

GENERAL AGREEMENT ON

RESTRICTED

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8 July 1992

TARIFFS AND TRADE

Special Distribution

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD
ON 28 APRIL 1992

Chairman: Mr. Gerry Salembier (Canada)

1. The Committee on Subsidies and Countervailing Measures ("the Committee") held a regular meeting on 28 April 1992.
2. The Committee adopted the following agenda:
 - A. Election of Officers
 - B. Examination of countervailing duty laws and/or regulations of signatories of the Agreement¹ (SCM/1 and addenda):
 - (i) Australia (SCM/1/Add.18/Rev.1/Suppl.3)
 - (ii) Chile (SCM/1/Add.16/Rev.2)
 - (iii) Colombia (SCM/1/Add.29)
 - (iv) Turkey (SCM/1/Add.28)
 - (v) United States (SCM/1/Add.3/Rev.3/Suppl.2)
 - (vi) Other legislation
 - C. Notification of subsidies under Article XVI:1 of the General Agreement
 - (i) New and full notifications (L/6630 and addenda)
 - (ii) Updating notifications due in 1991 (L/6805 and addenda)

¹The term "Agreement" means Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.

- D. Semi-annual reports of countervailing duty actions taken within the period 1 July-31 December 1991 (SCM/136 and addenda)
- E. Reports on all preliminary or final countervailing duty actions (SCM/W/252 and 254)
- F. Countervailing duty investigation initiated by Argentina in respect of certain dairy products from the EEC and of canned fruits from Greece
- G. German Exchange Rate Scheme for Deutsche Airbus - Report of the Panel (SCM/142)
- H. United States - Countervailing duties on non-rubber footwear from Brazil - Report of the Panel (SCM/94 and SCM/96)
- I. Other panel reports pending before the Committee:
 - (i) EEC subsidies on export of wheat flour - Report of the Panel (SCM/42)
 - (ii) EEC subsidies on export of pasta products - Report of the Panel (SCM/43)
 - (iii) United States - Definition of industry concerning wine and grape products - Report of the Panel (SCM/71)
 - (iv) Canada - Imposition of countervailing duties on imports of manufacturing beef from the EEC - Report of the Panel (SCM/85)
- J. Draft guidelines on the application of the concept of specificity (SCM/W/89)
- K. Other business
 - (i) United States' countervailing duty proceeding regarding portable seismographs from Canada
 - (ii) Derestriction of the Panel Report on Canadian countervailing duties on grain corn from the United States (SCM/140 and Corr.1)
 - (iii) Imposition by Brazil of provisional countervailing duties on milk powder from the EEC

A. Election of Officers

3. The Committee elected Mr. Gerry Salembier (Canada) as Chairman and Mr. Rak Yong Uhm (Korea) as Vice-Chairman.

4. The Chairman, on behalf of the Committee, expressed thanks to the outgoing Chairman, Ms. Angelina Yang, and Vice-Chairman, Mr. Johannes Potocnik, for their excellent service to the Committee.

B. Examination of countervailing duty laws and/or regulations of signatories of the Agreement (SCM/1 and addenda)

(i) Australia (SCM/1/Add.18/Rev.1/Suppl.3)

5. The Chairman recalled that the Committee had examined amendments to Australia's countervailing duty legislation at its meetings of 25 October 1990 (SCM/M/48, paragraphs 17-19), 1 May 1991 (SCM/M/51, paragraphs 13-17) and 22 October 1991 (SCM/M/54, paragraphs 7-12). Australia had submitted a further communication on this subject in September 1991 (SCM/1/Add.18/Rev.1/Suppl.4). Written questions had been submitted by the delegation of Canada (SCM/W/234), and a communication had been submitted by the delegation of the EEC (SCM/127). Since the October 1991 meeting Australia had responded to Canada's questions (SCM/W/256) and to the EEC's questions (SCM/W/259). At a special meeting of the Committee on 26 March 1992 (SCM/M/58), the EEC had requested consultations on some aspects of this matter under Articles 3 and 16 of the Agreement (SCM/145), and Australia had responded in writing to the EEC initiative (SCM/146).

6. The representative of the EEC said that the Community appreciated the effort made by Australia to reply in some detail to the concerns expressed by the Community on several occasions regarding certain provisions of the Australian Customs Amendment Act 1991. However, this reply had not put those concerns to rest. Australia agreed that the definition of "domestic industry" and of "like product" contained in the Code made it clear that domestically produced inputs could not be considered a "like product" compared to the finished or processed product derived from such inputs. Nevertheless, according to Australia, producers of a primary product could be considered, and were, part of the industry producing a processed agricultural product on the basis of certain economic tests and based on a sufficient degree of vertical integration and on a close relationship between prices. This situation would be different from that arising from the definition of industry for wine and grape products in the US Trade and Tariff Act of 1984 which, according to Australia, simply deemed the producers of the raw agricultural product to be within the definition of industry. Such contentions had been heard in the past, with respect to the dispute involving the definition of industry concerning wine and grape products (SCM/71) and also the case involving Canadian countervailing duties on imports of manufacturing beef from the Community (SCM/85). Economic interdependence between primary producers and processors, close relationship between production of a primary product and of a processed

one, price correlations, continuous sequential production process, function of the allocation of an input of a primary product in a processed end-product - these and other elements had been put forward on several previous occasions. The Community was not relying on the findings and conclusions of the above-mentioned panel reports as a matter of law, but had made it clear in both cases that it was not prepared to accept the kind of argument described above, in the face of the clarity of the relevant provisions of the Code, the mandatory nature of the definition of domestic industry in Article 6:5 and the clear negotiating history of that definition. The Community could not accept an open-ended definition of domestic industry, which would be the inevitable consequence of any principle which would justify the interpretation supported by Australia. Nor could the Community accept that the balance of rights and obligations arising from the Code could be altered, on a point of crucial importance, through unilateral interpretation. Any perceived shortcoming of the Code could be tackled only through multilateral negotiations, and in the Community's view, there had been more than ample opportunity to do this in recent years.

7. Australia had stated that legislation in similar terms had already passed through the Committee process. He said that if Australia's reference here was the US Omnibus Trade and Competitiveness Act of 1988, he wanted to note that the Community had reserved its position as to the conformity with the Code of certain provisions of that legislation, pending their implementation. Also, while the economic tests spelled out in the US Trade Act bore some resemblance to those argued in the wine and beef cases and to those of the Australian Customs Amendment Act, the Community was under the impression that these tests were now being employed in a different context than the definition of domestic industry. Therefore, this so-called precedent would appear to be irrelevant to the present case. He reiterated that the arguments thus far advanced by Australia did not diminish the Community's concern about this legislation. As to Australia's view regarding the procedures in this matter - that "legislation itself cannot be validly examined under the dispute settlement provisions of the Code", and that "within the GATT ..., it has been held on a number of occasions that inconsistent legislation is not a violation of GATT obligations until such legislation is applied" (SCM/W/259, page 2, last paragraph) - the Community was of the view that such a position was not correct, for the following reasons: The relevant legal context which determined the rights and obligations of Code signatories was the Code itself. Article 1 of the Code provided that "Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement". In cases where legislation inconsistent with the Code gave private parties a right of action, enforceable against the government, before a national court, and the investigating authority had no discretion not to apply the legislation inconsistent with the Code, there was already a violation of Article 1 and its practical effects might be only a matter of time, not to mention the impact on the business prospects of both exporters and importers caused by

the threat of the application of the legislation in question. Apart from the obligations arising from Article 1, legislation inconsistent with any of the substantive provisions of the Code also constituted a direct violation of the clear-cut obligation arising from Article 19:5(a) which provides that "Each government accepting or acceding to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the signatory in question".

8. He said that even if the wine and grape panel report had never been adopted, and thus could not be considered as constituting a precedent as to its findings and conclusions, the Panel had nevertheless been established by the Subsidies Committee and had carried out its mandate, which referred only to the legislation itself. Any actions under that legislation had been initiated months after the Panel had been established, and in this respect the case did constitute a valid precedent. Therefore, regardless of whether or not the Community would ever want to invoke the dispute settlement provisions of the Code in respect of this question, it was clear that the Community would have the right to do so under the Code, and that the process which had begun under Article 16 at a special meeting of the Committee on 26 March 1992 would be a valid one for this purpose. However, the Community had not insisted on maintaining on the agenda of the Committee at the present stage the Article 16 consultations on the Australian legislation, as it believed that Article 16 had to leave room for bilateral consultations. Thus, the Community had reiterated its request to the Australian authorities for such bilateral consultations, and would wait for a reply to that request, which it was confident would be forthcoming. Regarding the process in which the Committee was engaged at the present meeting - the examination of the Australian Customs Amendment Act 1991 - he repeated that the Community was still of the view that this legislation, and in particular its Clause 7, was not in conformity with the provisions of the Code.

9. In conclusion, he reiterated that the Community's preoccupations were real and concrete. The Community had been informed that the Australian Anti-Dumping Authority, in its final determination concerning glacé cherries from France and Italy, had recommended the imposition of countervailing duties on the basis, inter alia, of the legislation under discussion. Australia had offered the Community consultations under Article 3 of the Code in respect of this investigation, and such consultations had been ongoing for some time. Australia had also recently expressed its continued willingness to continue this process with regard to this investigation as well as to other ongoing ones. The Community appreciated this and would soon take up this offer. However, he had mentioned the investigation regarding glacé cherries in order to underline that once legislation had been enacted and private parties had a right to resort to it, actual use was only a matter of time.

10. The representative of Finland, speaking on behalf of the Nordic signatories, recalled that these countries had on previous occasions expressed their concern over deviations in national legislation from the clear-cut definitions of "industry" and "like product" in the Code. They had drawn the Committee's attention to the very serious consequences that would follow should such deviations be accepted. The Nordic countries supported the statement by the EEC on this aspect of the Australian legislation under examination.

11. The representative of Canada recalled that Canada had submitted questions on the Australian legislation and appreciated the written answers. Regarding the answer to question 1 in SCM/W/256, Canada found this somewhat ambiguous and asked for clarification as to whether the undertakings could be considered only after a preliminary affirmative finding of subsidy, injury and causal link. Also, what was the timing of the preliminary determination in such an instance? On question 2, the third paragraph of the answer stated that the provisions could be applied by the Minister subsequent to any dispute settlement under the Subsidies Code. What conditions would need to prevail were this applied? Would application of a countervailing duty remedy without an injury test apply only to non-signatories? Could Australia provide some information as to whom this remedy might apply? Regarding the question of the definition of industry with respect to standing and injury, Canada was sympathetic to the concerns which the Australian legislation tried to address. The current Code provisions could result in anomalous situations, particularly in certain cases in the agricultural sector. Canada had proposed in the Uruguay Round negotiations language on "standing" to clarify such situations, initially in the subsidies negotiations, and also in the agricultural negotiations where Canada was continuing to promote its adoption as part of the agricultural package. Canada's position was that the best way to address the lack of clarity in the present rules was through amendments to those rules.

12. The representative of New Zealand associated his delegation with the statement by Canada regarding the question of definition of industry and standing. New Zealand too was sympathetic to the concerns which the Australian legislation tried to address, and continued to look for some resolution of this question in the multilateral trade negotiations.

13. The representative of Australia said that Australia's response to the EEC's concerns (SCM/127, repeated in SCM/145) was contained in SCM/W/259 of 10 April 1992. Firstly, the EEC seemed to believe that the legislation broadened the domestic industry definition by an extension of what could be considered a like product. However, he stressed Australia's acceptance that the definitions of "like product" in footnote 18 and "domestic industry" in Article 6:5 made clear that domestically produced inputs could not be considered a "like product" compared to a finished or processed import derived from such inputs. Australia's legislation did not contradict this principle - it simply delimited the definition of domestic industry in certain cases where the following tests were met: (1) the raw goods were devoted substantially or completely to the processed goods, and

processed goods were derived substantially or completely from the raw goods; and (2) there was either a close relationship between movement in prices of the raw and processed goods, or the raw goods constituted a significant proportion of the production costs of the processed goods. In other words, the legislation did not, as the EEC appeared to contend, imply that a raw agricultural good was to be regarded as a "like product" to a processed agricultural good. Rather, it reflected Australia's conviction that where there was an inextricable linkage, based on vertical integration and economic interdependence, it was a reasonable interpretation of the Code to treat the growers as an integral part of the domestic industry producing the processed "like product". There was, in this sense, only one industry, and the primary producers and processors were both part of it. In the terms of Article 6:5 of the Code, the producers and processors were "the domestic producers as a whole of the like product".

14. He said that the situation in the wine and grape case was distinguishable from that which the Australian law addressed. In the former case, the law simply deemed grape growers to be within the definition of industry. Furthermore, in that report, and in the unadopted manufacturing beef report, the standing of the growers was questioned because they were found to be separate from the industry producing the "like product". The Australian law, on the other hand, addressed situations where producers were not separate from one another. In other words, the existence of close economic linkages between producers of inputs and processed products allowed the producers to be considered part of the same domestic industry. There were many cases of such significant coincidence of production and financial links in Australian agriculture. One such case was that of co-operatives where the processing facilities were owned by the growers. In this context, there were obvious exclusive financial and supply links. Another example was the situation in which crops were grown under contract to processors. In such cases the processor might supply the seed - to ensure product consistency -, provide advice on growing practices, determine the date of harvest - which might not correspond to maximum yields -, and sometimes even provide the harvesting equipment. In cases such as these the industry producing the processed product clearly comprised both growers and processors. These situations could not be aligned with the wine and grape case. In summary, he said that the Code rules relating to this issue were unclear and open to interpretation. This had been recognized for several years. Australia's legislation did not imply that the raw good and a processed import were "like products". The legislation clarified how cases in which there was a significant coincidence between growers and processors, in the form of vertical integration and economic interdependence, were to be treated. These tests were a reasonable interpretation of Code provisions and could not, as seen from the examples cited, be regarded as amounting or leading to a prima facie Code violation. The legislation simply made clear in Australia's domestic law an interpretation which was permitted under the Code. It was similar to other legislation which had passed through the Committee process, such as that notified in SCM/1/Add.3/Rev.3.

15. Regarding the right to take legislation to dispute settlement, it was relevant that Australia had rejected any contention that its legislation made it impossible, or illegal, to comply with Article 1 obligations and could itself constitute a breach. Indeed, Australia had given examples of situations that would be covered, and where growers and processors unquestionably comprised part of the one industry. Furthermore, it was clear that particular CVD actions might be contested following consultations under Article 3. The Codes were interpretations of the GATT and, in the case of the Subsidies Code, of Articles VI and XVI. In Australia's view, the provisions of these Articles referred to actions by contracting parties and not to legislation or laws in themselves. Australia considered that legislation itself could not validly be examined under dispute settlement provisions. The proper procedure for examining legislation was the normal Committee scrutiny, which was currently proceeding pursuant to Article 19. His delegation had made clear that it did not deny the rôle of the Committee in examining legislation, in making recommendations to members and in adjudicating on general principles. Australia did not consider that taking legislation to dispute settlement was envisaged or appropriate. He noted that the related Anti-Dumping Code, which had national legislation provisions at Article 16:6 which were identical to Article 19:5 of the Subsidies Code, made clear under Article 1 that it applied to actions rather than to legislation. Regarding the Panel on wine and grape products, the Committee had taken a decision to establish a panel which had examined a legislative provision; however, there had been considerable differences in the Committee at that time on the appropriateness of that course. The Panel had merely noted on this point that it had no option but to examine the legislation due to the terms of reference which had been established. It was the prerogative of the Committee to examine the issue of Australia's legislation and to take a different view, in the light of Australia's arguments, of the very different nature of the legislation, and of the fact that this legislation had been examined under normal Committee processes. As to the 26 March meeting of the Committee, he said that the arguments made by Australia on that occasion were contained in the record of the meeting (SCM/M/58, paragraphs 15-16). However, he again stressed that Australia rejected any contention that valid consultations had taken place under any Code provision on that occasion. Australia regarded the process that had taken place to have been irregular, invalid and to have had no standing. Regarding the EEC's request for consultations, he reiterated that Australia had agreed to consult on specific cases of concern to the Community and on the application of Australia's legislation to those cases.

16. The representative of the EEC said that he would not repeat arguments on procedural matters and on the validity of the establishment of the Panel on wine and grape products as a precedent, or on the validity of the process which had taken place in the Committee on 26 March 1992. The Community had already made its views on this matter clear, and those views had not changed. Regarding Australia's comments on the substance of this issue, the Community did not understand the Australian legislation as considering primary and processed products as one "like product". The Community's contention, and the rules of the Code, were that the definition

of industry was given exclusively in terms of like product; if there were two like products, there were two domestic industries, not one. The Community understood the reasoning behind the Australian legislation; however, in terms of the existing rules of the Code, this reasoning was not correct. While there might be closeness of the economic relations between growers and processors in sectors of one country's economy, under present Code rules, that closeness was not relevant. In the Community's view, it had not been recognized that the rules of the Code in this respect were unclear. These rules were among the very few which were, in fact, clear-cut. The Community appreciated that other delegations recognized that the appropriate avenue for any modification of these rules was the multilateral negotiations. Unilateral interpretations of rules which were very clear was not an appropriate manner in which to solve economic problems.

17. The representative of Australia, in response to the questions put by Canada, said that in order for the Minister to seek or accept an undertaking, the Minister had to have countervailing action under his consideration. This was the substance of the first two lines of S269TG(4). As to when the Minister had countervailing action under consideration, one view was that Customs was responsible for the preliminary finding and provisional measures, and only where a positive preliminary finding was reached did the matter come before the Minister, who acted on advice of the Anti-Dumping Authority. An alternative view was that a matter before Customs was, by definition, before the Minister, or could be put before the Minister by Customs at any time. On the basis of this latter view, it would be possible to consider an undertaking before a preliminary finding was reached, but the Minister would have to be satisfied that a basis existed - in terms of subsidy, injury and causal link - to seek or accept an undertaking. Logically, the Minister would have to have a preliminary finding in order to be satisfied on these matters. Thus, by either interpretation of S269TG(4), a preliminary finding would have to be reached before undertakings were sought or accepted. The reality was that under current administration arrangements, an undertaking would not be accepted before a preliminary finding had been reached, and that any reasonable exercise by the Minister of his powers to accept an undertaking would only be available after a positive preliminary finding.

18. He said that the imposition of countervailing duties under S269TJ(4) could be applied where the three conditions were satisfied, as set out in sub-paragraphs (a), (b) and (c) of S269TJ(4). Those conditions essentially required that another country had countervailed Australian exports because of an alleged subsidy, and that action had been taken without regard or without proper regard to whether or not material injury had been caused by the allegedly subsidized Australian exports. The reality, as regarded GATT and Code signatories, was that these conditions could only be satisfied where, as indicated in Australia's written response (SCM/W/256), a basis had been established following dispute settlement procedures.

19. The Committee took note of the statements and agreed that it had concluded its examination of the amendments to the Australian countervailing duty legislation.

(ii) Chile (SCM/1/Add.16/Rev.2)

20. The Chairman recalled that Chile had introduced the amendments to its countervailing duty legislation at the Committee's meeting on 1 May 1991 (SCM/M/51, paragraphs 26-28) and the Committee had examined these amendments at its meeting of 22 October 1991 (SCM/M/54, paragraphs 19-23). Since the October 1991 meeting, further questions on the Chilean legislation had been submitted by Canada (SCM/W/249) and Chile had responded to those questions (SCM/W/260). Chile had also responded (SCM/W/255) to the questions raised earlier by the United States (SCM/W/244).

21. The Committee agreed that it had concluded its examination of the amendments to the Chilean countervailing duty laws and regulations.

(iii) Colombia (SCM/1/Add.29)

22. The Chairman recalled that Colombia had introduced its countervailing duty legislation at the Committee's meeting on 1 May 1991 (SCM/M/51, paragraphs 22-25) and the Committee had examined the legislation at its meeting of 22 October 1991 (SCM/M/54, paragraphs 13-18). Since the October 1991 meeting further questions on the Colombian legislation had been submitted by Canada (SCM/W/250).

23. The representative of Colombia explained that for reasons of force majeure it had been impossible for Colombia to present its responses to Canada's questions at the present meeting. There was a serious communications problem in Colombia which had made recent contact with the capital impossible. However, his delegation hoped to be able, in the next few days, to provide written replies to Canada's questions as well as to those raised by the United States at the Committee's October 1991 meeting.

24. The representative of Canada said that his country had no supplementary questions and could await the written replies from Colombia.

25. The Committee took note of the statements and agreed to revert to this item at its next regular meeting.

(iv) Turkey (SCM/1/Add.28)

26. The Chairman recalled that the Committee had examined this legislation at its meetings of 26 October 1989 (SCM/M/44, paragraphs 33-35), 24 April 1990 (SCM/M/46, paragraphs 19-22), 25 October 1990 (SCM/M/48, paragraphs 12-16), 1 May 1991 (SCM/M/51, paragraphs 6-12) and 22 October 1991 (SCM/M/54, paragraphs 3-6). Since the October 1991 meeting, Turkey had responded in writing (SCM/W/253) to the questions submitted by the United States (SCM/W/246) and considered at the October 1991 meeting.

27. The Committee agreed that it had concluded its examination of the legislation of Turkey.

(v) United States (SCM/1/Add.3/Rev.3/Suppl.2)

28. The Chairman recalled that the Committee had received a notification from the delegation of the United States containing the text of final regulations of the US International Trade Commission regarding US countervailing duty remedies.

29. The Chairman proposed that delegations wishing to submit questions do so in writing by 12 June 1992, and that the delegation of the United States respond to these questions in writing by 14 September 1992.

30. The Committee so agreed.

(vi) Other legislation

31. The Committee agreed to maintain this item on its agenda in order to allow signatories to revert to particular aspects of national countervailing duty laws and regulations at a later stage.

C. Notification of subsidies under Article XVI:1 of the General Agreement

(i) New and full notifications (L/6630 and addenda)

32. The Chairman said that the Committee would hold a special meeting following the present meeting to examine new and full notifications due in 1990 and submitted in response to the request circulated in L/6630. As of 27 April 1992 such notifications had been received from all signatories except Indonesia. He drew the attention of members of the Committee to the statement by the Chairman at the meetings of 24 April 1990 (SCM/M/46, paragraphs 35-36), 1 May 1991 (SCM/M/51, paragraph 53) and 22 October 1991 (SCM/M/54, paragraph 29).

(ii) Up-dating notifications due in 1991 (L/6805 and addenda)

33. The Chairman noted that updates due in 1991 to the new and full notifications for 1990 had been received from the following delegations: Hong Kong (Add.1), Japan (Add.2), South Africa (Add.3), Austria (Add.4 + Suppl.1 and Corr.1), Brazil (Add.5), Chile (Add.6) and Australia (Add.7). While some full notifications, which had been due in 1990 and which had been received only recently, covered the latest developments and could be considered as up-dating notifications as well, the fact remained that only a few signatories had made their full and then up-dating notifications strictly in accordance with the decision of the CONTRACTING PARTIES. Regarding up-dating notifications due in 1992 (L/6973), he said that only two such notifications had thus far been received, and that he left it to Committee members to consider and reflect on this unsatisfactory situation.

34. The Committee took note of the statement.

D. Semi-annual reports of countervailing duty actions taken within the period 1 July-31 December 1991 (SCM/136 and addenda)

35. The Chairman recalled that the invitation to submit semi-annual reports under Article 2:16 of the Agreement had been circulated in SCM/136. Responses to this request had been issued in addenda to this document. SCM/136/Add.1 listed those signatories which had notified that during the period 1 July-31 December 1991 they had not taken any countervailing duty action. These signatories were Austria, Colombia, Egypt, Finland, Hong Kong, India, Israel, Japan, Korea, New Zealand, Norway, Pakistan, Philippines, Sweden, Switzerland, Turkey and Yugoslavia. The following signatories had notified countervailing duty actions: Chile (SCM/136/Add.2), Brazil (SCM/136/Add.3), the United States (SCM/136/Add.4), the EEC (SCM/136/Add.5), and Canada (SCM/136/Add.6). No report had been received from: Australia, Indonesia and Uruguay.

36. The Chairman said that although the list of signatories who had not complied with their obligation under Article 2:16 was relatively short, some countries appeared on this list at each meeting. He therefore urged those signatories to reconsider their attitude in this Committee and to submit their reports without further delay.

37. No comments were made on the semi-annual reports submitted by Chile, Brazil, the United States, the EEC and Canada.

38. The Committee took note of the statement.

E. Reports on all preliminary or final countervailing duty actions (SCM/W/252, 254 and 257)

39. The Chairman said that notices of countervailing duty actions had been received from the delegations of Australia, Chile and the United States.

40. No comments were made on these notices.

F. Countervailing duty investigation initiated by Argentina in respect of certain dairy products from the EEC and of canned fruits from Greece

41. The Chairman said that this item had been included on the agenda of the present meeting at the request of the European Communities.

42. The representative of the EEC said that the Community had requested the inclusion of this item on the agenda of the present meeting in order to express its serious concern over the manner in which signatories to the Code and active participants in the Uruguay Round negotiations treated the obligations arising from the Code in respect of countervailing duty investigations. The investigations recently opened by Argentina against dairy products from the Community and canned peaches from Greece were in flagrant contradiction with many provisions of the Code. Regarding the procedures followed by the Argentine authorities, the Community had never been offered consultations prior to the opening of the investigation. The

first information the Community had received concerning the dairy products investigation had been an invitation to a hearing delivered to the head of the Community's delegation in Buenos Aires; the only information concerning the canned peaches investigation had been a note to the Greek Consul in Buenos Aires which, furthermore, referred to anti-dumping proceedings and made no mention of a countervailing duty investigation. This failure to offer prior consultations as required by Article 3 of the Code had led to great confusion with regard to both proceedings and had prevented the Community from raising, in a timely fashion, legitimate concerns as to both the procedure and substance of these cases. The Community had still not been officially notified of the investigation concerning canned peaches from Greece. Furthermore, the Argentine authorities had made no attempt to identify and notify the Community exporters of the products concerned, as required by Article 2:3 of the Code. In the dairy products case, only the EEC delegation in Buenos Aires and the Argentine importers had been informed of the initiation of the proceeding. In the canned peaches case, only the Greek Consul had been informed of the initiation of an anti-dumping proceeding, and the Community had not even seen a copy of the complaint, nor had it been informed of many details of the allegations made by the complainant. He said that this total lack of transparency had made it hard to be very precise about the substance of these cases. The Community had succeeded, however, in obtaining some clarification through diplomatic channels, and in holding a bilateral meeting on 26 March. This clarification process was still far from being satisfactory, but it was already apparent that the complaints contained several factual errors and that the dairy products case would violate at least one key substantive provision of the Code, which was Article 6. The complainants, in fact, were Argentine milk producers, whereas the allegedly subsidized imported products were dairy products - milk powder, butter, cheese, etc. - which were clearly not like milk. The Committee had been notified - and the Community had been told several times by the Argentine authorities - that Argentina's signature of the Code was ad referendum only, pending ratification in the Argentine Parliament. Thus, the Community had been told that Argentina's countervailing duty law did not need to conform to the Code, and that the two investigations met the requirements currently contained in Argentina's legislation. While this might be correct from a strictly legalistic point of view, it did not augur well for Argentina's membership in the Subsidies Committee.

43. He said that Argentina had already manifested its willingness to abide by the disciplines of the Code by signing it, and that this had been confirmed by Argentina's Minister of Economics who had affirmed to the head of the Community's delegation in Buenos Aires that Argentina should already abide by the provisions of the Code. In fact, prior consultations might have avoided many of the problems which were arising in this case. Furthermore, as to the standing of the complainant in the dairy products case, the concept of like product, on which the notion of domestic industry and therefore the standing to lodge a complaint were based, was already contained in Article VI of the General Agreement, as confirmed by a report adopted by the contracting parties in 1959, which provided that, "... as a

general guiding principle judgements of material injury should be related to national output of the like commodity concerned" (BISD 8S/150, paragraph 18). The Community wanted to raise this matter in the Committee, as Argentina was already an observer and would soon be a full member. As for any further action that the Community might deem appropriate, it reserved its right to revert to this issue in the GATT Council under Article VI of the General Agreement.

44. The representative of Argentina, speaking as an observer, said that his delegation was surprised by the Community's statement on several fronts. In fact, Argentina was merely an observer in the Committee, with neither the rights nor the obligations of a full member. Argentina had signed the Subsidies Agreement subject to ratification by the Argentine Parliament. However, it was not reasonable to expect a country to implement legislation which its parliament had not yet adopted. Thus, it was out of the question for Argentina to supersede existing legislation with legislation which was currently being enacted. Regarding procedures in the Committee, he asked whether a matter concerning a non-signatory should be dealt with in this Committee. He understood that there had been precedents indicating a negative answer to this question. As to the two products of concern to the Community, he said that Argentina was actively participating in the Uruguay Round and, if one looked at the texts reached thus far, it seemed clear that the EEC, unless it violated the provisions of those texts, would not be in a position to export "powdered milk" to Argentina. The Community was entirely within its rights in raising this issue elsewhere with regard to provisions of the General Agreement, but not in the Subsidies Committee. He said that these issues had been in existence for six or seven months. There had been numerous consultations between the Community and Argentina, not just one. There had been an exchange of diplomatic notes and even conversations at ministerial level. In each of these contexts Argentina had said that the only applicable legislation was that currently in force in Argentina, i.e. Law 22,145. He asked the Chairman whether this issue was proper for discussion under the item raised by the Community.

45. The Chairman said that a signatory of the Agreement had the right to request any matter for inclusion on the agenda of the Committee. Whether the Committee would decide to examine that matter was another question. In the past, the Committee had examined matters raised by observers vis-à-vis signatories and vice versa. For example, the Committee had examined the subsidy notification of Yugoslavia, which was in the same legal position as Argentina.

46. The representative of the EEC said that the Community had a very strong interest in discussing the behaviour, with respect to the Code, of a prospective signatory of the Code. According to EEC legal experts, under the general law of treaties, a state which had signed an agreement was already bound not to do anything which might be counter to the object and purpose of the agreement, even though it had not been ratified and was not applicable domestically. As to the substance of these cases, the

Community did not claim that Argentina should have implemented the Subsidies Agreement prior to its ratification by the parliament, but that had Argentina felt compelled by its signature of the Agreement to offer prior consultations, many problems could have been avoided. The consultations which had been held had not been particularly satisfactory. He said that were Argentina a member of the Subsidies Committee, its position on the way the Community applied countervailing duty laws would not change, because Argentina already enjoyed the benefits of the Code as far as the Community was concerned, since the Community applied its countervailing duty laws in conformity with the Code erga omnes - a unilateral choice by the Community.

47. The representative of Argentina, speaking as an observer, said that he understood from the Chairman's ruling that a precedent existed regarding Yugoslavia. However, these were two different situations. Argentina's position was that as a non-signatory of the Agreement, it had no interest in discussing a matter such as this within the Committee. He would not address the substance of these issues, but wanted to make a few general comments. The Community had implied that Argentina's legislation was not consistent with the Code; this was merely the opinion of the Community. In fact, in Argentina's view, a great deal of its legislation was consistent with the Code. The Community had also said that prospective signatories should be carefully scrutinized, and that under international law, signing an agreement prior to ratification required compliance with the agreement, even where there was a contradiction between domestic and international law. Argentina had never before heard this alleged. On the contrary, within GATT one often found cases of non-compliance of domestic legislation with ratified international law, such as non-compliance by contracting parties with panel reports. The consultations which had been held did not seem to have satisfied the Community; nevertheless, lengthy consultations had been held and on several occasions. His delegation would like to know what the position of an observer in the Committee was vis-à-vis a signatory, in terms of rights and obligations. Could legislation be discussed in this Committee when the case involved a signatory and a non-signatory?

48. The representative of the United States said that his delegation supported the Chairman's ruling, which the United States felt was an accurate reflection of the Committee's practice. In the United States' view, the Community was not requesting specific action by the Committee, but rather informing it of a matter of concern to it. In this regard, the Community was fully within its procedural rights.

49. The Chairman said that he had taken note of Argentina's reluctance to discuss certain aspects of Argentina's legislation, and recalled that while it was the right of any signatory to include an item on the Committee's agenda in respect of the actions or legislation of a non-signatory, should the non-signatory in question choose not to discuss the matter, it was his right to so decide.

50. The Committee took note of the statements.

G. German exchange rate scheme for Deutsche Airbus - Report of the Panel (SCM/142)

51. The Chairman recalled that the dispute which had led to the establishment of this Panel had been referred to the Committee by the United States in December 1989 (SCM/97). The Committee had held a conciliation meeting on this matter on 31 January 1990 (SCM/M/45). At a special meeting on 6 March 1991 the Committee had considered a request by the United States for the establishment of a panel (SCM/108) and had agreed at that meeting to establish a panel (SCM/M/49). At a special meeting held on 11 April 1991 the terms of reference of the Panel had been established (SCM/M/50). On 4 March 1992 the Panel had submitted its report to the Committee (SCM/142).

52. The Chairman of the Panel, Ambassador Julio Lacarte, introduced the Panel report. He said that the Panel, established by the Committee in March 1991, had started its work in May 1991. As indicated in SCM/M/50, the terms of reference of the Panel had been established in April 1991 as follows:

"The Panel shall review the facts of the matter referred to the Committee by the United States in SCM/108 and, in light of such facts, shall present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by this Agreement."

The matter in question dealt with an exchange rate guarantee scheme operated by the German Government with respect to Deutsche Airbus, the German partner in the Airbus Industrie consortium, covering Deutsche Airbus' participation in certain Airbus aircraft programmes. The Panel had met with the two parties to the dispute on 5 June, 17 July and 4 October 1991. It had used as the basis for its examination of the disputed issues the written submissions by the parties to the dispute as well as factual information provided by the parties in response to specific questions by the Panel. On 14 January 1992 the Panel had submitted its findings and conclusions to the two parties. On that occasion it had informed the parties that should no mutually satisfactory solution have been reached by 5 February 1992, and should no request for an extension of the deadline have been received from both parties by that time, the full Report would be circulated to members of the Committee. The Panel had then released its full Report to the Committee on 4 March 1992. The main legal issue before the Panel had been whether the German exchange rate guarantee scheme for Deutsche Airbus was inconsistent with the prohibition of exchange risk programmes in Article 9 of the Subsidies Agreement as set out in Item (j) of the Illustrative List thereto.

53. The conclusions of the Panel appeared in paragraphs 6.1 and 6.2 of the Report and were as follows:

"6.1 In light of its findings and reasoning in paragraphs 5.2, 5.3 and 5.8 above, the Panel concluded that the German exchange rate guarantee scheme resulted in a subsidy granted on exports and that the scheme

was prohibited in terms of Article 9, as an export subsidy covered by Item (j) of the Illustrative List.

6.2 The Panel recommends that the Committee on Subsidies and Countervailing Measures request that the exchange rate guarantee scheme operated by the Government of Germany with respect to Deutsche Airbus be brought into conformity with the provisions of Article 9 of the Subsidies Agreement."

Subsequent to the submission of the Report to the parties, the EEC, in a letter addressed to him as Chairman of the Panel, had raised some questions relating to the scope of the application of the Subsidies Agreement and to the concept of "export" as set out in the Panel Report. However, the Panel had not considered that the EEC's contentions in this regard justified a reconsideration of the Panel Report. The issues raised by the EEC in its letter had already been thoroughly considered by the Panel, and its conclusions had been set out in paragraph 5.6 of the report which stated, in relevant part, that:

"... Article 9 was an interpretation of Article XVI:4. Article XVI:4 applied to Germany as a contracting party. ... Since the signatories of the Subsidies Agreement intended to "apply fully and interpret" the General Agreement, they could not have intended to modify the concept of relevant border, which was a key element in the determination of export subsidies. ... The Panel therefore considered that it could not have been the intention of the signatories of the Subsidies Agreement to authorize export subsidies which were prohibited under the General Agreement. ... The member States of the EEC were today still GATT contracting parties, and GATT obligations, in particular that of Article XVI:4, still applied individually to them. The Panel further noted that it would be inconsistent for the export subsidy disciplines of the Subsidies Agreement not to apply to the exports of an EEC member State, because export subsidy practices engaged in by an EEC member State had an impact on third (non-EEC) country signatories which were suppliers of the product benefiting from such subsidies."

In concluding, he said that the Panel considered that by submitting the Report contained in SCM/142 it had fulfilled its terms of reference.

54. The representative of the EEC said that, firstly, this dispute should have been adjudicated on the basis of a proper choice of the applicable multilateral rules. The Agreement on Trade in Civil Aircraft constituted the lex specialis for all matters concerning trade in civil aircraft, and the provisions of the Subsidies Code were applicable only to the extent that they were recalled in and qualified by the Aircraft Agreement. However, in a spirit of compromise, the Community had chosen not to oppose the request for the establishment of a panel by the Subsidies Committee alone, in the expectation that appropriate terms of reference could be found which would enable the Panel to properly take into account all relevant and applicable multilateral rules, including those of the Aircraft Agreement. When this did not happen, the Community had stated its concern

that a panel which began on a flawed legal basis would not be able to reach legally valid conclusions. Regardless of the attitude that the Community would take on a unilateral or bilateral basis as to the recommendations of the Panel and as to the future of the German scheme, the legal reasoning followed by the Panel was seriously flawed and would have disastrous consequences, reaching far beyond the present case or even the interpretation of the Subsidies Code, striking at the very heart of the Community's "constitutional" structure and modifying the balance of rights and obligations between signatories to the Code. Acceptance of the legal reasoning on which this report was based would, in fact, require the Community to go against key provisions of its constitutive treaty and against the case law of its highest judicial authority. This reason alone would be sufficient, in the Community's view, to reject the reasoning on which this report was based. But even if one set aside this question and concentrated on the reasoning in terms of purely multilateral rules, the Community found it in contradiction with basic rules of international law and of the multilateral trading system. He said that from this strictly legal point of view, the reasoning on which this report was based was unacceptable to the Community because:

- the Panel had incorrectly defined the subject matter of the dispute;
- the Panel had opted for incorrect notions of "export" and of "export subsidy", and had wrongly construed the relationship between the GATT and the Subsidies Code;
- in so doing, the Panel had not applied some basic rules of international law;
- the Panel's procedural choices had also been instrumental in arriving at incorrect legal conclusions, and the report lacked motivation on some crucial issues.

55. The Community's arguments were as follows: the subject matter of this dispute had always been trade in large civil aircraft, as was clear to anyone with any familiarity with the history of the dispute itself. Only in their first written submission before the Panel had the United States shifted to alleged trade in aircraft fuselages between Germany and France. The Panel had followed the United States along this path, because the US request "did not specifically exclude any product included in the scheme", and therefore the Panel had considered that "the matter referred to the Committee by the United States was formulated in such a way that it did not limit the scope of the Panel's enquiry to aircraft" (SCM/142, paragraph 5.1). First, the Panel should not have considered whether any products were excluded by the US request for the establishment of the Panel itself, but whether the request included any product. Document SCM/108 had only a passing reference to the product, and this was to aircraft. Second, even if the Panel had not been able to find adequate guidance in the request itself, it still had an obligation to decide in advance what the relevant product was, drawing arguments from the

history of the dispute and not from ex post rationalizations presented by one of the parties. This obligation of the Panel arose not only from general principles of law, but also for two more specific reasons: (1) Footnote 26 to Article 8:4 of the Subsidies Code stated that the signatory granting the alleged subsidy will be accorded a "reasonable opportunity" to rebut the presumption that an export subsidy has resulted in adverse effects; this would be impossible without a prior determination of the product concerned. (2) The dispute settlement mechanism of the Subsidies Code was not intended to enforce respect of some "abstract" obligation not to grant export subsidies, but to solve disputes relating to the Code, and such disputes always involved subsidization of a product. Had the Panel fulfilled this obligation, as it had been requested to do by the Community, it would have been clear that the subject matter of this dispute had always been aircraft, and not parts of aircraft. On this basis, the Panel itself admitted (paragraph 5.12) that the scheme was not an export subsidy: "... the scheme constituted, for the purpose of the production of the aircraft by Airbus Industrie, a subsidy which reduced the cost of production of the aircraft thus making its price more competitive for all foreign and domestic buyers. Such a subsidy was not an export subsidy in the sense of Article XVI of the General Agreement and was not, therefore, covered by Item (j) or any other item of the Illustrative List". However, the Panel had chosen to allow the United States to determine ex post the subject matter of the dispute, and to adjudicate on that basis. This choice alone made the report unacceptable.

56. He said that the notions of "exports" and of "export subsidy" chosen by the Panel were also unacceptably narrow. Although the Panel had stated that it would apply the ordinary rules of interpretation of treaties, that is, interpret a provision according to its ordinary meaning in its context and in the light of its object and purpose, the result did not live up to this standard. As to the interpretation of the term "export" in the expression "export subsidy" of Article 9 of the Subsidies Code, there was no doubt that the right context was the Code itself. The Panel, however, had referred exclusively to provisions of GATT, which were in principle irrelevant to the interpretation of a later agreement - the Subsidies Code - which, although it related partly to the same subject matter as the earlier one, differed considerably in scope from the General Agreement and had been concluded between different parties. Even more serious, however, was the Panel's reasoning when it tried to define what it called the "relevant border for export". The crucial question, however, was not that of the "relevant border", but of what legal obligations existed, upon whom they were incumbent, and to whom they were owed. The Panel's reasoning was based on Article 9 of the Subsidies Code being a mere interpretation of Article XVI:4 of GATT, and this in turn was based solely on the title of the Subsidies Code. These statements, however, remained unsubstantiated, and the Panel had overlooked a basic rule of legal interpretation, that is, that the declaratory, i.e. interpretative, or innovative nature of a provision of law in respect of earlier ones did not depend on the title, but on the substance of the provision; a later legal text might innovate

on an earlier one even though it was called an "interpretation", whereas a text which purported to lay down new rules might prove to be a simple interpretation of earlier ones. The Panel had not carried out - indeed, it had hardly attempted - a proper analysis of the rules it invoked and of the relationship between the two agreements - GATT and the Subsidies Code - where these rules were found. Had it done so, it would have had to address the really crucial question, i.e., the fact that the Subsidies Code, having been concluded between different parties than the GATT, the obligations arising from Article 9 of the Code were owed to different parties, and this had consequences for the nature of such obligations. The Subsidies Code had been concluded between a number of states and the Community. Obviously this bound member States of the Community, and the Community was responsible under international law for violations committed by member States. Just as obviously, however, the obligation which the Community had contracted under Article 9 of the Code in respect of export subsidies was an obligation not to grant export subsidies on exports from one signatory (the Community) or any of its constituent parts (the member States) to other signatories of the Subsidies Code. In the present case, therefore, Germany had an obligation - arising from its membership in the Community and from the Community's signature of the Code - not to grant export subsidies on exports to another signatory of the Code, such as the United States. Agreements concluded between the Community and other countries could not create obligations inter se between members of the Community itself: this had to have been obvious to any state concluding an international agreement with the Community, and it must certainly have been obvious to the United States in 1979 when it had already concluded many agreements with the Community. The Panel, therefore, should have applied the principle non venire contra factum proprium: nobody can go against the facts to which he himself has contributed.

57 . He said that against the simple and incontrovertible fact that the Subsidies Code was a later agreement concluded between different parties than the GATT, it was irrelevant to argue, as the Panel did, that Article 9 was an interpretation of Article XVI:4 of GATT, because the nature of the obligation arising from Article 9, as well as the parties between which the obligation was owed, had changed as compared with Article XVI:4. Even if the Panel were right as to the notion of "relevant border" that it read in Article XVI:4, this notion was not decisive in itself. What was decisive was: to which exports across the relevant border does the prohibition of export subsidies apply? The answer to this question could be found only in the Subsidies Code and in its membership, and not in GATT. In this respect, the Panel had limited itself to ascribing all kinds of intentions to the signatories to the Subsidies Code - and mostly intentions which they could not have had, according to the Panel - instead of carrying out the necessary legal analysis of the relevant provisions and of their inter-relationship. Nor was it relevant to argue, as the Panel did, that signatories to the Code could not legally authorize export subsidies which were prohibited under GATT. First of all, this line of reasoning presupposed either that the Subsidies Code was a mere interpretation of GATT - which it was not, as demonstrated above, even aside from the fact that the Panel's statement in this respect was unsubstantiated - and/or

that there was a hierarchy between the GATT and the Subsidies Code so that the Code could never change the General Agreement. This, too, was not correct, since there was a very strong presumption against hierarchy between treaties under international law, and this would be all the more true for the relationship between a treaty which in large part was merely applied provisionally, such as the GATT, and a later one, such as the Subsidies Code, which contained some detailed provisions which were fully applicable. Secondly, in any event the issue was not that of a change in the scope of the obligation arising from Article 9 as compared to the obligation arising from Article XVI:4 of GATT. If anything, Article 9 prohibited export subsidies even more fully and unconditionally. The point was that it did so between different parties than the GATT. This had been the result of a free choice by the Community's partners, who had believed that it was both necessary and advantageous to them to conclude the Subsidies Code with the Community, including inter alia the advantage of applying subsidies disciplines to subsidies granted by Community institutions on top of those granted by its member States. Finally, it was also irrelevant to say that "it would be inconsistent for the Subsidies Agreement not to apply to the exports of an EEC member State, because export subsidy practices engaged in by an EEC member State had an impact on third (non-EEC) country signatories which were suppliers of the product benefiting from such subsidies" (paragraph 5.6). This kind of "effects" argument was simply irrelevant for the purpose of determining whether a subsidy was a prohibited export subsidy or not. What the Panel was actually saying was that the German scheme could have an effect of export displacement, that is, it could have displaced the exports of aircraft fuselages from a third country to France. Even if such trade in aircraft fuselages existed - and anyone with any knowledge of trade in civil aircraft knew that it did not, at least under current market conditions - this export displacement effect could only be relevant under Article 8 of the Code, to determine whether a subsidy which was not an export subsidy had nevertheless caused adverse effects to the interests of other signatories; it could not, however, be the basis for a finding of export subsidization.

58. The Community had raised the question of the effects that the alleged subsidy could have had, and had demonstrated that it could not have any. It could not have effects on alleged trade in aircraft fuselages, as no such trade existed, and even if it existed, Airbus would not participate in it, as it was bound by its relationship with its constituent partner companies. Furthermore, it could not have effects on production and pricing of completed aircraft, as the work between the partner companies, and the value of such "workshares", had been fixed before the scheme had been put in place. Thus, the scheme might improve the financial position of Deutsche Airbus in absolute terms, but could not improve its competitive position, either vis-à-vis its partners in the Airbus consortium or vis-à-vis other presumed competitors in the business of building and selling fuselages, if any competitors existed. For the same reason, the scheme could not improve the competitive position of Airbus vis-à-vis its competitors as far as completed aircraft were concerned. This factual point had been amply discussed with the Panel and had been, as far as the

Community understood, accepted by it. Nevertheless, this point had been completely ignored in the conclusions. What had therefore been condemned by the Panel was the abstract principle of this type of exchange rate scheme, and not its impact on international trade, for the simple reason that the Community had succeeded in demonstrating that it had none. In the Community's view, this constituted a misuse of the dispute settlement mechanism of the Code, and a misunderstanding of its purpose. Thirdly, the Panel could not say, on the one hand, that effects were relevant in abstracto, and then refuse, on the other hand, to see whether there were effects - actual or potential - in the case at issue, in relation to what trade actually took place between the parties to the dispute or between them and third parties. Yet this is what the Panel had done, by ignoring the Community's arguments just outlined - and their relevance under footnote 26 of the Code - and by not drawing from them the correct consequences in terms of identification of the subject matter of the dispute, as outlined earlier.

59. The interpretation of the words "export subsidy" in Article 9 of the Code was also unacceptably narrow, and indeed not correct. The Panel had simply disregarded Article 9 itself, and had looked only at the Illustrative List of Export Subsidies, which had been seen, in practice, as an exhaustive one, at least as far as Items (a) to (k) were concerned. The illustrative nature of the List had been limited by the Panel to Item (l), but this Item had also been read in a very narrow fashion, as referring to Article XVI:4 of GATT and to subsidies which generated a price differential in favour of exports. The result of this reasoning was that the notion of "export subsidy" was reduced to an exhaustive listing - Items (a) to (k) of the List, plus price-differential-generating subsidies - and that Article 9 lost any value as an autonomous legal provision. However, this was not correct, for the simple fact that Article 9:2 said that "The practices listed in points (a) to (l) in the Annex are illustrative of export subsidies"; this could only mean that there was a notion of export subsidy in Article 9 which could not be reduced to the List. If the Panel had still wanted to rely on Article XVI:4 in order to interpret this notion, it should have looked at the principle embodied in that provision, that is, that an export subsidy is a subsidy which discriminates in favour of exports. The Community had not, as the Panel said, proposed an additional criterion - the "export-orientation" of the scheme - for the notion of export subsidy, nor had it justified its argument on the basis of special characteristics of the scheme. The Community had only sought application of a simple rule of legal interpretation, that is, that a provision of law had to be interpreted in the light of its function and purpose. If the purpose of Article 9 was to prohibit subsidies which discriminated in favour of exports - that is, which were "export-oriented" - the Panel should have examined the facts of the case and the characteristics of the German scheme, in order to ascertain whether it discriminated in favour of exports. Clearly, the scheme did not discriminate in favour of exports of aircraft. This, and nothing else, was the Community's argument, and even the Panel had agreed, in paragraph 5.2 of the report, although it had done so only in passing. If the Panel had chosen the right product, this

would have been the end of the story. Nevertheless, even on the basis of the choices made by the Panel as to the product (parts of aircraft) and as to the notion of "exports", the scheme did not yet appear, even to the Panel itself, to discriminate in favour of exports. This "discrimination" was based on a series of further statements by the Panel in respect of the nature of the "transfers" and of the relationship between Deutsche Airbus and Airbus Industrie, which contradicted one another. The Panel said that it would not be enough for the subsidized production to "happen" to be totally exported to trigger the prohibition, but it also said that the prohibition applied to this case because it applied to "transfers" which were found to be all exports. It was difficult to understand the difference between the two situations. To be more precise on this point, the Panel first said (paragraph 5.7) that the scheme applied only to products which contractually had to be exported. In this respect, according to the Panel, the German scheme differed from a subsidy on production which happened to be exported in its totality. It could be deduced from this reasoning that something in the contractual or legal set-up of a subsidy scheme had to determine that it applied to exports only. The Community had argued, in this respect, that the German scheme also contractually applied to production - which had not yet started, namely for the A321 - for which no transfer to another Community country was necessary, since assembly of the aeroplane was going to take place in Germany itself. To this the Panel replied (at the end of paragraph 5.8) that such a future application of the scheme - even if laid down contractually - was not relevant. Only that part of the contractual or legal construction which was presently applied was relevant. This implied that if the Panel had taken place at a later stage - after assembly in Germany had started - the scheme would not have been considered as a prohibited export subsidy. A panel report whose judgement as to the prohibited nature of an alleged subsidy depended on the timing of the panel was hardly acceptable. The real implication of the Panel's ruling on this point was that it was not, after all, the legal set-up of the scheme which was decisive, but the fortuitous coincidence that thus far all of Deutsche Airbus's production had been exported. The Community wondered whether all signatories could live with such an interpretation of the notion of export subsidy.

60. He said that the inconsistency of the Panel report also clearly appeared if one tried to transfer its legal deductions and the results that would flow therefrom to the situation of the other partners in the Airbus consortium. For example, it would theoretically be possible for the French partner in the Airbus consortium to use an exchange rate scheme like the German one, because its contribution to the project took place without parts of aircraft crossing an intra-European border. Conversely, the German Airbus partner could use the exchange rate system in the context of the A321 because the delivery of parts by the German partner would take place in Hamburg, not in Toulouse, and therefore, to follow the logic of the Panel report, would not constitute an export. The existence of an "export subsidy" was therefore made dependent on where the final assembly point for an Airbus programme was located within the Community. This would lead - and in the present case had led - to absurd results.

61. Thus, in the Community's view it was clear that the Panel had not applied some basic principles of law. First, the Panel had not determined at the outset of the procedure the subject matter of the dispute, but had let itself be influenced by the arguments and ex post rationalizations of one of the parties. Second, it had not interpreted Article 9 of the Subsidies Code in its proper context, that is, the Code itself, but exclusively in the light of an earlier international treaty, the General Agreement. Third, it had treated the Subsidies Code as a mere interpretation of the General Agreement, simply on the basis of its title, without attempting an analysis of the substance of the provisions involved and of their inter-relationship. Fourth, it had ignored that the Subsidies Agreement had been concluded between different parties than the GATT, and that this had consequences on the nature of the obligations arising from the two Agreements, on the parties upon whom they were incumbent, and on the parties to whom they were owed. Fifth, it had allowed the United States to ignore the Community's signature of the Subsidies Code, and had not applied the principle non venire contra factum proprium. Sixth, it had presumed a hierarchy between two subsequent international treaties, in the absence of any indication to this effect and even without explaining this assumption. Seventh, it had read Article 9 of the Code exclusively in the light of the Annex to the Code, treating this, in practice, as an exhaustive definition, instead of an illustrative list, and had disregarded common rules of legal interpretation.

62. Another point on which the reasoning of the Panel was flawed was where it affirmed that since the member States were still GATT contracting parties, GATT obligations still applied individually to them. In the Community's view this was no longer true. It had been made clear to the Community's partners ever since the Kennedy Round that there had been a transfer of powers in the field of commercial policy from the member States to the Community, and this fact had found extensive recognition with GATT partners. Not only had the latter concluded most of the Tokyo Round Codes with the Community, but they had concluded tariff protocols with it and numerous other minor agreements. Habitually the GATT partners and Code partners dealt with the Community as one entity, except on matters of a particular nature, such as budgetary questions. It was therefore not only in the framework of the Codes concluded with the Community, but also in the framework of the GATT, that the rule of estoppel applied to the GATT contracting parties: they could not constantly and habitually deal with the Community as one entity and regard it as internationally responsible for infringements of the GATT, but when it pleased them revert to legal formalism and say that GATT obligations still applied individually to the member States. The International Court of Justice (Advisory Opinion on Namibia, ICJ Reports 97) had recognized that the customary law of an international organization can set aside the letter of its Charter. This is what had happened in the GATT: customary law had been developed in respect of the treatment of the Community in the GATT, and the Panel could not deviate from it when this was expedient. The Community was the responsible contracting party for obligations in respect of export subsidies both under the Code and under Article XVI:4 - except the latter had been entirely absorbed and superseded by the former. Moreover, such

obligations on export subsidies did not apply in the abstract to "exports of an EEC member State"; they were obligations in relation to non-EEC member States and applied to exports to such countries. The prohibition of export subsidies was not some kind of objective régime under international law that was no longer related to specific treaty partners. Such a status was reserved in international law to human rights treaties and remained quite exceptional.

63. As to the procedures adopted by the Panel in the conduct of its proceedings, the lack of clarity on the subject matter at the outset of the proceedings had already been dwelt upon. Another questionable choice concerned the way the Panel had treated the US tactic of presenting completely new written arguments in response to questions of the Panel - even without any germaneness to these questions -, and even on the occasion of the comments requested by the Panel on the draft of the factual part of the report. The Community had repeatedly requested that such arguments not be taken into account by the Panel, but the Panel had not reacted to such requests during the hearing or in the report. He said that if countries wanted to move the multilateral dispute settlement mechanism towards a binding and more jurisdictional nature, clear, predictable and impartial procedures were a conditio sine qua non. Furthermore, some of the substantive points mentioned above also had serious procedural implications, as they reflected lacking or insufficient motivation for certain statements contained in the Panel report, even though these statements formed an important part of the basis for the Panel's findings. In particular, this could be detected in the way the Panel had rejected the Community's arguments as to the subject matter of the dispute; in the lack of analysis of the relationship between GATT and the Subsidies Code - where a hierarchy between the two, and/or the merely interpretative nature of the Code had been simply taken for granted; and the, at most, implicit rejection of the Community's argument on the lack of adverse trade effects of the scheme, even though this point had been discussed at length before the Panel. The Community was therefore not in a position to agree to the adoption of this Panel report. The Community regretted this situation, but had given the Committee a full explanation of the reasons for it. This was apart from what the Community would do about the substance of this dispute, i.e. its presumed commercial side.

64. The Community had, independent of its rejection of the legal arguments and conclusions advanced in the Panel report, decided on the following:

- (a) The operation of the German exchange rate scheme had been suspended with respect to claims flowing from the exchange rate scheme which had materialized after 5 January 1992; this suspension would remain in force until the conclusion of the negotiations referred to below.
- (b) The exchange rate scheme was enshrined in a contract concluded between the Federal Republic of Germany and a private party in that country. Any modification of the scheme, therefore, had to be undertaken following renegotiation of that contract. The

German authorities had initiated such negotiations with the private party concerned; these negotiations had not yet been concluded. The Committee would be informed in due course of the result of these negotiations as far as the exchange rate system was concerned.

65. The representative of the United States expressed his Government's appreciation for the work of the Panel in this case, which had been an unusually complex case and had consumed an unusually large amount of time during a very busy period for the Panel members. His Government had brought this matter to the Committee because it felt it to be important. There were two principle reasons for this. First, it involved an item on the Illustrative List of Export Subsidies, which item was the cornerstone of the disciplines of the Subsidies Code. Second, because exchange rate schemes by their nature were particularly disruptive and distortive of the fundamental equilibrating mechanism in international trade - exchange rate fluctuations. The Community had put forward a large number of different arguments at the present meeting. He would not respond to those arguments at this meeting or engage in litigation or adjudication of those points, all of which had been aired in front of and considered by the Panel, and discussed by the parties. These arguments included the jurisdiction of the Subsidies Committee, the location of production of future models of Airbus aircraft, the price effects of the scheme, and whether there was a requirement that an export subsidy had to discriminate in favour of exports. All of these points had been argued by the Community in the panel proceeding and had been considered and decided upon by the Panel. What the Panel report reflected was that these were intriguing but also flawed arguments, and that the facts of this matter were straightforward. The facts with respect to the operation of the exchange rate scheme were simple and were set out in the Panel report at paragraph 5.3 as follows:

"The Panel noted three features of the scheme: first, no interest accrued in favour of the German Government on money paid by it to Deutsche Airbus, between the time of disbursement and the date at which an eventual repayment became due; therefore, under no circumstances would this interest be paid. Second, the scheme did not provide for any recovery of administrative costs - an element in operating costs - which in all cases were borne by the German Government. Third, the Panel noted that any repayment to the German Government of the funds disbursed was contingent on a rise in the dollar/deutschemark exchange rate above a certain level."

In operation, the scheme had a commercial effect which was also fairly simple. The scheme, provided by the Federal Republic of Germany, benefited a German company, Deutsche Airbus. The scheme provided simply that the Government would reimburse Deutsche Airbus for so-called "losses" whenever the dollar fell below a certain level vis-à-vis the deutschemark. The transfers of funds were paid upon the transfers of funds by Airbus Industrie in France in return for the shipment of the designated parts of the aircraft by Deutsche Airbus to Airbus Industrie. In other words, the scheme operated on the exportation of the products between Germany and

France, where the aircraft were assembled. These were the simple facts of the scheme, which revealed that there was an exchange risk programme, within the meaning of Item (j) of the Illustrative List, that operated on exports from Germany to France. The EEC had claimed that the Panel's definition of "export" was flawed. In fact, the Panel's definition was the commonsensical definition that most delegations present would come up with; this was that an export was the shipment of goods from the territory of one contracting party to the territory of another contracting party. The EEC had also raised objections to the Panel's interpretation of the Subsidies Code vis-à-vis the GATT, but in fact, as was set out plainly in the Subsidies Code, at footnote 2, "Wherever in this Agreement there is reference to "the terms of this Agreement" or the "articles" or "provisions of this Agreement" it shall be taken to mean, as the context requires, the provisions of the General Agreement as interpreted and applied by this Agreement". Clearly, the Agreement interpreted and applied Articles VI, XVI and XXIII of the General Agreement. The United States was particularly disturbed by the EEC's argument - rejected by the Panel - that the Code's export subsidy disciplines did not apply as between member State transactions. As the Panel Chairman had noted in his description of the Panel's decision on this issue, the Panel had taken the unusual step of taking into account the EEC's strong objection - registered after the issuance of the Panel report - by modifying a certain paragraph in the report. Notwithstanding that, the EEC had indicated at the present meeting that it could not accept the report. The United States, as a member of the Subsidies Committee, was strongly concerned by the EEC's position and by the interpretation of the Subsidies Code it had suggested. Quite simply, the interpretation offered by the EEC indicated that if one member State in the EEC provided an export subsidy to finance the shipment of a product to another member State, and by so doing defeated the sale by any of the other Code signatories into that other member State, the EEC would take the position that the other Code signatories could not have recourse to Article 9. In the US view, this was a fundamentally incorrect interpretation of the Code, and was nowhere reflected in the Code, in the EEC's accession to the Code, or in the accession of the United States or other signatories to the Code when they signed it. The United States strongly urged the adoption of the report, and was greatly disappointed with the Community's indication that it would be unable to do so at the present meeting. He appreciated the Community's references to the possibility of some implementation of the report's recommendations, and would look forward to discussions in this forum and elsewhere in this regard. Nonetheless, the report should be properly implemented, particularly vis-à-vis the Panel's recommendations in paragraphs 6.1 and 6.2.

66. The representative of Japan said that his Government had a strong interest in this case and had been following its development carefully. The Japanese aircraft industry had suffered from the same problems as the German aircraft industry, namely huge losses due to exchange rate movements. In 1985, after the agreement in New York regarding exchange rate issues, the rate of the yen vis-à-vis the US dollar had moved from 230 yen to 150 yen within a very short period. Consequently, the Japanese

aircraft industry had suffered huge exchange rate losses, as it was exporting fuselages of Boeing 767 aircraft to the United States. However, the Japanese Government had not intervened, as it believed that such a loss should be shouldered by the private industry concerned. Japan concurred with the Panel's finding that the German scheme was prohibited under the Subsidies Code, and firmly supported the adoption of the report. Japan welcomed the German Government's decision to suspend the operation of the scheme as from January 1992.

67. The representative of Canada said that his delegation urged the adoption of the Panel report. He said that there had been no mention of the bilateral agreement, rumoured in the press, between the United States and the EEC concerning aircraft subsidies, and asked whether either of those delegations intended to comment on this agreement at the present meeting or in the future. Canada would be interested to know the details of this agreement, and reserved the right to raise in the Committee matters relating to that agreement at a later time. Regarding the fact that the EEC's principle objection to the adoption of this Panel report appeared to rest on the idea that EEC member States should not be treated as individual units for the purpose of the Subsidies Code, he said that this position ran 180 degrees counter to the EEC's position on the identical issue in the Uruguay Round subsidies negotiations. In the latter context, the EEC was arguing that for the purposes of the new Code, in particular regarding the specificity test, the member States should be treated as individual units. He asked the EEC whether its statement at the present meeting meant that it had abandoned the position taken in the Uruguay Round. If not, he asked the EEC to explain how it reconciled the two diametrically opposed positions.

68. The representative of the EEC said that the two issues raised by Canada were not the same. The Community had never denied, and was not now denying, the individual responsibility of EEC member States through their membership in the Community and through the Community's membership in the Code for the obligations contained therein. Each and every member State was subject to those obligations. The question before the Panel was to whom those obligations were owed, and not upon whom they were encumbent, which was a different issue than that of specificity in the Uruguay Round negotiations.

69. The Committee took note of the statements and agreed to revert to the Panel report in SCM/142 at its next meeting.

H. United States - Countervailing duties on non-rubber footwear from Brazil - Report of the Panel (SCM/94 and 96)

70. The Chairman recalled that the Committee had examined this report at its meetings of 26 October 1989 (SCM/M/44), 24 April 1990 (SCM/M/46), 25 October 1990 (SCM/M/48), 1 May 1991 (SCM/M/51) and 22 October 1991 (SCM/M/54). The Committee had agreed in October to revert to this report at its April 1992 meeting.

71. The representative of the United States said that as had just been noted by the Chairman, this was the sixth time that this report had been before the Committee for adoption. There had already been a full discussion of the substance of the issues in question. The United States remained of the view that the report should be adopted and sincerely hoped that Brazil was in a position to agree to such adoption at the present meeting.

72. The representative of Brazil said that his delegation had maintained that it was necessary to await the outcome of Article XXIII proceedings on denial of m.f.n. treatment by the United States to Brazil before the Subsidies Committee took any action on the report before it. Subsequent to the Committee's most recent consideration of this report in October 1991, the Panel established under Article XXIII had supported Brazil's claim that in the implementation of the Article VI obligations, the United States had acted inconsistently in this case with Article 1:1 of the Subsidies Agreement. The United States had stated at the most recent meeting of the Council, and for the second time, that it was not yet in a position to agree to the adoption of the Article XXIII Panel report but that it hoped that by the next Council meeting it would be in a position to indicate how this matter might be resolved. Brazil still maintained that it was necessary to await the outcome of proceedings in the Council before the Committee could take action on the report before it.

73. The representative of Colombia said that this was a sensitive topic, not only because of the situation of this panel report but because of the other four panel reports pending before the Committee. He asked Brazil why it was necessary to await the adoption of the report in the Council before the report in the Committee could be adopted.

74. The representative of Brazil said that this very matter had been discussed on previous occasions in the Committee and he did not want to repeat Brazil's arguments in the absence of any relevant new information. He recalled that other delegations had expressed their concern with the shortcomings of the panel report before the Committee, and that bilateral consultations had been going on between Brazil and the United States in relation to both of these panel reports. Brazil wanted to wait until there had been an opportunity to find a solution satisfactory to all interested delegations before taking up this matter again.

75. The Committee took note of the statements and agreed to revert to this matter at a later meeting of the Committee.

I. Other panel reports pending before the Committee

76. The Chairman recalled that at the Committee's meeting on 22 October 1991, the Chairman had made a detailed report on the consultations concerning the non-adoption of the following panel reports pending before the Committee (SCM/M/54, paragraph 45):

- (i) EEC subsidies on export of wheat flour (SCM/42);

- (ii) EEC subsidies on export of pasta products (SCM/43);
- (iii) United States - Definition of industry concerning wine and grape products (SCM/71);
- (iv) Canada - Imposition of countervailing duties on imports of boneless manufacturing beef from the EEC (SCM/85):

In that statement the Chairman had noted that these four panel reports had been pending for periods ranging from five to eight years, and that a series of five Chairmen had made repeated efforts to find a practical solution to this situation. In the most recent attempt to resolve this problem, a scenario had been discussed informally with the three parties involved (Canada, the EEC and the United States) based on the removal of all adverse trade effects of the measures in question by all three parties. While some progress had been made on this basis, the blockage had remained. He asked whether any delegation had any proposal to make in regard to this problem.

77. The representative of the United States said that his delegation had very actively supported attempts to find a solution that would enable the unblockage of these panel reports in the Committee. The United States' proposal was that the new Chairman pursue, with renewed vigour, the efforts of his predecessors, with the aim of finding a solution in the very near future. In that regard, he said that he was pleased to be able to report that after deep reflection, his authorities had concluded that the original reasons which had led the United States to block adoption of the Panel report on "United States - Definition of industry concerning wine and grape products" (SCM/71) had ceased to exist. The United States was prepared to accept at the present meeting the adoption of this report, as a token of its sincerity that the Subsidies Code should cease to be the example cited in legislatures around the world of GATT organs that did not work. His delegation hoped that this action, following on Canada's agreement to adopt the Panel report on Canadian countervailing duties on grain corn from the United States (SCM/140 and Corr.1) would serve to break the logjam.

78. Regarding the wine and grape Panel report, he noted that this case involved US legislation that had long since expired. There was, therefore, no longer any substantive issue. Furthermore, this had been a piece of specialized legislation which declared that for purposes of US countervailing duty law, grape growers were deemed to be part of the wine-producing industry. Thus, in accepting this Panel report, the United States was not accepting the underlying views of delegations such as the EEC on the issue of "industry" in the processed agricultural product industry. To that extent his delegation could subscribe fully to the views expressed by Australia in its second statement under item B(i) of the present meeting's agenda. The United States was thus not changing its view on the issue of processed agricultural products, nor did it believe that this report had any effect on the well-documented criteria - in the United States' and several other countries' legislation - under which it was determined whether a particular industry was part of a broader unit.

His second point was that in accepting this Panel report, the United States reserved its position of opposition to the Panel's view that it was ripe for the Panel to consider a matter that did not involve an actual initiation of an action, but rather an abstract question of whether a proceeding, if initiated, would have been consistent with the Subsidies Code. The United States was making these points as a matter of record so that there would be no misunderstanding. He reiterated the United States' sincere hope that its action at the present meeting would help the Chairman in his efforts to end the blockage of the remaining unadopted panel reports before the Committee.

79. The Chairman thanked the delegation of the United States for the very forthcoming decision to agree to the adoption of this report, and proposed that the Committee agree to adopt the Panel report in SCM/71.

80. The Committee so agreed.

81. The Chairman expressed the hope that the adoption of this panel report would be an auspicious beginning for his efforts as Chairman to resolve the problem of the outstanding panel reports. Should the Committee so wish, he would undertake consultations with the parties concerned in order to try once again to resolve the problem of these unadopted reports.

82. The Committee so decided.

83. The representative of the EEC assured that Chairman that his delegation would participate in these consultations with the same spirit of co-operation it had tried to show in the efforts of previous Chairmen. He expressed the Community's appreciation for the United States' decision. At the same time, he underlined the fact that the Community might have a different view than that expressed by the United States as to the principle found in the findings and conclusions of this panel report and as to its precedential value with regard to the examination of the legislation, as the Community had said earlier in the discussion under item B(i). Regarding the other outstanding panel reports, he would report to his authorities what had happened at the present meeting. For the time being, the Community's position remained the same. This was that there were two functions of dispute settlement under the Code: one was to interpret the rules in relation to a concrete case - and this seemed to be the function which had caused trouble for signatories so far; the other was to settle trade disputes. The latter was the fundamental function of the dispute settlement mechanism. In that respect, the Community still had some difficulties envisaging a complete solution to the problems of these pending reports as long as there was an outstanding trade dispute. It had long been the Community's view that no matter how strong the disagreement over a panel's interpretation of rules, signatories should do their utmost to resolve the substance of the dispute itself. As the United States had stated, in the case of the wine and grape panel report, the substance of the dispute had disappeared a long time ago, as the legislation had expired and actions taken under it had not led to the imposition of duties. The same was true of two of the other outstanding

reports, but unfortunately was not true of the panel report on manufacturing beef (SCM/85), and this would still weigh heavily in the Community's consideration of any solution to this problem.

84. The representative of Australia associated his delegation with the statement by the United States in accepting the report's adoption. He also noted the comments made by Australia under item B(i) of the present meeting's agenda as to the precedent therein.

85. The representative of Chile expressed his delegation's commitment to co-operating with the Chairman in his efforts to solve the problem of the unadopted panel reports. He suggested that the main approach should be the practical application of the rules on the part of the parties concerned, and their undertaking to do so steadfastly. This was the only way to ensure that the multilateral trading system would continue to be feasible. Chile congratulated the United States on its acceptance of the wine and grape Panel report and urged the other parties to undertake to commit themselves to do likewise, in regard to the other pending panel reports, as soon as possible.

86. The representative of Canada congratulated the United States on its decision to adopt the wine and grape Panel report. Canada stood ready to co-operate fully in efforts to seek a solution to the long-standing impasse regarding the outstanding panel reports. He would report the present developments to his authorities; however, he reiterated that for the moment, Canada's position on the manufacturing beef Panel report (SCM/85) had not changed and that it was identical to what Canada had stated at the Committee's October 1991 meeting (SCM/M/54, paragraph 54).

87. The representative of Colombia recalled that for the past five years, his delegation had repeatedly expressed its concern over these unadopted panel reports and criticism over the blockage. Colombia now welcomed the United States' action regarding one of these reports. Colombia had noted in detail the various elements in this panel report regarding industry and investigations, and supported what the Community and Canada had said about the implementation of other panel reports. The Community had said that the work of this Committee concerned the interpretation of rules and the resolution of pending disputes. The solutions developed in these disputes enabled multilateral dispute settlement to be carried out multilaterally, and this was important.

88. The representative of Japan expressed Japan's appreciation for the United States' decision to agree to adopt this panel report. However, Japan had concerns similar to those expressed by the Community with respect to this panel report as well as the examination of Australia's legislation (item B(i)). Should an interpretation similar to that contained in this Panel report be applied to the industrial sector, it would lead to the abuse of anti-dumping and countervailing duties by importing countries.

89. The representative of New Zealand joined those delegations which had congratulated the United States for its most helpful and constructive action and statements at the present meeting. New Zealand hoped that this action would contribute to the success of the Chairman's efforts to find a solution to this whole matter.

90. The representative of Korea congratulated the United States for its important and courageous decision to accept the adoption of this panel report, and hoped that this would set a good precedent for the remaining unadopted panel reports.

91. The Committee took note of the statements.

J. Draft guidelines on the application of the concept of specificity (SCM/W/89)

92. The Chairman recalled that the Committee had agreed at its October 1991 meeting to revert to the question of these Draft Guidelines at its April 1992 meeting.

93. The representative of the United States said that the position of his authorities remained unchanged on this issue. Whereas the United States continued to follow the notion of requiring specificity before finding a countervailing subsidy, it continued to have certain reservations about the detailed nature of these Draft Guidelines. Important work had been done on this issue thus far in the Uruguay Round, and it would be inadvisable to adopt these Guidelines at the present time.

94. The Committee took note of the statement and agreed to revert to this item at its next regular meeting.

K. Other business

(i) United States' countervailing duty proceeding on portable seismographs from Canada

95. The representative of Canada said that the United States had initiated a countervailing duty case against imports of portable seismographs from Canada without attempting to satisfy itself that there was sufficient evidence of subsidy and/or injury. In fact, the only evidence the United States had was allegations by the petitioner that since there were various programmes in Canada and the targets of the petitioner were Canadian exporters, the latter had to have benefited from the programmes. The petitioner had failed to provide evidence that the companies involved had benefited from the programmes, or that they even qualified for assistance under them. Thus, the US Department of Commerce (USDOC) should not have initiated this case. The US International Trade Commission (USITC) had then made an affirmative preliminary determination of injury citing that there was insufficient information on the state of the domestic industry to terminate the case at that time. This was yet another example of the low standard of evidence employed by the United States and its use

of trade remedy laws to harass exporters. Canada expected the investigation to be terminated after a negative preliminary determination of subsidy. However, even if this occurred, this small Canadian company would have incurred many legal costs simply to prove its innocence under a US system which seemed to be based on a presumption of guilt until the accused conclusively proved otherwise. Canada reserved its right to return to this matter at a future meeting.

96. The representative of the United States said that his delegation had taken note of Canada's concerns regarding the USDOC's initiation of this particular investigation. His delegation had no direct knowledge of whether certain subsidies involved in that investigation were such that the industry under investigation would not even qualify for them. Based upon US past practice, it was his understanding that there was evidence of eligibility for certain programmes in question. His delegation would look into this matter, and assured Canada that if there was a negative determination of subsidization, the investigation would of course be terminated. The United States did not agree that the USITC's preliminary injury determination was not well-founded.

97. The Committee took note of the statements.

- (ii) Canadian countervailing duties on grain corn from the United States - Derestriction of the Panel report (SCM/140 and Corr.1)

98. The Chairman recalled that at the Committee's meeting on 26 March 1991, the delegation of the United States had indicated that it intended, at the present meeting, to propose the derestriction of the Panel report on Canadian countervailing duties on grain corn from the United States (SCM/140 and Corr.1) which had been adopted by the Committee at the March meeting.

99. The representative of the United States said that his delegation now formally proposed the derestriction of this Panel report.

100. The representative of Canada said that his delegation joined the United States in supporting the derestriction of this report.

101. The Committee took note of the statements and agreed to derestrict the Panel report in SCM/140 and Corr.1.

- (iii) Imposition by Brazil of provisional countervailing duties on milk powder from the EEC

102. The representative of the EEC said that it had been brought to the Community's attention that Brazil had imposed provisional countervailing duties on milk powder from the Community. Although it would appear that the Brazilian authorities had offered the Community bilateral consultations prior to the opening of the investigation, there was some confusion as to the legal basis and scope of this offer for consultations, and no

information had been supplied as to the allegation of subsidization, material injury and causal link. It also did not seem that the Community exporters of milk powder had been given the opportunity to intervene in the proceedings thus far. On 9 April 1992 provisional countervailing duties had been imposed, but the decision to do so made no reference to a preliminary affirmative finding of subsidization, injury and causal link. Reference had been made only to the need to prevent injury being caused pending a final determination. Under these circumstances, he said that it would seem that notwithstanding the offer for bilateral consultations, the transparency of countervailing duty proceedings mandated by the Code had not been fully applied. This transparency was a fundamental element of Code disciplines on the use of countervailing duties. Community procedures in this respect were fully open, and it expected the same of its partners. The Community had raised another case earlier at the present meeting which resembled in some ways the case at hand. While the Community wanted to draw the Committee's attention to the need for transparency in countervailing duty procedures, this was without prejudice to the clarification which the Community would seek bilaterally from Brazil regarding the case just described.

103. The representative of Brazil said that his delegation was not in a position to reply to the points raised by the Community, which he had taken note of and would report to his Government. He hoped to be able very soon to provide full information on the points raised.

104. The Committee took note of the statements.

Date of the next regular meeting

105. According to the decision taken by the Committee at its April 1981 meeting (SCM/M/6, paragraph 36), the next regular meeting of the Committee would take place in the week of 26 October 1992.