LEGAL MEMO

To: Mexican Mission to the WTO

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RE: Export Taxes under WTO Agreements[1]

[1] This memorandum is a research paper prepared on a *pro bono* basis by students of the Graduate Institute of International and Development Studies (IHEID) in Geneva. It is a pedagogical exercise to train students in the practice of international trade law, not professional legal advice. As a result, this memorandum cannot in any way bind, or lead to any form of liability or responsibility for, its authors, the supervisors of the IHEID Trade Law Clinic or the Graduate Institute.

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1- Question Presented

What is the coverage of export taxes in the GATT and WTO regime?

It is widely recognized that export taxes are not regulated under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) law. However, the goal of this paper is to further explore the rules which could allow challenging export taxes at the WTO, with a particular focus on differential export tax schemes. To this end, this paper will chronologically analyze the negotiating history of the GATT[2] and of the subsequent WTO Agreements.

First, a necessary background to the analysis will be given through **GATT Article II** on the schedules of concessions and **GATT Article XI** on the elimination of quantitative restrictions. Indeed, these provisions appear to be the most plausible ones regarding the issue of export taxes. The discussions that arose during the negotiations help to develop a better understanding of the position of the contracting parties concerning export taxes.

The analysis will then turn to **GATT Article XVI** on subsidies which sets up an obligation to notify them. It will be shown that export taxes may qualify as "income support" to downstream producers within the meaning of that Article. The focus will be on the meaning to be given to the notion of "income or price support"; similarly to the way a WTO Panel or the Appellate Body would proceed, the starting point will be the ordinary meaning of those words as given in a dictionary[3]:

[2] For a brief introduction to the negotiating history of the GATT, refer to Annex 2, p. 36.

[3] On the method of interpretation, see Appellate Body Report, European Communities - Customs Classification of Frozen Boneless Chicken Cuts, 12 September 2005.

In this case, the Appellate Body proceeds to the interpretation of the term "salted meat" by

i) looking at the ordinary meaning of the word "salted"; and

ii) by using the context of the term "salted" to narrow down (if required or permitted) the ordinary meaning: "We need to determine whether the context of the term "salted"—**or other elements of the customary rules of treaty interpretation**—require or permit a reading of the term "salted" in heading 02.10 of the E.C. Schedule more narrowly than the ordinary meaning of that term suggests" (AB Report, § 209).

The second part of the reasoning of the Appellate Body is not restricted to the context of the term but applies to "other elements of customary rules of treaty interpretation". As a consequence, we can apply this reasoning to our case by

i) looking at the ordinary meaning of the term; and

ii) by looking at the negotiating history (cf Article 32 of the Vienna Convention on the Law of Treaties) to check if there is any element which would narrow down the ordinary meaning.

> **Income**: that which comes in as the periodical produce of one's work, business, lands, or investments (considered in reference to its amount, and commonly expressed in terms of money); annual or periodical receipts accruing to a person or corporation; revenue[4].
> **Price**: money, or the like, paid for something; the money (or other equivalent) for which anything is bought or sold; the rate at which this is done or proposed[5]. [still needed?]
> **Support**: the action of contributing to the success or maintaining the value of something; the action or fact of holding up, keeping from falling, or bearing the weight of something[6].

Judging solely from these dictionary definitions, the meanings of "income support" and "price support" respectively appear to be very broad. They seem apt to include differential export taxes, given that by applying such a tax scheme, a government helps to increase downstream producers' revenues thanks to lower prices for inputs. In order to confirm this assumption, this paper will examine the negotiating history of the term "income or price support" for evidence to the contrary.

Afterwards, we will consider **Article 1** of the Agreement on **Subsidies and Countervailing Measures** (SCM) which deals with the definition of a subsidy and also includes the notion of "income or price support".

Finally, a look at the negotiating history of the **Agreement on Agriculture** (AoA), will be useful as to the views of the contracting parties on export duties in this particular area.

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[4] See The English Oxford Dictionary.
[5] *Ibid.*
[6] *Ibid.*

2- Brief Answer

1- **GATT Articles II:1(b)** enables a contracting party to challenge an export tax only if another member has made binding commitments in its schedule of concessions and violates these commitments.

2- **GATT Article XI:1** potentially enables a contracting party to challenge an export tax only if it amounts to a *de facto* export ban.

3- The ordinary meaning of "income and price support" in **GATT Article XVI:1** is broad enough to include export taxes. The negotiating history does not contradict this interpretation. Indeed, a broad understanding is conveyed by the delegates' discussions. Given that the obligation under this Article is a mere obligation to notify and discuss, the negotiators tolerated the broad wording of the provision.

4- The negotiating history of the **SCM Agreement** does not shed any light on the way "income or price support" ought to be interpreted. However, SCM Article 1.1(a)(2) explicitly makes reference to GATT Article XVI when it speaks of "income or price support in the sense of Article XVI of the General Agreement". For this reason, the above findings on GATT Article XVI:1 which illustrate a broad and unrestricted interpretation of this term are decisive in giving meaning to the term as it is used in the SCM Agreement.

5- **The Agreement on Agriculture** does not prohibit export taxes. However, given current negotiations on this issue, it might be possible to challenge them in the future.

3- Discussion

As outlined above, each relevant provision will be addressed in turn, from the early GATT provisions to the SCM Agreement and the Agreement on Agriculture. The approach will be twofold: in general, the contracting parties' understanding of export taxes and relevant remarks relating to such practice will be highlighted and interpreted. A second focus will be on the concept of "income or price support".

I- GATT Article II

The negotiating history of GATT Article II demonstrates that this provision is the result of a compromise: whereas export duties are not formally subject to negotiations for binding reduction commitments in Article II:1(b) (as opposed to import duties which are generally subject to ceilings on the basis of mutual concessions), nothing prevents the contracting parties from negotiating on export duty ceilings.

However, even absent a binding regulation on export taxes, the negotiating history of GATT Article II is useful to the extent that it helps to get a better understanding of the contracting parties' intention concerning this practice.

A- Origin of Article II

The first trace of GATT Article II dates back to the London Conference which took place from October-November 1946. At the end of the Conference, it was agreed that a General Agreement on Tariffs and Trade should be negotiated in addition to the Charter for an International Trade Organization.

The negotiators elaborated a first draft which was annexed to the final report of the London Conference as a *Tentative and Partial Draft Outline of General Agreement on Tariffs and Trade*. Article III provided that:

> "Each signatory government **shall accord to the Commerce of the customs territories of the other signatory governments the treatment provided for in the appropriate Schedule** annexed to this Agreement and made an integral part thereof".[7]

The first draft of Article II appears to be rather short but **leaves open binding commitments on import and export duties** as proves the use of the word "**commerce**". Indeed, "commerce" comprises any kind of commercial relationship between the parties, including exports. This draft shows that initially, in 1946, the door was open for negotiations on export duties, too.

This Article was then amended and elaborated during the conferences held at Lake Success and Geneva.

B- Negotiating History of Article II

The focus in the negotiating history of Article II will be to understand why, eventually, the contracting parties only made binding commitments on import duties but not export duties, as opposed to the open wording provided in the first proposal. Only a few documents are relevant to this issue.

Article II actually was a **compromise between the opposite positions of two delegations**. Indeed, in its *Comments on U.S. Proposals for Expansion of World Trade and Employment*, the Government of India raised the conflicting **intentions of the U.S., who wanted to abolish export taxes, as opposed to the U.K., who did not**.

The position of the U.S. Delegation is not surprising, given that the U.S. Constitution forbids the use of export duties in its Article 1 section 9 paragraph 5, which reads as follows: "No Tax or Duty shall be laid on Articles exported from any State".

On the contrary, the U.K. regarded an abolition as too strong a discipline on export duties and only demanded reduction commitments on import duties. Furthermore, the possibility of applying export taxes was deemed necessary by the U.K. in order to protect the processing industries of its colonies. Indeed, an export tax applied to inputs reduces the price of said

[7] E/PC/T/33, *Report of the First Session of the Preparatory Committee of The United Nations Conference on Trade and Employment*, See Annex 10, *Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee*, p. 52.

inputs in the domestic market and thus gives an advantage to the local processing industries. It can be inferred from this quotation that the U.K. wanted to have the flexibility to use export duties in their colonies for protectionist purposes:

> "The proposal with regard to export tariffs also represents a compromise between the British and American points of view. In the Article VII discussions, **the Americans** took the stand that export taxes and restrictions should be totally abolished, or in any case should cease to be protective. **On the British side**, the view was expressed that there was no reason why protective export duties should not be treated on the same footing as protective import duties and that the **abolition or reduction of export duties would leave the colonial processing industries without defence** against importing countries which might wish to take over the processing themselves. […] an undertaking may safely be given that any export duties which may be imposed will be non-discriminatory and will be open to negotiation in the same way as duties on imports".[8]

In the end, it appears that none of the delegations were strongly opposed to the possibility of negotiations on export duties in the same way as tariffs. Indeed, since the U.S. preferred a complete abolition, they were necessarily in favour of reduction commitments. Concerning the U.K., the government was of the opinion that export duties should be treated on the same footing as import duties, *i.e.* reduction commitments. Finally, the Government of India was also open to negotiations on export duties.

However, in the following months of the negotiations, there was **no more discussion on the issue of whether it was necessary to include disciplines on export tariffs**. There is just a verbatim report from the London Conference in which the U.S. delegate clearly confirmed the desire of his government to abolish export duties. Nevertheless, there was no support by any other delegation and the Chairman was opposed to an abolition of export taxes. As previously, negotiations for reduction commitments regarding both import and export duties were deemed more reasonable:

> "**(USA):** Mr Chairman, if we had put in this draft exactly what we ourselves would have liked, **there would have been a prohibition of export duties and a prohibition of restrictions on raw material.** This is in effect saying, "Well, we are ready to negotiate for it because we have to negotiate on import tariffs", and then somebody would make the logical remark that a protective

[8] E/PC/T/W.14 - E/PC/T/5, Preparatory Committee of the International Conference on Trade and Employment, Government of India, Department of State, Government of India, Department of Commerce, *Comments on U.S. Proposals for Expansion of World Trade and Employment*, 21 October 1946, p. 28.

export tax is also necessary for some people and is designed by them for the same purpose, very often, as a protective import duty, **and therefore to be logical you must negotiate on that, too**.

THE CHAIRMAN: Thank you. I think there is perhaps one further consideration which enters into this, and that is that you may have a case of a country which produces the raw material of an industry, and they may see a risk that in certain countries which are not themselves producers of raw material there may be imposed customs duties which would protect the processing of that raw material and would encourage the processing within that country. Now**, the country which is a source of raw material may find that it is justified in doing something to offset the possibility that by that means a processing industry may be taken away from it and may be established elsewhere**. There may be a certain reasonableness in the idea that a country producing the raw material should be in those cases able to **defend itself by reserving the right to have an export tax serving to prevent the processing industry being completely taken away from it by an import duty in another country.** Do I make myself clear? Having regard to that, I should be tempted to express an opinion that **it would not be altogether reasonable to require the complete abolition of export taxes, but,** on the other hand, **there may be a good case for asking for negotiation**".[9]

C- Conclusions

The negotiating history of Article II shows that the contracting parties were not able to reach an agreement on export duties. In short, GATT Article II formally binds the contracting parties solely in respect of import duties, as specified in GATT Article II:1(b). However, it **does not prevent WTO members to make commitments concerning export duties**. Such a commitment was for instance made by the U.K. in their first schedule:

"The United Kingdom Schedule XIX, Section D (Malayan Union) attached to the 30 October 1947 text of the General Agreement contained **a concession on export duties on tin ore and tin concentrates**, to the effect that "The products comprised in the above item shall be assessed for duty on the basis of their tin content; the rate to be levied on such tin content being the same as the rate chargeable on smelted tin, Provided that the rate of duty on this item may exceed the rate chargeable on smelted tin in the event that and so long as the United States of America subsidised directly or indirectly the smelting of tin in the United States"**[10]**.

[9] E/PC/T/C.II/ST/PV/1, *Verbatim Report of the First Meeting of the State Trading Sub-Committee of Committee II*, 7 November 1946, p. 11-12.

[10] GATT Analytical Index, Part I, Schedules of concessions, available at: http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/gatt_ai_e.htm.

As a conclusion, GATT Article II:1(b) enables a contracting party to challenge an export tax only if another member has made binding commitments in its schedule of concessions and violates these commitments.

II- GATT Article XI:1

A- Negotiating History

During the negotiations of GATT Article XI, export taxes were only briefly addressed. They were clearly identified as a trade-distortive practice, but no commitments could be agreed upon. The prohibition set out in GATT Article XI:1 therefore does not extend to "taxes" but only to quantitative restrictions on both imports and exports. This decision, *i.e.* to exclude taxes from the scope of application of GATT Article XI:1, was motivated by two main reasons: First, there were countries that could not adequately use import duties and therefore depended on the use of export taxes for their revenue. Secondly, in light of this aspect, the trade impact of export taxes was felt not to be significant enough to justify their prohibition. However, the issue was left open for future negotiations.

> "The Chairman: […] Having regard to [the necessity of export taxes for certain countries to protect their domestic processing industries], I should be tempted to express an opinion that **it would not be altogether reasonable to require the complete abolition of export taxes, but, on the other hand, there may be a good case for asking for negotiation**.
> Mr. AUGENTHALER (Czechoslovakia): [The export duties of certain countries] actually take the place of import duties, because [those countries] are unable to get the necessary results in any other way. That is why they have been introduced. I do not know if it would be possible for those states to do without them or not.
> THE CHAIRMAN: One sees the difficulty that countries may have which rely on export duties. I take it that it follows from that that if they are willing to negotiate and bind the right of those export duties they will wish to bind them at a comparatively high rate; […] [a country relying on a large extent on export taxes for its revenue] may nevertheless come into the negotiations and may negotiate to the extent which it feels to be reasonable in the circumstances. […]. On the other hand, it is not compelled to negotiate any given reduction […]
> Mr. HAWKINS (US): **[…] Where there in an export tax it is very likely, except in the case of a country with a monopoly, to be kept at a moderate level, in order to get the maximum revenue**; but the number of cases of export duties is very small compared with the number of cases of import duties. […] It may be that **in half a dozen cases you could say we have worried**

> **about the export tax**, and those have always been where **the tax was put on and made very high** to **protect a domestic industry by depriving foreign competing. industries of the necessary raw material.** There is very little of it, though." [11]

The discussions around GATT Article XI thus revolved only around quantitative restrictions. This practice was also analyzed in a Working Party Report issued after the conclusion of the GATT; the Working Party had been appointed to assess how the disciplines set out in the General Agreement would apply to quantitative export restrictions. While there certainly is a fundamental difference between a quantitative export restriction and an export tax, this analysis is nonetheless relevant for the following reason: **an export tax will, depending on the chosen level of protection, have the same (or at least very similar) economic effects as compared to a quantitative export restriction**.

The scenario selected by the Working Party was essentially the same as the one of this paper: export restrictions were imposed on inputs with the objective to promote domestic downstream industries.

The Working Party concluded that the **GATT did not permit quantitative export restrictions imposed for such a purpose**. This purpose, it further noted, would have to be determined on a case-by-case basis:

> "The Working Party was appointed […] with the following terms of reference:
> To explore the application of the provisions of the Agreement to […] quantitative export restrictions which are being applied for protective, promotional or other commercial purposes.
> The Working Party then proceeded to examine […] restrictions used by a contracting party on the export of raw materials, in order to protect or promote a domestic fabricating industry […]
> The Working Party concluded that the Agreement does not permit the imposition of restrictions upon the export of a raw material **in order to protect or promote** a domestic industry, whether by affording a price advantage to that industry for the purchase of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means. However, it was agreed that the question of the **objective of any given export restriction would have to be determined on the basis of the facts in each individual case**."[12]

As the above quote shows, the Working Party put a strong focus on the Member's motivation underlying such quantitative export restrictions. In other words, even in cases where

[11] E/PC/T/C.II/ST/PV/1, *Verbatim Report of the First Meeting of the State-Trading Sub-Committee of Committee II*, 7 November 1946, p. 12-13.
[12] GATT/CP.4/33, *Report of Working Party "D" on Quantitative Restrictions*, 28 March 1950, pp. 1, 2, 4.

quantitative restrictions were imposed on inputs with the effect of promoting downstream industries, the Working Party would additionally **require a protectionist intention**.

In the case of a differential export tax, such intention would be much easier to establish than in the case of mere quantitative restrictions simply because of the differential: Whereas quantitative export restrictions in the above scenario were only applied to inputs, a differential export tax specifically targets inputs and processed goods alike in a particular manner designed to promote exportation. Subject to a few exceptions, **a differential export tax, by its very structure, application and design, does not serve any other purpose but to increase production and exports of a given processed product.** One of these exceptions might be where a government applies a high export duty to a given raw material in a situation where ample supply of this product in the domestic market is deemed "essential" by that government, *e.g.* for the purpose of relieving a food crisis. Absent such a "legitimate" intention, however, there is a strong case supporting the allegation that a state applies a differential export tax wholly for protectionist purposes, as explained above.

B- Conclusions

GATT Article XI:1 potentially enables a contracting party to challenge an export tax only if the tax is set so high as to effectively amount to a *de facto* export ban.

III- Export Taxes, Income and Price Support under GATT Article XVI

A- Origin of GATT Article XVI:1 - Subsidies under the United States ITO drafts

1- The First U.S. Draft, November 1945

The essence of GATT Article XVI:1 was already part of the first ITO draft, which was published in November 1945 by the United States. The corresponding draft provision reads as follows:

Section D. Subsidies

1. Subsidies in General

Subject to the provisions of paragraphs 2 and 3, below, members granting any subsidy which operates to increase exports or reduce imports should undertake to keep the Organization informed as to the extent and nature of the subsidy, as to the reason therefore and as to the probable effects on trade. They should also be prepared, in cases where, under procedures approved by the Organization, it is agreed that serious injury to international trade threatens to result from the operation of the subsidy, to discuss with other members or with the Organization possible limitations on the quantity of the domestic product subsidized**. In this paragraph, the term "subsidy" includes any form of internal income or price support**.[13]

The draft provision regarding subsidies even contained essentially the same obligations that are imposed by GATT Article XVI:1, namely the two obligations to (1) notify subsidies affecting trade and (2) to discuss prejudicial subsidization with the Member(s) concerned. In particular, it also provided that "any form of internal income or price support" would constitute a subsidy.

This is important since it means that "income or price support" is not a term that was negotiated by the contracting parties but that was drafted solely by the United States. The practical consequence is that the meaning attached to this term will be its general meaning unless the negotiating history of GATT Article XVI:1 provides evidence to the contrary, *i.e.* if and to the extent that the contracting parties gave a particular meaning[14] to "income or price support" by explaining or restricting it in some way.

2- The U.S. Draft Charter, September 1946

This first draft was further elaborated by the United States and an amended version was eventually published by the United States in September 1946, named the ***Suggested Charter for an International Trade Organization of the United Nations***[15]**.** The Draft Charter still contained the original provision about subsidies from the first draft, albeit in a slightly modified form. It served as a basis for the negotiations during the London Conference. As

[13] U.S. Department of State Publication no. 2411, November 1945.
[14] VCLT Article 31.4: "A special meaning shall be given to a term if it is established that the parties so intended."
[15] U.S. Department of State Publication no. 2598, September 1946; hereafter referred to as the "Draft Charter" (for reasons of coherence with forthcoming excerpts from relevant ITO negotiations).

such, the Draft Charter represents the starting point of the actual drafting process that was conducted by all of the contracting parties together. The Charter provision about subsidies and the changes that transformed it into GATT Article XVI:1 will be analyzed in detail in the following section B.

3- The Meaning that the United States Drafters Attached to "Income Support" and "Price Support"

Before, however, we will briefly address the probable meaning that the United States, being the sole drafter of the provision until the beginning of the multilateral trade negotiations, initially intended for the term "income or price support". It appears from the relevant U.S. legislation that was passed prior to and shortly after the conclusion of the GATT in 1947 (below) that "income support" and "price support" were used mainly in the **context of agricultural support programs** launched during and after the Great Depression in the 1930s as part of the New Deal. These programs aimed to restore the falling prices of agricultural products at "parity level", *i.e.* the price level before the crisis, and to maintain a reasonable income for farmers.

> It is hereby declared to be the policy of Congress to […] **regulate […] commerce** in [certain agricultural products] to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities […] through […] assisting farmers to obtain, insofar as practicable, **parity prices** for such commodities and **parity of income** […][16]

> […] the Secretary is authorized and directed to **make payments to producers** of [certain agricultural products], on their normal production of such commodities in amounts which, together with the proceeds thereof, will **provide a return to such producers which is as nearly equal to parity price** as the funds so made available will permit […][17]

> The level of **price support** for any commodity shall be determined upon the basis of its parity price […][18]

This means that, in light of the historical background of the U.S. drafting process,
(1) **price support** was understood by the U.S. drafters to mean government schemes designed either to **increase prices or to keep prices at a certain (high) level**, whereas

[16] Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31, p. 2.
[17] *Ibid.*, p. 16.
[18] Agricultural Act of 1949, Section 401 Subsection (d)

(2) **income support** was understood as government schemes designed to **increase returns to producers or keeping returns at a certain (high) level**.

As a consequence, **a differential export tax would have qualified under these terms as income support**:
a) it clearly is a "regulation of commerce" and
b) it results in increased margins for domestic processing industries due to reduced production costs arising out of cheaper inputs available on the domestic market.

This view is consistent with the understanding of the contracting parties in respect of the obligation set out in GATT Article XVI:1, as will be shown in the following section.

B- Negotiating History and Drafting of GATT Article XVI:1

The Draft Charter provision on subsidies, Article 25 of the Charter, already differed from GATT Article XVI:1 as adopted by the contracting parties[19] only in a handful of relevant respects. To set the scene for the analysis to follow, and to allow for a better direct comparison, both Article 25 of the Charter and GATT Article XVI:1 have been reproduced next to each other. Furthermore, relevant differences in each provision have been underlined. They will be considered in detail below.

Section E. Subsidies	**GATT Article XVI:1**
Art. 25. General Undertaking Regarding Subsidies – Elimination of Export Subsidies – Exceptions	**Section A** — Subsidies in General
1. Except as provided in paragraphs 2 and 3 of this Article, if any Member establishes or maintains any subsidy, **including any form of income or price support,** to the domestic	1. If any contracting party grants or maintains any subsidy, **including any form of income or price support**, which operates directly or indirectly to

[19] E/PC/T/214 ADD.1.REV.1, *General Agreement on Tariffs and Trade*, p. 41.

producers of any product, which operates to increase the exports of such product from, or to reduce the imports of such product into, the territory of the Member, such Member shall notify the Organization in writing as to the extent and nature of the subsidization, as to the anticipated effect of the subsidization on the quantity of the product imported into and exported from the territory of the Member, and as to the conditions making the subsidization necessary. In any case in which it is determined that serious injury to the trade of any Member is caused or threatened by the operation of any such subsidization, the Member granting such subsidization shall undertake to discuss with the other Member or Members concerned, or with the Organization, the possibility of limiting the subsidization. **2. - 4.** [...]	increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

1- The Relevant Differences

There are five differences between Article 25 of the Charter and GATT Article XVI:1 that will now be considered. It is important to note that none of these differences directly relate to "income or price support". However, they are valuable to the discussion as they illustrate the intention of the contracting parties to draft a provision with an extensive scope of application.

(1) The heading of Article 25 of the Charter only refers to "Export Subsidies", whereas the heading of the final text covers all subsidies.

This modification was initially suggested by the Cuban delegation.[20] It was only implemented on the initiative of the United States, namely in the first U.S. proposal for a GATT draft[21], but was afterwards accepted by the other contracting parties in the Drafting Committee[22].

It can be inferred from this that the contracting parties did not want Article 25 of the Charter to be construed so as to only relate to subsidies conditional on exportation but to **cover the whole possible range of government conduct** that might lead to an increase in exports or reduction of imports. This is the first of a range of indicators that support a very broad understanding of the provision.

(2) Unlike GATT Article XVI:1, Article 25.1 of the Charter contains an exemption from the obligation set out therein for cases specified in the subsequent paragraphs 2 and 3. The reference specifically relates to the subsidization of primary products resulting in special difficulties like a burdensome world surplus – in this case, special provisions on consultations should apply instead of the mere "obligation to discuss". This exception, however, was set out again explicitly and in detail in the subsequent paragraphs.

For this reason, the reference in Article 25.1 of the Charter was scrutinized by the delegates as unnecessary[23] and eventually deleted[24]. In particular, it was clarified that Article 25.1 was supposed to generally apply to all subsidies that a Member would grant. This underlines again that the contracting parties **did not intend to limit the scope of application of the provision:**

> "PROF. de VRIES: May I ask one more question on [Article 25.1 of the Charter]. It is said by the United States delegate, and **we agree to it, that the first and principal thing in this whole Article is that any kind of subsidy you have to notify to the organization**. I do not understand really why there is "except as provided in paragraphs […]". Is it not necessary to say that **any member has to report any type of subsidy without exception**?

[20] E/PC/T/C.II/19, *Suggested Amendments by the Cuban Delegation to the proposed North American Charter*, 28 October 1946.
[21] E/PC/T/C.6/W.58, *Tentative and Non-Committal Draft Suggested by the Delegation of the United States General Agreement on Tariffs and Trade*, 7 February 1947, p. 22.
[22] E/PC/T/C.6/85/REV.1, *Draft General Agreement on Tariffs and Trade*, 20 February 1947, p. 26.
[23] E/PC/T/C.II & IV/PP/PV/2, *Verbatim Report of the Second Meeting of the Joint Drafting Sub-Committee of Committee II and Committee IV on Subsidies on Primary Products*, 15 November 1946, p. 8.
[24] E/PC/T/34, *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, 5 March 1947*, p. 26.

> THE RAPPORTEUR: […] In re-drafting this report I had the same question in my mind. I should be glad personally to agree with the suggestion that those introductory words be dropped if it will not impair the provision […] that in certain circumstances paragraph 1 shall not apply".[25]

(3) Article 25 of the Charter does not include the notion of "direct[] or indirect[]" operation of the subsidy.

This was changed on the initiative of the Delegation of New Zealand[26] and adopted by the Contracting Parties so as to clarify that the provision's scope of application is not restricted only to cases where subsidies operate directly[27].

This change is the reason why an export tax that restricts the export of certain raw materials could possibly be regarded as "income support" within the meaning of GATT Article XVI:1, since it operates only indirectly to the benefit of downstream processing industries.

(4) In Article 25 of the Draft Charter, the subsidized product and the product which is affected by the subsidization must be identical ("such product"), whereas GATT Article XVI:1 recognizes trade effects on "any product".

This change was initiated by a U.S. proposal to replace "such product" with "a product"[28]. The U.S. proposal was then taken up in the course of the drafting process, where the contracting parties, led by the Canadian Delegation, agreed on the use of "any product" instead[29].

This modification permits the affected product and the subsidized product to be entirely different and as such signifies an enormous increase in the scope of application of the provision. It is relevant to the extent that it clearly states that the product that is subject to the government intervention need not be the product affecting international trade; this is similar in case of a differential export tax: it is applied to raw materials but the trade

[25] E/PC/T/C.II & IV/PP/PV/2, *Verbatim Report of the Second Meeting of the Joint Drafting Sub-Committee of Committee II and Committee IV on Subsidies on Primary Products*, 15 November 1946, p. 8.
[26] E/PC/T/C.6/23 Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment Summary Record of the Eight Meeting, 30 January 1947, p. 2.
[27] E/PC/T/34, *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, 20 January to 25 February 1947*, p. 26.
[28] E/PC/T/C.6/W.21, *United States Suggestions Article 30. General Undertaking Regarding Subsidies-Elimination of Export Subsidies – Exceptions*, 27 January 1947.
[29] E/PC/T/C.6/23, *Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment Summary Record of the Eight Meeting*, 30 January 1947, p. 2.

impact results from an increased exportation of the goods processed from those raw materials.

(5) Article 25 of the Charter requires "serious injury to the trade", as opposed to "serious prejudice to the interests" of other Members in GATT Article XVI:1, to trigger the obligation to discuss the subsidization with the affected Member(s).
The delegates criticized the use of the word "injury" as being too narrow and agreed that "prejudice" would be a more appropriate choice. They did not want to limit the scope of application of the provision at all in this respect but rather intended a flexible term with a very broad meaning so as to avoid a restrictive interpretation:

> "SENOR GUERRA (Cuba): Perhaps […] "seriously injured" [in Art. 25 paragraph 3] could be changed to "seriously affected"? That would have a **broader meaning** […], because "injured" carries the implication that it gets worse from a given situation […]
> THE RAPPORTEUR: That is a limited interpretation of "injured". […]
> THE CHAIRMAN: Or it might be made **broader**. For instance, if a member considers that his interests are "seriously prejudiced". That would **cover everything**. […]
> THE RAPPORTEUR: It should go wherever we have the word "injury" so that there is a standard terminology […].
> MR. DE VRIES (Netherlands): I would like to make the same point. […] If different words are used in different places, somebody eventually makes a specific difference out of it. It is better to have one word used throughout which has a **broad meaning not too closely defined**. **If it is too defined, a lawyer will make something different of it from an agriculturist or an economist, and there will be trouble**. [...]"[30]

This willingness to extend the scope of application of the provision can only be explained by the fact that the **nature of the obligation imposed by the provision is both vague and soft**: it is a mere obligation to "discuss the possibility of limiting the subsidization"; there are no concrete steps that a member has to take and there is no legal obligation as to the withdrawal or reduction of the subsidy. It was intended only to encourage the dialogue between members and possibly negotiations in cases where a member supported its domestic industry by subsidization to the detriment of other members. Certainly, if Article XVI had contained reduction commitments or even a prohibition, the contracting parties would have been much more careful about its wording and scope of application.

[30] E/PC/T/C. II & IV/PP/PV/2, *Verbatim Report of the Second Meeting of the Joint Drafting Sub-Committee of Committee II and Committee IV on Subsidies on Primary Products*, 15 November 1946, p. 14-16.

The above intention of the contracting parties to "cover everything" and to make Article 25 of the Charter a "soft" provision is further illustrated by several discussions during and after the drafting process. These discussions will be considered in the next section.

2- The Contracting Parties' Broad Understanding of the Obligation set out in GATT Article XVI:1

As pointed out above, the obligation imposed by Article 25 of the Draft Charter is surprisingly vague and soft, hence the willingness of the contracting parties to draft it in a very broad fashion. This understanding of Article 25 is repeatedly confirmed throughout the drafting process:

> "In general the intention of Article 25 […] is to give members whose interests are prejudiced by subsidization **the right to a full international consideration** of their case, to oblige subsidizing members to participate in such consideration and to provide for limiting subsidization so that its prejudicial effects may be reduced."[31]

It is clear that the contracting parties did not regard this obligation as an interference with state sovereignty. Rather, they intended to provide for some diplomatic incentive to find a mutual solution to trade issues and conflicts of interest arising from subsidization:

> "It is pointed out […] that **Article 25 […] "would permit, without serious qualification, the use of governmental subsidies** for the purpose of establishing and expanding a manufacturing industry". The **requirements […] are moderate and few**:
> 1. If the subsidy does not reduce imports no requirements are made.
> 2. If the subsidy does reduce imports the only requirement - subject to what is said below - is that it be reported to the International Trade Organization together with an indication concerning the probable effect of the subsidy and the reason why it is necessary.
> 3. Even if the subsidy should cause serious injury to international trade the only requirement is that the members granting it discuss with members whose interest is seriously prejudiced the possibility of limiting the subsidy."[32]

After the conclusion of the GATT, the application of Article XVI:1 by the contracting parties and the **scope of the obligation** set out therein were addressed, notably during the

[31] E/PC/T/C.II/61, Committee II, *Report of the joint drafting Sub-Committee of Committees II and IV on subsidies on primary products*, 21 November 1946, p. 3-4.
[32] E/PC/T/C.II/60, *Report of the Sub-Committee on subsidies on manufactured goods*, 21 November 1946.

negotiations for the Agreement on Agriculture. The delegates, in particular the delegate from the European Communities, emphasized that the duty to notify was not very well respected despite the fact that **it ought to be understood broadly.** Countries were avoiding the obligation on the grounds that Article XVI:1 did not provide a clear, applicable definition of the meaning of "subsidy". Especially **the obligation to notify "any form of income or price support" was neglected** even though these schemes were explicitly covered under Article XVI:1. Importantly in this context, the E.C. delegate referred to a U.S. support scheme which kept prices artificially low domestically (quoted below). This conveys an **understanding of "support" that is not restricted to keeping prices at a certain level or raising prices for any commodity, but a system that is flexible and more focused on the result of the government intervention rather than its nature**. Judging from this, a differential export tax that results in prices for raw materials at an artificially low level, thus increasing the margins for downstream producers, would well fall within the meaning of "income support":

> "the practice had been for those countries that did not subsidize their exports directly, but rather **subsidized at the stage of production**, […] to consider these not as export subsidies and therefore not subject to other obligations […]. He cited as an example the United States' **price support** on grains, which **maintained prices at an artificially low level**. He questioned whether the United States' system did not, in fact, result in increased exports. […] Was it appropriate, the E.C. representative therefore asked, for disciplines to apply only [subsidies on] exportation, or whether price and income support should also be covered by the rules. To clarify the debate, therefore, participants should agree that **all forms of price and income support should be notified**. […] The GATT did not speak about all subsidies, but all subsidies which had an effect on trade. […] One difficulty […] with Article XVI:1 was that it did not identify the subsidies covered.
>
> Moreover, the E.C. representative asked whether the Community would have the right to use the procedures of Article XVI:1 second sentence, because the **United States maintained its prices artificially low domestically** as well as on the world market. **Since the United States was the largest agricultural exporter in the world, this resulted in diminished returns for certain producers in other countries** […]."[33]

Despite the lack of reference to "income or price support" in the meetings specifically dealing with drafting issues, the delegates discussed subsidies in general and briefly touched upon the notion of "price support". This issue was addressed by the Australian delegate in response to the purpose and scope of application of Article 25 of the Charter, *i.e.* the "obligation to

[33] AG/M/3, 29 February 1984, *Minutes of the meetings held from 4 to 13 October and from 28 to 30 November 1983*, p. 187.

discuss" prejudicial subsidization with other Members. This obligation was deemed not strict enough by the Australian delegate, who preferred stricter limitations on those subsidies that would adversely affect the world market. In explaining this attitude, he conveyed a very broad understanding of the concept of price support: **price support was regarded by him as an essential general consequence of both subsidies and tariffs**. This broad understanding of price support was not scrutinized by the other delegates:

> "Mr. HAWKINS (United States) said that [Article 25.1] would obligate members to report […] on types of subsidies to be established or maintained, including any form of income or price support to the domestic producers. In general, direct subsidies to producers would still be permitted. However, in cases where serious injury to the trade of any member was caused or threatened by such subsidization, the member granting such subsidization would undertake to discuss […] the possibility of limiting the subsidization. Export subsidies, including any system which resulted in the export of a product at a price lower than the domestic price, would be generally prohibited. […]
>
> Mr. CARTHY (Australia) […] The great objection to subsidies for primary products was that they had the effect of stimulating production, thus glutting the world market. Australia did not mind what form of support was given to the producers, as long as it had not an adverse effect on the world market. […] **He could see no validity to the distinction between production and export subsidies, as both gave price support**, and the incidence could be the same in both cases. […] **Tariffs and subsidies both supported prices. If such devices did not adversely affect world markets, he saw no reason why they should not be allowed."**[34]

C- Conclusions

There is nothing in the negotiating history of GATT Article XVI:1 that would restrict or narrow down the broad general meaning of "income or price support".[35] On the contrary, the contracting parties intended for a very broad scope of application for GATT Article XVI:1, not least due to the "soft" nature of the obligation that it imposes. As the Article is phrased, it is apt to cover all possible actions that can be attributed to the government. For this reason, there is nothing that prevents an interpretation of "income support" to include the application of a differential export tax.

[34] E/PC/T/C.II/37, Committee II, *Sixth Meeting held on Thursday 31 October 1946*, p. 7 and 9.
[35] In the Agreement on Agriculture the notion of "domestic support" includes income or price support. For an analysis of domestic support under the Agreement on Agriculture, please refer to Annex 3, p. 38.

IV- Income and Price Support under the SCM Agreement

A- Context: Definition of a Subsidy and Relevant Case Law

For a better understanding of the analysis, it is vital to keep in mind the following structural aspect of the SCM Agreement: the single purpose of SCM Article 1 is to define what a "subsidy" is. This definition therefore only sets out the **scope of application** of the Agreement. In other words, only measures that meet the criteria in SCM Article 1 and are thus considered as "subsidies" will be subject to the other provisions. This is a mere threshold requirement.[36]

As the use of the word "or"[37] in SCM Article 1.1 shows, there is a clear distinction between two alternatives according to which a measure may qualify as a subsidy within the meaning of SCM Article 1:

(1) **First possibility**:

a- SCM Article 1.1(a)(1): there is a financial contribution by the government.

b- A benefit is conferred

(2) **Second possibility**:

a- SCM Article 1.1(a)(2): any income or price support in the sense of GATT Article XVI.

b- A benefit is conferred.

In this paper, we will be focusing on the second possibility for the following reason: in the *Export Restraints*[38] case, the U.S. had argued that there was "no substantive difference, but only a semantic one, between a restriction on exporting a product and an instruction to sell that product domestically, […] the two [being] functionally equivalent".[39]

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[36] Once this threshold is passed, the subsidy will only then violate the Agreement if it is either:
a) "prohibited" in the sense of SCM Article 3 or
b) "actionable" in the sense of SCM Article 6.
A differential export tax would probably not qualify as "prohibited", since its subsidizing effects are granted without being contingent upon exportation or contingent upon the use of domestic products. However, given the fact that the input targeted by the tax determines the processing industries that may benefit from cheaper production costs, a differential export tax is sector-specific and may therefore be "actionable".

[37] The Oxford dictionary defines "or" as a word "used to introduce another possibility".

[38] WT/DS194/R, *United States – Measures treating export restraints as subsidies*, 29 June 2001.

[39] *Ibid.*, para. 8.26.

The panel rejected this approach, stating that "[…] applying the "effects" approach to the question of whether a financial contribution exists would have far-reaching implications. In particular, it would seem to imply that any government measure that creates market conditions favourable to or resulting in the increased supply of a product in the domestic market would constitute a government-entrusted or government-directed provision of goods, and hence a financial contribution."[40] It could find no support for such an extensive interpretation of this provision in the negotiating history of the SCM Agreement, given that "[the definition of a subsidy in the SCM Agreement] was drafted with the express purpose of ensuring that not every government intervention in the market would fall within the coverage of the Agreement […]".[41]

Given this precedent, we will focus on the second approach, *i.e.* show that a differential export tax can be qualified as a form of "income support" within the meaning of SCM Article 1.1(a)(2).

B- The Meaning of "Income or Price Support"

As already stated above, the term "any form of income or price support" as used in SCM Article 1.1(a)(2) is extremely broad from an economic perspective and such a broad interpretation is wholly supported by the drafting history of GATT Article XVI:1. In contrast, the precise legal meaning that the SCM drafters wanted to attach to this expression is unclear to the extent that the term is not elaborated any further in the SCM Agreement.

The negotiating history of the SCM agreement only provides little guidance regarding this lack of clarity, as the following section will show.

C- The SCM Agreement: Negotiating History

The preparatory work of the SCM Agreement[42] does not include any discussion as to the meaning of the term "income or price support" or to the reason why it was incorporated in the provision. It appeared as such for the first time in the *Status Report of the Negotiating Group from the Chairman to the Group of Negotiation on Goods*[43] towards the close of the

[40] *Ibid.*, para. 8.35.
[41] *Ibid.*, para. 8.63.
[42] Documents MTN.GNG/NG10/1, 2, 3, ... 24 and documents MTN.GNG/NG10/W/1, 2, 3, ... 42.
[43] MTN.GNG/NG10/W/38, *Status of work in the Negotiating Group, Report by the Chairman to the GNG, 18 July 1990*, Article 3(a).

negotiations. It was then included in the Chairman's drafts of the SCM Agreement and was not the subject to any discussion until the signing of the Agreement.

In a nutshell, the negotiating history of the SCM Agreement does not offer much guidance in determining how "income or price support" ought to be properly interpreted. However, SCM Article 1.1(a)(2) **explicitly makes reference to GATT Article XVI** when it speaks of "income or price support in the sense of Article XVI of the General Agreement". For this reason, the above findings on GATT Article XVI:1, which again illustrate a broad and unrestricted interpretation of "income or price support", are decisive in giving meaning to the term as it is used in the SCM Agreement.

As stated above, the Panel in *Export Restraints* rejected the U.S. effects-based approach within the context of "financial contribution" and "government entrustment and direction" as set out in SCM Article 1.1(a)(1)(iv) by basing its line of argument on the negotiating history of the SCM Agreement. Given the fact that SCM Article 1.1(a)(2), however, references to GATT Article XVI, the panel's reasoning cannot apply here. Indeed, the language used in Article XVI:1 clearly focuses on the effects when it is speaking of "a subsidy that **operates directly or indirectly to increase** exports of any product from, or reduce imports of any products into, its territory [...]".
Consequently, the use of SCM Article 1.1(a)(2) allows an approach that is much more focused on the effect of the resulting measure, thus reducing the level of scrutiny required in respect of the degree of governmental involvement.

There is, however, **a document that may be construed in such a way so as to conflict with the qualification of differential export taxes as "income support"**. This document is a suggestion by the *Group of Experts on the Calculation of the Amount of a Subsidy*, which was established in 1980 with a mandate to make proposals for consideration by the contracting parties regarding issues revolving around subsidization. It discusses the question as to whether export restrictions and related measures can constitute countervailable subsidies. In essence, the **Group concluded that export taxes would not per se qualify as subsidies under the GATT, despite their trade-distortive effects**:

> "Restrictions on the export of a product are introduced or maintained by governments for a wide variety of reasons. They may be considered necessary, for example, to **ensure the availability of certain raw materials to a domestic processing industry** where there is a shortage of supply on

> the domestic market, **or in order to encourage exports of finished or part-finished products instead of raw materials** as a means of safeguarding employment and of building up the country's industrial base. While the imposition of **such restrictions may affect the production and trade of processed goods**, the question arises whether a subsidy results from these measures. […]
> Under the terms of GATT not every government intervention having an effect on trade and competition can be qualified as a subsidy. Indeed, GATT clearly distinguishes between, on the one hand, subsidies and other measures which can also have an impact on trade and international competition. This distinction is relevant because Article VI GATT enables Contracting Parties unilaterally to take protective action against subsidized imports, whereas the GATT does not permit such action against other practices, e.g. quantitative restrictions, import or **export taxes**, even if these practices can also lead to a distortion of trade. Quantitative export restrictions are regulated by Articles XI, XII and XX. GATT and any alleged violation of these provisions can be pursued only via the GATT dispute settlement procedures.
> **It follows that export restrictions on raw materials and other input factors do not <u>per se</u> constitute a subsidy to the processing industry."** [44]

However, **this document should be treated with care and is not decisive for the following three reasons**:

First, it merely contains a reference to export taxes in general. However, the narrower issue of differential export taxes is not taken into account. In particular, the design, structure and central role of governmental involvement regarding this special type of export tax is not addressed. **Furthermore**, this proposal has never been adopted by the contracting parties. **Finally**, the use of "per se" does give certain leeway in this respect. In this context, the Group refers to additional government actions taken in connection with the initial measure (*i.e.* the export tax), which would give rise to a subsidy:

> "However, an export restriction may be linked to **supplementary governmental measures**, for example, those designed to or resulting in the provision of raw material inputs on preferential conditions to a specific industry. To the extent that these measures are found to be sector specific, then a subsidy may exist. It is important to note, however, that it is the supplementary measures rather than the export restrictions which give rise to the subsidy". [45]

One might thus argue that the differential itself is such a supplementary governmental measure that allows to distinguish the differential export tax from those schemes operating merely with equal export duty rates for inputs and processed goods.

[44] MTN.GNG/NG10/W/4, *Subsidies and Countervailing Measures - Note by the Secretariat*, 28 April 1987, p. 21.
[45] *Ibid.*

D- Conclusions

In the end, it can be asserted that via reference to GATT Article XVI:1, a differential export tax qualifies as a subsidy in the form of income support to downstream industries within the meaning of SCM Agreement Article 1.

V- Agreement on Agriculture

The negotiating history in the area of agriculture is remarkable because it demonstrates that the contracting parties have been consistently expressing their concern regarding the trade-distortive effects of export taxes.

The multilateral negotiations for the AoA started during the Uruguay Round in 1986 but the Ministerial Declaration of November 1982 was already at the origin of the creation of a **Committee on Trade in Agriculture**, constituted by the Council on 26 January 1983. Consequently, the contracting parties were already working on trade in agriculture in the early eighties, based on the existing rules of the GATT. We will consider all of these documents.

A- The Work of the Committee on Trade in Agriculture

The work of the Committee on Trade in Agriculture was divided into two exercises[46]:
- **Exercise A:** Examination of trade measures affecting market access and supplies, including those maintained under exceptions or derogations.
- **Exercise B:** Examination of the operation of the General Agreement as regards subsidies, especially export subsidies, and including other forms of export assistance.

Remark: These examinations have been concluded in a limited number of recommendations by the Secretariat in preparation for future multilateral negotiations during the Uruguay Round[47].

[46] For details on the organization of the work, see document AG/W/1, 8 February 1983, *Committee on Trade in Agriculture, Note by the Secretariat*.
[47] AG/W/8, *Draft Recommendations*, 17 May 1984.

During these examinations, **existing export taxes had to be specified** by the contracting parties and certain delegations expressed their **concern about such a practice**. It was put forward that most of the time the **practice of export taxes was for a protectionist purpose** and that **differential export tax schemes were used by many developing countries to support their domestic processing industries**. The discussions under Exercise A concerning export taxes were summed up as follows:

> "20. The Committee's examinations indicated that a very **extensive and diverse range of taxes and other charges were applied by many contracting parties**. Article VIII was generally referred as being relevant to the application of many of these charges. Reservations were, however, expressed as to whether in fact some of these charges were being applied consistently with Article VIII:1(a) in particular, which provided that such charges should be cost related and **should not constitute an indirect protection to domestic products or a form of taxation on imports or exports**. Attention was drawn in this connection to the fact that there were often significant variations in the amount of such charges as between different products. **Economic development needs and revenue considerations were noted in some cases as being relevant considerations**. It was noted as well that there was **a general tendency for many developing countries to apply differentiated charges or levies on exports in order to promote greater local processing of the raw materials they produced".**[48]

B- The Negotiations of the Uruguay Round

During the multilateral negotiations on agriculture starting in 1986, **export taxes were also treated as a practice having distortive effects on trade**.

First, in their *Contribution to the Work of the Negotiating Group on Agriculture relating to the Identification of Major Problems and their Causes,* **the E.C. precisely identified differential export taxes as one of those problems in the sector of Vegetable Fats and Oils**. It was submitted that such a tax scheme favors the exportation of processed goods at the detriment of raw materials:

> "2. MEASURES AFFECTING TRADE
>
> 2.1. Access[…]
>
> 2.2. Support measures[…]

[48] AG/W/5, 13 February 1984, *Draft Report of the Committee on Trade in Agriculture, Note by the Secretariat*, § 20. For more details on export taxes applied country by country, see AG/M/3, 29 February 1984, *Minutes of the meetings held from 4 to 13 October and from 28 to 30 November 1983.*

2.2.3. ARGENTINA

A system of **differentiated export taxes** discourages export of oilseeds in favour of that of processed products.[…]

2.2.5. MALAYSIA

New trade policy for (raw) palm oil; international joint ventures for its processing in consumer countries (Egypt, Pakistan, United States). **Reduced export tax for raw oil, and higher tax for refined oil"**.[49]

Then, more importantly, the **U.S. Delegation made a concrete proposal** in the framework of export competition disciplines which was **to abolish export taxes, with the primary purpose of preventing differential export tax schemes profiting a country's domestic processing industries:**

"II. EXPORT RESTRICTIONS AND PROHIBITIONS

RULES AND DISCIPLINES

[…]

If a Contracting Party maintains export taxes, duties or charges on products that are used as inputs for the production of other products, and if such taxes, duties or charges are higher than the rate charged on the secondary products, then the differential between such taxes, duties or surcharges must be progressively reduced and eliminated. **The purpose of this provision is to prevent countries from using a differential export tax structure to discourage exports of raw materials and thereby ensure a ready supply of artificially low-priced inputs for domestic processing industries.**

IMPLEMENTATION

The change proposed in the first paragraph of the section above should be implemented in one step on January 1, 1991. Elimination of the differential in export charges would take place on the same schedule as the phase-out of export subsidies (five years)".[50]

However, in the end, no concrete provision concerning export taxes was adopted in the AoA[51].

[49] MTN.GNG/NG5/W/4, 1st May A987, *Contribution to the Work of the Negotiating Group on Agriculture relating to the Identification of Major Problems and their Causes*, p. 35.

[50] MTN.GNG/NG5/W/118, 25 October 1989, *Submission of the United States on Comprehensive Long-Term Agricultural Reform*, p. 7. For a general overview of the negotiating proposals of all the delegations, see document MTN.GNG/NG5/W/150/Rev.1, 2 April 1990, *Synoptic Table of Negotiating Proposals Submitted Pursuant to Paragraph 11 of the Mid-Term Review Agreement on Agriculture.*

[51] The American proposal does not even appear in the draft text of the chairman for a *Framework Agreement on Agricultural Reform Programme* of 11 July 1990, MTN.GNG/NG5/W/170.The Dunkel proposal of the 20 December 1991 (MTN.TNC/W/FA) does not contain any such provision either. Article 9 of the Draft concerns only export subsidy reduction commitments.

C- The Current Negotiations

In 2004, a framework was adopted for the reform of Agriculture disciplines and e**xport taxes appear as "Issues of interest but not agreed**". Nothing more has been agreed during the negotiations taking place between 2004 and 2010.

However, it shows that export taxes in agriculture are still a central focus of the current negotiations. **Different countries have made concrete proposals to regulate them and even to ban them**: Japan, the U.S., CAIRNS, the D.R.C., Jordan, Korea and Switzerland[52]. The most elaborated draft is the one of Japan, which reads as follows:

> **"IV- Proposal on Rules and Disciplines on Exports**
>
> 23. In view of redressing the imbalances of the rights and obligations between importing and exporting countries, and of maintaining the food security of food-importing countries, rules and disciplines on export-promoting and export-restricting measures should be established. (See examples described in 4.1 and 4.2 below.)
>
> 24. Negotiations on these future rules and disciplines on exports should be conducted, by making sure that an appropriate balance can be achieved with the outcome of negotiations on imports, in order to reach a fair and equitable agreement that can be accepted by both exporting and importing countries alike.
>
> **Export subsidies**
>
> […]
>
> **Export prohibitions/restrictions, export taxes**
>
> 31. **To tariffy all export prohibitions and restrictions** (by replacing them with export taxes);
>
> 32. **To bind all export taxes** (including those possibly introduced in the future). For products subject to the export tax, to establish quotas in which a certain amount of exports will be exempt from the export tax;
>
> 33. In the case where temporary and short-term measures to restrict exports become necessary before export taxes are introduced, to clarify the disciplines applied on such emergency measures used in order to adjust the volume of exports. Measures for clarifying such disciplines are:
>
> (i) To establish strict requirements for the application of such emergency measures;
>
> (ii) To introduce consultations with other Members as a prerequisite for imposing emergency measures, and to clarify the measures to be taken when the consultations do not result in a satisfactory solution;

[52] For the details of each proposal, see:
[http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd09_taxes_e.htm].

(iii) To obligate Members, when introducing emergency measures, to maintain the proportion of exports to domestic production at the level of the preceding x years, in order to allow importing countries to secure the necessary level of imports;

(iv) To limit the duration of such emergency measures".[53]

Despite the lack of consensus of the contracting parties to make binding commitments during the GATT negotiations, export taxes have nonetheless been recently considered as an issue of interest which should be regulated, especially in the field of agriculture. In addition, the Protocol of accession of China is a further illustration of the growing will to have disciplines on export duties. Indeed, China has committed to eliminate them except for a list of 84 items for which it has bound tariffs.[54]

To conclude: as of today, the Agreement on Agriculture does not prohibit export taxes as such. However, the current negotiations seem to indicate that it might be possible to challenge them in the future.

[53] G/AG/NG/W/91, *Negotiating Proposal by Japan on WTO Agricultural Negotiations*, 21 December 2000.

[54] The Protocol of Accession of China is available on the WTO website: [http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#chn]. It is specified p. 7 that: "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994". For the list of products subject to export duties see p. 93 of the Protocol.

4- Conclusion

Throughout this paper, our goal was to identify the coverage of export taxes, in particular differential export tax schemes, under the WTO agreements, with a special focus on the relevant negotiating history.

The Agreement on Agriculture currently does not permit a contracting party to take action against export taxes.

Despite the fact that differential export taxes qualify as “income support” and thus constitute subsidies under GATT Article XVI:1, the obligation set out in this provision is merely an obligation to notify and discuss subsidies.

Even though GATT Articles II:1(b) and XI:1 enable a contracting party to challenge export taxes in some restricted scenarios, the SCM Agreement appears to be the most favourable option for this purpose.

Indeed, given the reference to GATT Article XVI:1 in SCM Article 1.1(a)(2), the broad meaning of “income support” and the resulting coverage of differential export taxes in that provision also applies to the SCM Agreement. The SCM Agreement thus enables a contracting party to challenge a differential export tax scheme.

5- Annexes

ANNEX 1: PROVISIONS AT ISSUE

• GATT Article II

Schedules of Concessions

1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

[…]

• GATT Article XI

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

[…]

• GATT Article XVI

Subsidies

Section A - Subsidies in General

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

[…]

• SCM Agreement Article 1

Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), *i.e.* where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) [55];

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would

[55] In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

ANNEX 2: HISTORICAL INTRODUCTION

In order to facilitate the understanding of the references made in connection with the drafting history of the GATT, this section will give a brief overview of the negotiating history of the GATT.

It can be divided into four major steps:

(1) In 1945, the United States government published a first draft for an International Trade Organization. A version of this draft was submitted to other governments jointly by the United States and the United Kingdom. It presented the two countries' common views and was meant to further the discussion about international trade regulation.

The draft was then further elaborated by the United States in light of the 1946 U.N. resolution to call an International Conference on Trade and Employment (the Havana Conference, 21 November 1947 – 24 March 1948). Eventually, the U.S. published a second draft named the *Suggested Charter for an International Trade Organization of the United Nations.* This document already included the essence of many provisions that would later be included in the GATT; it served as a basis for the first negotiations of the contracting parties.

(2) These negotiations were undertaken on the "London Conference"[56] from 15 October to 20 November 1946. The U.S. Draft Charter provisions were amended, new provisions were added and the delegates provided criticism and suggestions. In particular, the conclusion of a General Agreement on Tariffs and Trade was suggested. The GATT was intended to make the negotiated tariff concessions already binding for the contracting parties prior to the establishment of the ITO. This would secure and important step in the ITO negotiations and facilitate transition once ITO would come into being. The London Conference closed with the publication of the first ITO Charter.

(3) The ITO Charter and the suggestions made during the Conference were forwarded to a special Drafting Committee which convened in Lake Success[57], New York, from 20 January to 25 February 1947. It had two mandates:

[56] Formally known as "The First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment".

[57] Formally known as "The Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment".

a) to implement the suggested changes and provide a more elaborate draft version for further negotiations; and

b) to draft a proposal for the GATT.

(4) The ITO and GATT draft prepared by the Drafting Committee were further elaborated during the following "Geneva Conference"[58] from 10 April to 19 August 1947. Towards the end of this Conference, the provisions for the GATT were finalized and eventually adopted by all of the contracting parties.

[58] Formally known as "The Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment".

ANNEX 3: DOMESTIC SUPPORT UNDER THE AGREEMENT ON AGRICULTURE

The preamble of the AoA states that three areas should be submitted to binding commitments: "market access; **domestic support**; export competition".

The legal text and the jurisprudence do not give any definition or interpretation of the notion of "domestic support".

According to the WTO website, the notion of domestic support should be understood as "**subsidies and other programmes, including those that raise or guarantee farmgate prices and farmers' incomes**"[59]. As a consequence, "price and income support" is part of the notion of domestic support, which is then broader and includes other kinds of intervention by a state on the market.

What we can infer from this Agreement is that the practice of price support is strongly regulated. The system implies that each measure of domestic support having a price support effect is not permitted and should be subject to reduction:

- Domestic supports measures have been divided into three boxes:

1) Green box: permitted (see AoA Annex 2):

Conditions: a- No distortion of trade (or at most cause minimal distortion)

b- Government-funded (not by charging consumers higher prices)

c- **Do not involve price support**.

+ Policy-specific criteria and conditions (General services, Public stockholding for food security purposes, Domestic food aid…).

2) Amber box: reduction commitments (part IV of Schedules, see AoA Article 6):

Domestic support measures considered to distort production and trade (with some exceptions).

3) Blue box: Any support that would normally be in the amber box is placed in the blue box if the support also requires farmers to limit production. The Blue Box is an exemption from the general rule that all subsidies linked to production must be reduced or kept within defined minimal ("*de minimis*") levels.

- The chairman of the negotiating group on agriculture in 1990 stated that that the following measures of internal support should be subject to reduction:

- […] **market price support**, **including** any measure which acts to maintain producer prices at levels above those prevailing in international trade for the same or comparable products, and taking account of levies or fees paid by producers;

[59] See: [http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm#domestic].

- **direct payments to producers** other than those which may be exempted on the basis of the agreed criteria, including deficiency payments and taking account of levies or fees paid by producers;
- and **input and marketing cost reduction measures** available only in respect of agricultural production, including credit and other financial input assistance and taking account of input taxes.[60]

Note: it is worth mentioning that even if domestic support is only subject to reduction commitments (and thus not prohibited) this type of measure cannot be used to circumvent a prohibited export subsidy. Indeed, in *Canada-Dairy (Article 21.5 — New Zealand and US II)*, the AB insists on **the legal difference between domestic support and export subsidies**:

"90. We believe that it would erode the distinction between the domestic support and export subsidies disciplines of the Agreement on Agriculture if WTO-consistent domestic support measures were automatically characterized as export subsidies because they produced spill-over economic benefits for export production. […]

91. **However**, we consider that **the distinction between the domestic support and export subsidies disciplines in the Agreement on Agriculture would also be eroded if a WTO Member were entitled to use domestic support, without limit, to provide support for exports of agricultural products.** Broadly stated, domestic support provisions of that Agreement, coupled with high levels of tariff protection, allow extensive support to producers, as compared with the limitations imposed through the export subsidies disciplines. **Consequently, if domestic support could be used, without limit, to provide support for exports, it would undermine the benefits intended to accrue through a WTO Member's export subsidy commitments"**.

[60] MTN.GNG/NG5/W/170, 11 July 1990, *Framework Agreement on Agricultural Reform Programme*, p. 2.