UNIFORM INTERPRETATION AND EFFECTIVE APPLICATION
OF THE AGREEMENT
Report by the Chairman

Past discussions in the Committee have revealed, on several occasions, divergent perceptions regarding the interpretations of Articles 8 and 10 and the application of Article 9. In this respect some delegations proposed that the Committee should undertake a review of these provisions in order to arrive at their uniform interpretation and application (SCM/M/18, paragraphs 14, 15, 17, 18, 24, 34, 47, 50 and 54).

Following these proposals and in pursuance of the agreement reached in the Committee (see SCM/M/18, paragraphs 38 and 59), the Chairman has, over the past several months, organized informal consultations. Interim reports on these consultations were made to the Committee at its meetings on 18 November 1983 (SCM/M/Spec/9, paragraph 2) and 10 May 1984 (SCM/M/Spec/10, paragraph 2).

Set out below are problems identified during the Chairman's consultations, relating to Article 8-10 of the Agreement, as well as proposals aimed at overcoming these problems and thus arriving at a uniform interpretation and effective application of the provisions of the Agreement mentioned above.

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

2. 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.

3. 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.

4. 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 or 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 in so far 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 rôle 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;

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

(vi) significant non-commercial transactions\(^1\) 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;

(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 rôle 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

\(^{1}\)Other than those referred to in paragraph 14(a) and (b).
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

(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.

15. 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

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1 As listed in Appendix F to FAO Principles of Surplus Disposal and Consultative Obligations of Member Nations.
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.

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

17. 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.

18. 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.

19. 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.