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DISC Legislation as a Violation of the General Agreement on Tariffs and Trade, The

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Comments

THE DISC LEGISLATION AS A VIOLATION OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

I. Introduction

The General Agreement on Tariffs and Trade[1] was established in 1946 with the avowed purpose of promoting international trade through the elimination of tariff and non-tariff barriers and other governmental distortions of the free flow of goods and services. Its creation is usually attributed to the United States, as "a product of U.S. planning and a reflection of certain views that dominated the thinking on trade matters of U.S. diplomats in the 1940s."[2] Because of this initiative, it is argued, the United States should be particularly sensitive to charges that it has violated the terms or the spirit of GATT.[3]

The enactment in 1971 of legislation authorizing the Domestic International Sales Corporation [DISC][4] has evoked just such criticism. The tax deferral treatment of DISCs is attacked as an export subsidy, which is both expressly prohibited by GATT and inconsistent with its policy goals.

The purpose of this comment is to evaluate that charge in light of the specific language and the underlying policies of GATT and DISC.

II. GATT and Its Purpose

A. *In General*

The worldwide depression of the 1930's served to disrupt the network of international trade and finance which had developed during the 1920's.[5] This depression played a significant role in the instigation of programs geared to national self-sufficiency and economic independence which were considered to be the earmarks of the trend toward economic nationalism and the fettering of free international trade.[6] Following World War II,

1. IV General Agreement on Tariffs and Trade [hereinafter cited as GATT] Basic Instruments and Selected Documents: [hereinafter cited as BISD] 1 (1969).
2. K. Dam, The GATT—Law and International Economic Organization 10 (1970) [hereinafter cited as Dam].
3. Although GATT has never been submitted to the Senate for its approval, it is generally agreed that the General Agreement constitutes a valid executive agreement entered into pursuant to existing legislation. For a thorough discussion of the status of GATT as domestic law, see Jackson, *The General Agreement on Tariffs and Trade in the United States Domestic Law,* 66 Mich. L. Rev. 249 (1967).
4. 85 Stat. 497. Title V thereof added sections 991-97 to the Int. Rev. Code of 1954.
5. N. Palmer and H. Perkins, International Relations 533 (3d ed. 1969).
6. *Id.*

the United States took the lead in drawing together the countries of the world and influencing them to take positive steps toward the reduction of barriers to world trade.[7] The most significant product of this combined endeavor was the instrument negotiated at the Geneva discussions in 1947 entitled "The General Agreement on Tariffs and Trade."[8] This multilateral international agreement is today the principal method of regulation of world trade.[9]

B. *Treatment of Subsidies*

Because it is designed to reduce governmental barriers to international trade, "[t]he General Agreement is hostile to subsidies."[10] The underlying principle of Article XVI of the General Agreement expresses the view that all subsidies are "undesirable interferences with the free flow of goods."[11] Theorists aver that subsidies divert international trade from its normal pattern and distort the structure of production from that determined by comparative costs.[12]

Notwithstanding the contracting parties'[13] apparent disfavor of subsidies, the General Agreement does not reflect a single determined approach of condemnation. The failure of the parties to agree upon such an approach probably stems both from the complexity of the problem and from a lingering attachment to those economic protectionist programs of which special interest groups have become so fond.[14]

The General Agreement, in its treatment of subsidies, distinguishes between "production subsidies" and "export subsidies." The general aim of a production subsidy is to protect domestic producers from the import of foreign goods. It enables the domestic producer to sell at a price lower than a foreign producer can afford to sell his imported product, thereby frustrating competition. Examples of this form of subsidization include payment of certain amounts for each item produced, tax exemptions or remissions based on each item produced, and favorable loans for capital improvement.

An export subsidy, on the other hand, is designed specifically to promote exports. It bestows a competitive advantage upon domestic producers by enabling them to ship goods abroad to be sold at a price below the

7. *Id.* at 535.
8. *Id.* at 538; DAM, *supra* note 2, at 11.
9. Jackson, *supra* note 3, at 250.
10. DAM, *supra* note 2, at 132.
11. DAM, *supra* note 2, at 134; Anninger, *DISC and GATT: International Trade Aspects of Bringing Deferral Home*, 13 HARV. INT'L L.J. 391, 392-93 (1972).
12. *See, e.g.,* G. HABERLER, THE THEORY OF INTERNATIONAL TRADE 321-22 (1936); R. BALDWIN, NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE 5 (1970) [hereinafter cited as BALDWIN].
13. When used in all capitals, this term refers to the CONTRACTING PARTIES acting jointly under authorization of GATT, Article XXV, paragraph 1, or other clauses of GATT. Otherwise, "contracting parties" refers to members of GATT individually.
14. J. JACKSON, WORLD TRADE AND THE LAW OF GATT 367 (1969) [hereinafter cited as JACKSON].

foreign market price. This form of subsidization differs from a production subsidy in that it is conferred only upon those products which are exported. Hence, the same methods of implementation may be utilized.

1. Production Subsidies

Production subsidies are treated less harshly by the General Agreement than are export subsidies.[15] Article XVI, Section A, which embodies a "notification-consultation" requirement, is the only provision applicable to production subsidies. Under this provision, if contracting parties maintain subsidies that operate "directly or indirectly to increase exports or . . . reduce imports," they are to notify the CONTRACTING PARTIES of such subsidies. Furthermore, where it is determined that serious prejudice to the interests of any other contracting party is caused or threatened, a duty arises to "discuss" the "possibility of limiting the subsidization."[16]

Although this provision seems rather innocuous, it is generally agreed that "nations exhibit considerable sensitivity to such a reporting requirement, perhaps because notification of subsidies can focus attention on them and excite other GATT members to utilize their remedies in GATT."[17] Moreover, "the consultation requirement may be an aid in making contracting parties aware of the harsh effects of their subsidies on other nations and, when viewed in the light of various other remedies available under GATT, could be meaningful."[18]

2. Export Subsidies

Until 1955, Article XVI, Section A was the only provision which spoke

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15. The difference in treatment of import and export hindrances to trade is part of a notion evident throughout the General Agreement that a country has a greater right to interfere with its own domestic markets than with markets of other countries. Artificially reducing imports by tariffs or domestic subsidies is regarded as more acceptable than artificially increasing exports by means of export subsidies, domestic subsidies, or dumping.
R. BALDWIN, *supra* note 12, at 47. Even so, "both sets of measures have significant economic effects on both foreign and domestic markets." *Id.* at n.44. *See also,* DAM, *supra* note 2, at 134; JACKSON, *supra* note 14, at 365-66.

16. Article XVI(A)(1) provides:

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

17. JACKSON, *supra* note 14, at 388.

18. *Id.* at 392.

to the subsidy issue.[19] At the Ninth Session of the Contracting Parties in 1955, this article was amended by the addition of Section B dealing with export subsidization.[20] Therefore, in addition to the "notification-consultation" requirement imposed by Section A, an export subsidy may now be subject to the more stringent requirements of Section B, paragraphs (3) or (4). To determine which paragraph applies, one must look to the type of product which the subsidy supports.

a. Primary Products

Paragraph (3) of Article XVI addresses itself only to those "subsidies on the export of primary products."[21] A primary product is defined as "any product of farm, forest or fishery, or any mineral in its natural form or which has undergone such process as is customarily required to prepare it for marketing in substantial volume in international trade."[22] The distinction between primary and nonprimary products stems from the desire of many governments to "insulate their farmers from the vicissitudes of world market prices by subsidies or by measures that are analytically

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19. DAM, *supra* note 2, at 141-42.

20. GATT, 3d Supp. BISD 222, 224-27 (1955); PROTOCOL AMENDING THE PREAMBLE AND PARTS II AND III OF THE GATT 1955). Section B provides in full:

> 2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.
>
> 3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, 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.
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> 4. Further, 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. Until 13 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.
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> 5. The CONTRACTING PARTIES shall review the operation of the provisions of the Article from time to time with a view to examining its effectiveness, in light of actual experience, in promoting the objectives of the Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

21. *Id.*

22. GATT, Annex I, Ad. Art. XVI, sec. B(2).

similar to subsidies."[23] Thus, paragraph (3) was structured to allow such subsidization without condoning the same.

Paragraph (3) first instructs that the contracting parties should seek to avoid primary product subsidization.[24] If such a subsidy is employed, however, it "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. . . ."[25] As one may easily detect, the insertion of the term "equitable share" has presented definitional problems which have led to nonobservance of the prohibition.[26]

b. Nonprimary Products

Paragraph (4) of Article XVI, which deals with the export of nonprimary products, presents a more determined attempt to eliminate subsidies as trade barriers than does paragraph (3).[27] It states:

> [C]ontracting 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.[28]

This prohibition on the introduction of new export subsidies is immediately followed by what is called the "standstill" obligation.[29] At the time of enactment it represented an agreement to work toward the elimination of then existing export subsidies,[30] but, contrary to its terms, no agreement on the prohibition of all such subsidization was reached by December 1957. Thus, the "deadline" was extended[31] until 1960 when the Seventh Session of the Contracting Parties arrived at *The Declaration Giving Effect*

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23. DAM, *supra* note 2, at 134.
24. *See* note 20 *supra.*
25. *Id.*
26. DAM, *supra* note 2, at 142-43.
27. However, it is of limited applicability as it is binding only on those few developed nations which have accepted *The Declaration Giving Effect to the Provisions of Article XVI, Paragraph 4, done at* Geneva, on Nov. 19, 1960, GATT, 9th Supp. BISD 32 (1961). Accepted by the United States on Sept. 19, 1961, Proc. No. 3515, 3 C.F.R. 246 (1959-1963 Comp.), 445 U.N.T.S. 294, 303 (1962).
28. *See* note 20 *supra.*
29. *Id.*
30. Interpretive Note, Ad. Art. XVI, para. 4, GATT, 9th Supp. BISD 32 (1961).
31. *Declaration Extending the Standstill Provisions of Article XVI: 4 of the GATT,* 1957; GATT, 6th Supp. BISD 24 (1958); *Proces-Verbal Extending the Validity of the Declaration Extending the Standstill Provisions of Article XVI:4 of the GATT,* 1958; GATT, 7th Supp. BISD 30 (1959); *Proces-Verbal Further Extending the Validity of the Declaration Extending the Standstill Provisions of Article XVI:4 of the GATT,* 1959; GATT, 8th Supp. BISD 25 (1960). This series of extensions is indicative of the difficulty which accompanies an attempt to pierce protective economic trade barriers.

to the Provisions of Article XVI, Paragraph 4,[32] which became effective November 14, 1962.[33]

3. Summary

The net effect of Article XVI of the General Agreement, then, can be summed up in the following manner: (1) production subsidy—no constraint except to report and consult; (2) export subsidy: primary product—slight constraint (not to use subsidies to get more than an equitable share of the market); and (3) export subsidy: nonprimary product—constraint for a small group of developed countries only.[34]

III. DISC AND ITS PURPOSE

A. *The Purpose of DISC*

Prior to 1972, domestic corporations were generally subject to tax on all income on a current basis, even if derived from foreign trade or export, whereas foreign corporations were generally free from United States tax on foreign-source income, even if owned by an American company, until such profits were distributed to the domestic parent.[35] This tax structure supposedly contributed to the United States' balance of payments deficit by encouraging American corporations to establish manufacturing subsidiaries in foreign countries.[36] Congress therefore enacted the DISC provisions as part of the Revenue Act of 1971 in order to curb the mounting trade deficits, as well as to increase domestic employment.[37] This twofold objective, it was reasoned, would be attained by inducing domestic companies to establish non-domestic markets for their products and to supply these markets with products manufactured in domestic factories.[38] This inducement has taken the form of a tax incentive as effected through the DISC deferral system.

In theory, the desired increase in American exports should be the result of three interacting factors. First, a tax deferral gives the exporters the opportunity to lower prices[39] or to increase the demand for exports

32. *See* note 27 *supra*.
33. For a discussion on the topic of which countries are bound by Art. XIV(4), *see* JACKSON, *supra* note 14, at 374-76.
34. JACKSON, *supra* note 14, at 377. *See also* note 27 *supra*.
35. INT. REV. CODE OF 1954, §§ 951-64.
36. Anninger, *supra* note 11, at 391; S. REP. No. 92-437, 92d Cong., 1st Sess., reprinted in U.S. CODE CONG. & AD. NEWS 1918, 1996 (1971) [hereinafter cited as S. REP. No. 92-437 followed by the appropriate page of the U.S. CODE CONG. & AD. NEWS].
37. S. REP. No. 92-437 at 1928, 1996; H.R. REP. No. 92-533, 92d Cong., 1st Sess., reprinted in U.S. CODE CONG. & AD. NEWS 1825, 1832 (1971). Previous attempts to improve the international economic position of the United States by means of the tax system include: (1) the Western Hemisphere Trade Corporation provisions, INT. REV. CODE OF 1954, §§ 921-22; (2) the Subpart F provisions, INT. REV. CODE OF 1954, §§ 951-64, 972-92; and (3) the Interest Equalization Tax, INT. REV. CODE OF 1954, §§ 4911-31.
38. Comment, *DISC: A Tax Primer*, 20 LOYOLA L. REV. 325 (1973-1974).
39. *Hearings on the Revenue Act of 1971 Before the Senate Comm. on Fi-*

by expending more funds on export promotion.[40] Second, increasing the profitability of exporting will, according to economic theory, cause a shift of firms and their resources to the exporting industry, which in turn should result in a higher number of exports.[41] Third, by making it just as profitable to have a manufacturing subsidiary based within the United States, the trend toward establishing manufacturing subsidiaries in foreign countries should be slowed down considerably.[42] Accordingly, the demand for the product, formerly satisfied by the foreign subsidiary, would have to be satisfied by the domestic company.

B. *Statutory Qualifications*

A DISC is a domestic corporation and tax entity whose business is exporting. If the corporation (usually a shell corporation and a subsidiary of a domestic manufacturer) satisfies the five statutory requirements, then it qualifies as a DISC and as such may enjoy several tax benefits. These requirements are:

(1) The corporation must be one which is incorporated under the laws of any of the states or the District of Columbia.[43]

(2) The corporation must have only one class of stock,[44] and the par or stated value of its outstanding stock must always be maintained at $2,500 or above.[45] Also, a DISC must keep separate books and records and maintain its own bank account.[46]

A more simple and less expensive accounting device for determining export profits could have been created, but the separate incorporation method relieves the Internal Revenue Service from having to trace the allocated income and investment uses through the books of an integrated firm.[47]

(3) At least 95 percent of the gross receipts of the corporation must consist of qualified export receipts.[48] "Gross receipts" are defined as the total receipts from the sale, lease, or rental of property held primarily for

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nance, 92d Cong., 1st Sess. 45 (1971) (Testimony of Sec. of the Treasury, John Connally).

40. Considine, *The DISC Legislation: An Evaluation,* 7 J. INT'L LAW & POL. 217, 218 (1974).

41. REPORT OF THE PRESIDENT'S TASK FORCE ON BUSINESS TAXATION 44 (1970).

42. *Hearings on the Trade Act of 1970 Before the House Comm. on Ways and Means,* 91st Cong., 2d Sess. 535 (1970) (Testimony of Undersecretary of the Treasury, Paul Volcker).

43. INT. REV. CODE OF 1954, § 992(a)(1); Treas. Reg. § 1.992-1(a) (1) (1974).

44. This requirement obviates the need for special allocation rules for earnings distributions to different classes of shareholders.

45. INT. REV. CODE OF 1954, § 992(a)(1)(C). As to the treatment of debt payable to shareholders, see Treas. Reg. § 1.992-1 (d) (2) (1974).

46. Treas. Reg. § 1.992-1(a)(6), (7) (1974).

47. Considine, *supra* note 40, at 223; S. REP. No. 92-437 at 1999.

48. INT. REV. CODE OF 1954, § 992(a)(1)(A). *See* Treas. Reg. § 1.992-1 (a)(2), (b) (1974). For a detailed discussion, see Roberts, *DISC: Qualified Export Receipts Under the Proposed Regulations,* DIGEST OF TAX ARTICLES 42 (April 1975).

sale, lease, or rental in the ordinary course of trade or business, and gross income from all other sources.[49] The definition of "qualified export receipts" includes several items, the most significant of which are: gross receipts from the sale, exchange, or other disposition of export property;[50] gross receipts for services which are related and subsidiary to any qualified sale, exchange, lease, rental, or other disposition of export property by such corporation;[51] and interest on any obligation which is a qualified export asset—*e.g.*, a producer's loan.[52]

This requirement is apparently designed to ensure that the DISC will engage in the exporting business and not be used as a shelter for nonqualified domestic sales.[53]

(4) The adjusted basis of the qualified export assets of the corporation at the close of the taxable year must equal or exceed 95 percent of the sum of the adjusted basis of all assets.[54] This "qualified export asset" test seeks to channel the reinvestment of DISC earnings into export-related assets. "Qualified export assets" include inventory;[55] necessary working capital;[56] storage, handling, and transportion assets;[57] stock or securities of a related foreign export corporation;[58] accounts receivable which arise from DISC transactions;[59] and producer's loans.[60]

(5) The corporation must make an election in order to obtain its DISC status for the taxable year.[61] This election can be made by filing Form 4876 with the service center with which the corporation would otherwise file its income tax return.[62] For the election to be valid, the consent of every person who is a shareholder of the corporation as of the

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49. INT. REV. CODE OF 1954, § 993(f). For examples of gross and nongross receipt items, see Treas. Reg. § 1.993-6(a)(2), (b) (1974).

50. INT. REV. CODE OF 1954, § 993 (a) (1) (A). Export property is defined in section 993(c)(1) as property:

> (A) manufactured, produced, grown, or extracted in the U.S. by a person other than a DISC,
>
> (B) held primarily for sale, lease, or rental, in the ordinary course of trade or business, by or to, a DISC, for direct use, consumption, or disposition outside the U.S., and
>
> (C) not more than 50% of the fair market value of which is attributable to articles imported into the U.S.

51. INT. REV. CODE OF 1954, § 993(a)(1)(C). This includes installation and maintenance services. *But see* Rev. Rul. 75-322, 1975 INT. REV. BULL. No. 31, at 17 (services performed by a third party under contract with the parent company).

52. INT. REV. CODE OF 1954, § 993(a)(1)(F).

53. Comment, *Some Thoughts on DISC,* 9 WILLAMETTE L.J. 261, 262 (1973).

54. INT. REV. CODE OF 1954, § 992(a)(1)(B); Treas. Reg. § 1.992-1 (a) (3), (c) (1974).

55. INT. REV. CODE OF 1954, § 993(b)(1), (c).

56. *Id.* at § 993(b)(4).

57. *Id.* at § 993 (b) (2).

58. *Id.* at § 993(b)(6), (e).

59. *Id.* at § 993(b)(3).

60. *Id.* at § 993(b)(5), (d).

61. *Id.* at § 992(b). Until revocation such election is also valid for the succeeding taxable years.

62. Proposed Reg. § 1.992-2(a)(1)(i), 140 C.F.R. 27, 484 (June 30, 1975).

beginning of the first taxable year for which such election is effective must be attached to Form 4876,[63] unless an extension is granted by the Internal Revenue Service.[64]

C. *Tax Benefits*

1. Tax Deferral

The profits of a DISC, as such, are exempt from the federal income tax.[65] Instead, the shareholders are taxed to the extent that the DISC income is actually, or deemed to be, distributed to them.[66] Generally, half of the profits will be taxed to the shareholders currently while the tax on the remaining half will be deferred until the profits are actually distributed, the shareholder sells his stock, or the corporation loses its DISC status.[67] This deferral of tax results in cash being currently available for qualified uses.[68]

2. Intercompany Pricing

Because of the availability of the income tax deferrment, the process for the determination of DISC income is a crucial part of the entire DISC arrangement. In this regard, the statutory intercompany pricing rules of section 994 of the Internal Revenue Code may be applied to income from export sales made by a DISC following domestic purchases of the products from related parties—*e.g.*, its parent company. These rules make it unnecessary to establish an "arm's length value" on prices charged by related parties as would otherwise be the case under section 482, the provision which empowers the Internal Revenue Service to reallocate profits between related taxpayers if such is necessary to prevent tax avoidance. Instead, section 994 allows two alternative ("safe haven") methods of allo-

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63. Treas. Reg. § 1.992-2(a)(1)(i) (1974).

64. *Id.* at § 1.992-2 (b). Subsequent transferees of DISC stock must also file consent forms pursuant to Treas. Reg. § 1.992-2(c) (1974).

65. INT. REV. CODE OF 1954, § 991; Treas. Reg. § 1.991-1(a) (1974).

66. INT. REV. CODE OF 1954, § 995. *See also* Treas. Reg. § 1.995-1(b)(1), (2) (1974). Since a deemed distribution does not reduce the earnings and profits of a DISC, it does not affect the determination whether a subsequent actual distribution is a dividend under section 316(a). However, it does affect the determination whether a subsequent actual distribution is excluded from gross income because the deemed distribution increases "previously taxed income." Treas. Reg. § 1.995-1 (c)(2) (1974).

67. INT. REV. CODE OF 1954, § 995; Treas. Reg. 1.995-1 (b) (1974). *See generally* Brannon, *The Revenue Act of 1971—Do Tax Incentives Have New Life?*, B.C. IND. & COM. L. REV. 891, 900 (1973); Feinschreiber, *How to Aggregate DISC Sales to Make the Most Effective Use of the Deferral*, 36 J. OF TAXATION 300 (1972).

68. Qualified uses include: effecting "producer's loans," defined by section 993(d) of the Code, (*see* Treas. Reg. § 1.993-4 (1974); J. CRIPPS, DOMESTIC INTERNATIONAL SALES CORPORATIONS 26-29 (1972) [hereinafter cited as CRIPPS]), financing export receivables, and investing in qualified obligations. CRIPPS at 31-32. Misuse can result in termination of the DISC status and distribution of all accumulated retained earnings. INT. REV. CODE OF 1954, §§ 992(c), 995(b)(2).

cation[69] which are comparatively simple in application[70] and which may serve to increase the DISC profit figure above that which would result under section 482.[71] In other words, these "special transfer-pricing rules . . . allow a substantial part of the parent's manufacturing profits to be attributed to the DISC subsidiary [which in turn is] given preferential treatment."[72]

3. Producer's Loans

In order to maintain its deferred status, the DISC income must be invested in qualified export assets.[73] One of the allowable uses to which the deferred accumulated income may be put is the "producer's loan."[74] This use is especially attractive to the parent company, because it may borrow money from its DISC essentially interest-free. The interest income is not taxable to the DISC, and although it is ultimately taxed to the shareholders of the DISC, such expense constitutes a deduction for the parent borrower.[75]

For an obligation to qualify as a producer's loan, it must satisfy the following requirements and limitations of section 993(d) of the Internal Revenue Code. First, the borrower (either related or unrelated to the DISC)[76] must be engaged in the manufacturing, production, growing, or extraction of export property in the United States, within the meaning of section 1.993-3(c) of the Treasury Regulations of 1974.[77] It is not necessary, however, for the borrower to be exclusively engaged in the export property trade or business,[78] nor is it necessary to be able to trace the loan to specific investments in export property.[79]

The second requirement is that the obligation be evidenced by a note (or other evidence of indebtedness) with a stated maturity date not more than five years from the date of the loan.[80] Thus, a loan which does not have a stated maturity date, even though it eventually matures within the five year period, cannot qualify.[81] It is also worth noting that section 482 is designed to assure that an arm's length rate of interest is provided

69. INT. REV. CODE OF 1954, § 994(a)(1), (2). *See also* Treas. Reg. § 1.994-1(c)(2), (3) (1974). For further discussion and examples of application, see Hyde, *The Domestic International Sales Corporation in Perspective and Operation,* 28 BUS. LAW. 43, 46 (1972-1973).

70. CRIPPS, *supra* note 68, at 18.

71. Anninger, *supra* note 11, at 399; Feinschreiber, *supra* note 67, at 300-01.

72. Musgrave, *International Aspects of United States Tax Policy—Recent Development and Trends,* 1973 CONFERENCE REPORT, CANADIAN TAX FOUNDATION 16, 19. For examples of application of these rules, see Treas. Reg. § 1.994 (1974).

73. INT. REV. CODE OF 1954, § 995(b)(1)(B).

74. *Id.* at § 993(d). *See also* Treas. Reg. § 1.993-4 (1974); S. REP. No. 92-437 at 2009-11.

75. Announcement 72-23, 1972-1 CUM. BULL. 679, 686-87.

76. Treas. Reg. § 1.993-4(a)(2)(iii) (1974).

77. INT. REV. CODE OF 1954, § 993(d)(1)(C).

78. Treas. Reg. § 1.993-4(a)(5) (1974).

79. *Id.*

80. INT. REV. CODE OF 1954, § 993(d)(1)(B).

81. Treas. Reg. § 1.993-4(a)(4) (1974).

for on the loan.[82] In addition, the obligation, at the time of creation, must bear a legend stating, "This Obligation Is Designated A Producer's Loan Within The Meaning of Section 993(d) of the Internal Revenue Code," or words of substantially the same meaning.[83]

The final requirement involves placing limits on the total amount of producer's loans made by the DISC and the amount of producer's loans received by the borrower. First, with respect to the lending DISC, the amount of the loan, when added to the unpaid balance of all other producer's loans made by the DISC, cannot exceed the accumulated DISC income at the beginning of the month in which the loan is made.[84] There is a presumption in favor of the taxpayer that a loan has been made out of accumulated DISC income if the balance of producer's loans made during the year does not exceed accumulated DISC income at the end of the year.[85] Second, with respect to the borrower, a loan will be treated as a producer's loan only to the extent that the amount of the loan, when added to the unpaid balance of all other producer's loans made by all DISC's to the same borrower, does not exceed the amount of the borrower's export-related assets[86] multiplied by the ratio of export receipts for the three preceding taxable years.[87] This export-related assets limitation is supplemented by the increased investment requirement, which states:

> A loan to a borrower is a producer's loan only to the extent that the amount of the loan, when added to the unpaid balance of all other producer's loans made by all DISC's to the borrower during the borrower's taxable year, does not exceed the amount of the borrower's increase for the year in investment in export-related assets.[88]

The contemplated function of producer's loans is to encourage parent-manufacturers to increase their investment in export-related assets.[89] It is viewed as the major outlet for the investment of accumulated DISC income. The significance of the producer's loan as an investment alternative is particularly apparent where the DISC operates on a commission basis and does not maintain its own inventory or plant,[90] because the "qualified export asset" test of section 992(a)(1)(B) requires the adjusted basis of the qualified export assets to equal or exceed 95 percent of the sum of the adjusted basis of all the assets.[91]

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82. *Id.*
83. INT. REV. CODE OF 1954, § 993(d)(1)(D); Treas. Reg. § 1.993-4 (a) (iv) (1974).
84. INT. REV. CODE OF 1954, § 993(d)(1)(A).
85. Treas. Reg. § 1.993-4(a)(3)(ii) (1974).
86. As determined under Treas. Reg. § 1.993-4(b)(2) (1974).
87. INT. REV. CODE OF 1954, § 993(d)(2); Treas. Reg. § 1.993-4(b) (1974).
88. Treas. Reg. § 1.993-4(c) (1974); INT. REV. CODE OF 1954, § 993(d)(3).
89. Richman, *Proposed DISC Regulations: Maintaining DISC Status Through Use of Producer's Loans*, 39 J. OF TAXATION 229 (1973).
90. *Id.*
91. *See* notes 54-60 and accompanying text *supra*.

IV. Does DISC Violate the General Agreement?

A. *As a Circumvention of the Technical Language?*

In order to determine whether the DISC provisions constitute a technical violation of the General Agreement it will be necessary to examine paragraph (4) of Article XVI very closely. If a particular nonprimary product subsidy is such that it invokes the strict prohibitory language of paragraph (4), *a fortiori,* the same subsidy is subject to the more permisive regulations of paragraph (1).[92] A similar analysis can be used in the examination of primary product subsidies under paragraph (3), but this discussion will concentrate on nonprimary product subsidies for three reasons. First, "[w]hile there is nothing to prevent primary product producers from utilizing DISC, they showed little interest in the provisions during the Congressional hearings."[93] Second, assuming that there is utilization of DISC by such exporters, the definitional problems which accompany the "equitable share" element of paragraph (3) render the impact of the provision's applicability uncertain.[94] Third, "since almost all countries subsidize exports of primary products, the incremental distortion caused by DISC would probably not be viewed very seriously."[95]

The prohibitory language of paragraph (4), *i.e.,* "shall cease to grant," applies if two elements coexist. First, the governmental program must fall within the definition of "export subsidy of a nonprimary product."[96] Second, this subsidy must be found to result "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."[97]

1. DISC As an Export Subsidy

The aforementioned "export receipts" test and "export assets" test[98] stand as the principal DISC qualifying features. These requirements serve to compel the DISC to engage almost exclusively in export activity. Therefore, if DISC is a subsidy at all, it must be an export subsidy. Assuming

92. Jackson, *supra* note 14, at 397.
93. Anninger, *supra* note 11, at 400-01 & n.45. A recent Revenue Ruling, however, may draw the interest of primary product producers. A farmer's cooperative, exempt from federal income taxation under section 521, may organize a wholly-owned DISC to handle overseas marketing activities. Rev. Rul. 73-247, 1973-1 Cum. Bull. 294. Moreover, it has been ruled that the dividend paid by the DISC to the cooperative is tax exempt if it is distributed in turn to the patrons of the cooperative in the form of qualified patronage dividends under sections 1382(b)(1) and 1388 (a). Rev. Rul. 75-228, 1975 Int. Rev. Bull. No. 24, at 12. *But see* Tax Reduction Act of 1975 § 603, 89 Stat. 26, *amending* § 993 (c) (2) of the Code and ending DISC benefits as to the sale of energy resources and other scarce materials.
94. Anninger, *supra* note 11, at 401; Dam, *supra* note 2, at 142-43; Jackson, *supra* note 14, at 393-96.
95. Anninger, *supra* note 11, at 401 & n.46; Dam, *supra* note 2, at 266.
96. *See* note 20 *supra.*
97. *Id.*
98. *See* notes 48-69 and accompanying text *supra.*

then, that the DISC deals with nonprimary products,[99] the bare definition of "subsidy" is the sole issue to be confronted in this part of the analysis.

The General Agreement contains no general definition of the term "subsidy."[100] However, paragraph (1) of Article XVI contains the following descriptive clause concerning that term: ". . . which operates directly or indirectly to increase exports of any product from, or reduce imports of any product into, its territory. . . ."[101] This clause has been interpreted to mean that even a subsidy which serves only to maintain the status quo by preventing a decline in exports would be within the scope of Article XVI.[102] This "in absence of the subsidy" test, coupled with the "directly or indirectly" language of paragraphs (1) and (4), seems to suggest that the concept of "subsidy" was intended to be expansive in coverage.[103]

As an aid to a clearer understanding of what programs would be considered an export subsidy within the meaning of the General Agreement, a GATT Working Party issued a list of eight practices which were deemed to be Article XVI(4) subsidies.[104] Of these eight practices, items (c) and (d)—as well as the Interpretive Note to Article XVI[105]—have served as the basis for charges that DISC violates the General Agreement, and as

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99. The Interpretive Note to Art. XVI, which defines "primary product," is also applicable to paragraph (4) and therefore defines, by exclusion, a "nonprimary product."

100. GATT, 10th Supp. BISD 201, para. 23, at 208 (1962).

101. *See* note 20 *supra.*

102. GATT, 9th Supp. BISD 188, 191 (1961).

103. *Id.* at 200; JACKSON, *supra* note 14, at 384.

104. The list reads as follows:

(a) Currency retention schemes or any similar practices which involve a bonus on exports or re-exports;

(b) The provision by governments of direct subsidies to exporters;

(c) The remission, calculated in relation to exports, of direct taxes or social welfare charges on industrial or commercial enterprises;

(d) The exemption, in respect of exported goods, of charges or taxes, other than charges in connection with importation or indirect taxes levied at one or several stages on the same goods if sold for internal consumption; or the payment, in respect of exported goods, of amounts exceeding those effectively levied at one or several stages on these goods in the form of indirect taxes or of charges in connection with importation or in both forms;

(e) In respect of deliveries by governments or governmental agencies of imported raw materials for export business on different terms than for domestic business, the charging of prices below world prices;

(f) In respect of government export credit guarantees, the charging of premiums at rates which are manifestly inadequate to cover the long-term operating costs and losses of the credit insurance institutions;

(g) The grant by governments (or special institutions controlled by governments) of export credits at rates below those which they have to pay in order to obtain the funds so employed;

(h) The government bearing all or part of the costs incurred by exporters in obtaining credit.

GATT, 9th Supp. BISD 185, 186-87 (1961).

105. *Id.* at 32.

the basis for a complaint entered by the European Communities and referred to the CONTRACTING PARTIES pursuant to Article XXIII.[106]

Before examining the language of these items and the Interpretive Note as they bear upon the DISC legislation, it would be useful to understand the general theory which underlies GATT's approach to tax expenditure subsidization.[107] The Interpretive Note to Article XVI states in part:

> The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed a subsidy.[108]

The "borne by the like product" phrase has been interpreted to represent the distinction drawn between direct taxes and indirect taxes.[109] According to the Note, the exemption or remission of an indirect tax will not constitute a subsidy if the amount exempted or remitted does not exceed the amount due or previously collected. However, the Note implies, and items (c) and (d) of the bad practices list expressly state, that the exemption or remission of a *direct* tax does constitute a subsidy.

The reason for this distinction stems from the once generally accepted economic supposition that indirect taxes are shifted forward and reflected in the purchase price, while direct taxes are absorbed by the seller and not so reflected.[110] Assuming the validity of this premise, an exemption or remission of a direct tax would then constitute a subsidy in favor of the seller, whereas the exemption or remission of an indirect tax would operate in favor of the foreign consumer and not aid the seller.

Contrary to the foregoing theory, however, it now seems apparent that the exemption or remission of an indirect tax allows the seller to reduce the price of his product. It has been difficult for many writers to understand why such an opportunity to reduce prices and thus increase sales

106. GATT Doc. L/3851 (1973). There were 23 consultations under Art. XXIII prior to the initiative of the European Communities on behalf of member countries which referred the matter to the CONTRACTING PARTIES. Mullen, *Export Promotion: Legal and Structural Limitations on a Broad United States Commitment,* 7 LAW & POL. INT'L BUS. 57, 125 & n.400 (1975).

107. The term "tax expenditure" has been used to describe those special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives. These special provisions provide deductions, credits, exclusions, exemptions, deferrals, and perferential rates, and serve ends similar in nature to those served by direct government expenditures or loan programs.

Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures,* 83 HARV. L. REV. 705, 706 (1970).

108. GATT, 9th Supp. BISD 32 (1961).

109. JACKSON, *supra* note 14, at 300; DAM, *supra* note 2, at 139. A direct tax is that levied upon the income derived from the production and sale of the product whereas an indirect tax is ordinarily levied on the transfer of the product. An indirect tax takes the form of a sales tax or turnover tax. The income tax is the most common form of direct tax.

110. DAM, *supra* note 2, at 214; Hufbauer, *The Taxation of Export Profits,* 28 NAT. TAX J. 43, 58 (1975).

does not also constitute subsidization under the General Agreement.[111] Although the soundness of either economic theory is beyond the scope of this comment, it is obvious that the manifestation of the former theory by GATT's approval of indirect tax subsidization discriminates against countries which rely principally on direct taxation systems—*e.g.*, the United States.[112] Accordingly, it has been urged that this very inequity was one of the incentives for the enactment of the DISC legislation.[113]

Even though the Senate has manifested its dislike for the inconvenience of having to tread lightly around the wording of an international agreement which has not been submitted for its approval,[114] Congress chose not to confront directly the General Agreement. Instead, it opted for an export stimulus which was not expressly prohibited. Consequently, the question whether the bad practices list covers the DISC situation remains unsolved.

Item (c)'s prohibition on the remission of direct taxes does not seem to cover the DISC deferral system. A "remission," as the term is commonly used in the typical border tax adjustment scheme,[115] refers to the forgiveness or refund of a tax already assessed or paid.[116] Of course, it could be argued that the amount of the deferred tax cannot be determined until the income tax liability has been assessed, thus rendering the provision applicable.

Item (d) uses the term "exemption" and comes closer to applying to the DISC situation. The United States has opined that a tax deferral is not a tax exemption because the tax on the income will eventually be paid by the DISC stockholders.[117] Authors on the subject, however, have concluded that the deferral system is an exemption because the deferred status of the income may be perpetuated indefinitely.[118] In support of this argument, they have made reference to the Accounting Principles Board's

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111. *See, e.g.*, Dam, *supra* note 2, at 215; Considine, *supra* note 40, at 251-52; Hufbauer, *supra* note 110, at 58.

112. Considine, *supra* note 40, at 250-51. The acceptance by the United States of these seemingly non-favorable provisions of the General Agreement has been attributed to the faith in the strength of the United States economy following World War II. Accordingly, these discriminatory provisions were viewed as balancing factors in favor of the economies of war-torn nations. Comment, *GATT, Altered Economics, and DISC: A Legitimate Application of Rebus Sic Stantibus*, 5 Denver J. of Int'l Law & Policy 121, 127 (1975).

113. S. Rep. No. 92-437 at 1928.

114. *Id.*

115. Jackson, *supra* note 14, at 295.

116. Anninger, *supra* note 11, at 403.

117. *Id.* at 393 & n.12. *See also* Curzon, *Outlook for United States Trade Policy*, 4 J. of World Trade L. 608, 612 (1970); Schenk, *Domestic International Sales Corporation: A Proposed Stimulant for American Exports*, 23 The Tax Exec. 597, 606-07 (1971).

118. Anninger, *supra* note 11, at 404; Feinschreiber, *Electing DISC Benefits*, 50 Taxes 304 (1972); Musgrave, *supra* note 72, at 20; Naylor, *Some Observations Concerning the Operation of a DISC*, 50 Taxes 783, 784 (1972); Seghers, *How a DISC Can Increase an Exporter's Profits*, 9 Taxation for Accountants 228 (1972).

position that the contingent tax liability [related to DISC tax-deferred income] is so remote that it need not even be considered in the compilation of annual earnings.[119] Moreover, it has been argued that even if the deferred status is terminated, the earnings attributable thereto would ordinarily be sufficient to cover the tax liability, thereby resulting in an exemption.[120]

The art of manipulative interpretation and construction need not be pursued to the extreme in order to reach the conclusion that DISC is an export subsidy within the meaning of Article XVI(4). The 1960 Working Party has made it quite clear that the list "should not be considered exhaustive or . . . limit in any way the generality of the provisions of paragraph 4 of Article XVI."[121] Therefore, notwithstanding the argument that the foregoing list fails to cover the deferral system, it would be difficult to support the proposition that such a system does not constitute an export subsidy under the General Agreement.[122]

2. The Price-differential Clause

According to at least one author, the bad practices list "implicitly recognized" that each of the export subsidies listed satisfied both elements of Article XVI(4).[123] Therefore, each item therein would be considered a subsidy "which . . . 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."[124] However, if items (c) and (d) were determined not to include DISC as a forbidden practice, then this "price-differential" test must be confronted and satisfied.

It has been argued that the price-differential clause is not intended to be an independent requirement for bringing the prohibition into play.[125] It is very difficult to gauge the impact which newly-enacted programs such as DISC have upon the price of imports. Furthermore, "non-price-reducing export subsidies can also have a trade-distorting effect."[126] Therefore, the argument goes, the first part of the test is the crucial one, and any subsidy which falls within it can be presumed to have the prohibited effect without affirmative proof.

The foregoing line of reasoning is not convincing. Paragraph (1) of Article VI (Anti-Dumping and Countervailing Duties), also contains a "price-differential" clause. It is generally recognized that this clause is

119. Announcement 72-23, 1972-1 CUM. BUL. 679, 681-82.
120. Statement by S. Surrey in *Hearings on H.R. 10947 Before the Senate Comm. on Finance,* 92d Cong., 1st Sess., pt. 2, 729, 733 (1971).
121. GATT, 9th Supp. BISD 185, 187 (1961).
122. JACKSON, *supra* note 14, at 365-66, 383-84; Hufbauer, *supra* note 110, at 46-47.
123. Anninger, *supra* note 11, at 407.
124. *See* note 20 *supra.*
125. Anninger, *supra* note 11, at 408-09.
126. *Id.* at n.80.

integral to the meaning and application of Article VI.[127] It is well settled that the concepts' contained in Article VI may properly be applied to Article XVI (4) by analogy as an aid to interpretation of the latter.[128] Therefore, the significance of Article XVI(4)'s "price-differential" clause should not be overlooked. The difficulty which may accompany the attempt to prove that any given subsidy causes a reduction in the price of the export should not be determinative whether this part of the test must be satisfied by the complaining contracting party.

For this reason, an abstract statement which charges that DISC violates Article XVI(4) is neither properly founded nor very meaningful. Notwithstanding the initial conclusion that DISC was intended to, and does in fact, operate as an export subsidy within the meaning of paragraph (4), it may be argued and proven in a given situation that a DISC's tax deferral does not lead to a reduction in the price of the exported product.[129] If this were indeed true, then the second part of the test would be satisfied and the restrictions of paragraph (4) should not apply.

If such a conclusion were reached, one must revert to paragraph (1) of Article XVI in order to allege that DISC violates the General Agreement. This means that evidence must be collected and presented which indicates that DISC has operated to increase exports or reduce imports.[130] At the present time, though, even the Treasury Department has been unable to record accurately the impact of DISC on export activity.[131]

B. *As a Frustration of the Objectives of Article XVI?*

It is easy, at first glance, to conclude that DISC must certainly frustrate the purpose of GATT, even though it may not technically violate the General Agreement. This conclusion may be drawn by reasoning that DISC falls within that group of trade barriers which GATT was designed to eliminate. It can be argued, however, that to the extent that the direct-indirect tax distinction theory is incorrect, the allowance of indirect tax exemptions and remissions has a distorting effect on the otherwise normal pattern of world trade. Following this line of reasoning, DISC can be viewed as a corrective device designed to counterbalance this inequity,

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127. *Id.* at n.79; JACKSON, *supra* note 14, at 414-18.
128. JACKSON, *supra* note 14, at 397-98.
129. For example, instead of reducing the price of the product, the exporter may elect to increase export promotion expenditures thereby increasing the demand for his product. *See* note 39 and accompanying text *supra.*
130. *See* note 16 *supra.*
131. Mullen, *supra* note 106, at 82-83 & n.153. Accordingly, the United States has not recognized DISC as a violation of Art. XVI (1) and therefore has not complied with the "notification-consultation" requirements thereof. Anninger, *supra* note 11, at 409-10. This inability to gauge the effects of DISC stems not only from the inconvenience of having the data collection tied to the tax return schedule, but also from the fact that numerous other elements interrelate to determine the volume of export activity—*e.g.*, wage rates and the availability of raw materials. Dowd, *Is the U.S. Being Priced Out of World Markets?*, 25 J. OF MARKETING 1, 1-8 (1960).

thus actually furthering the purpose of GATT. Until it is possible to gauge correctly the shifting pattern of direct and indirect taxation, though, this type of argument lacks a strong foundation.

V. An Alternative Approach

The fact that DISC may not constitute a violation of Article XVI in certain instances should not lead to the conclusion that GATT is irrelevant to the issue of the desirability of the DISC legislation. It is suggested that the propriety of keeping the DISC provisions in force should be evaluated by weighing two factors.

The first of these factors concerns the efficiency of DISC in effectuating the objectives behind its enactment. This matter must be viewed from two perspectives. It must initially be determined what the benefits expected of DISC will cost the American taxpayers. A recently published study has concluded that a balance of payments gain of fifty cents will be recognized for every dollar of revenue lost through the deferral of the income tax.[132] In other words, "[a]ny possible payoff in increased exports is utterly inefficient in terms of revenue loss compared with balance of payments gains. . . ."[133] Thus, opponents of the DISC legislation contend that the tax deferral aids the major companies in the United States at the expense of the consumers.[134]

Evaluation of the efficiency of DISC must also entail consideration of how this system of preferential taxation compares with alternative courses of remedial action. Only ten days following the passage of the 1971 Revenue Act, the United States entered into the Smithsonian Agreement.[135] In this agreement, the United States agreed to devalue the dollar in terms of gold, while our trading partners agreed to revalue their currencies in terms of the dollar.[136] The intended consequences of this agreement were that the increased cost of foreign goods would cause a decline in our demand for imports and that the decreased cost of American goods would increase the foreign demand for our exports. Consequently, the balance of payments problem is combatted on two fronts by increasing our export activity while decreasing the flow of imports.[137] Thus, in terms of cost to the American taxpayer as compared to revenue lost, it would not seem

132. Brannon, *supra* note 67, at 899. This study has been recognized and cited by the following: S. Surrey, Pathways to Tax Reform 186 n.24 (1973); Considine, *supra* note 40, at 236-45; Musgrave, *supra* note 72, at 27.

133. S. Surrey, supra note 132, at 186 n.24.

134. *Id.* at 186. *See also* B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 17.14 (Cum. Supp. No. 2, 1975); Richman, *supra* note 89, at 229 n.1.

135. International Monentary Fund Release No. 862 (Dec. 19, 1971). Text of the IMF communique was reprinted in the New York Times, Dec. 20, 1971, at 56, col. 2.

136. R. Gill, Economics and the Public Interest 215 (2d ed. 1972).

137. *Id.*

logical in an era of floating exchange rates to also engage the assistance of preferential taxation.[138]

The second factor to be examined with regard to the propriety of DISC has to do with GATT in general. A subsidy need not violate the General Agreement in fact in order to elicit a response from other contracting parties. Contracting parties who perceive themselves as "victims" of DISC may avail themselves of certain retaliatory measures provided in the General Agreement.[139] These include the imposition of countervailing duties[140] and the suspension, withdrawal, or modification of a GATT concession or obligation.[141] DISC, therefore, may initiate a "chain reaction"[142] which would result in the erection of a myriad of defensive trade barriers. Aside from undermining the purpose of GATT,[143] these retaliatory acts by other nations would also operate to defeat the purpose for which DISC was designed.[144]

Therefore, consideration of the inefficiency of DISC as an incentive to increase exports and the likelihood that it will incite a "competitive subsidization race"[145] would seem to compel the conclusion that the DISC legislation should be repealed.

VI. CONCLUSION

The DISC legislation represents an attempt to increase United States export activity in order to remedy the country's balance of payments deficit. It has been argued that the DISC legislation should be repealed because it violates the General Agreement on Tariffs and Trade. This comment has shown that there is at least some merit to this argument. Whether or not DISC violates the General Agreement, however, there are other practical reasons for its elimination. The cost of the program in terms of tax revenue lost compared to export revenue gained, and the possibility of provoking affected contracting parties into adopting counterbalancing economic measures are two of the primary reasons. The threat that such an inefficient subsidy could engender such adverse reactions should strike the balance against the continuation of this deferral system.

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138. Hufbauer, *supra* note 110, at 57.
139. DAM, *supra* note 2, at 136; JACKSON, *supra* note 14, at 377.
140. Article VI(3), (6)(a).
141. Article XIX(1), XXIII(2); JACKSON, *supra* note 14, at 377-78.
142. Anninger, *supra* note 11, at 420 & n.132.
143. DAM, *supra* note 2, at 136.
144. Musgrave, *supra* note 72, at 28.
145. DAM, *supra* note 2, at 136.