. As a working hypothesis, a prohibition based on the terminology of Articles XVI:1 and XVI:3 is adopted. This would involve a prohibition on the granting, directly or indirectly, of any form of subsidy, including any form of price or income support, which operates to increase the export of any agricultural primary product.

Possible exceptions

2. It is submitted that the principal exemption should be a provision whereby subsidies on the export of an agricultural primary product which are financed through a system of mandatory levies on producers, or under other mechanisms depending on the nature of the domestic price or income support arrangements involved, are considered not to be subsidies for the purposes of the general prohibition as defined. A provision along these lines would be intended to constitute the fulcrum on which more effective disciplines on subsidies affecting exports would hinge. The underlying philosophy is that there would be a move progressively away from direct government financing of export subsidies, and that producers' returns would in general, i.e., subject to such arrangements as may be made to protect the incomes of marginal producers, reflect a weighted average of domestic and world market prices. The result would be that producers' decisions would tend to be more responsive to general supply and demand conditions, and that by virtue of such arrangements and of the general prohibition itself, there would be a more effective limitation on the use of export subsidies.

3. The suggested exemption would of course relate to producer financed export subsidy arrangements which would otherwise be subject to a prohibition as defined. The GATT status of producer financed subsidies was considered in 1960 in the context of a panel report on the Article XVI notification requirements (Ninth BISD, page 192, paragraph 12). In general the distinction drawn by the panel was between schemes "in which a group of producers voluntarily taxed themselves in order to subsidize exports of a product", and schemes "in which the government took a part either by making contributions into the common fund or by entrusting to a private body the functions of taxation and subsidization with the result that the practice would in no real sense differ from those normally followed by governments". The panel felt that the question of notifying levy/subsidy arrangements depended on the source of the funds and the extent of government action, if any, in their collection.

4. At present Note 2 to Article XVI:3 constitutes an exemption from the more than equitable share discipline in respect of producer-financed export subsidies under a domestic price or income support system which results in export prices being lower than the domestic price. It is suggested that this note might provide a basis on which to develop a producer-financed export subsidy exemption in the context of a general
prohibition. At present the following three criteria must be fulfilled, with the first and second of these criteria being subject to determination by the CONTRACTING PARTIES:

(a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market;

(b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties; and

(c) operations under the system are financed exclusively from funds collected from producers, i.e., such operations would not be entitled to the benefit of the exemption if they are wholly or partly financed out of government funds.

5. Furthermore, under Article VI:7 producer export subsidy arrangements are presumed not to result in material injury in terms of the requirements relating to anti-dumping and countervailing duty determinations under Article VI:6. The provisions of Article VI:7 are along similar general lines to those of Note 2 to Article XVI:3, one difference being that Article VI:7 does not include an explicit requirement that such export subsidy arrangements must be exclusively financed by producers.

Other possible exceptions

6. If producer-financed export subsidies were to constitute the main form of permissible export subsidization, then it is considered that specific exceptions, to which any contracting party fulfilling the stipulated conditions might have recourse, should be kept to a minimum. It is suggested that consideration might be given to the following:

(i) food aid transactions in respect of which the grant element is not less than [ ] per cent and which are not linked to commercial transactions, on the basis that such transactions would be deemed not to be export subsidies within the meaning of a prohibition;

(ii) subsidized export credits, export credit guarantees and export risk insurance on terms and conditions which are in conformity with the provisions of an intergovernmental agreement (to be negotiated) relating to the provision of such credits or export facilities by government agencies or by entities acting under governmental direction, control or favour;

(iii) the provision by governments or their agencies of utilities or services to the agricultural sector on a less than full-cost recovery basis, or the provision by governments of subsidies on utilities or services used in the production of
agricultural primary products, which in either case are not contingent on export performance and which do not result in the sale of agricultural primary products for export at prices lower than the comparable prices charged for the like product to buyers in the domestic market.

7. Exceptions (i) and (ii) do not require special comment. The exception outlined in (iii) would be intended to exclude, on certain conditions, a range of governmental assistance to the agricultural sector whose inclusion would make the prohibition unnecessarily complex or even unmanageable. The categories of assistance in question would involve, for example, the provision on a less than full-cost recovery basis of inspection or advisory services, expenditure on research, infrastructure subsidies etc. While arguably such categories of assistance may indirectly increase exports, if they are not export performance related and do not result in export prices being lower than domestic prices, it is difficult to see why such measures should not be covered by an exception.

Possible ad hoc exceptions

8. Ad hoc exceptions would be intended to cover the situation in which recourse to the use of otherwise prohibited export subsidies might be permitted on a temporary basis. Ad hoc exceptions would be in derogation of generally negotiated transitional arrangements under which direct export and other subsidy practices would have to be brought into conformity with the producer-financed export subsidy system and with the other permanent exemptions or exceptions discussed above. The facilitation of the introduction of minimum access commitments under Article XI could be one situation in which a departure from these arrangements might be negotiated. Other possible situations could be where the specific characteristics of the production of a product in a particular country, or the relative importance of exports of a product to the economy of a particular country, are such that the negotiation of special transitional arrangements may be warranted.

Transitional arrangements

9. Under the approach outlined above the negotiations would consist in a first stage in which the object would be to reach substantial ad referendum agreement on the terms of: (i) the definition of the scope of the prohibition; (ii) the producer-financed export subsidy exemption; and (iii) the other possible exceptions. The scope of any ad hoc exceptions would be a matter to be considered at a later stage in the negotiating process. A second stage would involve the negotiation of the transitional arrangements, including time frame and review procedures, under which contracting parties would have to bring their export subsidy or assistance practices into conformity with the new framework. Some of the more important elements in such a negotiation would be the phasing down of government financial involvement in producer-financed subsidy arrangements, and the quantum of domestic production in respect of which guaranteed prices or income support could be payable. Following the end of the transition period export subsidy practices could only be maintained if they were in full conformity with an exception, or were being maintained temporarily under such possible ad hoc or special transitional arrangements as may have been negotiated on a case-by-case basis.
Special and differential treatment

10. There are a number of areas where, in the context of the negotiation of exceptions and transitional arrangements, differential and more favourable treatment might be considered. Whether in addition to such possible measures there might be a specific exception in favour of developing countries is a matter which is likely to be influenced, inter alia, by the extent of the commitments undertaken by other contracting parties in the framework of any general prohibition and vice versa.

11. In principle, there are three possibilities: a specific exception under which the use of export subsidies would continue to be permitted; the application of the prohibition to all contracting parties, subject to such special transitional and other arrangements in favour of developing countries as may be negotiated; and, a qualified exception somewhat along the lines of the provisions of Article 14 of the Code on Subsidies. The last-mentioned possibility might, for example, involve an exception formulated in the following terms: export subsidies on agricultural primary products the use of which is not inconsistent with the demonstrable competitive and development needs of a developing contracting party and which are not applied in a manner which would compromise, or render more burdensome, the obligations of other developed or developing contracting parties in limiting and progressively reducing the use of prohibited export subsidies, provided however that developing contracting parties should endeavour to enter into commitments to reduce or eliminate the use of export subsidies on agricultural primary products.

Rules and disciplines governing the use of export subsidies under exceptions

12. There are two aspects to this question: the nature of the rules that should govern competition in third markets during the transitional stage, when existing export subsidy practices are being brought into conformity with the producer financed export subsidy exemption, and the rules which should govern competition thereafter. The rules that should govern competition in third markets in the post-transition stage should, it is submitted, be addressed on the basis of general GATT principles, since what in effect is at issue is a new permanent framework affecting general rights and obligations. The rules which might govern a transitional stage may need to be determined, taking account also of certain pragmatic considerations, in order to facilitate the transition.

13. In the post-transition, when a new framework would be fully operational, the use of export subsidies and other forms of export assistance would be subject to effective disciplines. Moreover the use of a prohibited export subsidy, or the use of a permitted export subsidy otherwise than in conformity with the terms and conditions of an exception to the prohibition, would constitute a prima facie case of nullification and impairment under Article XXIII. In these circumstances it is considered that it would not be necessary to continue to maintain the more than equitable share rule once a new framework had come into operation. On the other hand it is considered that export subsidies applied in conformity with the provisions of a new
framework should continue to be subject to the general requirement that such subsidies should not be applied in a manner which causes serious prejudice to the trade or interests of other contracting parties. Whether this requirement should be linked to an obligation to discuss the possibility of limiting the subsidization in question, or whether it should be linked to an obligation in certain cases, such as displacement in individual markets, to take appropriate remedial action, are matters which would depend, inter alia, on the extent to which effective limitations on the use of export subsidies are negotiated.

14. In the transitional period itself it is suggested that the equitable share principle, reinforced as outlined, should apply in conjunction with the existing Article XVI:1 provisions on serious prejudice. It is considered that this régime would provide a reasonable framework to govern competition in third markets in a situation in which contracting parties would be adjusting to the general prohibition and in which progress in accordance with the negotiated transitional arrangements would be subject to regular review.

Export subsidies on incorporated agricultural primary products

15. A prohibition delimited as suggested in paragraph 1 above, would preclude the use of direct export subsidies on agricultural primary products incorporated in processed products. The supply by producers themselves of agricultural primary products to export manufacturers at prices which they would otherwise obtain on the world market, would obviously not be inconsistent with the prohibition. Somewhat different considerations could come into play where, for example, the proceeds of a mandatory export financing levy were to be used to subsidize the supply of inputs to export manufacturers. It is suggested that one approach would be to adopt the solution suggested in paragraph 21 of Annex B-II as an ad hoc transitional arrangement, with provision possibly being made thereafter for a progressively higher requirement in terms of the added value of the primary component.
1. Introduction

This non paper is prepared with the aim of contributing to the elaboration of the recommendations accepted in November 1984. Let us remind ourselves that these recommendations together with the Ministerial Declaration represent a high level political commitment to elaborate a basis for future negotiations aimed at achieving greater liberalization for trade in agriculture. In short, what I would describe as an improved framework of rules and opportunities for agriculture under the GATT. Moreover, we should not lose sight of the fact that the problems we have to deal with are deep-seated and are not going to be easily solved, especially because they are highly political. The need to find lasting solutions are as pressing now as they were when the Committee embarked on its work.

2. The broader context

We agreed, that in agricultural trade, the trade-restricting measures are in many cases intimately linked to the pursuit of a range of domestic policy objectives. Almost all countries have developed an agricultural policy with the objective of stabilizing producers' income at acceptable levels.

This is the case in highly developed industrialized countries, in which agriculture had gradually become a sector of relatively less importance in terms of shares in national income and employment. It applies also - in my opinion even more urgently - to developing countries where agriculture is still a very important sector of the economy and so many people depend on it for their existence.

In comparison with past efforts to improve the conditions of international trade and the functioning of international markets I think that there is a growing awareness that such efforts can only be successful if these intimate links with the national agricultural policies are taken into account.

Proposals which do not leave sufficient room for countries to conduct national agricultural policies and to pursue the objectives of these policies are not likely to yield feasible solutions. On the other hand, unless national policies are conducted within a more market-oriented and liberal international framework the inevitable result will be further generation of unmanageable and unmarketable surpluses, which will continue to make unsustainable demands on national budgets and seriously compound the difficulties faced by those contracting parties who depend on international markets for their economic returns and livelihood.

Since domestic policies as such are not negotiable the approach proposed and accepted in the GATT Committee would involve rights and obligations in GATT being a function of the manner in which internal policy is conducted.
At present many domestic markets are insulated from competition. Many governments take deliberate action to prevent a direct price interdependence between the domestic and international markets. As a result supply response to changing conditions in world markets does not occur under those circumstances.

Very serious problems arise if the agricultural policy operates to maintain internal prices at a high level, without any mechanism to limit the extra production elicited by those high price support measures. Consideration therefore needs to be given to making producers more responsive to changing international prices.

3. Measures affecting access

There are some factors which distinguish trade in agriculture from trade in other sectors. I mention the need to guarantee food security; the impact of fluctuations in world market prices on domestic prices and on farm incomes. A proposal that would prohibit all quantitative restrictions, minimum import prices, voluntary restraint agreements, state trading and variable levies is not responding to the fact that every country wants to maintain a certain level of domestic production of certain basic foodstuffs and to stabilize farm incomes at an acceptable level. In my view it is useless to try to fight the legitimacy of those national policy objectives. Accepting this does not mean that there is a complete freedom to restrict, even block, imports of agricultural commodities.

In my view there must be a willingness, or in the GATT terms a commitment, to respect a minimum level of access in any case where restrictions are imposed to protect the operation of domestic income or price support measures.

In other words the support policy should be subject to the requirements that it is operated in a manner that is consistent with an obligation to respect a minimum level of access, and production is effectively controlled or regulated. In my view control of production is not only realized by a system of supply management, but also for instance by maintaining or even reducing the guaranteed price. In fact one must judge the measures to control production more by their results than by their method. At the same time it is important that the conditions under which new restrictions may be imposed should not be relaxed.

Furthermore I would point out that in the case of variable levies a linkage should be made with the minimum access provisions. The minimum access commitments should also be extended to state-trading enterprises.

Tariffs should be reduced and bound but if prohibitively high unbound tariffs are nevertheless maintained they should also be subject to a minimum access commitment.

Essential in this approach is of course that residual quantitative restrictions, and measures currently outside the disciplines of the GATT, under waivers and other derogations, should be brought within reinforced rules including provisions relating to minimum access commitments.
4. Measures affecting competition on third markets

The impact of high price and income support policies is becoming even more serious for other exporters' interests when access to third markets is hampered by export facilities - direct and indirect.

Two approaches are to be elaborated, concerning the use of export subsidies and other forms of export assistance, including subsidized export credits:

- an approach based on improvements to the existing rules and disciplines
- an approach based on a general prohibition with exceptions in conjunction with improvement to the existing rules and disciplines.

Personally, I doubt that we will be able to avoid serious friction in world markets and reach our goal to liberalize trade without a more effective limitations on both the use of export subsidies, including other forms of export assistance, and their prejudicial effects.

The history of panel reports shows that, so far, it hasn't been possible to find criteria which make it possible to determine in an operationally meaningful manner what constitutes more than an equitable share of world export trade.

A major drawback of relying on the equitable share concept is that the focus is on discipline after the fact. Thus there are no rules which effectively constrain policy makers in shaping subsidy programmes. Nevertheless one of the questions that has to be addressed even-handedly is whether the existing rules can be made operational. This is relevant to a greater or lesser degree with both the existing and new framework options.

An improvement in the existing rules could be to predetermine equitable shares in negotiations between principal and other suppliers. This could involve market-sharing arrangements. Such arrangements are not only difficult to negotiate but demand firm commitments with regard to export restrictions and we all know that these are very difficult especially in periods of surpluses. We also need to consider whether such arrangements would really constitute a permanent solution. Whether there are other possibilities in this regard is a matter which the Committee may need to examine.

It may also be possible to define more precise criteria regarding serious prejudice and to establish an obligation that contracting parties should not only discuss limiting subsidies but should also commit themselves to take appropriate remedial action.

In considering a new framework what we need to ask ourselves is whether countries which have a long-term vocation as exporters of certain commodities should have to compete through the use of direct or indirect export subsidies. Another reason why I think it necessary to consider a new framework seriously is that in a system which to some extent accepts a considerable protection of the internal markets, because the pursuit of national policy objectives makes it necessary,
competition among external suppliers should be governed by the market. From my point of view, the tolerance of a more or less degree of obligations with respect to restrictions on agricultural imports would suggest relatively greater intolerance of export subsidization. One should not be able to have it both ways consistently with a balanced framework of rights and obligations.

A general prohibition of export subsidies and other forms of export assistance would not be realistic unless the exceptions are such as to make it possible to maintain domestic price and income support policies and, at the same time, enables these policies to be adapted progressively to a new framework of disciplines.

My view is that the principle should be one under which the exporting country could provide price or income support on that part of domestic production which is consumed internally through a guaranteed domestic market price, deficiency payments or a combination of both; the part of the production exported would receive the world price. This would mean that the difference between the internal price and the world market price on the part exported should be progressively financed by the producers themselves and that subsidies and other forms of export assistance out of public funds should be phased down. This would be possible under a system of levies on producers, or other arrangements depending on the nature of the domestic price or income support system. It would be important that guaranteed prices or deficiency payments on production sold for domestic use should not be manipulated to offset the impact of lower returns that may be received for that part of production which is exported.

This policy would re-establish a link between the internal prices and the world market prices: the world market will have a certain influence on the level of production; the more exported, the greater is the influence of world market prices.

5. Sanitary and phytosanitary regulations

Sanitary and phytosanitary regulations and other technical barriers to trade can be used above the real necessity. So in my view it is necessary to install an improved basis for consultations in which expert opinion, technical as well as trade policy, would have a role to play. Whether we could go beyond this, towards some element of compensation where concessions are nullified, is an open question.

6. Other issues

Concerning the need for a balance of rights and obligations, I recognize the necessity to make a distinction between the new framework of rules and disciplines (changing Articles XI and XVI) and the negotiations on the basis of this framework. Of course, can an agreement on the new framework not be executed before a new balance of rights and obligations through negotiations is realized and before new laws and rules in the jurisdiction of the different contracting parties are installed?
Concerning the specific characteristics of agriculture, I will stress the fact that in order to guarantee the income position of farmers, contracting parties may restrict imports on condition that production is effectively controlled and a certain minimum level of access is allowed. No country is forced to export and there is no reason to relate export assistance to the specific characteristics of agriculture.

Concerning the special needs of developing countries, I can imagine in some cases import restrictions for development are also necessary. In the GATT rules there are sufficient possibilities to realize this. Moreover it is in the context of improved access to markets that, in general, special and differential treatment should be sought. Where export assistance is concerned I cannot see why developing countries should be excluded from improved disciplines. For example, the advantages of a prohibition for the developing countries are such that I cannot imagine that they need more, if more means it would not be possible for others to accept a prohibition. What we should turn our attention to, at the appropriate stage, is the scope for special and differential transitional arrangements under a new framework on subsidies affecting exports.

7. Conclusion

My feeling is that in the period ahead we should endeavour to further progress the elaboration along these general lines so that when the time comes we really do have a worthwhile and realistic basis for negotiations. We need to develop a coherent framework and in this regard we should work jointly in the coming months to examine in-depth how the suggestions in AG/W/9/Rev.1 might be refined in order to accommodate the diversity of interests involved.