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Volume 7 Number 2 2006/p.152-167 esteyjournal.com

The Estey Centre Journal of
International Law and Trade Policy

The EU's Export Refunds on Processed Foods: Legitimate in the WTO?

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Export subsidies on processed foods are an important trade policy instrument for the European Union. GATT Article XVI legitimised the use of export subsidies on *primary* agricultural products, under certain circumstances, but forbade the use of export subsidies on non-primary products. However it was never satisfactorily resolved whether export subsidies could be paid on the primary agricultural products incorporated into processed products, such as pasta. The Uruguay Round Agreements, and particularly the Agreement on Agriculture (the URAA), apparently legitimised the EU's practice of paying export subsidies on incorporated agricultural products, at least while the Peace Clause was in force. With the demise of the Peace Clause the question arises whether GATT Article XVI has any residual force, given that the range of primary agricultural products exempted by Article XVI from the ban on export subsidies is narrower than the list of agricultural products covered by the URAA.

Keywords: EU, WTO, agriculture, processed foods, export subsidies

Introduction

An important component of the European Union's common agricultural policy (CAP) has been the export subsidies (or export refunds as the EU's food industry prefers them to be called) granted on the export of processed products containing cereals, sugar, egg and milk products – even after the MacSharry reforms of 1992, the Fischler reforms of 2003, and the sugar reform that was agreed in principle in November 2005. From the perspective of the European food industry, these export subsidies recompense them for the additional costs they have incurred sourcing raw materials at CAP-supported prices, allowing them to compete on world markets. However, export subsidies on processed food products are potentially problematic in the WTO. Prior to 1995 they were probably illegal. The provisions of the Uruguay Round Agreement on Agriculture (URAA), and in particular the so-called Peace Clause (Article 13 of the URAA), probably made them legal. With the demise of the Peace Clause at the end of 2003 their status is uncertain, as conflicting WTO provisions seem to apply. Although other authors (notably Chambovey, 2002, and Steinberg and Josling, 2003) have explored the implications for agricultural subsidies of operating the URAA without the Peace Clause, the particular issue addressed in this article does not seem to have been discussed.

The article proceeds as follows. First, it sets out the GATT provisions on export subsidies prior to the implementation of the URAA in 1995. Second, it explains the URAA provisions, given the protection of its Peace Clause. Third, it outlines the importance of these provisions to the EU. Fourth, it explores the apparent conflict in WTO provisions that appears to exist now the Peace Clause has lapsed; and then it concludes.

I. GATT Article XVI

Article XVI deals with subsidies. It was amended in 1955, and subsequently had two parts: Section A dealing with subsidies in general, and Section B dealing with export subsidies. Article XVI differentiated between "primary products", on which the grant of export subsidies – under specified conditions – was permitted, and other goods (non-primary products) on which export subsidies were, in principle, prohibited (McGovern, 1986, p. 322). In particular, Paragraph 4 of Article XVI reads in part, " … as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for

the like product to buyers in the domestic market." McGovern (1986, p. 322) reports that, although "sharply criticised", several panels in the 1970s considered the dual pricing criterion to be met "once the existence of a subsidy had been established". Paradoxically, Paragraph 4 did not apply to all GATT contracting parties until it was re-enacted as a constituent part of GATT 1994, because only a minority of GATT members had been willing to adopt the necessary implementing declaration (Jackson, 1997, p. 286). However, scholars do query whether GATT Article XVI has any substantive role to play in the WTO legal order: Jackson (1997, p. 290), for example, notes that the Uruguay Round Subsidies Code is "sufficiently extensive and detailed that for most purposes it seems to supersede the text of GATT Articles VI [dealing with antidumping and countervailing duties] and XVI, although there may still be a few concepts that would remain embedded in those articles of GATT 1994" (see also Desta, 2002, pp. 157-161). We will revisit this below.

A primary product was "understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade" (Ad Article XVI).

Article XVI was supplemented by the Subsidies Code (Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade) adopted during the Tokyo Round by some, but not all, GATT contracting parties. This introduced "an outright prohibition on export subsidies for all except *certain* primary products" (McGovern, 1986, p. 322; emphasis added). The difference between the list of *primary products* associated with GATT Article XVI, and the list of *certain primary products* in the Tokyo Round Subsidies Code, is that the latter excluded minerals.

Thus it was important to determine the stage at which processing turns a primary product into a processed product. Is pasta, for example, a processed product? In the early 1980s the United States challenged the EU's grant of export subsidies on pasta. The panel, having noted that "neither party had finally contended that pasta was a primary product", expressed its opinion that "pasta was not a primary product but was a processed agricultural product" (GATT, 1983a, paragraph 4.2; see also McGovern, 1986, p. 329).[1]

Whilst accepting that pasta was a "processed agricultural product", the EU argued that the provisions of the Tokyo Round Subsidies Code were unclear, and should be resolved by negotiation rather than by a panel. In its view, the "conclusion that the terms 'primary product' and 'agricultural product' are not synonyms, slightly missed the point" (GATT, 1983b, paragraph 12). What the EU had argued was that "export

subsidies on processed products were permissible to the extent that they related to any primary products which they contained" (McGovern, 1986, p. 329). There was "no obligation to restrict such a subsidy to only those cases where the primary product was exported in the unaltered state" (GATT, 1983a, paragraph 3.11). The export subsidy on pasta simply provided "fair compensation for European pasta producers for purchasing wheat sold on the domestic market at prices higher than world prices as a result of the CAP" (Delcros, 2002, p. 225). Furthermore, i) this had been the EU's practice since 1967 when the CAP for cereals had begun; ii) the United States had itself once subscribed to this view on cotton and textiles; and iii) countries had signed up to the Tokyo Round Subsidies Code "in good faith" and retained "a legitimate right … to avail themselves of the interpretation" established through past practice (GATT, 1983a, paragraph 3.12). However, a majority of the panel rejected this argument (McGovern, 1986, p. 329; see also Desta, 2002, pp. 137-140).

The case prompted Harris, Swinbank and Wilkinson (1983, p. 345) to remark, "The implication of the GATT Panel ruling, if upheld, is that the EC's use of export refunds for processed food products in general is not permissible in GATT. The consequence may be a need to revamp the EC's export refund system for processed products …." However the panel report was never adopted, and the EU continued with its practice of granting export subsidies on processed foods.[2]

Article XVI (and the Tokyo Round Subsidies Code) did not allow for an unlimited use of export subsidies on primary products. Paragraph 3 of Article XVI urged contracting parties "to avoid the use of export subsidies on the export of primary products" and established an "equitable share" rule: "such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product." As many authors have noted, this rule was very difficult to apply, despite the attempts to clarify its provisions in the Tokyo Round Subsidies Code (see for example Hudec, 1998, pps. 8-12, and Josling and Tangermann, 2003).

It should be noted that even if not *prohibited* by virtue of GATT Article XVI, export subsidies on primary products could still be *actionable* under Article VI (in the form of a countervailing duty "levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise") or give rise to a "nullification or impairment" complaint under Article XXIII.

II. The Uruguay Round Agreements Pre-2003

On 1 January 1995, with the coming into force of the Uruguay Round Agreements, a new era of international trade relations began. GATT Article XVI was not repealed: indeed it was retained intact in GATT 1994, one of the Multilateral Agreements on Trade in Goods listed in Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization (together with the Agreement on Agriculture [referred to as the URAA in this paper], the Agreement on Subsidies and Countervailing Measures [which replaced the Tokyo Round codes; referred to as the SCM Agreement in this paper] and others). However, as we have seen above, the scope of the SCM Agreement does lead one to question the present purpose of GATT Article XVI. The challenge facing WTO members trying to respect WTO rules, and facing panels and the appellate body in interpreting the rules, is that of deciding how collectively they regulate trade in any particular instance.

Article 3 of the SCM Agreement is much stricter than Article XVI: it flatly prohibits the use of various subsidies (those "contingent, in law or fact, … upon export performance"; and those "contingent … upon the use of domestic over imported goods") *except* as provided for in the URAA. Furthermore, Article 21 of the URAA specifies that "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A shall apply subject to the provisions of this Agreement." The URAA applies to the "agricultural products" listed in its Annex 1. This URAA list, whilst excluding wood, fish and fish products, goes beyond a listing of primary agricultural products (as defined in GATT Article XVI) and includes processed foods, including pasta. But GATT Article XVI still differentiates between primary and non-primary products in determining whether or not export subsidies are prohibited and, as we have noted, the panel in the unadopted pasta ruling from 1983 had been "of the opinion that pasta" (a rather simple processed food) "was not a primary product but was a processed agricultural product" (as quoted in WTO, 1995, p. 452).

Part V of the URAA sets out the export subsidy commitments. Taken in conjunction with the modalities document (GATT, 1993), it entitled WTO members, on the basis of their past use of export subsidies, to create a product-specific list of budget outlay and quantity commitments for the export subsidy practices listed in Article 9.1 of the URAA. These *listed* subsidies include "subsidies on agricultural products contingent on their incorporation in exported products". For developed countries, after a phased reduction, these budget outlays on *scheduled* products were not to exceed 64 percent of the 1986-1990 base, and the exported "quantities

benefiting from such subsidies" were limited to 79 percent of the base. Clearly this can be more restrictive than GATT Article XVI: if, for example, the base was zero (and the products were not listed, i.e., *unscheduled*), then no subsidised export was now permissible.[3] Furthermore, in contrast to pre-1995 experience, WTO panels have found it possible to rule against export subsidies on agricultural products. The export regime for Canadian dairy products was found to contravene URAA provisions, and elements in the U.S. tax system for foreign sales corporations (FSCs) were deemed, *inter alia*, to grant export subsidies on U.S. agricultural products that threatened circumvention of the United States' bound export subsidy commitments (see van Vliet, 2000, pps. 228-231). In *Upland Cotton,* a highly complex case with many ramifications, it was decided *inter alia* that the U.S. export credit guarantee program was not exempted by the URAA and consequently did constitute a prohibited subsidy under the SCM Agreement (Benitah, 2005, p. 108). In *European Communities – Export Subsidies on Sugar,* the panel found that the EU's export subsidy regime contravened various provisions of the URAA, but declined on grounds of judicial economy to rule whether these elements amounted to prohibited subsidies under Article 3 of the SCM Agreement (WTO, 2005a, paragraph 321).

In setting out the export subsidy commitments in Part V of the URAA, Article 11 makes explicit reference to "incorporated products". The text reads, "In no case may the per-unit subsidy paid on an incorporated agricultural primary product exceed the per-unit export subsidy that would be payable on exports of the primary product as such." This resembles the argument the EU had advanced in the early 1980s in defence of its export subsidies on pasta (see above). Paragraph 9 of Annex 8 of the modalities document (GATT, 1993) put a slightly different twist on the construct. It refers back to Annex 7 of the modalities document, which set out the list of export subsidies that would definitely be subject to reduction commitments (reflected in Article 9.1 of the URAA), and in particular to f): "subsidies on agricultural products contingent on their incorporation in exported products". Thus budgetary outlay (but not volume) commitments were to be established "in respect of subsidies on agricultural primary products incorporated in exported products"; but this did "not preclude the scope for negotiating commitments on particular incorporated products or, where feasible, on quantities".

Thus, whilst the latitude that GATT Article XVI had allowed to grant export subsidies on primary products had been narrowed by Article 3 of the SCM Agreement (by in effect prohibiting export subsidies on minerals, forest products, and fish and fish products) and by the budgetary and volume constraints of the URAA (and only 25 members – counting the EU as one – notified the WTO Secretariat of export subsidy

reduction commitments: see WTO, 2002, p. 1), its scope had apparently been expanded (as compared to its interpretation by the pasta panel) to include "incorporated agricultural primary products". However, in case of potential confusion, "export subsidies that conform fully to the provisions of Part V of [the URAA], as reflected in each Member's Schedule" were made "exempt from actions based on Article XVI of GATT 1994 …" for a nine-year implementation period by virtue of the Peace Clause (URAA Article 13(c)(i)). Quite what is meant by the word "actions", however, will require further consideration in section IV.

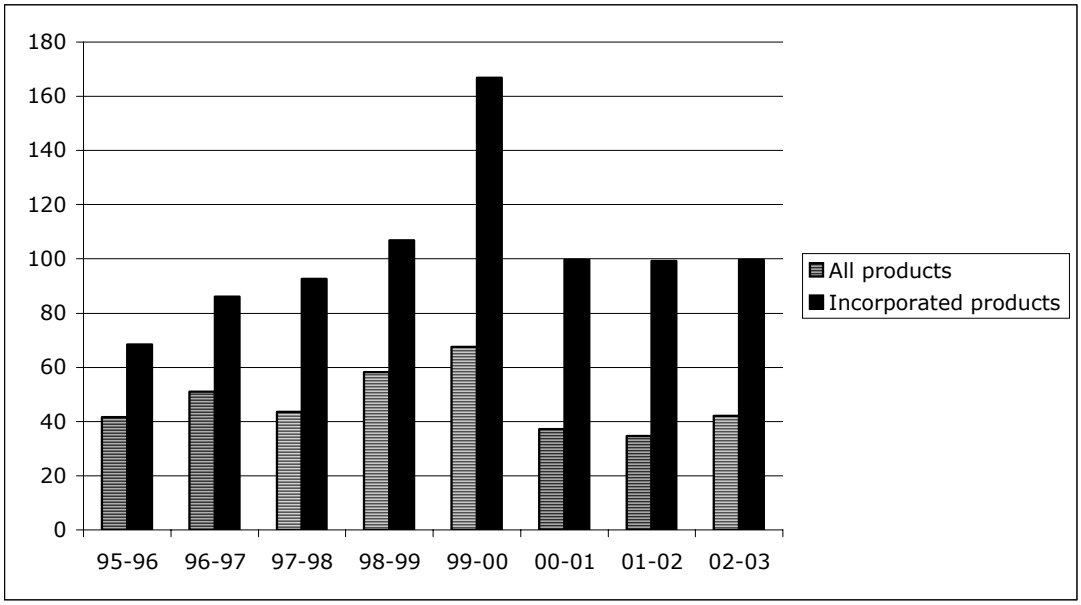
III. The EU's Use of Export Subsidies on Processed Foods

As a result of the Uruguay Round, only 25 founding members of the WTO were entitled to grant export refunds on scheduled agricultural products. Of these, only 5 members (Bulgaria, Canada, EU, Norway and Switzerland) notified a commitment on incorporated products, although the notifications for New Zealand and Panama simply covered "all agricultural products" (WTO, 2002, table 2).

The EU has made assiduous use of its "entitlement". It is allowed to grant €415 million of export subsidies on an annual basis on incorporated agricultural products, some 5.6 percent of its overall export subsidy expenditure entitlement. Over the period 1995/96 to 2002/03, its actual spend on export subsidies on incorporated agricultural products has amounted to 12 percent of its overall spend (author's calculations, based on the EU's annual declarations to the WTO in the G/AG/N/EEC/ document series). Furthermore, it has used virtually 100 percent of its entitlement, as illustrated by figure 1.

During years two to five of the implementation period, based on Article 9.1(b) of the URAA, the EU claimed it was entitled to carry forward unused entitlements from earlier years.[4] Thus, in both 1998/99 and 1999/2000, it declared expenditures in excess of its annual entitlements. However, over these five years, expenditure amounted to 97.4 percent of its aggregate entitlement, and in each of the three subsequent years it amounted to 97.6 percent or above. This has been a binding constraint, and the EU has been forced to ration the allocation of export subsidies to the trade (Noble, 2005, p. 7).[5]

The way the system works is that, at the time of export, a subsidy is determined based upon the composition of the exported product. This is the EU's so-called non-Annex I regime (Harris and Swinbank, 1997, p. 278). Annex I (formerly Annex II) to the Treaty of Rome lists the products covered by the CAP. When certain non–Annex I



Source: Author's calculations from the EU's annual declarations to the WTO in the G/AG/N/EEC/ document series. These documents are downloadable from the WTO website. Note these numbers have not been recalculated to reflect the outcome of the sugar panel ruling.

Figure 1 EU's Use of Export Subsidy Expenditure Entitlements, All Products and Incorporated Products (% of entitlement used)

goods containing certain Annex I products (milk, sugar, cereals and eggs) are exported, they become eligible for export subsidies on the incorporated products. Although the export refund element on cereals was reduced sharply as a result of the MacSharry (1992) and Agenda 2000 (1999) reforms, those on dairy and sugar will remain substantial despite the Fischler (2003) and sugar (2005) reforms. If one refers to the export subsidies determined by tender in January 2006 for butter and sugar (as reported in *Agra Europe*) and deducts the further cuts in support prices agreed in the Fischler reforms for dairy, and in November 2005 for sugar, subsidies of €625 (butter) and €132 (sugar) per tonne remain (25 and 32 percent of the new support prices respectively).

EU exports of processed food products eligible for export subsidies under the non–Annex I regime have risen sharply in recent years. Exact data are complex to assemble, but figures made available on the website of the Confédération des industries agro-alimentaires de l'UE (CIAA) suggest that of the €57.8 billion of agricultural, food and drink exports from the EU in 2002, €8.8 billion fell within the

tariff lines under which such export subsidies could be granted.[6] This latter product grouping, selected by the author, saw the value of export sales rise from €6.8 billion in 1999 to €9.1 billion in 2004, with particularly strong growth in codes 1806 (chocolate), from €0.9 to €1.3 billion; 1905 (pastries or biscuits), from €1.0 to €1.4 billion; and 2106 (food preparations), from €1.6 to €2.5 billion. An annual export subsidy spend of €415 million represented 6.1 percent of the 1999 export value of this grouping of export subsidy–eligible non–Annex I goods, declining to 4.6 percent in 2004. Overall these are not particularly big numbers, but bearing in mind likely trading margins, the fact that they are averages, and that the denominator is doubtless too large, they could indicate potential problems in some sectors, particularly where sugar and dairy products are important cost components.

IV. The Uruguay Round Agreements Post-2003

We suggested above that although there might have been a potential conflict between the provisions of GATT Article XVI on the one hand, and the URAA provisions on export subsidies for incorporated products on the other hand, the Peace Clause resolved the issue: export subsidies were exempt from actions based on GATT Article XVI. But the Peace Clause expired at the end of 2003 (or the relevant 2003/04 marketing year, depending upon interpretation). How then is the matter to be resolved?

One interpretation, offered by Chambovey (2002, p. 311), is that URAA Article 21.1 (which reads, "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of the Agreement") gives only a residual role to the other Annex 1A Agreements: that these other agreements apply only to the extent that the matter is unregulated by the URAA. But if the URAA always prevails, what was the purpose of the Peace Clause? Its existence implied that it had some purpose, and that the interaction between the URAA and the other Annex 1A Agreements was potentially changed by its expiry. Article 21.1 does, after all, refer to "the provisions of this Agreement", which presumably means *all* its provisions, including Article 13 (the Peace Clause).

Consequently Chambovey (2002, p. 313) concludes that "the very existence of the Peace Clause suggests that the criterion of relationship enshrined in Article 21.1 cannot be interpreted as a sort of *lex specialis* providing an exemption from the other WTO provisions dealing specifically with the same matters as the URAA. However, this should not mean that, in the absence of the Peace Clause, the other relevant Annex 1A Agreements would automatically apply to the agricultural subsidies" that had previously been protected by the Peace Clause. Chambovey suggests taking a middle

way. But what is that middle way? In particular, did the demise of the Peace Clause render export subsidies on incorporated products potentially challengeable under GATT Article XVI?

Chambovey (2002, p. 313) goes on to suggest that "the URAA would supersede the other Annex 1A Agreements" in two (potentially overlapping) situations: "to the extent of a conflict between provisions dealing 'specifically with the same effect'", and "when the application of a provision of another Annex 1A Agreement does not enable a URAA provision to have appropriate effect". Although Chambovey does not deal specifically with the issue raised in this paper, the thrust of Chambovey's argument suggests that the URAA would still trump GATT Article XVI (see also Delcros, 2002, particularly p. 251).

Chambovey and Delcros, European trade officials from Switzerland and the EU respectively, but expressing their personal rather than their institutions' views, were clearly unimpressed by the notion that the demise of the Peace Clause significantly changed the prospect of successfully challenging agricultural policies. However two U.S.-based academics (Steinberg and Josling, 2003) took a rather different view. They declare, "When the Peace Clause expires, the full substantive and procedural legal apparatus of the WTO may be used … to challenge EC and US agricultural subsidies" (p. 370). Upon expiry of the Peace Clause, "WTO jurisprudence and the ordinary meaning of these [GATT 1994, the URAA, and the SCM Agreement] agreements indicate that they should be read cumulatively with various elements of all three agreements applying to agriculture simultaneously so as to create a coherent, integrated system" (p. 374). They suggest that two general principles would apply: first, "the more specific agreement prevails over the more general", and second, "under the public international law principle of effective interpretation, wherever possible, agreements are to be read to give meaning and legal effect to all the terms". Further, the "principle of effective interpretation has been read to suggest that wherever possible, agreements should be interpreted consistently with each other so as not to trigger the specificity principle (which could render meaningless language in the less specific agreement)" (p. 375).

Steinberg and Josling go on to suggest six possible legal routes for challenging agricultural subsidies after 2003, five of which they suggest are "implausible"; and the most unlikely outcome is the determination that agricultural subsidies are illegal under Article 3 of the SCM Agreement (2003, pps. 376-377). They argue that it is important to distinguish between "legality and actionability": the Peace Clause "constrains actionability through the end of 2003 and does not bear on the question of legality" (p. 377). Thus Article 3 of the SCM Agreement, given its interaction with the URAA,

makes legal export subsidies on agricultural products that conform to the provisions of the URAA, regardless of the Peace Clause (with the corollary that export subsidies on agricultural products that do not conform to the provisions of the URAA are prohibited subsidies under Article 3 of the SCM Agreement). However, the Peace Clause did exempt export subsidies on agricultural products that conform to the provisions of the URAA from *actions* under Part III of the SCM Agreement (dealing with "actionable subsidies") (p. 378).

Rather confusingly, in developing their argument, Steinberg and Josling (2003, p. 378) also state, "GATT Article XVI:4 makes illegal export subsidies for any product except 'primary products', which includes agricultural goods." However, as argued above, this is contestable. It was not the view of the pasta panel: its view was that processed agricultural products (in particular pasta) were not "primary products", and the WTO agreements do not redefine the term "primary products". Article 3 of the SCM Agreement, however, in prohibiting export subsidies does so "[e]xcept as provided in the Agreement on Agriculture". Thus it appears to make illegal some export subsidies (on minerals, fish and forest products) that would have been legal under GATT Article XVI, and conversely make legal export subsidies on a longer list of agricultural products as specified in Annex 1 to the URAA.

The only reference to GATT Article XVI in the URAA is in the Peace Clause (Article 13). As regards export subsidies, Article 13(c)(ii) reads as follows: "exempt from *actions* based on Article XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement" (emphasis added). If GATT Article XVI no longer applies, why mention it? If GATT Article XVI still applies, how are its provisions on primary products to be reconciled with the SCM Agreement's provisions on agricultural products, bearing in mind the public international law principle of effective interpretation, that "agreements are to be read to give meaning and legal effect to all the terms"?

If the sole intent of Article 13(c)(ii) was to make URAA-compliant export subsidies non-actionable under Part III of the SCM Agreement (Articles 5 to 7), why mention SCM Article 3? There is nothing in the URAA that defines what is meant by the word "actions" in Article 13(c)(ii). Although the SCM Agreement refers to actionable and non-actionable subsidies (in Parts III and IV respectively), the word "action" is not used in Parts III and IV of the agreement. It is first used in footnote 37 ("procedural action") in Part V dealing with countervailing measures and the application of GATT Article VI. Consequently it is unclear what the word "actions" means in URAA Article 13(c)(ii).

From this we provisionally conclude the following. Whilst the Peace Clause was in force, the WTO provisions taken together meant that subsidies on all the agricultural products listed in Annex 1 of the URAA were not prohibited, provided they were applied in accordance with the provisions of the URAA.[7] However, once the Peace Clause lapsed, the list of products in Annex 1 became, potentially, divisible into two: *primary* agricultural products, which were not prohibited by either the SCM Agreement or GATT Article XVI; and *non-primary* agricultural products, which, whilst not prohibited by the SCM Agreement, arguably are still prohibited by GATT Article XVI:4.

One of the limited outcomes of the sixth WTO Ministerial in Hong Kong in December 2005 was an agreement that, in the context of an overall agreed outcome to the Doha Development Agenda, export subsidies would be eliminated by 2013 (WTO, 2005b, para. 6). In effect, as of that date, the provisions of Part V of the URAA would become redundant and could be repealed, and all export subsidies would become prohibited subsidies under the SCM Agreement.

However, a successful conclusion of the Doha Round is not at all certain. In July 2006 the talks were suspended. If they are not restarted, with a real prospect of success, WTO members that had hoped to secure agricultural trade liberalisation through negotiation might well resort to the dispute settlement mechanism. A challenge to the EU's export subsidies on processed foods could prove a tempting target, *if* it could be demonstrated that Article XVI:4 now applies. First, to recap, Article XVI:4 forbids the "grant either directly or indirectly [of] any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market"; and in the 1970s several panels considered the dual pricing criterion to be met "once the existence of a subsidy had been established" (McGovern, 1986, p. 322). Thus a complainant would not have to show that its industry had been damaged, or that the EU's world market share had increased, as a result of the subsidy: the existence of a subsidy not authorised by the URAA would suffice. Second, it would be the EU's food processing industry, rather than its farmers, that would bear the commercial brunt of a successful challenge. The prospect of this could very well strengthen the resolve of the EU's food industry to lobby for further CAP reform. Although an expansion of the inward processing relief (IPR) could offer some relief for export-oriented food processors, IPR is of necessity a bureaucratic procedure for industry; and it does not appeal to the farm lobby, as it provides no market outlet for EU-grown raw materials.

V. Conclusions

Pre-1995, under GATT 1947, whilst export subsidies could be paid on *primary products* under certain circumstances, their use on non-primary products was forbidden. The legal status of export subsidies paid on primary agricultural products incorporated into processed products (such as durum wheat in pasta) was unclear. The Uruguay Round Agreements tightened up the requirements but, by introducing a new distinction between *agricultural products* listed in Annex 1 of the URAA, and all other products on which an outright export subsidy prohibition applied, doubtless legalised the payment of export subsidies on incorporated agricultural products whilst the Peace Clause applied. With no Peace Clause in place, there does seem to be a discord between Article XVI:4 of GATT 1994, and the provisions of the SCM Agreement and the URAA. This may mean that there is now a GATT Article XVI:4 prohibition in place that specifies the class of goods (*primary agricultural products*) on which export subsidies can be paid, an approach that is more limiting than the list of agricultural products in Annex 1 of the URAA. If the Doha Round remains stalled, the CAP's international critics might well use the dispute settlement mechanism to find out.

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Endnotes

1. In another unadopted report (*EEC – Subsidies on Export of Wheat Flour*, 1983), the United States had argued that wheat flour was a non-primary product, but the panel treated it as a primary product (WTO, 1995 p. 452).
2. The pasta case was, however, brought to a formal conclusion in August 1987, after an interim agreement in 1986. The EU, in a bilateral deal with the United States, agreed that 50 percent of its pasta exports to the United States would be produced under inward processing relief (IPR) arrangements (under which the raw material would be imported into the EU free of import duty, and the resulting pasta exported without export subsidy), and that the export subsidy on the remaining exports to the United States would be reduced by 27.5 percent (Commission of the European Communities, 1988, p. 113). See Noble (2005) for a description of current IPR arrangements.
3. Apart from the remainder of this paragraph, the substantive discussion of this paper deals with *listed* export subsidies (i.e., those listed in Article 9.1 of the

URAA) on *scheduled* products (i.e., those products for which a WTO member has entered budgetary and/or subsidised volume commitments in its schedule of reduction commitments, as required by URAA Article 3). It does not deal with *unlisted* export subsidies on products, whether *scheduled* or *unscheduled*, URAA Article 10 on the prevention or circumvention of export subsidy commitments, or the use of listed export subsidies on unscheduled products. For a full discussion of these complex issues see Desta (2002, chapters 6-8).

4. Leetmaa and Ackerman (1998, p. 22) claim this was a wrong interpretation: that the provisions instead allowed countries in this transitional period to "pay back" any permitted overspend they had incurred in earlier years. See also Desta (2002, pp. 267-277).
5. However, the 2004 enlargement of the EU from 15 to 25 member states has relaxed this constraint, in that refunds had previously been paid on EU-15 exports to the new member states (Noble, 2005, p. 5). This raises the question, not discussed here, of the appropriateness of applying this EU-15 limit to EU-25.
6. http://stats.ciaa.be/pages/homepage.asp accessed 1 December 2005. Original data from Eurostat and Comext. Author's extraction.
7. They could still be subject to countervailing duties, and the Peace Clause only insisted that members show "due restraint in initiating any countervailing duty investigations" (Article 13(c)(i)).

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