REVUE BELGE DE DROIT INTERNATIONAL
1997/2 — Éditions BRUYLANT, Bruxelles

AGRICULTURAL EXPORT SUBSIDIES UNDER THE WTO « AGRICULTURE PACKAGE » : A LEGAL ANALYSIS

BY

Melaku Geboye DESTA (*)

TABLE OF CONTENTS

(*) LL.B. with distinction (Addis Ababa University, Ethiopia), LL.M. *Magna cum Laude* (Catholic University of Leuven, Belgium) ; teaching law at the Faculty of Law, Addis Ababa University ; currently on a study leave at the Institute of International Trade Law, Faculty of Law, Catholic University of Leuven, preparing a doctoral thesis on the law of international agricultural trade under the supervision of Professor Dr. Hans Van Houtte. The author would like to express his gratitude to Professor Van Houtte for his constant attention, encouragement, and the highly valuable comments he made on the draft of this text. However, all responsibility for any of the defects of this article lies with the author.

A. — Introduction

International agricultural trade is long known for defying the rules and disciplines of the multilateral trading system. The first successful move in the endeavour to bring agriculture into the rules-based international system of the GATT came from the Uruguay Round, which introduced a set of four legal instruments on agricultural trade. Often collectively referred to as the « agriculture package », they are the Agreement on Agriculture itself, the Schedules of Concessions members had to undertake in the areas of market access, domestic support, and export subsidies, the Agreement on Sanitary and Phytosanitary Measures, and the Ministerial Decision concerning Least-Developed and Net Food-Importing Developing Countries (1). Of these, the provisions of the Agriculture Agreement on export subsidies and the reduction commitments thereupon are the primary focus of this article.

It should be said at the outset that this agriculture package did not create a fully liberal trading regime for agricultural products ; it only introduced a mechanism for a stage-by-stage liberalization of the sector. To that end, the Uruguay Round draws on the decades-old and fruitful experiences of the GATT in the negotiation and reduction of tariffs. Learning from these historic lessons, negotiating members decided that « specific binding commitments in the areas of market access, domestic support, and export competition shall be established » (2). These concessions have been incor-

(1) The text of these instruments, except the Schedules of Commitments, can be found in WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations : The Legal Texts* (1995).

(2) GATT, *Modalities for the Establishment of Specific Binding Commitments under the Reform Programme* GATT Doc. No. MTN.GNG/MA/W/24 (20 December, 1993) (hereinafter referred to as the Modalities or the Modalities Agreement), Para. 1.

porated by Article 3 of the Agriculture Agreement to form an integral part of GATT 1994 (3).

In the particular case of agricultural export subsidies, the Agriculture Agreement, inter alia, defines the term « export subsidies » and then identifies six forms of the practice that are mandated to be subject to binding reduction commitments (4). Apparently, this means that there are also practices that fall within the definition of export subsidies but that do not belong to any of the six specific practices listed as subject to reduction commitments (5). This raises and has already begun to raise a number of complex legal issues. To mention only a few, what is the legal status of those that are not included in the list ? If they are not subject to reduction commitments, does it mean that they are allowed ? Or, may it be that they are excluded from the scope of the Agriculture Agreement and treated as non-agricultural export subsidies subject rather to the Agreement on Subsidies and Countervailing Measures ? These issues will be discussed in the second part of this article.

However, there are also problems in the case of the listed export subsidies. As will be shown later, the Agriculture Agreement requires that they be subject to reduction commitments of a dual nature — budgetary and quantitative — to be implemented at two levels of duration — annually as well as over a six-year implementation period. This is an innovation by the new Agreement with positive implications in favour of greater market orientation. But, a closer look at the pertinent provisions of the Agriculture Agreement reveals that it is full of ambiguities. In an attempt to shed some light on the essence of the rules on reduction commitments and the practical problems that are being faced at the stage of implementation, such issues as the « base period », the « front-loading option », and « minimum reduction commitments » are discussed in this article. But the most contentious issue on agricultural export subsidies so far seems to be what is often called the « downstream flexibility » exception to the annual reduction commitment levels, and will be given special attention in the third part. The illuminating discussions made during a recent meeting of the Agriculture Committee of the WTO on this point will also be discussed in this part of the article.

Before we go to a discussion of the above-mentioned points, however, a brief historical review of GATT law and practice on the subject will be made so as to provide the appropriate contextual background for a proper

(3) The pertinent part of Article 3, in its paragraph 1, provides the following : « The domestic support and export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994 ».

(4) Hereafter referred to as « listed export subsidies ».

(5) Hereafter referred to as « non-listed export subsidies ».

appreciation of the worth of the current state of the law of agricultural export subsidies.

B. — Historical Background

1. — *The ITO Charter* (6)

Multilateral attempts to regulate agricultural export subsidies in the post-war era started with the *Suggested Charter* of the ITO, which was prepared and submitted by the United States (7). The *Suggested Charter* proposed to introduce distinct regimes for export subsidies on the one hand and domestic subsidies on the other. It also intended to create a sub-classification within the domain of export subsidies according to which the rule would be to prohibit all export subsidies resulting in bi-level pricing, while an exception would permit such export subsidies in the case of 'products of chronic oversupply' even if they might be causing similar bi-level pricing effects. Most agricultural products in the US were supposed to fall under this excepted category.

But, this U.S. proposal faced strong opposition from others. By the time the GATT was negotiated in the midst of the process for the establishment of the ITO, the proposed distinction had to be abandoned altogether in favour of a uniform approach to all forms of subsidies and all kinds of products. However, neither could this GATT solution continue acceptable any longer. The result was that the 1948 ITO Charter restored the two-tier classification of the *Suggested Charter* with minor modifications — this time, the sub-classification of export subsidies being between « primary » commodities and « non-primary » products (8). Accordingly, while domestic subsidies were to be permitted, export subsidies resulting in bi-level pricing were, as a rule, prohibited. But, an exception permitted export subsidies on primary commodities if they were not applied in such a manner as to acquire 'more than an equitable share of world trade in that product'. Yet, as the ITO Charter was only « stillborn », it was the GATT with its uniform rule on subsidies that continued to be the only regulatory instrument for quite some time to come.

(6) The text of the ITO Charter may be found in United Nations, U.N.Doc.ICITO/1/4 (1948).

(7) United States Department of State, *Suggested Charter for an International Trade Organization of the United Nations*, Washington, D.C. (1946) ; For details on the GATT/ITO negotiating history, see Hudec, R. *The GATT legal System and World Trade Diplomacy* (1975), at 3-13.

(8) See Articles 27 and 28 of the ITO Charter on subsidies in the area of « primary commodities ».

2. — *GATT 1947* (9)

Whether domestic or export, agricultural or industrial, the 1947 text of the General Agreement permitted all kinds of subsidies without distinction. The only obligations assumed by the contracting parties were the obligation to notify subsidies with effects on imports or exports, and, if found prejudicial to the interests of other contracting parties, the obligation to discuss the possibility of limiting the subsidization. It was, however, realized very soon that the rule amounted to nothing more than legalization of a practice the use of which would only circumvent the results of successful tariff reduction negotiations. As a result, this regime could not survive the first serious amendment to the General Agreement in 1955.

3. — *The 1955 Amendment* (10)

The 1955 review session restored the old two-tier classification of the Havana Charter of the ITO between domestic subsidies and export subsidies on the one hand and between export subsidies on primary commodities and export subsidies on non-primary products, on the other, with only slight modifications. A separate paragraph in the form of Article XVI :3 was introduced to regulate export subsidies on primary products — the category wherein agricultural products fall. Full of such ambiguous and controversial phrases as the « equitable share » the « representative period » and causation, however, this provision has been a source of tension and uncertainty throughout the history of the General Agreement. Besides, the 1955 amendment was applicable only to a small number of developed countries due largely to the opposition of most developing countries to the separate treatment of primary and non-primary products.

Subsequent attempts « to bring agriculture into the GATT » were also made at the Kennedy (1962-67) and Tokyo (1972-79) Rounds of multilateral trade negotiations, but to no avail. The cumulative effect of all those failures was that agricultural export subsidy wars reigned and agricultural trade issues in general became the cause of enormous international tensions for most part of the 1980s (11). It was with the object of easing this tension that agriculture was given a central place in the Uruguay Round, on the success of which hinged the very survival of the entire liberal trading system of the GATT at large.

(9) GATT 1947 here refers to the first version of the General Agreement on Tariffs and Trade, opened for signature on 30 October, 1947 and entered into force in January, 1948 ; 55 *United Nations Treaty Series*, at 187ff.

(10) A text of the GATT with the 1955 revision may be found in GATT, *BISD 4th Supplement* (1969).

(11) For a detailed analysis of the U.S.-EC relations in the period on this issue, see BOGER, W., « The United States-European Community Agricultural Export Subsidies Dispute », in 16 *Law and Policy in International Business* (1984), at 173-239.

4. — *The Punta del Este Declaration*

The Punta del Este Declaration of September 1986 launching the Uruguay Round responded to the then prevailing international tension by promising the ambitious object of bringing all measures affecting agricultural export competition under strengthened and more operationally effective rules (12). It in fact aimed not only at minimizing the negative effects of these practices, but also at « dealing with their causes » (13). Yet, as will be seen in a moment, all these high-sounding words and objectives could not bring agriculture back to the position of other products. As a result, agriculture is still a class in itself.

5. — *The Uruguay Round Negotiations on Agriculture*

Just like for most part of the previous four decades, the two rival trading powers in agricultural products — the United States (this time its position on the issue further strengthened by the emergence of the Cairns Group (14) advocating free trade in agricultural products) and the EC — continued their « transatlantic Ping-Pong » (15) by taking diametrically opposed positions on most crucial issues addressed during the Uruguay Round. Failure to reach agreement on agriculture not only caused delays in the conclusion of the Round, but even threatened the whole process with the danger of total collapse (16). Perhaps the highest share of the responsibility for this extremely controversial aspect of agriculture, however, falls on the specific case of agricultural export subsidies (17). To get a glimpse of the degree of divergence on this point, we may cite the fact that while the US « called for the phase-out of all agricultural export subsidies over

(12) GATT, « Ministerial Declaration on the Uruguay Round », reproduced in *GATT Focus Newsletter*, No. 41, (1986).

(13) *Id.*

(14) Members of the Cairns Group are Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji (then not a member of GATT but now a Member of the WTO), Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand, and Uruguay.

(15) HOEKMAN, B. and M. KOSTECKI, *The Political Economy of the World Trading System (1995)*, at 202.

(16) Worth mentioning among such failures is the Brussels meeting of December 1990. The failure of that meeting is attributed entirely to the deadlock over agricultural issues. In the words of Schott, « when the EC negotiators refused to discuss the proposal... [on agriculture], the developing countries in the Cairns Group of agricultural exporting countries walked out of the talks and the Brussels meeting collapsed. » SCHOTT, J. *The Uruguay Round : An Assessment* (1994), at 45.

(17) As the OECD has observed, during the Uruguay Round Negotiations on agriculture, « it was the incorporation of disciplines on export subsidies which proved the most difficult ». According to the OECD, this in fact was the « major factor in the collapse of the meeting held in Brussels in December 1990 to bring the Round to a close ». OECD, *The Uruguay Round : A Preliminary Evaluation of the Agreement on Agriculture in the OECD Countries*, (1995), at 13.

a five-year period » (18), the EC was ready only for « progressive reduction of such subsidies » (19) without any actual timetable for the reduction. Given the fact that agricultural export subsidies have been at the very core of the Common Agricultural Policy (the CAP), the latter often taken as the glue that keeps the Community together, it is hardly surprising that the EC was « reluctant » to accept specific limitations on the subject. Nevertheless, the final result that followed all those frustrations and impasses was a success.

C. — The Uruguay Round Agriculture Package

To start with, although opinion may be divided about the worth of the entire agricultural package (20), many eminent authorities on the subject agree that the discipline of agricultural export subsidies constitutes one of the most stringent and potentially effective disciplines in the whole package, promising « the most immediate, direct impact on markets and trade. » (21) The almost complete absence of discipline governing the practice in the preceding decades has provided the ideal background for the new discipline to appear revolutionary. The duality of commitments and the relatively greater degree of detail and precision accorded to the rules governing export subsidies have also been mentioned to have contributed to this

(18) Stewart, T. (ed.) *The GATT Uruguay Round : A Negotiating History (1986-1992)* (1993), 3 Vols., Vol. I, at 172.

(19) *Id.*, at 179.

(20) While a GATT FOCUS (No. 104, December 1993, P. 6) summary of the Final Act of the Uruguay Round calls it « a decisive move towards the objective of increased market orientation », Tangermann looks at it from an historical perspective and praises it as a « quantum leap forward ». S. Tangermann, *Implementation of the Uruguay Round Agreement on Agriculture by Major Developed Countries*, A Report prepared for the United Nations Conference on Trade and Development, UNCTAD/ITD/16, 3 October 1995, at 24. On the other side, while John Jackson calls the results of the Uruguay Round on agriculture as « meager » (Jackson, J. *The World Trading System : Law and Policy of International Economie Relations* (2nd ed. 1997), at 2), Ingco questions whether the Uruguay Round agricultural trade liberalization is one step forward and one step back. (Ingco, M.D., cited in Sharma, R. S., P. Konandreas, and J. Greenfield, « Synthesis of Results on the Impact of the Uruguay Round on the Global and LAC Agriculture », in Cordeau, J.L., A. Valdes and F. Silva (eds.), *Implementing the Uruguay Round in Latin America : the Case of Agriculture* (1997), at 41-63).

(21) OECD, *supra* note 17, at 46. Others have also expressed similar views on the matter. It has been said, for instance, that « the agreement reached on export subsidies in agriculture is both reasonably stringent and likely to be the most practically effective element in the Agreement... » Josling T.E., S. Tangermann, and T.K. Warley, *Agriculture in the GATT*, (1996), at 194-95. Likewise, Tangermann writes that « among all disciplines established under the AoA [Agreement on Agriculture], the constraints on subsidized exports are likely to be the most binding elements », (Tangermann, *supra* note 20, at 15.) and the new commitments on them are « the potentially most effective and hence the most important element of the Agreement on Agriculture. » (*Id.*, at 11.) The United States Department of Agriculture (the USDA), too, praises these commitments on agricultural export subsidies as « the most meaningful aspects of the Agreement on Agriculture. » (Economic Research Service/USDA, *Agriculture Outlook, (*December 1996), at 20.).

positive conclusion (22). As will be seen, however, the provisions of the Agriculture Agreement on export subsidies are not as clear and as precise as they may appear to be from a distance. What follows is thus a closer analysis of the rules of the Agreement on Agriculture on the essence and scope of agricultural export subsidies in general and the reduction commitments in particular.

1. — *Definition of Agricultural Export Subsidies*

The term « export subsidies » is defined under Article 1(e) of the Agriculture Agreement to refer to « subsidies contingent upon export performance » and includes the export subsidies listed under Article 9 of the same Agreement (23). Included in this list are such governmental acts as the provision of direct subsidies contingent upon export performance, the sale or disposal for export of non-commercial stocks of agricultural products at prices lower than on the domestic market, payments on the export of an agricultural product financed by virtue of governmental action, the provision of subsidies to reduce the costs of marketing agricultural exports, and subsidies on agricultural production contingent on their incorporation in exported products.

An export subsidy is, first and foremost, a subsidy. However, the Agriculture Agreement does not define the root term « subsidy ». To that extent, the definition of an export subsidy as a « subsidy contingent upon export performance » does not serve much useful purpose. The question of 'what is it that should be contingent upon export performance for an export subsidy to exist' needs to be answered first. Fortunately, thanks to the Agreement on Subsidies and Countervailing Measures annexed to the WTO Agreement, this historically elusive and controversial term has been defined for the first time. Both the Agriculture Agreement and the Agreement on Subsidies and Countervailing Measures being part of the multilateral agreements annexed to the WTO Agreement, the « package deal » principle stated under Article XIV of the WTO Agreement mandates that an acceptance of the WTO Agreement applies to all the multilateral agreements annexed thereto as well. In practice, this means that a country party to the Agriculture Agreement is also party to the Subsidies Agreement. As parts of a bigger whole, terms defined by one agreement may conveniently be used to interpret the provisions of another agreement, provided, of course, that the scope of application of one such a provision is not explicitly limited to specified areas (24).

(22) See, for instance, TANGERMANN, *supra* note 20, at 11.

(23) See Article 9 :1 of the Agriculture Agreement.

(24) For an example of a case where such an explicit restriction may affect the use of this method of interpretation, see *infra* note 25.

It is thus possible to go to Article 1 of the Agreement on Subsidies and Countervailing Measures and adapt the definition given to « subsidies » in order to understand the meaning of the term « export subsidies » as defined under Article 1(e) of the Agriculture Agreement : it refers to a financial contribution or any other form of income or price support in the sense of Article XVI of the GATT 1994 contingent upon export performance made by a government or any public body and conferring a benefit on the recipient. As a supplement to the definition, Article 9 of the Agriculture Agreement presents a list of practices falling under the umbrella of the term export subsidies as defined under Article 1(e) of the same Agreement that are « subject to reduction commitments ».

2. — *Export Subsidies Listed in Article 9 as Supplementing the Definition*

According to Article 1(e) of the Agriculture Agreement, « 'export subsidies' refers to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement ». As such, the list supplements the definition provision and helps to answer a number of the contentious issues regarding both the conception as well as the calculation of subsidies. Issues like the form of governmental involvement required for the existence of a subsidy, e.g. whether the government should suffer a charge to its accounts, have been resolved. Article 9 :1(c) explicitly provides that what matters for the existence of an export subsidy and for the application of the discipline of the Agriculture Agreement thereupon is the mere presence of *some form of governmental action whether or not a charge on the public account is involved*. Similarly, the wording of Article 9 (1)(e) also clears another important problem in relation to the exact role that should be played by the government for the existence of subsidies. It is stated that 'internal transport and freight charges on export shipments, *provided or mandated by governments*, on terms more favourable than for domestic shipments' are also included as export subsidies. This means, for example, that it is sufficient for a subsidy to exist if a government simply issues a directive mandating that all freight transport companies maintain a fare differential of, say, $5 per unit between domestic and export shipments of the same volume or weight in favour of the latter. The government suffers no expenses to its accounts ; nor does it carry out the task of transporting freight by itself ; yet, there is an export subsidy subject to the newly-introduced discipline in the same way as direct transfers of public funds are subjected to it.

The enumeration of Article 9 (1) does not, however, affect the generality of the definition given earlier. There are practices that fit in with the definition of the term but that are not covered by any of the items enumerated thereunder. The legal status of those practices which fall within the defini-

tion but outside the list has already begun to entertain divergent views around scholars and will be discussed below.

3. — *Categories of Agricultural Export Subsidies : Listed V. Non-Listed*

The Agriculture Agreement has created two categories of export subsidies — those that are listed under Article 9 (1) as export subsidies subject to reduction commitments, and those that are export subsidies as defined under Article 1(e) but do not fall in any of the enumerations of Article 9 (1), and hence not subject to reduction commitments. Accordingly, there is no uniform discipline applying to all forms of export subsidies that may be found to exist under the definition of the term mentioned above.

Article 8 of the Agriculture Agreement provides that « Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule ». Members are not precluded from providing export subsidies ; they only need to do it in conformity with the rules of the Agreement and their respective schedules of commitments. Unlike export subsidies on non-agricultural products, therefore, Members are free to use agricultural export subsidies in any manner they like, provided that certain conditions are satisfied. It is on the basis of the nature of the conditions attached to the different forms of export subsidies that the two categories are formulated. The export subsidies listed under Article 9 (1) are specifically required to be « subject to reduction commitments under this Agreement ». The obligation to respect the reduction commitments each Member incorporates in its Schedules constitutes the condition for the lawful use of these practices. On the other hand, the condition for the lawful use of those export subsidy practices that are not listed under Article 9 (1) appears to be the anti-circumvention requirement of Article 10 (1) of the same Agreement. But, as the legal status of this latter category of practices is not always that clear, some additional comments on the point seem to be in order.

4. — *Non-Listed Agricultural Export Subsidies and their Legal Status*

The question of whether these non-listed export subsidies are permissible at all has been approached differently by writers. An eminent authority on the subject of agricultural trade maintains, for instance, that « non-listed export subsidies will be subject to the Subsidies Agreement, which establishes three categories of subsidies : prohibited, actionable, and non-

actionable. » (25) As will be explained later, this means that the non-listed agricultural export subsidies are prohibited. He arrives at this conclusion from the premise that « export subsidies will be subject to the discipline provided for in the Agreement in Agriculture ; subsidies falling outside this discipline will be subject to the discipline provided by the Agreement on Subsidies and Countervailing Duties. » (26) This latter reasoning rightly suggests that those export subsidy practices that are subject to the discipline of the Agriculture Agreement are governed only by that Agreement and no other. What should not be forgotten, however, is that even the non-listed export subsidy practices are also subject to a discipline created by the Agriculture Agreement. Only the type of discipline applying to the listed and the non-listed categories varies. While the former are subject to reduction commitments, the latter are subject only to anti-circumvention requirements.

According to Article 10 (1) of the Agriculture Agreement, « Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments ». This provision implies that there is no prohibition on the use of these export subsidies ; it is only *the manner of their use* that is subject to the anti-circumvention condition, actual or potential. Paragraph 2 of Article 10 goes a step further and picks three of the potentially significant export subsidy practices that fall outside the list of Article 9 (1) — export credits, export credit guarantees, and insurance programs — and declares that Members shall undertake to work toward the development of internationally agreed disciplines governing their use, and shall abide by any such agreement when, and if, it is reached. As it stands to date, this is simply an agreement to maintain good faith for a planned future negotiation devoid of any substantive legal obligation for some time to come. Until then, there exists no legal distinction in the treatment of these three practices and the other forms of export subsidies not listed under Article 9 (1).

The relationship between the Agreement on Subsidies and Countervailing Measures and the Agriculture Agreement as regards these issues needs to be very clear, though. First of all, we are here dealing with export subsidy cases. The regime created by the Subsidies Agreement for them is a simple and flat prohibition (27). If this regime were to apply to agriculture, this

(25) McMahon, J. « The Uruguay Round and Agriculture : Charting a New Direction ? », 29 *The International Lawyer*, No. 2, (1995), at. 430.

(26) *Id.* at 430-431.

(27) Article 3.1 of the Agreement on Subsidies and Countervailing Measures, in its pertinent part, provides the following : « Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1 above, shall be prohibited : (a) Subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance... »

would mean that the export subsidy practices that are not listed under Article 9 (1) of the Agriculture Agreement are flatly prohibited while those that are listed therein are simply subjected to reduction commitments. The fallacy, however, is the following : if they were prohibited, why does the Agriculture Agreement talk of anti-circumvention ? Once prohibited, they could not be used in any manner whatsoever — whether circumventory or otherwise.

The case of export credits, export credit guarantees and insurance programs singled out by Article 10 (2) as subjects for a special future international agreement may help to show this fallacy more vividly. If the non-listed subsidies were subject to the Subsidies Agreement, these three practices would also be prohibited until the envisaged internationally agreed discipline is concluded in the future. Viewed from an historical perspective, the scenario surrounding this situation would look the following : Before the Uruguay Round Agreements, they were 'permitted' like all other agricultural export subsidies ; now they are prohibited like all non-agricultural export subsidies ; and when the envisaged international discipline is reached, they will be subject to a regime short of a flat prohibition. Not only is this situation inconsistent with the rule of reason ; it is also out of tune with the very spirit, purpose and direction of the multilateral trading system. Given the distortive nature of these practices, this would amount to moving away from a liberal regime into a restrictive one.

Article 3 (1) of the Subsidies Agreement on prohibited subsidies also explicitly excludes agricultural export subsidies from its purview. Accordingly, subsidies contingent upon export performance are prohibited « except as provided in the Agreement on Agriculture ». In line with this provision of the Subsidies Agreement, Article 8 of the Agriculture Agreement limits Members' obligations to the rules of the Agriculture Agreement itself : « Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule. » As long as the provision of agricultural export subsidies conforms to this Agreement and the Schedules of Commitments, therefore, there is no possibility to challenge the legitimacy of one such a practice.

In sum, Members are free to use those non-listed agricultural export subsidies on condition that they do not use them to circumvent, actually or potentially, their obligations *vis-à-vis* the listed export subsidy practices. The fact that Article 10 :1 of the Agriculture Agreement provides that export subsidies not listed in paragraph 1 of Article 9 *shall not be applied in a manner* which results in circumvention implicitly endorses their use ; only the manner of their use is regulated. And this conclusion also applies to the three non-listed export subsidy practices for which the commitment to work toward the development of an internationally agreed discipline is

undertaken by the members. When, and if, this latter agreement is reached, the direction of the move will also conform with the very purpose and direction of the multilateral trading system — a progressive move from a state of distortion to one of liberalization. It is, therefore, important to always keep in mind the fact that not all agricultural export subsidies are subject to reduction commitments. Some writers, for instance, conclude that « Contrary to the 'old' GATT... export subsidies are now prohibited in agriculture, except where indicated in Countries' Schedules. » (28) This statement is largely, but not entirely, true. A word of caution should be added — it holds true only as regards the listed subsidies ; the non-listed subsidies are not covered by the rule under Article 3 (3). Subject to the anti-circumvention condition, Members are always free to use any subsidies that fall outside the list of Article 9 (1) of the Agriculture Agreement. On the other hand, in line with the above-quoted conclusion, Members are precluded from introducing any of the listed export subsidies, in principle, on any product that had not been reported as having been benefiting from any such scheme during the base period.

5. — *Listed Export Subsidies and the Essence of Reduction Commitments*

a) *General*

The Agriculture Agreement establishes a basis for a progressive reduction of six important forms of agricultural export subsidies through the mechanism of binding commitments of a dual nature — commitments for the reduction of the quantity of agricultural products exportable with the aid of these subsidies, and commitments for the reduction of the budgetary outlays allowed for the purpose. These commitments are to be implemented at two levels of duration — annually as well as over the entire implementation period. The Agriculture Agreement then sets the general framework within which Members would negotiate their respective undertakings on the subject, leaving the specific details to the Modalities Agreement. The primary obligation stated under Article 8 of the Agriculture Agreement is that 'each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and *with the commitments as specified in that Members' Schedule'*. Furthermore, Article 3 of the Agriculture Agreement requires of Members to respect the budgetary outlay and quantity commitment levels specified in their respective schedules as « commitments limiting subsidization ».

The Agriculture Agreement does, inter alia, the following on export subsidy reduction commitments. Firstly, it defines the two forms of reduction

(28) JOSLING T.E., S. TANGERMANN, and T.K. WARLEY, *supra* note 21, at 195.

commitments — quantitative and budgetary — each Member is required to make on export subsidies. Secondly, it defines the base period from which to calculate the reductions. Thirdly, it sets the minimum allowable quantitative and outlay reduction commitments required of each Member by the end of the implementation period. Fourthly, it indirectly requires of Members to undertake both budgetary as well as quantitative commitments for each year of the implementation period and specify the same in their Schedules. And, finally, it provides for some room of flexibility so as to enable countries to adjust themselves to yearly fluctuations both in the quantity and price of agricultural products. Almost all of these points have their own more detailed versions and, in some cases, modifications in the Modalities Agreement, and will be briefly discussed below.

b) *The Base Period and the « Front-loading » Option*

To speak of reductions, the existence of a certain reference point is imperative. There should be a benchmark to start the calculation from at both the quantitative and the budgetary levels. To do that, the element of time is a necessity ; i.e. a base period has to be agreed upon. Given the extreme yearly fluctuations in production and prices characteristic of most agricultural products in practically every country, the choice of one base period over another was a delicate matter with important consequences. Naturally, each negotiating party would propose the time when its national figures at both levels were the highest. Bridging the gap which arose therefrom was a serious challenge.

After intensive negotiations, the base period for purposes of agricultural export subsidies was agreed to be the 1986-1990 period (29). Each Member was then required to report its respective figures on the quantity of subsidized exports and the amount of budgetary outlays spent for the purpose for every year of the base period. This means that, as the scope of the reduction commitments covered the six categories of export subsidies listed under Article 9 (1), countries were required to list both the quantity of exports with any of those subsidies and the amount of budgetary

(29) See Article 9 :2(b)(iv) of the Agreement on Agriculture, and Para. 11 of the Modalities. Tangermann writes in this connection that « As far as the volume of subsidized exports is concerned, the base period... was 'generous' in the sense that there had been a tendency for subsidized exports to grow over time, such that the 1986-1990 average quantity of subsidized exports was higher than in previous periods. On the other hand, quantities of subsidized exports continued to expand during the UR negotiations, and the levels reached immediately before the start of the implementation period (i.e. in 1993 or 1994) were often higher than those in the 1986-1990 base period... Even though the possibility was provided, under defined conditions, to start reductions from the higher 1991-1992 levels, export subsidization at the end of the implementation period (i.e. in the year 200) still has to be cut back by the agreed percentage (21 per cent for quantities, 36 per cent for outlays) relative to the 1986-1990 base period. In that sense the base period chosen for export subsidization was not too 'generous' in many cases. » TANGERMANN, S. *supra* note 20, at 5-6.

expenditures incurred therefor in each year of the base period. The averages calculated for this period constituted the benchmark on the basis of which to negotiate the size of the subsequent reduction commitments to be undertaken by each Member. In the words of the Modalities, the annual averages for the base period of the budgetary outlays and the quantities of products benefiting therefrom constitute, respectively, base outlay and quantity levels for purposes of the reduction commitments.

The decision to take 1986-1990 as the base period was not fully satisfactory to all negotiating parties, especially to those whose export subsidies had continued to rise after the base period. To accommodate these special cases, a particular arrangement was made in the form of what is often referred to as the 'front-loading' option included in the Modalities Agreement. In order to accommodate the special interests of Members whose subsidized exports had increased since the 1986-1990 base period level and the rate and size of reduction of which would be more abrupt and massive than otherwise, the « front-loading » option allowed these countries to start the reductions, in certain circumstances, from the higher post-1990 levels, while the ultimate commitment remains that based on the 1986-1990 base period level (30). Needless to say, the 'front-loading' provision has enabled such Members to export significantly more subsidized products than what would have been possible in its absence (31). It is thus possible to conclude that the 'front-loading' arrangement has significantly diminished the benefits that could otherwise have resulted from the choice of 1986-1990 as the base period for the purpose (32).

(30) Accordingly, countries were allowed to begin the reductions from the average for 1991 and 1992 levels on condition that (i) the average of the 1991 and 1992 quantities of products benefiting from a Member's export subsidy schemes exceeded the corresponding base period average, and (ii) the reductions would be made in equal annual instalments. However, in cases where the said excess of the average of 1991 and 1992 amounted to 25 percent or more of the base level average and where 40 percent or more of the quantity in 1992 of such a product was exported from publicly-held or intervention stocks, the reductions were required to be made beginning at levels determined by averaging the corresponding average of the 1991 and 1992 levels and the corresponding base period levels. Here again, it is required that the thus fixed reductions be made in equal annual instalments. At the practical level of the final Schedules as well, this front-loading exception has been utilized by almost all Members satisfying the requirements thereof. While the limited option to use the average of the 1986-1990 and the 1991-1992 averages seems to have been used only in one case — EC beef exports — all other cases satisfying the criteria for the application of the front-loading option started from the 1991-1992 levels. In other words, the 1986-1990 base levels were used only in cases where they were not exceeded by the 1991-1992 export levels.

(31) For a discussion of the quantitative effects of this arrangement see EC Directorate General for Agriculture, « GATT and European Agriculture », *CAP Working Notes-1995, Special Issue* (1996), at 24 ; *and* OECD, *supra* note 17, at 86.

(32) An Agra Europe paper has singled out the case of cheese in the EC as a good example to show the practical effect of the « front-loading » agreement : « Average annual exports over the period 1986-90 amounted to 386 000t, but the annual average in 1991-92 had risen to 427 000t. If the 'front-loading' arrangement had not been agreed, the Community would have had to cut cheese exports in Year 1 of the Uruguay Round agreement to around 372 000t, a reduction of 55 000t (or 12.9 %) in relation to the 1991-92 figure. In the event, however, the Year 1 target

c) *Minimum Reduction Requirements*

The agricultural package of the Uruguay Round sets, directly or indirectly, a minimum limit on the degree of concession required of each Member at two levels — the level of the entire implementation period, and the levels for each of the years constituting the implementation period. These will be discussed in turn.

(1) *Minimum Reduction Requirements for the Entire Implementation Period* (33)

The Agriculture Agreement does not directly set the minimum allowable reduction commitments to be undertaken by Members. The issue is only touched upon under Article 9:2(b)(iv) as one of the conditions for the use of the flexibility exceptions to the annual commitments. There it is provided that in any of the second through fifth years of the implementation period — the six-year period commencing in 1995 — a Member may provide export subsidies in a given year in excess of the corresponding annual commitment levels on condition, inter alia, that « the Member's budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, are no greater than 64 per cent and 79 per cent of the 1986-1990 base period levels, respectively. » It then provides for the differential and more favourable treatment accorded to developing countries (34). On the other hand, the Modalities Agreement, unlike the Agriculture Agreement, is more straightforward in this respect : « By the conclusion of the implementation period, each participant shall reduce : (i) the quantities of each agricultural product or group of products specified in this Annex benefiting from export subsidies by 21 per cent from the base period level ; and (ii) its budgetary outlays for export subsidies for each agricultural product or group of products specified in this Annex by 36 per cent from the base period level. » (35)

is 407 000t, a reduction of only 20 000t (or 4.7 %). » Agra Europe, *The GATT Uruguay Round Agreement — An Agra Europe Special Supplement* (December 1993), at 15.

(33) The « implementation period » for purposes of the Agriculture Agreement is defined under Article 2(f) to mean « the six-year period commencing in the year 1995, except that, for the purposes of Article 13 [on Due Restraint], it means the nine-year period commencing in 1995. »

(34) In line with the principle of special, differential and more favorable treatment for less developed countries, while the least-developed countries are exempted from any reduction commitments altogether, developing countries are granted preference at three levels : the minimum requirements have been brought down to 24 per cent on outlays and 14 per cent on quantities ; the implementation period has been extended to 10 years ; and they have been exempted from assuming any reduction commitments at all in respect of two of the six export subsidies listed under Article 9 :1(d) and (e).

(35) Paragraph 5(a) of the Modalities Agreement.

Worth noting at this juncture is that these percentage figures are nothing but the minimum that each and every Member is obliged to undertake. Being only the minimum, any move by any particular Member to go beyond the threshold was always welcome. Some countries have in fact followed that way, the most notable case in point being the elimination of agricultural export subsidies altogether by New Zealand. Calculations made by the WTO Secretariat have shown that « total agricultural export subsidy outlays will decline... from $21.3 billion to $13.7 billion by the end of the transition period » (36).

(2) *Minimum Reduction Requirements at the Annual Level*

In addition to the overall limitation for the entire implementation period, Members were also required to go a step further and specify in their Schedules the annual reduction commitment levels for each year of this period. However, as the Agriculture Agreement does not say much on this point, it is the Modalities Agreement which established the principle of equal annual instalments for both budgetary as well as quantitative commitments (37). These commitments represent, in principle, the maximum level of expenditure that can be allocated or incurred and the utmost quantity of agricultural exports that can benefit from the subsidy schemes in each of those years (38). However, in the case of the annual commitment levels, some degree of flexibility is permitted under Subparagraph (b) of Article 9 :2 so as to avoid the unnecessary rigidity that may result from such stringent obligations. This is what is often referred to as the « downstream flexibility » exception.

D. — « Downstream Flexibility » Exceptions Under Article 9:2 (b)

One of the important reasons for the absence of any meaningful discipline governing the sphere of agricultural trade for so long is the special vulnerability of the sector to extreme seasonal and yearly fluctuations, due, among others, to the high degree of dependence of the production process on nature. The exceptions that are addressed in this section are there to

(36) WTO, *WTO FOCUS Newsletter*, No. 1, (January-February 1995), at 8.

(37) According to Para. 5(b) of this Agreement, « the reductions... with respect to the quantities benefiting from export subsidies shall, in the first year of the implementation period, be made to a level at least 3.5 percent below the corresponding base period level and, for the remaining years of the implementation period, in equal annual instalments... ; and the reductions... with respect to budgetary outlays for export subsidies shall, in the first year of the implementation period, be made to a level at least 6 percent below the corresponding base period level and, for the remaining years of the implementation period, in equal annual instalments... »

(38) See Article 9 :2(a) of the Agriculture Agreement.

open some room for adjustment to such problems. The wording of these exceptions is rather ambiguous and complex, however. Discussions held at a meeting of the Agriculture Committee of the WTO on 25-26 September 1997 involving these provisions have shown that they have the potential to cause highly contentious and divisive issues. The WTO Secretariat described the flexibility issue as one that « aroused considerable amount of discussion » (39) during the Committee meeting. The points raised there are highly illuminative for the whole system of flexibility exceptions ; as such, they will be focused upon in the following section.

In general, Article 9 :2(b) provides that in any of the second through the fifth years of the implementation period, a Member may grant export subsidies in a given year in excess of the corresponding annual commitment levels, provided certain conditions are satisfied. Of the three conditions, while the first and the second concern budgetary and quantitative adjustments, respectively, the third applies to both.

1. — *First Condition : Flexibility in Budgetary Commitment Levels*

A Member may provide export subsidies in a given year in excess of the corresponding annual commitment levels on condition that :

> « the cumulative amounts of budgetary outlays for such subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative amounts that would have resulted from full compliance with the relevant annual outlay commitment levels specified in the Members' Schedule by more than 3 per cent of the base period level of such budgetary outlays. » (40)

Different factors may force Members to spend more than what their annual commitments allow for a given year — an international slump in prices of the product is perhaps what readily comes to mind. Countries may invoke this condition under two different contexts and with two different targets in view. One is where a country, that has been using its annual commitments to the full in the previous years, is forced to spend more than its commitments for a given year ; and the second concerns a case where a country, that has not been using the whole of its commitments for previous years, is forced to spend more than its annual commitment for a given year and claims a right to resort to its past, unused, quotas — its alleged 'savings', so to say.

To shed some light on the practical sides of these two scenarios, let us take a couple of similar, but not identical, hypothetical cases. Suppose that Countries A and B provide base-period averages of 100 units each in

(39) WTO, *FOCUS Newsletter*, No. 23, (October 1997), at 3.
(40) Article 9 :2(b)(i) of the Agriculture Agreement.

budgetary outlays to subsidize their respective wheat exports. Assume also that the ultimate reduction commitment levels in both cases for the end of the implementation period are set at the allowable minimum (i.e. 64 units), with a fixed reduction commitment of 6 per cent of the base level per year. This means that, for each of the six years of the implementation period starting from 1995 until 2000, the corresponding outlays are set at 94, 88, 82, 76, 70, and 64 units respectively.

Suppose further that, for the first two years of the implementation period, 1995 and 1996, both the production and marketing conditions were so favourable that while country A was able to export its wheat using only *its maximum allowable outlays for each year,* (i.e. 94 and 88 units, respectively), country B was able to export with only 50 units of money in export subsidies for each of the two years. However, in the third year, 1997, they faced such an unexpected slump in wheat prices on the world market that they had to use much more money in export subsidies than what their respective annual commitment levels would permit them. The question now is this : is there any distinction in the legal treatment of these two hypothetical cases under the above quoted condition ? In particular, can country B claim to resort to its unused export subsidies for the years 1995 and 1996 ? What is the maximum permissible amount for each of these countries for the year 1997 under the first condition ? The following discussion revolves around these hypothetical examples.

The key to these questions lies in the condition's phrase *'cumulative amounts that would have resulted from full compliance with the relevant outlay commitment levels'*. More specifically, what does *full compliance* mean in respect of reduction commitments ? If we return to the illustrations, how much should countries A and B spend in any year of the implementation period to be in *full compliance* with their respective obligations ? The answer that readily comes to mind is to say that a country complies with its obligations if it spends its annual commitment levels for the year in question and no more. This is not a wrong answer ; it fits in with the letter of the Agreement very well. But, is it the only right answer ? For instance, if in a given year the price of a certain product has risen so much that the country does not need to grant any export subsidies, has that country, by failing to grant subsidies for that year, also failed to *fully comply* with its commitments for that same year ? In other words, does *full compliance* require that a country use all its permissible budgetary outlays for any given year ?

In trying to resolve this issue meaningfully, a proper understanding of the nature of reduction commitments is a necessary prerequisite. Reduction commitments are nothing but maximum allowable limits, and not mandatory spending levels. By fixing its reduction commitments for any given year, a country is obligating itself only not to exceed that limit. All

expenditures below that limit are not only in full compliance with its obligations ; in a strange way of saying, they represent « more full » a compliance than a use of the whole allowable amount — for, in this case, the practice is in line not only with the letter but also with the spirit of the Agreement. It goes a longer way towards the realization of the liberalization objective of the entire multilateral trading system. This means that a Member fully complies with its obligations by spending any sum between zero and its commitment levels. Any other construction to the effect that countries comply with their obligations only when they spend the whole of their commitments would amount to the imposition of an obligation to subsidize for the purpose of liberalization — an outright anomaly.

Accordingly, issues involving the determination of the « cumulative amounts that would have resulted from full compliance with relevant annual outlay commitment levels specified in the Member's Schedule » are not simply a reference to a predetermined sum of the maximum allowable limits. That is only one instance — and an extreme instance at that — of full compliance. All annual expenditures below that limit are also in full, if not fuller, compliance and should always be taken as they are during the calculation of the *cumulative amounts that would have resulted from full compliance.* The overall effect of all this is that it is only with the sum total of all actual expenditures below or equal to the maximum limit — and not with the sum total of the maximum annual limits regardless of actual expenses — that the *cumulative amounts of budgetary outlays for such subsidies from the beginning of the implementation period through the year in question* should be compared. And it is the possible excess of the latter over the former that is required not to be more than 3 per cent of the base period level of the budgetary outlays.

Having this as a background, let us go back to the two hypothetical questions introduced earlier. To start with the easier of the two cases — that raised about country A — can it raise its budgetary expenditure for the year 1997 ? By how much ?

The answer to this question is straightforward ; country A has the right to increase its budgetary outlays for that year within the limits set by the first condition. Applying the preceding analysis to this case, the maximum that this country may spend in addition to its bound level as per this condition may be calculated as follows. The condition is that the *cumulative amounts of outlays from the beginning of the implementation period* (i.e. 1995) through the year in question (i.e. 1997), (which is $94+88+82+x = 264+x$, where x represents the additional amount that country A may be allowed to use for this year) should not exceed the *cumulative amounts that would have resulted from full compliance* with the relevant annual commitment levels specified in the Members' Schedule (which in this case is equivalent to the sum total of the commitment levels, $94+88+82 = 264$) by more than

3 per cent of the base period level of such budgetary outlays (which is 100 (3:100) = 3 units). This means that the maximum that country A can spend in the year 1997 in addition to its bound level for the year is 3 units — thus bringing the total allowable sum for the year to 85 units.

The situation concerning country B is, however, much more complex than the one just discussed. The issues arising in this connection are similar to the ones addressed in the Agriculture Committee meeting referred to earlier on. What happened in that case was that, in 1995 and 1996, agricultural prices on world markets were relatively so high that « many countries with export subsidy reduction commitments were... able to export without using the full amount of export subsidies that were available to them » (41). However, the condition of the market in 1997 deteriorated to such an extent that these same countries were forced to use much more than their annual commitments for that year (42). An issue then arose that if a country's spending on agricultural export subsidies in one year falls short of the maximum limit in its WTO commitment, « can it transfer the shortfall for later use — in any of the second to fifth years of the implementation period ? » (43)

Before going to the analysis of the merits of the case, some ambiguities in the way the WTO Secretariat reported the discussion need to be cleared up. It has been stated that the « central question » discussed during the Committee meeting was on whether a country can transfer the shortfall for later use in any of the second to the fifth years of the implementation period. However, the answers given by the contending parties to the discussion suggest that this was not the issue at all, much less the central one. More particularly, during the discussions over this issue, while some countries 'argued that the Agriculture Agreement allows them to do just that', others reacted that 'the interpretation conflicts with the letter or the spirit of the agreement, or both'. However, this latter group continued and stated that « interpreting the agreement to allow unused export subsidy commitments to be rolled over *in full (rather than within the narrower margins specified in the article)* could destabilize world markets, increase market uncertainty, and could even revive subsidy wars » (44) (italics added). The italicized part of this quotation alters the real point of dispute. Contrary to the former issue of whether countries can transfer their unused 'quotas' to the later years, both sides agree that countries are in fact

(41) WTO, *FOCUS Newsletter*, No. 23, (October 1997), at 3. For example, the export price of cereals rose by 17 and 20 percentage points for the years 1995 and 1996, respectively, over corresponding figures for preceding years. WTO, *Annual Report 1997*, (1997), at 12.

(42) To use the same example, the export price of cereals for the first half of 1997 showed a decline of 26 per cent over the corresponding period of the previous year. WTO, *Annual Report 1997*, (1997), at 12.

(43) WTO, *FOCUS Newsletter*, No. 23, (October 1997), at 3.

(44) *Id.*

allowed to do that. The bone of contention as between them rather turns out to be on the extent to which they can do so — are they allowed to roll over their unused export subsidy commitments in full or only within the narrow margins specified in the article ? In the view of this writer, however, the tacit understanding that countries are allowed to transfer unused export subsidies for later years is itself a flawed one. As will be substantiated below, counties are not at all allowed to make such transfers, and hence there is no room for issues of the transferable amount to be raised from the very outset.

In order to better appreciate the positions taken on these issues, a recapitulation of the essential points of the rule under treatment with the help of the hypothetical illustrations introduced earlier would be of importance here. Country B used only 50 units in each of the 1995 and 1996 years. But, the market condition of 1997 has forced it to use much more than the 82 units available for the year. The question is thus as to whether it can revert to the unused export subsidies for the preceding two years — the total amount of which is 82 units (i.e. the sum of the difference from 1995 (44 units) and the difference from 1996 (38 units). If yes, by how much ? If no, why not ?

In order to resolve these issues Article 9 :2(b) requires that two things be determined : the cumulative amounts of budgetary outlays for such subsidies from the beginning of the implementation period through the year in question (i.e. 1997), and the cumulative amounts that would have resulted from full compliance with the relevant annual outlay commitment levels specified in the Member's Schedule. The first one is straightforward once again : 50+50+82+X = 182+X (where X represents the maximum by which B may be allowed to exceed its annual commitment level for the year 1997). But the second one is not that clear. The question of whether it is the bound amounts of 94 and 88 or the actual amounts of 50 each that should be included in the calculation for the years 1995 and 1996 is controversial. The practical effect of choosing one over the other is significant. If the former, then country B will be allowed to spend as much as 167 units (i.e. X will be equal to the sum total of the three maximum amounts (94+88+82 = 264) minus the actually paid amount of 182 increased by 3 per cent of the base period level, which comes to 3 units : X = 264-182+3 = 85) in the year 1997. In the latter case, however, B will not be able to use more than 85 units in total, for the simple reason that even when spending 50 units each in 1995 and in 1996, B still « fully complied » with its obligations ; hence the cumulative amounts that would have resulted from full compliance with the relevant annual outlay commitment levels will be nothing else than the sum total of what had actually been spent in the years 1995 and 1996 plus the maximum allowable amount for the year 1997 (which comes to 50+50+82 = 182). It is with this figure that the now raised amount should be compared, and it is from this sum that the new figure

is required not to exceed by more than 3 per cent of the base period level. This means that the maximum B can spend for the year 1997 is once again 85 units.

Now the question is this — which one is the more appropriate solution to the problem ? All preceding analyses strongly suggest that the Agriculture Agreement does not allow the transfer of unused export subsidies to a future date. This view is dictated by the very nature of reduction commitments. A country is said to have failed to comply with its obligations only if it has breached its duties vis-à-vis other parties. A question may then be asked as to whether reduction commitments constitute a right or a duty for the members making them. In other words, by assuming export subsidy reduction commitments, are the parties obligating themselves to grant those subsidies, or are they simply binding themselves not to give, if they have to, more than the bound amounts ?

The whole purpose of the multilateral trade system in general and the Agriculture Agreement in particular is not to force countries to subsidize. On the contrary, it is the progressive dismantling of the export subsidy schemes of Members that forms the core of the whole effort. To that end, Members were very much encouraged during the negotiations to commit themselves to the highest possible reductions they could afford under the circumstances. The same applies to cases where they set their commitments at one level, but actually granted a lower amount of export subsidies. In point of fact, GATT is rich with the experience of countries binding their tariffs at a certain level, but actually applying lower rates in their day-to-day transactions. This practice is not just tolerated, it has always been encouraged. After all, further liberalization is the sole object and purpose of all the arduous and costly negotiations conducted in history and in the light of which all terms should always be interpreted (45).

Furthermore, the principle stipulated under Article 3 of the Agriculture Agreement in this respect remains that Members' Schedules constitute commitments limiting subsidization and that they 'shall not provide export subsidies... in excess of the budgetary outlay... levels specified therein'. On the other hand, this provision leaves them free to provide any amount below the bound levels. Thus, a country that has bound its outlay reduction commitments for export subsidies at, say, 100 units for a specific year « fully complies » with its obligations by allocating any sum between zero and 100. But, the moment it raises its expenditures above 100 even by a penny, it, in principle, violates its obligations and stands in need of a clear authority.

(45) Article 31 (1) of the Vienna Convention on the Law of Treaties, (1969) provides the general rule of interpretation that « A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose. »

All this leads to the conclusion that the « flexibility exceptions » of Article 9 of the Agriculture Agreement do not have anything to do with « quota saving » or anything of that sort. There is no possibility to transfer one's rights for a given year and resort to them at a later stage. The exception is there only to govern cases where Members may be forced to use more than their annual commitment levels by affording some room for adjustment. The fact that a Member did not use all its budgetary outlays for a previous year indicates that the implicit conditions of strain for the application of the exception did not exist in that year. By not using its commitment levels to the full, it has 'fully' complied with its obligations. The overall effect of this reasoning is that the issue of whether countries are allowed to roll over the unused amount in full or within limits — raised and discussed in the meeting of the Agriculture Committee — cannot have been raised at all. Needless to say, if countries are not allowed to transfer any unused part from the very beginning, there can be no room for issues of the transferable amount to enter the discussion.

2. — *Second Condition : Flexibility in Quantitative Commitment Levels*

The second condition relates to quantitative commitments undertaken by the Members. According to this condition, a Member may exceed its annual limits in this respect as well, provided that :

> « the cumulative quantities exported with the benefit of such export subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative quantities that would have resulted from full compliance with the relevant annual quantity commitment levels specified in the Members' Schedule by more than 1.75 per cent of the base period quantities. » (46)

Most of the factual, price-related market situations that lay beneath the controversial issue of whether to use past « unused » budgets in subsequent years also had their parallels in the quantitative front. For instance, the OECD reported that « World agricultural markets for 1995 were characterized by tighter supplies and lower stocks... The current supply situation for cereals involves the lowest world stocks for two decades » (47). These positive market developments also continued in the year 1996. This means that, in those years, most exporting Members were in a position to export their products without resorting to subsidies, or at least at less than their annual commitment levels. However, as the condition of the market deteriorated in the year 1997 — thus necessitating the use of more export

(46) Article 9 :2(b)(ii) of the Agriculture Agreement.

(47) OECD, « Agricultural Policies, Markets, and Trade in OECD Countries : Monitoring and Evaluation 1996 : Summary and Conclusions », published in 8 *World Trade and Arbitration Materials,* No. (September 1996), at. 144.

subsidies on additional quantities of products — cases similar to the ones discussed above could very easily be imagined. Therefore, almost all the issues raised, the points made, and the illustrations given in respect of the outlay commitments under the first condition apply, *mutatis mutandis*, to this condition. As such, no further comments will be given here.

3. — *Third Condition : No Flexibility over Final Commitment Levels*

The third condition pertains to both the quantitative as well as the budgetary commitments and further constrains the conditional exceptions that are allowed under the already stringent conditions discussed above. Accordingly, a Member may exercise the exceptions discussed above only on condition that,

> « the total cumulative amounts of budgetary outlays for such export subsidies and the quantities benefiting from such export subsidies over the entire implementation period are no greater than the totals that would have resulted from full compliance with the relevant annual commitment levels specified in the Member's Schedule. » (48)

This condition makes it clear that the exceptions allowed to the principle of strict adherence to the reduction commitments are nothing but a mechanism of 'internal' adjustment within the limits set for the entire implementation period. Given the fact that the whole purpose behind the exception is to give room for minor adjustments to unforeseen year-to-year fluctuations of different sorts, this condition simply stipulates that the limited excesses allowed under the preceding two conditions cannot be extended to the entire implementation period. In a sense, this condition makes it clear that these adjustments enable Members only to « borrow » from their « future rights » within the limits prescribed under the preceding conditions.

If we apply this to the hypothetical illustrations we used under the first condition above, the 3 units of money countries A and B used to alleviate their current problems in the year 1997 need to be « paid back » within the remaining years of the implementation period. In no way may the total cumulative amount of expenditure for these countries for the entire implementation period go beyond what a full compliance with the annual reduction commitments would have resulted. In line with what has been said about the essence of this latter amount, this means that any amount spent or quantity exported in any given year between zero and the commitment level will be counted as it is in the calculation of the cumulative amount that would have resulted from full compliance with the annual

(48) Article 9 :2(b)(iii) of the Agriculture Agreement.

reduction commitments. This cumulative amount may thus be as low as zero and as high as the sum total of the annual commitment levels.

In other words, Country A would be required to 'pay back' the 3 units of additional money used in 1997 by reducing its expenses from its commitment levels for the remaining years of the implementation period by a minimum of 3 units. The same holds true for country B. Despite the fact that it did not make full use of its commitment levels for the years 1995 and 1996, the 3 units of additional money spent to subsidize the 1997 exports should be 'paid back' in any of the remaining three years of the implementation period.

This third condition thus provides an additional constraint on the degree of flexibility allowed under the preceding conditions in favour of still greater market orientation. Members are thus allowed only to 'borrow' from their 'future rights' with the mandatory obligation to 'pay back' before the end of the implementation period. It seems precisely for this reason that the flexibility exceptions do not work during the final year of the implementation period, for there would be no time any more to make up for the excess.

4. — *Conclusion*

The following general remarks may be made about reduction commitments in general and the flexibility conditions in particular : Firstly, the essence of the reduction commitments and the rules governing them should be understood as setting only an upper limit, a ceiling, on the policy-making and implementation powers of countries. Members are not only free to subsidize a lesser quantity of exports than their annual commitment levels or spend less than what they have set in their Schedules ; they are highly encouraged to do so. Secondly, although there is no degree in compliance with one's legal obligations, it may even be proper to say that a Member that spends or exports less than its annual commitments complies with both the letter and the spirit of the law more than the one that fully spends and subsidizes exports at its allowable maximum for a given year. Thirdly, the cumulative amounts of budgetary outlays and quantities benefiting from such subsidies that would have resulted from full compliance refer to nothing but the sum total of all actual annual expenditures and quantities below or equal to the commitment levels and those exceptional additions made according to the flexibility criteria. And finally, whatever the actual expenditure of a Member within its bound limits of export subsidies in preceding years of the implementation period, the annual maximum can be exceeded only within the limits set by the Agreement to be rebalanced by reducing one's future expenses and quantities within the duration of the implementation period.