

# Legal issues of European integration

**1986/1**

**Gary Horlick, Reinhard Quick and Edwin Vermulst/Government Actions against Domestic Subsidies, An Analysis of the International Rules and an Introduction to United States' Practice**

**Peter van den Broek/The Protection of Property Rights under the European Convention on Human Rights**



**J.Th.S. Leenen/Equal Treatment of Male and Female Employees under European Community Law – Some Recent Case-law of the Court of Justice**

**Jan Klabbers and Annerie Vreugdenhil/Dispute Settlement in GATT: DISC and its Successor**

**KLUWER LAW AND TAXATION PUBLISHERS**

# LEGAL ISSUES OF EUROPEAN INTEGRATION 1986/1

LAW REVIEW  
OF THE EUROPA INSTITUUT,  
UNIVERSITY OF AMSTERDAM

Gary Horlick, Reinhard Quick and Edwin Vermulst/Government Actions  
against Domestic Subsidies, An Analysis of the International Rules and an  
Introduction to United States' Practice

Peter van den Broek/The Protection of Property Rights under the European  
Convention on Human Rights

A.Th.S. Leenen/Equal Treatment of Male and Female Employees under  
European Community Law – Some Recent Case-law of the Court of Justice

Jan Klabbers and Annerie Vreugdenhil/Dispute Settlement in GATT: Disc  
and its Successor

KLUWER LAW AND TAXATION PUBLISHERS

DEVENTER

ANTWERP · LONDON · FRANKFURT · BOSTON · NEW YORK

This Review may be cited as  
LIEI 1986/1

*Distribution in the USA and Canada*  
Kluwer Law and Taxation Publishers  
101 Philip Drive  
Norwell, MA 02061  
USA

"The library of Congress has cataloged this  
serial publication as follows:"

**Legal issues of European integration.** 1974-  
[Deventer] Kluwer.

v. 24 cm.

Semiannual

"Law review of the Europa Instituut, University of Amsterdam."

Key title: Legal issues of European integration, ISSN 0377-0915.

1. European federation -- Periodicals. I. Amsterdam. Universiteit.  
Europa Instituut.

K12.E33

341.24'2

75-644353

MARC-S

Library of Congress

77[8208]

D/1986/2664/72

ISBN 90 6544 2731

© 1986, Kluwer Law and Taxation Publishers, Deventer, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

**LEGAL ISSUES OF EUROPEAN INTEGRATION**

**1986/1**

# LEGAL ISSUES OF EUROPEAN INTEGRATION

## LAW REVIEW OF THE EUROPA INSTITUUT UNIVERSITY OF AMSTERDAM

### EDITORS:

D.J. Gijlstra  
R.H. Lauwaars  
E.L.M. Völker

### EDITORIAL BOARD:

H.G. Angelo, Davis, Brussels  
B. Baardman, Rotterdam  
A.M. Donner, Groningen  
B. van der Esch, Brussels  
B. Grossfeld, Münster  
J. van Hoorn, Amsterdam  
R. Kovar, Strasbourg  
O. Lando, Copenhagen  
H.G. Schermers, Leiden  
G.M. Schmitthoff, London  
G. Schrans, Ghent  
I. Seidl-Hohenveldern, Vienna  
E. Stein, Ann Arbor  
M. Waelbroeck, Brussels  
H.W. Wertheimer, Delft

Legal Issues of European Integration is published half-yearly.

All correspondence on the content of this review should be addressed to the editors at Europa Instituut of the University of Amsterdam, P.O. Box 19123, 1000 GC Amsterdam, The Netherlands.

All correspondence concerning subscriptions and distribution should be directed to Kluwer Law and Taxation Publishers, P.O. Box 23, 7400 GA Deventer, The Netherlands.

# TABLE OF CONTENTS

## GOVERNMENT ACTIONS AGAINST DOMESTIC SUBSIDIES, AN ANALYSIS OF THE INTERNATIONAL RULES AND AN INTRODUCTION TO UNITED STATES' PRACTICE

BY GARY HORLICK, REINHARD QUICK, EDWIN VERMULST

I.	<i>Introduction</i> .....	1
II.	<i>The International Rules on Subsidies and Countervailing Duties</i> .....	3
	A. <i>The GATT Provisions on Subsidies and Countervailing Duties</i> .....	3
	1. GATT Article XVI .....	3
	2. GATT Article VI .....	8
	B. <i>The Subsidies Code</i> .....	11
	1. Background .....	11
	2. Track II .....	12
	a. General Provisions .....	13
	b. Special Provisions .....	15
	c. Procedural Provisions .....	17
	3. Track I .....	19
	C. <i>Final Remarks about the International Rules</i> .....	21
III.	<i>United States Countervailing Duty Laws as Weapons against Domestic Subsidies</i> .....	24
	A. <i>The Trade Agreements Act of 1979 – A Survey of the Countervailing Duty Law</i> .....	24
	1. Background .....	24
	B. <i>Section 771(5) and (6) – Substantive Rules on Subsidies</i> .....	26
	1. Background .....	26
	2. Section 771(5)(B) – Domestic Subsidies .....	28
	a. De Minimis Test .....	29
	b. Specificity Test .....	30
	c. The meaning of ‘if provided or required by government action’ .....	31
	d. ‘Whether publicly or privately owned’ – Non-Market Economies .....	32
	e. ‘Whether paid or bestowed directly or indirectly’ .....	33
	f. Section 771(5)(B) and Export Subsidies .....	33
	g. Section 771(5)(B) (i) to (iv) .....	35
	3. Valuation and Net Calculation of Domestic Subsidies ...	38
	a. Valuation .....	38
	b. Net Calculation .....	42

## CONTENTS

C. <i>The Trade and Tariff Act of 1984</i> .....	44
1. Background .....	44
2. Upstream Subsidies .....	45
3. Compatibility with GATT and the Subsidies Code .....	46
IV. Conclusions .....	47

## THE PROTECTION OF PROPERTY RIGHTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BY PETER VAN DEN BROEK

I. Introduction .....	52
II. History of Article 1 .....	53
III. Other Articles of the Convention .....	55
A. Machinery Provisions of the Convention .....	55
B. Article 6 .....	56
C. Article 8 .....	58
D. Articles 13-18 .....	59
IV. General Rules Regarding the Convention .....	60
A. Hierarchy and Precedence .....	60
B. Interpretation Rules .....	61
1. Vienna Convention .....	61
2. Generous and Evolving Interpretation .....	61
3. Margin of Appreciation .....	62
4. Court of Fourth Instance .....	63
5. Concrete Cases and Abstract Interpretation .....	63
C. Temporal Restrictions .....	63
V. General Nature of Right .....	64
VI. Persons Entitled to Protection .....	65
VII. Property Protected .....	67
A. Statutory Rights .....	67
1. Pension Rights .....	67
2. Other Statutory Claims .....	69
3. Licenses .....	69

## CONTENTS

B. Business and Employment Rights .....	70
1. Employment Rights .....	70
2. Business Rights .....	70
VIII. Interference with Property Rights .....	72
A. Deprivations .....	72
1. Excepted Deprivations .....	74
a. Confiscations .....	74
b. Regulation of Private Rights .....	75
B. Control of Use .....	76
C. Taxation .....	76
D. Other Interferences .....	76
E. Positive Obligations .....	77
IX. The Requirements for Justification .....	78
A. Public Interest .....	79
B. Relationship of Aim and Interference .....	82
1. Court's Jurisprudence .....	82
2. Commission's Jurisprudence .....	85
3. A Test of Proportionality .....	85
4. Application of the Rule of Proportionality .....	86
C. 'Subject to the Conditions Provided for by Law' .....	88
D. 'Subject to the Conditions Provided for by the general Principles of International Law' .....	89
X. Summary .....	89

## EQUAL TREATMENT OF MALE AND FEMALE EMPLOYEES UNDER EUROPEAN COMMUNITY LAW – SOME RECENT CASE-LAW OF THE COURT OF JUSTICE

BY A. TH. S. LEENEN

I. Introduction .....	91
II. The elements of the legal term 'discrimination' .....	92
III. The different notions of discrimination .....	93
A. Direct/indirect discrimination .....	93



## CONTENTS

B. Overt ('direct') and disguised ('indirect') discrimination .....	96
C. Formal/material discrimination .....	97
IV. Article 119 of the EEC Treaty and the system of the three Directives .....	98
V. The prohibition of sex discrimination and its exceptions .....	101
A. Objectively justified economic grounds .....	102
B. Exceptions made in Directive No. 76/207/EEC .....	102
C. Exceptions contained in the Third Directive .....	105
VI. Procedures for legal protection and the sanctioning of the prohibition of discrimination .....	107
A. Claims by judicial process .....	107
B. Sanctioning discrimination: Article 6 of the Second Directive .....	108
C. The 'social development' clause of Article 9, para. 2, of the Second Directive, and of Article 7, para. 2 of the Third Directive .....	111
VII. Summary and conclusions .....	113

## DISPUTE SETTLEMENT IN GATT: DISC AND ITS SUCCESSOR

BY JAN KLABBERS AND ANNERIE VREUGDENHIL

I. GATT .....	115
A. Institutional framework of the GATT .....	116
B. Dispute settlement in GATT .....	117
II. Export subsidies .....	119
A. General remarks .....	119
B. Article XVI .....	121
III. Avoidance of double taxation .....	123
IV. Domestic International Sales Corporations .....	124
A. Backgrounds of DISC in the United States .....	124

## CONTENTS

B. The DISC legislation .....	125
C. The effect of DISC on US exports .....	127
D. Effects in the long run .....	128
E. The reaction of the European Communities .....	128
F. The procedure within the GATT .....	129
V. Foreign Sales Corporations .....	132
A. General remarks .....	132
B. Differences between DISC and FSC .....	134
VI. Does the FSC legislation conform to GATT? .....	134

GARY HORLICK,\* REINHARD QUICK,† EDWIN VERMULST‡

## GOVERNMENT ACTIONS AGAINST DOMESTIC SUBSIDIES, AN ANALYSIS OF THE INTERNATIONAL RULES AND AN INTRODUCTION TO UNITED STATES' PRACTICE

'The United States has become far and away the largest user of countervailing duty proceedings. All other nations combined have probably not used countervailing duties explicitly to offset subsidies more than about two dozen times. . . .

(T)he United States is blazing a trail.'§

### I. INTRODUCTION

In the present world economic situation subsidies have become an important and actual issue. The industrialized countries, facing difficult structural changes in their economies, are subject to severe political pressure to use subsidies to aid the adjustment process (indeed, subsidies are sometimes used to slow down the adjustment process, although protectionist measures are used more frequently for that purpose). The heavily indebted developing countries, considering exports the only means of paying off their debts and so diminishing their burden, try to boost their export activities by granting subsidies to their producers. The effects of such government aids, however, go beyond the intentional goals of the subsidizing countries and can create serious distortions in other countries. For this reason, and because government intervention is growing almost worldwide, the need for abiding by international rules becomes more and more acute.

Difficulties in tackling the problem of government aids are encountered at the very beginning, when it comes to defining what is, and what is not, to be considered a subsidy. The difficulty is faced by government officials at the decision-making level, negotiators in international fora and economists. Even

\* O'Melveny & Myers, Washington, DC, formerly Deputy Assistant Secretary of Commerce for Import Administration (1981-1983); International Trade Counsel to the Senate Finance Committee (1981); J.D. Yale 1973.

† Verband der Chemischen Industrie, e.V., Frankfurt, LL.M. Michigan 1984, Dr. Jur. Mannheim 1983.

‡ Van Bael & Bellis, Brussels; Foreign Associate O'Melveny & Myers, LL.M. Michigan 1984, J.D. Utrecht 1983.

§ Jackson, 'Import Practices: Are They Really Unfair?', 30 L. Quadrange Notes, 26, 30 (1986).

when a definition is found, difficulties remain in calculating the size and effects of subsidies. One of the most satisfactory broad definitions so far has been suggested by Malmgren: he considers a subsidy to be

'any government action which causes a firm's, or a particular industry's, total net private cost of production to be below the level of costs that would have been incurred in the course of producing the same level of output in the absence of the government action'.<sup>1</sup>

Presumably, this would include the subsidizing effect (e.g., extra revenue for the firm) from measures not conventionally considered as subsidies, such as tariff protection.

There are two basic kinds of subsidies: domestic subsidies and export subsidies. Those which are not contingent on the export destination of the production can be termed domestic subsidies; those which are granted on condition that the product is exported are export subsidies. (Although import competing interests sometimes claim that domestic subsidies to goods in excess of domestic demand are export subsidies – a definition which could impact quite heavily on small countries minimum efficient-size exporting plants.)

The scope of the present article will be limited to an analysis of domestic subsidies.

Discussions and negotiations in international fora in recent years have focused mainly on export subsidies whose impact on international trade is self-evident. The result has been a certain degree of regulation. However, negotiators have been unable to reach satisfactory agreement on the way domestic subsidies should be treated, mainly because of divergent opinions among countries on what is to be considered an unacceptable domestic subsidy. Not only is governmental involvement in national economics increasing, government officials also find more and new ways of helping the economy of their countries, means which are often indirect, hidden and difficult to quantify.

Governments decide to grant subsidies because of various social and political reasons which are not always justified in economic terms. By providing financial support governments try to correct the distortions which are present in the economy of their countries and which are often a result of one or more of the following factors: infant-industry situations, ailing industries, dislocation costs, overvalued currencies and 'externalities'.

Infant-industry situations exist when a country has the potential to produce a given product but cannot afford it because the initial costs appear prohibitive.

In the case of an ailing industry, the government acts to save or adjust a specific industrial sector which it considers vital to the need of its country, e.g., for strategic or political (employment) reasons.

1. Malmgren, *International Order for Public Subsidies*, at 22 (1977). Cf. Holmer, Haggerty, Hunter, 'Identifying and Measuring Subsidies Under the Countervailing Duty Law: An Attempt at Synthesis', in *The Commerce Department Speaks on Import Administration and Export Administration*, at 315 (1984): '... a subsidy exists where there is (1) selective government treatment ... and (2) the selective government treatment is different from the treatment that the recipient otherwise would receive in the marketplace.'

Dislocation costs are expenses solely incurred by a producer when relocating to an economically disadvantaged area or region.

An 'externality' is present when there is a discrepancy between private and social costs or benefits of an enterprise.

The reason why domestic subsidies are so widely used is that they are considered more efficient in correcting distortions than either tariffs or quotas because the distortions are inherent in the domestic market. If quotas were used, in some situations the effects would be the same, but there would be a risk to create new distortions which might give rise to the adoption of corrective measures elsewhere and so start a chain reaction.

Domestic subsidies, however, may have adverse effects on other countries. They may increase the flow of imports into another country and thus injure its industry; also, they may reduce the exports of other countries to third countries, or to the subsidizing country itself. This 'beggar thy neighbour' effect of domestic subsidies is obviously unacceptable to other countries. Under GATT they may therefore levy countervailing duties against subsidized exports or start an international proceeding against those exports.

The present article focuses on domestic subsidies and countervailing duties. The first part deals with the international rules provided by GATT, particularly Articles VI and XVI<sup>2</sup> and the Subsidies Code.<sup>3</sup> The second part is devoted to the application of US countervailing duty laws against domestic subsidies and includes a brief analysis of the 1984 Trade and Tariff Act provisions on upstream subsidies.

## II. THE INTERNATIONAL RULES ON SUBSIDIES AND COUNTERVAILING DUTIES

### A. THE GATT PROVISIONS ON SUBSIDIES AND COUNTERVAILING DUTIES

#### 1. GATT ARTICLE XVI

Although the GATT Preparatory Work<sup>4</sup> – and later the Havana Charter<sup>5</sup> –

2. In the following, Articles in roman numbers are those of GATT.

3. In the following, Articles in arabic numbers are those of the Subsidies Code.

4. See for example: US Suggested Charter, Dep't. State Pub. No. 2598, Art. 25, at 18-20 (1946); 'Report of the First Session of the Preparatory Committee, London Report', UN Doc. E/PC/T/33 (1946), Art. 30, at 32; Report of the Second Session of the Preparatory Committee, Geneva Report, UN Doc. E/PC/T/186 (1947), Arts. 25-29, at 26-28.

5. 'Havana Charter for an International Trade Organization, Contained in the Final Act of the United Nations Conference on Trade and Employment'. UN Doc. E/Conf. 2/78; UN Pub. Sales No. 1948 II.D.4; Arts. 25-28; for a discussion of the articles of the Havana Charter relating to subsidies see Wilcox, *A Charter For World Trade*, pp. 126 *et seq.* (1949).

contained rather detailed provisions on subsidies.<sup>6</sup> Article XVI originally only required the contracting parties to notify the GATT Secretariat of their subsidies and to consult with other contracting parties whenever their subsidies caused injurious effects.<sup>7</sup> The reluctance of the contracting parties to adopt the proposed rules on subsidies shows that the subject was controversial already in 1948: opinions differed on the different treatment accorded to domestic and export subsidies<sup>8</sup> and on the somewhat ambiguous distinction between export subsidies on manufactured and primary products.<sup>9</sup>

At the 1955 Review Session the CONTRACTING PARTIES amended Article XVI by adding a section B (Article XVI paragraphs 2-5), which dealt solely with export subsidies. Furthermore they added a series of Interpretative Notes to Annex I.<sup>10</sup> Recognizing the distortive effect of export subsidies and basically following the pattern of rules laid down in the Havana Charter,<sup>11</sup> they established limitations on the use of export subsidies both on primary<sup>12</sup> and non-primary products.<sup>13</sup> Thus, they incorporated into GATT not only the distinction between domestic and export subsidies but also the different treatment of export subsidies on primary and non-primary products. Many developing countries, however, objected to the latter;<sup>14</sup> indeed the amendment seemed to favour the subsidy programs of industrialized countries.<sup>15</sup>

6. The basic ideas regarding international rules on subsidies were the following: (1) prohibition of export subsidies on manufactured products, (2) more lenient rules on export subsidies on primary products and (3) the acceptance of domestic subsidies coupled with a notification and consultation requirement. For a discussion of the proposals see Jackson, *World Trade and the Law of GATT*, 376-371 (1969) (hereinafter cited Jackson, *World Trade*); Tarullo, *The MTN Subsidies Code: Agreement without Consensus*, pp. 6 *et seq.*, unpublished article, to be published in: *Interpretation and Implementation of International Economic Agreements, the American Society of International Law*; see also Phegan, 'GATT Article XVI:3 - Export Subsidies and "Equitable Shares"', 16 J.W.T.L. 251, 252 (1982).

7. The original text of Art. XVI can be found in GATT, *Basic Instruments and Selected Documents* (hereinafter cited GATT, BISD), Vol. I, at 39, 40 (1952).

8. See Jackson, *World Trade*, at 369, particularly footnotes 8 and 10.

9. This distinction was proposed by the US during the negotiations in order to legitimize its price support and export subsidy programs for agricultural products and was objected to by less developed countries; see Jackson, *World Trade*, at 369; for a criticism of this approach see Brown, *The United States and the Restoration of World Trade*, at 115-119 (1950); Dam, *The GATT*, 132 (1970) (hereinafter cited Dam, *The GATT*).

10. The amendments came into effect in 1957 for those nations accepting them; 278 UNTS 168 (1957).

11. See generally Jackson, *World Trade*, at 371; for a discussion of the 1955 amendment in comparison with the subsidy provisions of the Havana Charter see Tarullo, *supra* n. 6, pp. 9 *et seq.*

12. Art. XVI para. 3 urges the contracting parties 'to seek to avoid the use of subsidies on the export of primary products' and contains the obligation not to grant export subsidies on primary products that would result in 'more than an equitable share of world export trade' for the subsidizing country.

13. Art. XVI para. 4 contains the obligation not to grant any export subsidy on non-primary products 'where the 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.'

14. See Jackson, *World Trade*, at 372.

15. The more lenient treatment of export subsidies on primary products which are likely to be granted by developed countries and which seem to be directed against the competition of less developed countries conflicts with the prohibition of export subsidies on non-primary products which are likely to be granted by less developed countries in order to build up an industry.

Therefore it was not surprising that in 1960 only few developing countries accepted the 'Declaration Giving Effect to the Provisions of Article XVI Paragraph 4'<sup>16</sup> and thereby agreed to prohibit export subsidies on non-primary products.<sup>17</sup> The Declaration was prepared by a Working Party on Article XVI which included in its report a non-exhaustive list of eight practices which were regarded as export subsidies.<sup>18</sup>

In summary, until the end of the Tokyo Round, the GATT rules on subsidies were the following:

- (1) the notification and consultation requirement of Article XVI paragraph 1, accepted by all contracting parties;
- (2) the undertaking not to grant export subsidies on primary products that would result in more than an 'equitable share' of world export trade in that product, accepted by all contracting parties since 1969;<sup>19</sup>
- (3) the prohibition of export subsidies on non-primary products which result in 'dual pricing', accepted only by seventeen developed countries.<sup>20</sup>

While the 1955 amendments and the above mentioned report of the Working Party were attempts to clarify the existing GATT provisions on subsidies, no agreement was reached on probably the most important issue, *definition* of the term subsidy.<sup>21</sup> Such definition 'might neither be necessary nor feasible' with regard to the operation of Article XVI,<sup>22</sup> but certainly would be useful with regard to Article VI.<sup>23</sup>

As far as domestic subsidies were concerned, the only applicable rule consisted of the notification and consultation requirement of Article XVI paragraph 1. Domestic subsidies were not forbidden as such.<sup>24</sup>

The phrase 'increased exports' was clarified by the CONTRACTING PARTIES in 1948 as follows:

'The phrase increased exports in line 3 of Article XVI of the General Agreement was intended to include the concept of maintaining exports at a level higher than would otherwise exist in the absence of the subsidy. . . .'<sup>25</sup>

In 1960 the CONTRACTING PARTIES elaborated the 1948 statement:

16. GATT, BISD, 9th Supp., p. 32, 33 (1961).

17. For a description of this confusing process of stand-still agreements, acceptance of the prohibition of Art. XVI para. 4, and nonacceptance thereof see Jackson, *World Trade*, pp. 371 *et seq.*; see furthermore Dam, *The GATT*, p. 144, 145; Butler, 'Countervailing Duties and Export Subsidization: a Re-emerging Issue in International Trade', 9 *Va. J. Int'l. L.* 82 90-93 (1968).

18. GATT, BISD, 9th Supp. 185-188 (1961).

19. Jackson, *World Trade*, 376; Tarullo, *supra* n. 6 at 11.

20. Jackson, *World Trade*, 374.

21. For criticism of this lack of definition see Pestieau, 'Subsidies and Countervailing Duties: The Negotiating Issues', Report to the Canadian Economic Policy Committee, at 6 (1976).

22. GATT Panel Report on the Operation of the Provisions of Art. XVI, GATT, BISD, 10th Supp., 201, para. 23 at 208 (1962).

23. See *infra* nn. 46 to 50 and accompanying text.

24. GATT, BISD, 9th Supp., 190 (1961).

25. GATT, BISD, Vol. II, p. 44 (1952).

'*Mutatis mutandis* this interpretation must apply to the effect on imports. The criterion is therefore what would happen in the *absence* of a subsidy. While the Panel agreed that in most cases such a judgment cannot be reached only by reference to statistics, nevertheless, a statistical analysis helps to discern the trends of imports and exports and may assist in determining the effects of a subsidy. The Panel considers it fair to assume that a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, *e.g.*, a consumption subsidy, either increase exports or reduce imports.'<sup>26</sup>

Furthermore, the CONTRACTING PARTIES laid down procedural rules to strengthen the effect of the notification requirement:<sup>27</sup> whenever a contracting party feels that serious prejudice is caused or threatened it can request consultations with the subsidizing country.<sup>28</sup> Of course, consultations can also be held under the general procedures of Articles XXII, XXIII. The term 'serious prejudice' is not defined in GATT. In the 'Report on the Operation of the Provisions of Article XVI' a panel stated that a complaining party could ask for consultations whenever it considered that serious prejudice was caused, without having to await a prior action by the CONTRACTING PARTIES.<sup>29</sup> Therefore, GATT leaves it up to the complaining country to determine what it considers to constitute 'serious prejudice'.

The discussion of Article XVI paragraph 1 reveals that this paragraph is not, and was not intended to be, an adequate device to stop contracting parties from granting domestic subsidies. At the time GATT was drafted domestic subsidies were not of great concern.<sup>30</sup> Nevertheless, Article XVI paragraph 1 has two important functions. First, the notification requirement increases transparency of subsidy programs. In the second place, the consultation requirement makes the contracting parties aware of the possible transnational effects of their subsidies.<sup>31</sup>

This last function, however, lost more and more of its meaning.<sup>32</sup> Not only did contracting parties resort to domestic subsidies more often,<sup>33</sup> thereby triggering reactions by other contracting parties,<sup>34</sup> but they also did not

26. GATT, BISD, 9th Supp., 191 (1961).

27. See GATT, BISD, Vol. II, 19 (1952); GATT, BISD, 3rd Supp., 224-225 (1955); GATT, BISD, 9th Supp., 193 (1961); GATT, BISD, 11th Supp., 58 (1963); for a detailed analysis of the notification requirement see Jackson, *World Trade*, pp. 387 *et seq.*

28. See generally, Jackson, *World Trade*, 391-392; Butler, *supra* n. 17, at 94-96.

29. See GATT, BISD, 10th Supp., 201, 207 (1962).

30. Tarullo, *supra* n. 6, at 7.

31. Jackson, *World Trade*, at 392.

32. Rivers, Greenwald, 'The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences', 11 *Law & Pol'y Int'l Bus.*, 1447, 1459 (1979); Butler, *supra* n. 17, at 94; see also *Report of the Committee on Finance, United States Senate on H.R. 4537 to Approve and Implement the Trade Agreements Negotiated under the Trade Act of 1974*, and for other purposes, Report No. 249, 96th Cong., 1st Sess., 39 (1979) (hereinafter cited *Senate Report no. 249*).

33. Tarullo, *supra* n. 6, pp. 16 *et seq.*

34. In 1973, the US Treasury entered a countervailing duty order against 'radial tires from Canada', 38 Fed. Reg. 1018 (1973); this was the first countervailing duty order in many years against a product that benefitted from a domestic subsidy; for an analysis of the case see Guido, Morrone, 'The Michelin Decision: A Possible New Direction for US Countervailing Duty Law', 6 *Law & Pol'y Int'l. Bus.*, 237 (1974); Horlick, *Current Issues in Countervailing Duty Law*, in *The Trade Agreements Act of 1979 - Four Years Later*, 23 (1983).



comply with the obligations of Article XVI paragraph 1.<sup>35</sup> According to two authors 'there is no record of any country ever having limited a subsidizing practice as a result of consultations under Article XVI paragraph 1'.<sup>36</sup>

As a result, next to the controversial rules of Article XVI paragraphs 3 and 4<sup>37</sup> the limitation on the use of domestic subsidies was one of the major issues during the negotiations of the Subsidies Code.<sup>38</sup>

The fact that GATT allows domestic subsidies does not preclude contracting parties from availing themselves of GATT remedies against domestic subsidies. Already in 1955 a GATT Working Party stated:

'So far as domestic subsidies are concerned, it was agreed that a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned.'<sup>39</sup>

Therefore a contracting party can always invoke Article XXIII to demonstrate that an action of another contracting party – e.g. introduction of a subsidy after a tariff concession has been negotiated – nullifies and impairs its benefits under GATT, even if this action is normally allowed. The basis for the above

35. Butler, *supra* n. 17, at 94; Evans, 'Subsidies and Countervailing Duties in GATT: Present Law and Future Prospects', 3 Int'l. Trade L.J. 211, 230-231 (1977); Metzger, *Lowering Nontariff Barriers*, 121-122 (1974); Sabourin-Herbert, 'De la validité des subventions au regard de l'accord général sur les tarifs et le commerce: Une application Canadienne', 6 Rev. Gen. de Droit (Ottawa), 339, 348 (1975).

36. Rivers, Greenwald, *supra* n. 32, at 1459, 1460.

37. To deal with the interpretative problems of Art. XVI para. 3 and 4 goes beyond the scope of this paper.

However, two weaknesses of these paragraphs deserve mentioning: First, para. 3 does not constitute a viable prohibition of the use of export subsidies on primary products since those subsidies are normally not as massive as to change world market shares; see Dam, *The GATT*, at 143; furthermore, the term 'equitable share' was not defined, nor did the case law give any guidance as to what constituted an 'equitable share'; see generally the first *French Wheat Case*, GATT, BISD, 7th Supp., pp. 46 *et seq.* (1959). The panel found that subsidized French wheat exports displaced Australian wheat exports from traditional Australian markets in South East Asia, but it did not provide any answer as to what constitutes an equitable share; see Ribers, Greenwald, *supra* n. 32, at 1461 n. 77; Jackson, *World Trade*, at 394-5; Phegan, *supra* n. 6, at 255. Second, the bi-level pricing element in para. 4 was very difficult to prove and therefore eased the prohibition of export subsidies on non primary products; see Rivers, Greenwald, *supra* n. 32, at 1461; Barcelo, 'Subsidies and Countervailing Duties – Analysis and a Proposal', 9 L. & Pol'y Int'l. Bus. 779, 783-4 (1977). Several panel decisions in the 70s tried to overcome this difficulty by adopting the rebuttable presumption of dual pricing once the existence of an export subsidy had been established; see e.g. *The DISC Case* and the *European Tax Cases*, GATT, BISD, 23rd Supp., pp. 98 *et seq.* (1976); see also GATT, BISD, 26th Supp., pp. 330 *et seq.* (1980); for a criticism of this presumption see Jackson, 'The Jurisprudence of International Trade: The DISC Case', 72 A.J.I.L., 747, 768-71 (1978).

38. Rivers, Greenwald, *supra* n. 32, 1469, 1470-1475.

39. GATT, BISD, 3rd Supp., 222, 224 (1955).