

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

SCM/M/14

8 June 1983

Special Distribution

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD ON 22 APRIL 1983

Chairman: Mr. M. Ikeda (Japan)

1. The Committee on Subsidies and Countervailing Measures met on 22 April 1983 to consider the report of the Panel on EEC subsidies on export of wheat flour (SCM/42).
2. The Chairman recalled that the Panel had been established in pursuance of the decision of the Committee taken at its meeting of 14 December 1981. The Chairman of the Committee, after securing the agreement of the Signatories concerned had set, on 22 January 1982, the terms of reference and the composition of the Panel (see document SCM/M/10, Annex I). The two parties to the dispute had received the conclusions of the Panel's report on 24 February 1983 and had been given until 18 March 1983 to find a mutually satisfactory solution to the dispute. As no such solution was forthcoming, the Panel submitted its report to the Committee on 22 March 1983 (SCM/42).
3. The Chairman drew the attention of the Committee to an incident in the course of the Panel's proceedings which the Director-General of GATT considered as very grave and he fully shared his opinion in this respect. The day after the conclusions had been transmitted to the parties, their contents had been revealed in detail to the press. The conclusions had since been widely commented upon. Of necessity these comments were misinformed as the supporting analysis and arguments in the Panel's report had not been taken into account. The Director-General was of the opinion, and here again the Chairman agreed with him, that this was a sure way of destroying any chance of reaching a compromise solution. It was the Chairman's understanding that the Committee shared the concern over this way of treating panel conclusions, transmitted on the understanding that they would be considered as strictly confidential during the reflection period. It was also his understanding that the Director-General's comments, and his comments as the Chairman of the Committee, would be duly taken into account in order that this sort of incident could be avoided in the future.
4. In the absence of the Chairman of the Panel, Ambassador Suzuki of Japan, Mr. T. Hobson introduced the Panel's report. He said that in the course of its work the Panel had held consultations with the United States and the EEC and had encouraged conciliation. Written submissions and other information provided by the two delegations, their replies to the questions put by the Panel, as well as relevant GATT documentation and statistics had served as a basis for the examination of the matter before the Panel. The Panel had given full and very close attention to the arguments put forward by the United States and the EEC as they related to the facts of the case as well as to the application and interpretation of Article XVI of the GATT and the Code on Subsidies and Countervailing Measures.

5. The representative of the United States said that this matter was of extreme importance, not only because of the direct trade interests at stake for the parties to the dispute, but also because this was the first case under the dispute settlement procedures of the MTN agreements and because it involved the fundamental Code provisions concerning agricultural export subsidies. The particular matter of wheat flour might be of lesser concern to most other members of the Committee, but all members had to be concerned about the efficacy of the dispute settlement process under the Code and about the application of the important Code provisions at issue in this case. While she did appreciate the Panel's efforts - particularly the substantial body of factual findings - her Government was deeply concerned that the Panel had not provided any conclusions on the application of essential provisions of the Code in this dispute. In particular, the Panel had failed to answer the question of whether the EEC had gained a more than equitable share of world trade in wheat flour exports in terms of Article 10:1, and was unable to find on the question of nullification and impairment or serious prejudice in terms of Article 8.

6. She considered that the parties to the dispute and the Committee as a whole were thus confronted with an incomplete report. Article 18:8 provides that a Panel report should set forth the findings of the Panel as to the questions of fact and the application of the relevant GATT provisions as interpreted and applied by the Code. The Committee did not have such a report before it because of the lack of conclusions on the central issues, particularly the equitable share provisions of Article 10:1. Therefore, the United States believed that in these circumstances it was the responsibility of the Committee to reach conclusions on those provisions where the Panel had failed to do so. Without such conclusions, the Committee had a failed dispute settlement case and was left with a situation where the central provisions of the Code dealing with trade in primary agricultural products were inoperative. The implications of a failed dispute settlement case were extremely grave. The implications of a failure to apply the provisions of Article 10:1 were disastrous leaving all Signatories with no rules to follow and no reason to expect any discipline on export subsidies in this area. To accept that Article 10:1 was meaningless was to alter the basic balance of rights and obligations under the Code. She therefore strongly believed that the Committee had to provide conclusions where the Panel failed to do. She was not asking the Committee to completely reject or overturn the Panel report but rather to complete the process.

7. The US delegate further said that the findings to which the Code had to be applied were in the report. She might have reservations about some of those findings but she was willing to have the Committee make a judgement on the basis of those findings. The primary issue was whether the EEC had taken a more than equitable share of world trade. Tables VI and VII in the Panel report contained stark data. This data included food aid exports, which the United States did not believe were properly included, and would discourage such aid. Nevertheless, even including food aid data the figures were dramatic. In the twenty year period since the EEC introduced Community-wide export subsidies on wheat flour, the EEC market share had increased 158 per cent while that of all other suppliers - not just the

United States - had declined by an average of over 50 per cent. Even examining the most recent five years, which the Panel did not find as a fully satisfactory basis for comparison, the EEC's share of exports rose from 54 per cent to 66 per cent. If only commercial sales were taken into account the EEC share had grown from 25 per cent to 80 per cent in twenty years. No matter what period was examined the Panel had found that the fundamental trend was the same: the EEC share had grown by phenomenal amounts while the share of all other suppliers had declined.

8. She said that the Panel had also examined what it had termed "special factors". She had grave doubts that the Committee would wish to consider the matters enumerated as "special factors" in the sense of Article 10. Indeed, she believed these items which might have a minor effect on the trade, could not possibly account for the EEC's 158 per cent increase while every other supplier's share declined. Special factors had to explain away the causal link between the subsidies and the resultant increase in exports at the expense of others. Many of the observations treated as "special factors" by the Panel affected only part of the period in which the Panel had found the trend in market shares to be consistent; and many of those observations (like "political factors") affected only the United States and did not explain why the shares of all other suppliers had declined while the EEC share had increased. These factors must be considered minor compared to the effect of EEC export subsidies, and the Panel itself found "that the EEC, which without the application of export subsidies would generally not be in a position to export substantial quantities of wheat flour, had over time increased its share to become the world's largest exporter." She did not think that, in general, the Committee would need such a dramatic case to find that there was more than an equitable share but certainly this case was so dramatic that it should not be difficult for the Committee to make such a finding. The Panel had cited as its primary reason for not reaching a conclusion concerning the application of Article 10:1 the difficulties inherent in the concept of more than equitable share. It might be instructive to compare the situation here to that of the Australia-France dispute concerning wheat and wheat flour. In that case, the first brought under GATT Article XVI:3, the Panel had been able to conclude that France had taken a more than equitable share of world trade, although France's share had risen far less than that of the EEC in this case.

9. The US delegate further said that in the current dispute the Panel had also not made a finding on the application of Article 8, i.e. the issues of nullification or impairment and serious prejudice. Again, the principal reason cited was difficulty in interpreting and applying this provision. While this issue was of secondary importance if it was determined that the EEC had acted inconsistently with Article 10:1, it was untenable that this Article be likewise consigned to the wastebasket. She found it hard to believe that the Committee could not decide whether the effects of EEC export subsidies described in the report were adverse in the sense of Article 8.

10. She concluded by reiterating the necessity for the Committee to reach findings on those central issues. She did not believe that it was in any Signatory's interest for this dispute to remain unresolved, for the dispute settlement process to be further weakened, or for the Committee to agree that essential disciplines and rights of the Code were inoperative. Although she could agree with the Panel that improvements in the Code's rules should be a high priority matter, she could not accept that the law of the jungle should be an acceptable state of affairs while the Signatories were seeking agreed improvements. The existing rules had to be applied.

11. The representative of the EEC said that during the Panel's work the Community had tried to tone down the dispute concerning flour, as well as other agricultural products, and had tried to calm the tension a little; during the cereal marketing year that would shortly be ending, it had pursued an export policy that one could term responsible. Nevertheless, account had not been taken of that policy, and the procedure had been pursued to the end, regardless of external developments. With respect to the Community's efforts, it would be useful to look at the International Wheat Council's last report which recorded that in 1980 and 1981 - period taken as a reference basis for the United States complaint - EEC exports of flour had been of the order of 3,878,000 tons for the 1980-81 season, 4,143,000 tons for the 1981-82 season and would be at the level of 2,640,000 tons for 1982-83. He would therefore wish the minutes to record that the EEC had indeed listened to the appeals made by the Director-General of GATT as well as those made during meetings of the Panel and in conversations between Ambassador Suzuki and Community representatives, but that despite its efforts, of which the United States delegation was well aware, the Panel's procedure had nevertheless been continued deliberately.

12. Regarding the rôle of the Committee and the way in which the Panel had carried out its work - the question which the United States had raised - the EEC representative said that reference should be made to Article 18 of the Code and more particularly paragraphs 8 and 9 thereof. The United States representative had said that the Panel had failed to carry out its task. That was not a reproach that one could address to a court in the United States when one lost a court case. It was normal that the party losing a case should say that the court had not done its work. On the other hand, one could ask objectively whether the Panel had carried out its task. Article 18 stipulated that the Panel must submit a written report to the Committee. The Panel had submitted a written report to the Committee. Article 18 stated that the written report should set forth the findings of the Panel - not the views of the EEC or of the United States. In fact, the Panel's report comprised at least two parts: one part devoted to the United States submission, one part devoted to the Community submission, followed by a part regarding the Panel's findings. The Panel was entitled to make those findings, it could accordingly record the United States findings, the Community's findings but in any case one could not reproach it with not having made its own findings in the light of what it had read or heard. Like the United States, he was not entirely in agreement with all of the Panel's findings but could say at least that the Panel had carried out its task, namely that the Panel had set forth its own findings in its report.

Article 18:8 also stated that the report should set forth the Panel's findings as to the application of the relevant provisions of the Agreement. It was therefore the Panel's judgement on application and there was no cause to say, as the United States was seeming to do, that the Panel had failed to carry out its task.

13. With respect to the second question, i.e. the question as to what the Committee's task was under Article 18:9. the EEC representative said that the Committee had to do two things; in the first place, consider the report. One could therefore have a discussion on the content of the report, including perhaps the arguments put forward by the United States and those put forward by the Community, then on the Panel's factual findings and the legal findings. Then the Committee had a second task: taking into account the findings contained in the report, it could make recommendations. The Committee's task was no more than that: to consider what the Panel had done, examine its report, and, taking into account the findings in that report, make recommendations to the parties with a view to resolving the dispute. The Committee now had to consider what recommendations could be made to the United States and the Community. There were two possibilities: either to drop the matter, or to invite the United States and the Community to try to come to an arrangement. The Community had never refused an arrangement with the United States. Since the complaint had been filed, since the Community had been asked to make efforts, the Community had made such efforts but on the other hand in the 1982-83 marketing year alone, United States flour exports had doubled. How then could the dispute between the United States and the Community be settled? Perhaps the question had already been settled de facto and that was all the Committee could do.

14. As to the question whether the Committee should adopt the report, the EEC representative said that the text of the Code was clear. It was not asked to do that. The Committee simply had to consider the report. It might then, express the hope that the United States and the Community would settle their differences. Lastly, the Committee might take note of what the United States and the Community were doing bilaterally and recognize that the matter was settled. The provisions of Article 18:8 and those of Article 18:9 must be observed scrupulously.

15. Referring to Article XVI:3, the EEC representative said that it indeed mentioned equitable shares. The United States and other countries must not forget, however, that the Panel had made a very clear differentiation between increasing one's exports and increasing one's equitable shares. Neither the drafters of the Code nor those of the General Agreement had said "you are in the wrong if you increase your trade" but had merely said "you are in the wrong if you increase your equitable share". That was the most

fundamental thing. Moreover, it was confirmed by all existing GATT case-law and, in particular, was confirmed by the first note to Article XVI. There was a fundamental difference, therefore, between increasing one's exports - and the EEC was not denying that it had increased its exports - and taking more than an equitable share. The second thing that the United States was forgetting was that there was no differentiation between an equitable share and special factors. In determining an equitable share, account must be taken of any special factors. That was precisely where the Panel had tried to make certain findings. There was no assimilation between increasing exports and increasing an equitable share, and precisely in order to evaluate an equitable share, one took account of certain special factors. That was what the Panel had done. Having regard to the actual GATT texts, it was therefore a fundamental error to say that the Panel had failed to carry out its task, that it had not done what it should have done. Article 10 had been included in the Code at the request of the United States, not of the EEC, and that Article defined how any exceeding of an equitable share was to be determined. The most objective way was to consider whether there had been any market displacement. That was the most fundamental concept and was mentioned in Article 10:2(a). The best way to determine whether more than an equitable share had been taken was to determine whether there had been any market displacement. And there the conclusion was absolutely clear. In paragraph 4.28 of its report, the Panel had stated that the EEC had not displaced the United States in the seventeen markets which the United States had cited in its submission to the Panel.

16. In conclusion, the Committee had two tasks. It was not obliged to accept the report, but must consider the Panel's findings and make recommendations to the parties - i.e. the Community and the United States - with a view to resolving the dispute. The EEC was ready to hear whatever recommendations the other members of the Committee or the Chairman might wish to make in that respect.

17. The representative of Australia said that his country had a particular interest in this case for two reasons. First, it had a direct interest as a significant exporter of wheat flour, despite the fact that the volume of its exports had fallen from some 700,000 tonnes or 20 per cent of the world market twenty years ago to some 78,000 tonnes or less than 2 per cent of the world market, due largely to the massive subsidies paid to EEC exporters over this period. Australia's share of world trade would not have fallen in this way had it not been for the effects of these subsidies on EEC production and exports. Accordingly, the Australian Government had over many years, made numerous representations on this matter to the EEC. Most recently, it had held consultations under Article XXII of the GATT with the EEC on this matter in October 1980. Unfortunately, these representations and consultations had had no impact whatsoever on the EEC's policies and exports, which continue to increase their share in the world market for wheat flour. Since the consultation in late 1980, Australia had therefore been looking to action on the complaint by the United States to provide the basis for an

improvement in world trade in wheat flour and the restoration of world requirements for wheat flour in the most effective and economic manner, with subsequent improvement in the trading opportunities for its depleted but economic and efficient industry. Secondly, as a major exporter of primary and processed primary products, Australia had a particular interest in the operation of the GATT and Code rules on export subsidies relating to these products. This was the first complaint based on the Code's rules on such matters, and it therefore constituted an important precedent in terms of the operation of the GATT and the Code in this area. Australia had always maintained that both the GATT and the Code provided inequitable treatment between primary and non-primary products. Australia was therefore particularly anxious to see that the provisions were not further weakened by ineffective interpretations as to their operation.

18. He shared the United States' view that the Panel report in document SCM/42 was an extraordinary one which warranted careful consideration by the Committee. It was based on the unresolved and, at best, dubious premise that wheat flour was a primary product rather than a non-primary product in terms of the GATT and the Code provisions on export subsidies. This was, of course, a fundamental issue in terms of rights and obligations under the Code, as the Code proscribes outright export subsidies on non-primary products whilst for primary products, while recognizing the damage such subsidies can cause and requiring Signatories to seek to avoid their use, it only proscribes their application in certain circumstances. This matter was raised before the Panel by the United States and was commented on in paragraphs 2.3, 2.4 and 4.2 of its report. The Panel's conclusion on this matter was that it did not constitute part of the matter referred to it by the Committee and therefore it did not consider the substantive issue involved. He found it strange that the Panel came to this view as its terms of reference left it to the Panel to determine which were the relevant provisions of the GATT and the Code. The Australian view was that wheat flour was a non-primary product in terms of the definition contained in the notes and supplementary provisions to the GATT. Accordingly, he believed that the Panel's report had been based on a false premise.

19. The Australian delegate further said that the Committee had to determine whether wheat flour was a farm product in its natural form or which had undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade. In this respect he noted that the share of wheat flour in total commercial trade in wheat and wheat flour was now less than 7 per cent. As this issue affected the rights of all Code Signatories, the Committee had to make a judgement on it, irrespective of the views of the EEC and the United States. The Committee had to determine what provisions of the Code were relevant to this case, as was required in the terms of reference of the Panel. In Australia's view, if the Committee were to accept the Panel's report as it stands, it would mean that it determined that the rules on which the Panel had based its conclusions - that is those relating to primary product - are those which are relevant to wheat flour. His delegation challenged this view and requested the Chairman to ensure that this matter be formally addressed by the Committee.

20. Another important point he wished to make was that the adoption of the Panel report would effectively render the GATT rules on export subsidies on primary products inoperative. The Panel had concluded in paragraph 5.3 of its report that it was unable to conclude as to whether the EEC's increased share in world trade in wheat flour had resulted in the EEC "having more than an equitable share" because of, most importantly, the difficulties inherent in the concept of "more than equitable share". Moreover, the Panel had concluded in paragraph 5.9 of its report that "solutions to the problem of export subsidies in this area could only be found in making the pertinent provisions of the Code more operational, stringent and effective in application". The EEC had, however, made it perfectly clear - particularly at the recent GATT Ministerial Meeting - that it was not prepared to countenance the strengthening of the rules in this area. Thus, the unqualified adoption of the Panel report would put Signatories in a difficult situation - the Code's (and the GATT's) rules would have been found to be inoperative whilst they clearly would not be in a position, at least for the foreseeable future, to make those rules more "operational, stringent and effective in application" as was proposed by the Panel. Australia could not accept any such erosion of the Code and of the GATT and was, if necessary, prepared to take this matter to the CONTRACTING PARTIES under the Decision of the GATT Council of 28 November 1979 on the unity and consistency of the GATT system.

21. The third point the Australian delegate wished to make on the Panel report was that it had not taken into account certain agreed interpretations of the concept of "more than an equitable share of world export trade". The facts it had presented would have provided the Panel with the basis to determine that the EEC had operated export subsidies in a way that had allowed it to achieve such a share of world export trade and was therefore in prima facie breach of its Code and GATT obligations. Indeed, one may well ask how in 1958 a Panel and the CONTRACTING PARTIES were able to determine that France's part whose share in world exports of wheat flour had increased by only a few percentage points, was more than equitable, whilst in 1983 a Panel could not conclude that the EEC's subsidized exports of wheat flour whose share of world exports have increased from an average of 29 per cent in the base period of 1959-60 to 1961-62 to reach 75 per cent in the period 1978-79 to 1980-81 - that is, an increase of over 45 percentage points - had not similarly resulted in "more than an equitable part". If the GATT rules were operative in 1958 why had the Panel now determined that they were inoperative in 1983? In this context he noted that the Panel had concluded in paragraph 5.8 of its report that it was "anomalous, for instance that the EEC which without the application of export subsidies would generally not be in a position to export substantial quantities of wheat flour, had over time increased its share of the world market to become by far the largest exporter". The Panel had also found, in paragraph 4.11 of its report, that market shares "for virtually any period in the last twenty years, had been affected by the application of export subsidies" and, in paragraph 4.27, that there had been a "situation of relative oversupply for much of the period under review" and that the EEC export refund mechanism "subsidizes the export to the extent necessary to meet lower price levels of wheat flour".

22. He further noted that the Panel had looked at a number of special factors (such as the relative quality of exports of wheat flour, special transactions, transportation costs) and had dismissed these. It had also looked at a range of representative periods and found that the fundamental picture of market developments tended to be consistent (paragraph 4.12). In the light of these conclusions, Australia found it unacceptable that the Panel had not been able to conclude that the massive increase in the EEC's share of the world market - and one which continued to increase - was not more than equitable. Bearing in mind the conclusions he had just noted, he was puzzled by the vague reference in the Panel's conclusion to the "highly artificial levels and conditions of trade, the complexity of developments in the markets, including the interplay of a number of special factors, the relative importance of which it was impossible to assess". He wondered what these overriding factors were? It was true that the Panel had noted factors such as historical links, the trade practices of respective traders and the increase in domestic milling capacity and had not made any definitive judgement on these factors. However, surely these factors should have been dismissed on the grounds that if they were significant in determining the huge increases in the EEC's share of the world market, the EEC would not have needed to maintain its export refund mechanism. The only other "special factor" noted by the Panel was political developments in respect of one exporter, namely the United States. However, he doubted that the Panel was suggesting that such developments were responsible for the huge increase in the EEC's share of the market.

23. The Australian delegate further stated that the Panel had clearly presented the facts of this case and had reached positive findings on all the essential relevant factors. One could only assume that it was simply not prepared to take these findings to their logical conclusion in a way that would find the EEC to be in prima facie breach of its obligations. This brought him to the fourth comment he wished to make on the Panel's report. It seemed to him that the equivocal nature of its findings was based not so much on the facts of the case, or on GATT law, but on the philosophy or view which was held in some influential quarters that the wording of various GATT provisions lack precision and that conciliation and consensus settlement ought to be the modus operandi rather than the resolution of legal issues. The GATT and the Codes were treaties under which parties had certain rights and obligations. Australia could not accept the undermining of the legal status and integrity of the General Agreement and the Codes through indecisive decisions or indecisive Panel reports, particularly in case where the rules had been operative and effective in the past, as they had been in this case. The GATT Ministerial Meeting had understood the importance of an effective dispute settlement procedure, and Australia would strongly oppose attempts to have it put into question.

24. He concluded by saying that there were a number of other specific points in the Panel report to which he would revert at an appropriate time,

such as the lack of any economic credibility in the Panel's equivocal conclusions in respect of the effect of the EEC's subsidies on world prices for wheat flour, and the fact that it made no reference to the first sentence of Article XVI:3 of the GATT which required contracting parties to "seek to avoid the use of subsidies on the export of primary products", which was not only an important provision in its own right, but also constituted an important premise to the concept of "more than an equitable share of world export trade". Australia would also comment in more detail on this concept at an appropriate time. Moreover, Australia totally rejected the EEC assertion contained in paragraph 2.17 of the Panel report concerning the continuing validity of a previously agreed interpretation in relation to Article XVI:3 of the GATT. He thought that these points made it clear why Australia could not accept the conclusions in the report; it was therefore of the view that it should not be adopted by the Committee.

25. The representative of the EEC said that the Committee had held three conciliation meetings and the Australian delegation had had every opportunity to state that the United States complaint was not well founded and should be based on Article 9 or on Article 10. Furthermore, Australia could have made a submission to the Panel and even asked to be heard by it on the question of primary products. Yet Australia had never raised that question and it had now been settled. Moreover, in 1958 Australia had filed a complaint against France under Article XVI:3 and not Article XVI:4, so that already at that time had had no doubt but that flour was a primary product. With respect to Australia's opposition to possible acceptance of the report by the Committee, Article 18 was quite clear: the Committee's task was to consider the report, not to accept it.

26. The representative of Chile said that he had anticipated some difficulties as to whether the Committee should adopt the report or only take note of it but having heard the interpretation of the representative of the EEC of the rôle of the Committee he had to say that he was in complete disagreement with this interpretation. The case under consideration was the first dispute settlement case and therefore was of special importance. The Committee should ensure the proper functioning of this procedure so that it neither impairs the existing rights and disciplines under the Code nor imposes new obligations. The US complaint had raised a number of difficult problems, the analysis of which was not facilitated by the provisions of the Code which was hardly a model of precision and clarity. Therefore the Committee should look at the conclusions of the Panel with special care. Firstly, the Panel had concluded that the EEC system of refunds constituted an export subsidy. There was no disagreement on that point. Secondly, the Panel did not want to examine the question of whether wheat flour was a primary or a non-primary product. As this was a fundamental question the Committee should examine it in detail. Until a decision had been reached on this matter the conclusions of the Panel should rather be seen as a working hypothesis. Thirdly, the Panel had concluded that the EEC share of world

export trade had considerably increased while that of all other exporters had decreased. It had also concluded that the EEC would not have exported wheat flour at all, or much less, if it had not had the complex system of agricultural policy, the most essential element of which were export subsidies. The existence of a direct link between export subsidies and the generation of an export surplus was therefore evident. Without these subsidies and in the absence of other special factors, the EEC share would not have increased in such a spectacular way. The Panel had recognized this fact in paragraph 5.8 of its conclusions.

27. He further stated that the Panel had been unable to conclude that the increased EEC share had resulted in the Community having more than an equitable share. However, it had also been unable to conclude that the Community had not obtained more than an equitable share. The Panel had therefore made no conclusions in this regard which was incomprehensible. The Panel had given three reasons for that. Firstly, it had said that the levels and conditions of trade in wheat flour were highly artificial and complex. This complexity resulted from increasing milling capacities and governmental interventions through subsidies and special sales which in turn maintained the market at an artificially high level. In other words, because there were subsidies the market was artificial and because it was artificial it was impossible to conclude whether or not the effects of subsidies contradicted the equity criterion of the Code. This sort of reasoning was false and anti-legal and in no way helpful for now or for future cases. The Panel had also said that the evolution of the markets was very chaotic because of the existence of a few important markets with greatly varying imports from one year to another and a large number of small markets, some of which imported only on an irregular and unpredictable basis. It had also referred to price variations as a reason for complexity but in paragraph 3.24 it stated that the wheat flour export prices were fixed freely by the exporters on the basis of their own appreciation of the market. It did not result from all this reasoning that the conditions on the flour market were really so different from other markets products, nor were they so chaotic or abnormally complex. This conclusion was again not well founded.

28. The delegate for Chile went on to say that the Panel had also tried to justify its lack of conclusions by "the interplay of a number of special factors, the relative importance of which it was difficult to assess". Although these special factors were analyzed one by one in the report, none of them was found by the Panel to be so important as to justify the spectacular increase of the EEC share. It was therefore impossible to assess the importance of these factors but nevertheless their interplay had prevented the Panel to reach a conclusion which was self-evident. The Panel had also referred to the difficulties inherent in the concept of "more than an equitable share". However, the Panel had been requested to assist the Committee in resolving these difficulties. Instead of assisting, the Panel had brought the Committee back to the starting point.

29. He also noted that although market displacement was not evident for the Panel in the seventeen markets, it did not conclude that such a displacement had not taken place. There were, however, elements in the Panel report that indicated the existence of such a displacement. Here again the Panel had not brought its reasoning to a logical end. Furthermore, if other exporters who also had exportable surpluses, had seen their share of the market decrease while the EEC had increased its share, the only logical conclusion seemed to be that the EEC exports had displaced exports of other exporters. As there were no special factors and as there was no doubt that EEC exports were considerably subsidized it was difficult to see how such a conclusion could be avoided. The Panel itself had not escaped this conclusion when in paragraph 4.29 it had stated that "it could not rule out the possibility that the application of EEC export subsidies had resulted in reduced sales opportunities for the United States". He further said that the Panel had found that on the basis of available information there was not sufficient ground to reach a definitive conclusion on price undercutting. It was a respectful conclusion but it raised the question of whether the Committee should determine what sort of information would be necessary to allow conclusions as to the price undercutting. He also said that in paragraph 5.6 the Panel had almost arrived at a conclusion when it expressed its feeling that the application of EEC export subsidies had caused undue disturbance to the normal commercial interests of the United States. The Panel had also found it desirable that the EEC make greater efforts to limit its subsidization of exports of wheat flour and found it anomalous that because of subsidies the EEC had become by far the largest exporter of wheat flour. He also noted that paragraph 5.9 contained certain recommendations which could be used by the Committee.

30. The representative of Chile also drew the Committee's attention to the fact that the Panel had been unable to arrive at a conclusion on the question of nullification or impairment under Article 8 of the Code because of lack of clarity in its provision. He considered that this question should be examined in detail by the Committee in order to clarify certain points and improve multilateral discipline in the field of subsidies. The Committee could examine, *inter alia*, the following questions: application of Article 8:4 to primary products, notion of "primary product", concept of "more than an equitable share", inclusion of special sales in the notion of "world export trade", increased disciplines in the field of special or concessional sales, the sort of information required to determine the existence of price undercutting in the sense of Article 10:3. He concluded by saying that although he did not want the Committee to adopt the Panel report, according to normal procedures the Committee should decide whether or not to adopt this report.

31. The representative of Canada said that although he was sympathetic to the points made by the representative of Australia on the question of whether wheat flour was a primary or non-primary product and although he

would welcome a determination in this respect, he considered that because of what was said during the conciliation process in the Committee and because of the history of the 1958 Panel case, the Committee should not deal with this question in the present context. He further said that looking at precedents would not help very much in resolving the issues raised by the Panel. The only valid precedent was the 1958 Panel case which, however, was much simpler, especially as there had been no special factors and a direct price undercutting leading to a change of market shares. Turning to the report itself, he noted that the Panel had made various types of findings: those that were factual in nature, those that were uncertain and those that left certain issues undecided. In the first category were the findings that the EEC had subsidized exports of wheat flour, that it had broadly expanded its world market share which had been anomalous in view of the lack of natural advantage for the EEC and that market displacement was not evident. The Panel had not been certain whether there had been price undercutting and had not made any finding on the question of "more than an equitable share". The Panel had avoided the central issue in this case, namely whether the EEC's increased share had resulted in it having more than an equitable share. This question still remained unanswered. He further wondered what the Committee could do. Article 18:9 says that the Committee should take into account the findings contained in the report and may make recommendations to the parties. It seemed to him that the only clear recommendation the Committee could make at this time was the one contained in paragraph 5.7 of the report, namely that the EEC make greater efforts to limit the use of subsidies on the exports of wheat flour. Apart from that, the report did not provide a sufficient basis for recommendations. There was therefore an outstanding task which should be tackled in order to come to grips with the question of what constituted an equitable share. He further said that if one looked at the table on page 31 of the report and saw the changes in the market share but could nevertheless not come to the conclusion that there had been a degree of inequity, then one would despair whether the relevant provisions of the Code had any meaning. The Panel had been, for various reasons, unable to come to any conclusion and therefore the Committee should resolve the matter if the GATT was to have any meaning in this field.

32. The representative of Sweden speaking of behalf of the Nordic countries noted that the Panel had not considered it to be within its mandate to address the question of whether wheat flour was a processed product or a primary one within the meaning of the GATT. The Panel's interpretation of its mandate on this issue had had a bearing on the examination carried out by the Panel. He further said that the Panel had not found sufficient grounds to reach a definite conclusion as to whether the export subsidies had resulted in the EEC, by price undercutting in the sense of Article 10:3, having more than an equitable share of the world trade in wheat flour and caused market displacement. Despite the fact that the EEC had increased its share of the world market, the Nordic countries thought that there was no basis to call in question the assessment of the Panel, taking into

consideration the special factors which existed on the wheat flour market and the fact that in GATT there was no precise definition of the concept of "more than an equitable share of world export trade" or any detailed guidelines as to how that was to be determined. The Nordic countries regretted that the Panel had not been able to present clearer conclusions; they would therefore welcome further discussion on the concept of equitable market share in the Committee and were prepared to consider various procedural possibilities to this end. He also wished to caution against panels being too disposed towards balancing their legal assessment with considerations of a general nature. This could give scope for a politicizing of the panel instrument, thus weakening all the usefulness of the dispute settlement mechanism. He emphasized the importance the Nordic countries attached to the different elements of the procedures regarding panels, not least to encourage development of mutually satisfactory solutions between the parties. The dispute settlement procedures within GATT were, in their view, very important. The Nordic countries were anxious to contribute to the safeguarding of these procedures which must not be allowed to erode or be put in question.

33. The representative of the EEC compared the situation in which the Committee was placed to a case where a court had dismissed a charge. The United States complaint was not well-founded. It was clear, therefore, that the Panel could not state that the EEC was at fault; there was no case to answer. The procedure should have stopped there. One could accept the Panel's conclusions that the provisions of the Code were sometimes not very clear, but he could not agree that it was quite normal that the Committee should decide, without being so instructed by the CONTRACTING PARTIES, that the task should be undertaken of rewriting and redefining the provisions of the GATT. The Committee had certain specific tasks. Article 19:6 said that the Committee should review annually the implementation and operation of the Agreement. It could even amend the Code, but one could not do so without a specific mandate. In the case under consideration the Committee had only two tasks: to consider the report and, if it wished, make recommendations. The only recommendation possible was that since 1978 the United States had been wrongly accusing the EEC of not having observed its GATT commitments, that there was no case to answer and that the matter should be dropped. The United States ought to recognize that it had lost. In his view, there was no question of embarking on a procedure for renegotiating the Code; furthermore, the concept of an equitable share was well defined and quite clear. The Code contained specific provisions concerning dispute settlement, in particular Articles 18:8 and 18:9, according to which the Committee's task was not to accept the report but merely to consider it and perhaps make recommendations.

34. The representative of Australia recalled that his delegation had brought up the argument that wheat flour was a non-primary product in October 1980 in the consultations with the European Community as well as in an informal meeting of the Committee at a later date. He reiterated that

this was a fundamental issue which needed to be resolved before the Panel report would have any credibility. He also noted that some Signatories, including Canada, had argued that it would be inconsistent for Australia to argue now that wheat flour was a non-primary product when the precedent for a finding in respect of the concept "more than an equitable share of world trade" was based on the 1958 French Flour case where Australia had taken the opposite position. He considered that there was no inconsistency in Australia's view since the percentage of wheat flour in world trade of wheat and wheat flour was now less than seven per cent. Therefore it was no longer traded in substantial volume as required by the definition in the notes to Article XVI and reflected in the Code in footnote 29. For these reasons, Australia claimed that the Panel report was based on a false premise and therefore essentially flawed. As to the question what the Committee should do with this report he reiterated his position that it should not be adopted by the Committee. He considered that the Committee should recommend that the EEC take steps to avoid undue disturbance to the normal commercial interests of the United States in the sense of Article XVI:2. It should also recommend that the EEC make greater efforts to limit the use of subsidies on the exports of wheat flour and finally, that the EEC examine the technical aspects of the validity and accuracy of its method of calculating its subsidies.

35. The representative of India said that the understanding of his delegation on the work of panels had always been and continued to be that it was the task of panels to interpret provisions of the General Agreement and of various MTN codes and to see whether the practices of particular parties were consistent with the legal provisions. In the present case the Panel had not adequately addressed the issue of whether the EEC subsidies were granted in violation of particular provisions of the Code. The central issue was whether these subsidies had had the effect of giving the EEC more than an equitable share. Without having done this the Panel had proceeded to pronounce the provisions of the Code themselves to be deficient. Although the provisions of Article XVI:3 of the General Agreement and of Article 10:1 of the Code had given some cause for concern and probably needed further clarification, his delegation regarded it as inappropriate for the Panel to have come to such a conclusion. The facts and data could not lead to the conclusion the Panel had drawn in paragraph 5:9 when it said that the solution to the problem would only be found in making the pertinent provisions of the Code more operational, stringent and effective. His delegation's view was that in the present case such a conclusion was inappropriate.

36. The representative of New Zealand said that his authorities had concluded that the Panel's report was inconclusive and did not tackle the important and fundamental question of what constituted an equitable share. The failure of the Panel to give guidance on this issue confirmed the need to make rapid progress in the task of clarifying obscurities of the GATT

rules on subsidies. The clarification of such terms as an equitable share needed to be attempted objectively and in a general way rather than in the context of a particular dispute. He therefore proposed that pending the resolution of general issues, the Committee should simply note the report of the Panel along with the statements that had been made.

37. The representative of the United States said that the contention by the representative of the EEC that the United States had lost this case was incorrect. In the legal sense there was no winner because there was no complete report on which to make recommendations. However, everybody had something to lose if the Committee was prevented from or unable to finish its task.

38. The representative of the EEC said that the contention that the United States had lost the case had been made not by the Community but by the United States itself. There had been a complaint, the finding had been there there was no case to answer, and matters had been left at that. There would be another complaint, by the EEC against the United States regarding sales of flour to Egypt, and everyone would be able to see that the provisions of the Agreement were quite clear and did not need to be supplemented very much.

39. The representative of the United States said that the Committee should address the requirements of Article 18:8 of the Code. This Article contained two requirements. First, that a panel's report should set forth the findings as to the questions of fact and secondly, that it should set forth the findings on the application of relevant provisions of the Code. In her opinion this second requirement had not been met and there was no complete report upon which to base possible recommendations provided for in Article 18:9.

40. The representative of the EEC said that the current stage of the procedure fell under Article 18:9. The question of Article 18:8 had been settled because a written report had been submitted. On the basis of that report, the United States could always contend that the Panel had not given its findings as to the application of the relevant provisions, but that would be the opinion of the United States and not of the Committee. Consequently, he would accept no reference to paragraph 8 except to say that, as stipulated in paragraph 8, the Panel had submitted its report.

41. The representative of the United States said that the representative of the EEC, in pronouncing his opinions on the rôle of the Committee should also take into account Article 13:4 of the Code.

42. The Chairman said that further reflection was needed. All the statements would be duly reflected in the record of the meeting and the Committee would meet on 19 May 1983 to continue its discussion.