

GENERAL AGREEMENT ON

RESTRICTED

TARIFFS AND TRADE

SCM/M/61

17 September 1992

Special Distribution

Committee on Subsidies and Countervailing Measures

MINUTES OF THE SPECIAL MEETING HELD ON 21 JULY 1992

Chairman: Mr. G. Salembier (Canada)

1. The Committee on Subsidies and Countervailing Measures ("the Committee") held a special meeting on 21 July 1992.

The Committee considered three items:

- (i) Brazil - countervailing duty proceeding concerning imports of milk powder from the European Economic Community - Request by the European Communities for conciliation under Article 17 of the Agreement (SCM/149)
- (ii) Australian Customs Amendment Act 1991 and countervailing duty proceeding concerning imports of glacé cherries from France and Italy - Request by the European Communities for conciliation under Article 17 of the Agreement (SCM/150)
- (iii) United States countervailing duties on non-rubber footwear from Brazil - Report of the Panel (SCM/94)

2. With regard to the third item on the agenda of the Committee circulated in GATT/AIR/3336, "Panel report on United States countervailing duties on non-rubber footwear from Brazil", the Chairman said that the United States had recently indicated that it did not wish to pursue this matter at the present meeting. He therefore proposed that this item be deleted from the agenda of the present meeting.

3. The representative of Brazil said that since the United States had indicated it did not wish to pursue this matter at the present meeting, he would not address the issue of the conditions for the inclusion of the item on the agenda. He asked the Chairman to confirm that no precedent had been established by the inclusion of the item on the agenda in the first place.

4. The Chairman said that no precedent was being established one way or the other by the inclusion of the item on the agenda.

5. Under "Other Business", the EEC asked to raise a procedural matter regarding Yugoslavia, and the United States asked to raise the Panel report on the German Exchange Rate Scheme for Deutsche Airbus (SCM/142).

The agenda was adopted as amended.

6. The representative of the EEC said that at a meeting of the Foreign Affairs Council on 20 July 1992, the Community and its member States had issued a declaration stating that the new Federation of Yugoslavia "... cannot be accepted as the sole successor to the former Socialist Federal Republic of Yugoslavia. In the light of this, the Community and its member States will oppose the participation of Yugoslavia in international bodies". Accordingly, he reserved the Community's position regarding any follow-up to this declaration within the GATT system, including the Subsidies Committee.

(i) Brazil - Countervailing duty proceeding concerning imports of milk powder from the European Economic Community - Request by the European Communities for conciliation under Article 17 of the Agreement (SCM/149)

7. The Chairman recalled that at the Committee's regular meeting on 28 April 1992 (SCM/M/59) the representative of the EEC had raised, under "Other Business", the matter of Brazil's imposition of provisional countervailing duties on milk powder from the Community. He drew the Committee's attention to SCM/149 in which the EEC described the background to its request for conciliation in this matter.

8. The representative of the EEC said that the Community's request for conciliation should be seen in its proper context. The Community did not challenge Brazil's right to undertake countervailing duty proceedings concerning products imported from the Community. All signatories of the Subsidies Code had this right, provided certain conditions were met. The request for conciliation had been motivated by Brazil's failure to respect the provisions of the Code in the procedure followed in the present case, particularly the premature imposition of provisional countervailing duties. Brazil had opened this proceeding on 16 March 1992, but had failed to notify the Community of this, in contravention of Article 2:3 of the Code. On 8 April 1992, Brazil had imposed a provisional countervailing duty of 31-52 per cent on imports of milk powder originating in the Community, in contravention of Article 5:1 of the Code, which stated that:

"Provisional measures may only be taken after a preliminary affirmative finding has been made that a subsidy exists and that there is sufficient evidence of injury as provided for in Article 2, paragraph 1(a) to (c)."

9. In the Community's view, this action constituted a significant breach of the Code by Brazil. He said that it had long been accepted in GATT that provisional measures should be applied with moderation and should not provide unwarranted protection to the domestic industry. The wording of Article 5:1 made it clear that before such measures could be taken, a preliminary investigation had to be carried out and all the parties involved had to be given an adequate opportunity to provide evidence. In the present case no investigation had been carried out before the provisional duty had been imposed. The questionnaire relating to this case had been sent on 18 May 1992, more than one month after the taking of provisional measures; this was the first occasion on which the Community had been informed of the proceeding. Exporters in the Community had never been informed of the investigation, since Brazil had made no attempt to identify the exporters concerned.

10. The Community considered that Brazil's failure to carry out at least a preliminary investigation - which involved informing, and requesting information from, the parties concerned in order to ensure their rights of defence - made the imposition of provisional measures incompatible with Article 5:1 of the Subsidies Code. Furthermore, in its formal determination set out in the public notice of 8 April 1992, Brazil had provided no evidence to show that the requirements of Article 5:1 had been met. There was no evidence which could lead to a preliminary affirmative finding of the existence of a subsidy, or to the conclusion that there was sufficient evidence of injury as provided for in Article 2, paragraph 1(a) to (c) of the Code. Furthermore, there was no indication as to how the amount of duty had been calculated. The Community had requested such evidence in a letter of 7 May 1992 to the Brazilian authorities, but as yet had not received a satisfactory reply. The Community thus submitted that the imposition of provisional measures by Brazil violated Articles 1 and 5:1 of the Subsidies Code. The Community had held consultations with Brazil in Brasilia concerning this proceeding on 23 June 1992, and had also exchanged correspondence on this case. The consultations had not led to a mutually agreed solution for the following reasons: (1) the Community had been told that the basis for calculating the amount of the duty was a study by the Ministry of Agriculture in Brazil, and no attempt had been made to request information from the Community on this subject before the duties had been imposed; (2) concerning the evidence of injury, the Brazilian representative had stated that it was not for Brazil to produce such evidence, but rather for the Community to show that allegedly subsidized imports had not caused injury; (3) Brazil had insisted that a preliminary "analysis" of the existence of a subsidy and injury was sufficient for the purpose of taking provisional measures, an approach which seemed to imply that no investigation was necessary.

11. The Community for obvious reasons could not accept these arguments, in particular the interpretation of Article 5:1. During the consultations and in the correspondence, Brazil had frequently cited Article 2:10 of the Code which stated that the procedures set out in Article 2 were not

intended to prevent a signatory from proceeding expeditiously with regard to, among other things, the imposition of provisional duties. This provision did not mean that signatories could simply ignore other provisions of Article 2 in order to proceed expeditiously, or that provisional duties could be imposed before the other signatory had been notified of the opening of the investigation or had had an opportunity to submit evidence. As a consequence of these facts, the consultations with Brazil had come to nothing. Therefore, the Community was now requesting conciliation under Article 17 of the Code, thus continuing the process started by the Article 3 consultations. The Community would like to see the provisional measures withdrawn and any duties collected refunded. However, in a spirit of conciliation, the Community would be prepared to consider any concrete proposals from Brazil on this matter.

12. The representative of Brazil said that his delegation understood the history of this case to be the following: the initiation of the investigation had been requested by two entities highly representative of the industry affected; both were private associations. Regarding the motivation behind the request, he said that the importation of the subsidized products in question from the EEC by Brazil had severely inhibited the expansion of Brazilian production. The imported product sold in Brazil at severely distorted prices competed unfairly, causing not only material injury to the established industry, but constant threat of further injury, especially as Brazil endeavoured to liberalize its economy. It had also caused material retardation of the expansion of the industry. Following the acceptance of this request and prior to the initiation of the investigation - more precisely on 27 February 1992 - the head of the Foreign Trade Department of the Brazilian Ministry of the Economy, in fulfilment of obligations under Article 3:1 of the Code, had addressed a written communication on the matter to the Head of the EEC delegation in Brasilia, offering the opportunity for consultations with the objective of reaching a mutually satisfactory solution. The communication explicitly referred to Article 9 of CPA Resolution No. 00-1227 of 14 May 1987 (reproduced in SCM/1/Add.26/Suppl.1) which had been examined by the Committee at its regular meeting on 31 May 1988. This regulation stated that if the government of the exporting country manifested within 15 days its interest in holding consultations, a hearing for this purpose would be held within a maximum period of one month.

13. Upon examination of the information provided by the petitioners, the Brazilian authorities had concluded that there was sufficient evidence of: the existence of the alleged subsidies, as foreseen in Article 2:1(a); injury in the sense of Article 2:1(b); and a causal link between the two, as prescribed by Article 2:1(c). On 17 March 1992, having not received any reply from the EEC on the proposed consultations and following other measures to afford a reasonable opportunity for consultation, the investigation had been initiated by means of publication in the Federal Official Gazette (Diário Oficial, Circular Decex No. 83, of 16 March 1992). This was prescribed by Article 12 of Resolution 1227. All measures had

been taken in strict respect of the Code, including Articles 2:10 and 3:3. On 9 April 1992 - and not on 8 April as stated in paragraph 3(b) of the EEC communication in SCM/149 - after his authorities had made a preliminary affirmative finding that subsidies did exist, that there was sufficient evidence of injury caused by such subsidies, and that it was necessary to prevent injury during the period of investigation, provisional countervailing duties had been imposed upon publication of a ministerial act in the Federal Official Gazette. The levels of these duties were correctly stated in paragraph 3(b) of SCM/149. Only as from mid-April 1992 had the EEC started to contact the Brazilian Mission in Brussels on this matter, and only on 30 April had there been a specific response to Brazil's offer of 27 February for consultations. The consultations had been held in Brasilia on 23 June 1992. One of the main reasons for the long lapse of time between the date the EEC had responded and the date the consultations had been held, was the EEC's insistence that they be held in Brussels or Geneva, a condition nowhere specified in the Code.

14. In Brazil's view, and contrary to the EEC's view, these consultations had not failed and had been very useful for a better understanding that could lead to a bilateral solution. Brazil had explained the technical and legal criteria used to calculate the amount of the provisional duties, and had informed the EEC that an extensive list of information items requested by the Commission in May would be transmitted as soon as possible, although it was Brazil's view that this information was not determinant in itself for the determination of injury. The EEC had been urged to provide Brazil with the information requested in the standard questionnaires which the EEC had had since 27 February. In conclusion, he said that it was evident that Brazil had not violated any provisions of the Subsidies Code, and that the EEC was being afforded the widest opportunity for consultations with a view to clarifying the factual situation and to arriving at a mutually agreed solution, as prescribed by Article 3:2. He understood that subsequent to the consultations on 23 June, the Commission had provided information in the standard questionnaire mentioned in the EEC communication and in his previous comments, and this information was being carefully examined by his authorities. Thus, it would seem inappropriate, or at least premature, to say that consultations had failed.

15. The representative of the EEC said that the Community had neither challenged the standing of the petitioner nor alleged any violation of Article 3 of the Code. The charge was that Brazil had violated Article 5, and his delegation had not heard any justification from Brazil in this respect. He reiterated that the Community did not challenge the use of countervailing duties by any signatory of the Code. However, there were procedures and rules to be respected, one of which was that prior to a preliminary determination, there be an investigation and sufficient evidence - albeit at the preliminary stage - of elements of subsidization, injury and a causal link between the two. While the Brazilian authorities

had apparently reached a conclusive determination on these matters on the basis of the evidence they had, the Community would have liked to have been informed of what this evidence was. Thus far, signatories who had applied countervailing duties had followed these rules. The subjective conviction of the Brazilian authorities as to the existence of the necessary elements was not sufficient to fulfil the Code's Article 5 obligations. While bilateral consultations were continuing, they had thus far failed to produce a mutually acceptable solution, and that was the reason the Community had raised this matter in the Committee.

16. The representative of Brazil said that he had mentioned the question of "standing" of the petitioner in his earlier statement in order to make clear that there were good reasons for the initiation of the countervailing duty investigation. Brazil was more than willing to provide all of the information requested, and the delay in doing so had been due to the Community's delay in making clear what further information it wanted. Brazil was following the rules of the Code and hoped that the Community would be satisfied as to the reasons for, and the extent of technical examination of, this case.

17. The Chairman said that the Committee had heard the views of the parties on this matter, and he encouraged the delegations of the EEC and Brazil to make further efforts to reach a mutually satisfactory solution consistent with the Code, as provided for in Article 17:2.

The Committee took note of the statements.

(ii) Australian Customs Amendment Act 1991 and countervailing duty proceeding concerning imports of glacé cherries from France and Italy - Request by the European Communities for conciliation under Article 17 of the Agreement (SCM/150)

18. The Chairman recalled that at a special meeting of the Committee held on 26 March 1992 (SCM/M/58) the EEC had referred to a request for consultations on some aspects of this matter under Articles 3 and 16 of the Agreement (SCM/145) and Australia had subsequently responded in writing to this request (SCM/146). In a communication dated 10 April 1992 (SCM/147) the Community had reiterated its request for bilateral consultations with Australia. At its regular meeting on 28 April 1992 (SCM/M/59), the Committee had discussed the Australian legislation in some detail in the context of its examination of countervailing duty laws and/or regulations of signatories of the Agreement, and the EEC had indicated that it had repeated its request for consultations with Australia on the legislation. He drew the Committee's attention to SCM/150 in which the EEC described the background to its request for conciliation in this matter.

19. The representative of the EEC said that the Committee was well aware of the substance of this issue and had discussed it several times. The Chairman had accurately summarized the procedural background to this

matter. The Community remained seriously concerned about the enactment by Australia of legislation of the kind of Clause 7 of the Customs Amendment Act 1991, and remained firmly convinced that the notion introduced was in clear contradiction of relevant provisions of the Code. He said that the Community's concerns about its application had proved to be well-founded, because the legislation had been applied, most apparently in the case involving glacé cherries. The Community had tried to set in motion a process in the multilateral framework of the Code which would enable the Community to clarify this matter with Australia and to reach a solution, as this matter involved an issue of principle of great interest to all signatories of the Code. In addition, the Community had, on several occasions, aired its concerns in several meetings of the Committee, not only in the special meeting held on 26 March 1992, but also at previous and subsequent regular meetings. He recalled that at the 28 April 1992 meeting the Community had not insisted on having this item included as a separate item on the agenda, but had accepted Australia's suggestion that the discussion be continued under the general item of the Committee's examination of signatories' countervailing duty laws and/or regulations. The Community had keenly sought bilateral discussion of this matter with Australia, but unfortunately Australia had been unwilling to engage in such consultations due to its views on the inappropriateness of doing so; this had been recently confirmed in a letter dated 30 June 1992 from Australia to the EEC. Under these circumstances, the Community had no choice but to request the Committee to conduct conciliation under Article 17 in order to try once again to reach a mutually satisfactory solution.

20. As to the substance of this case, he said that Article 6:5 was one of the few provisions of the Code that was crystal clear; "domestic industry" was comprised of producers of the "like product". The notion of "like product" was also very clear, no matter how strong the economic links were between producers of the like product - which constituted the only relevant domestic industry for the purposes of a countervailing duty action - and producers of any other product, be that an input of the like product or a derivative or a parallel product. These linkages were irrelevant in terms of the Code, and this kind of legislation was bound to create conflicts. The Community was not hopeful that Australia would undertake any commitments regarding legislation adopted by its Parliament, but hoped that in the end Australia would agree to discuss the legislation in the Committee with a view to bringing it into conformity with the Code.

21. The representative of Australia said that one element missing from the Chairman's summary under this item was that conciliation was being sought on a particular case - glacé cherries - in which there had been consultations under Code provisions over a period of time, and that this matter was now before the Committee. He said that in the course of the Committee's normal work, Australia had responded to the Community's concerns over the conformity of the legislation, both in SCM/W/259 and SCM/M/59. In summary, Australia had pointed out, in response to earlier Community arguments, that the legislation did not attempt to broaden the

definition of domestic industry by extending what could be considered a like product. Rather, it established that in certain cases where there was a significant coincidence between growers and processors in the form of vertical integration and economic interdependence, it was a reasonable interpretation of the Code to treat growers as an integral part of the domestic industry producing that like product. Australia had provided examples - such as those of co-operatives, where the processing operation was owned by growers - which would be covered by the legislation and where it was clear that both growers and processors were part of the one domestic industry. Australia therefore contended that its legislation could not be prima facie in breach of Code provisions, and was a reasonable interpretation permitted by the Code. Australia had already pointed out that the legislation was markedly different from legislation raised in earlier EEC communications - the specific US legislative provision involved in the wine and grape case (Panel report in SCM/71) - which simply deemed grape growers to be part of the wine industry.

22. He said that in addition to these arguments, the legislation, like other similar legislation preceding it, had now passed through the normal scrutiny of the Committee pursuant to Article 19 of the Code. Australia saw this as further grounds on which to reject any notion that the legislation in itself was in breach of the Code or should now be subject to dispute settlement provisions. Australia had also held, on other grounds as well, that it was not appropriate for the legislation per se to be put to dispute settlement, and had provided argumentation based on GATT practice and on the related Anti-Dumping Code provisions to support its conviction that it was actions, rather than legislation per se, that could be contested. He noted that such action had now been taken under the legislation, and the Community had a basis to pursue its real trade concerns in a manner consistent with normal GATT and Code practice. The Community contended in paragraph 7 of SCM/150 that mandatory legislation could constitute a breach of the Code. While he would not comment on that assertion, he pointed out that the converse was more at issue here, because if legislation contained discretionary provisions regarding its application, this was an additional reason why it was inappropriate to examine provisions of such legislation for Code conformity. The Australian Customs Amendment Act 1991 had always been discretionary, since the Minister might or might not decide to impose anti-dumping or countervailing duties. In addition, a recent specific amendment confirmed Ministerial discretion as to whether particular industries were given the benefit of the domestic industry definition on processed agricultural products. On the other hand, if particular provisions of legislation providing for optional procedures were applied, it would be appropriate for the Committee to examine for Code conformity the actions or decisions actually being applied. Australia would argue that this interpretation was in line with the customary practice of the GATT. Specifically, three recent panels had distinguished between mandatory legislation and discretionary legislation; these were the tuna panel (report in BISD 29S/91), the Superfund panel (report in BISD 34S/136) and the

screwdriver assembly panel (report in BISD 37S/132), which had made it clear that unless and until the legislative options were actually applied to another contracting party, the CONTRACTING PARTIES as a whole could not rule on the conformity of legislation.

23. Regarding the matter before the Committee at the present meeting, he said that - while Australia had never accepted that it was an appropriate course - the Community's pursuit of a Code process based on legislation alone could perhaps have been understandable in the absence of any action appropriate for Code dispute settlement provisions. However, the further explanation just provided would clarify and expand on why his delegation did not regard such action as appropriate and why it could not accept the legitimacy of a challenge to legislative provisions per se, especially when these provisions had been examined under the appropriate Code procedures. Furthermore, an action had now been taken, and the Community had the full range of Code procedures available to it. Australia had never taken exception to this, and had agreed at the Committee's meeting on 28 April 1992 to continue an Article 3 consultation process on an action involving glacé cherries, but that offer had not been taken up. Australia had further agreed to continue the Article 3 process or to move to an Article 17 conciliation meeting regarding this issue. Thus, Australia had not been unresponsive to the Community's real concerns about specific trade cases and alleged effects. However, regarding the move toward Article 17 on the legislation per se, Australia strongly maintained its position that there was no basis for so doing. The precondition - valid Article 16 consultations in the Committee - clearly did not exist. Australia continued to reject any contention that the Committee proceedings on 26 March represented a valid consultation. A simple examination of the record of that meeting (SCM/M/58) would reveal to the Committee that no consultation had actually taken place. Furthermore, the relevant item had been included on the agenda without notice sufficient to meet normal GATT procedures which the Committee had agreed to observe at an early stage of its life. The present meeting could therefore be regarded as a legitimate conciliation process only as regarded the action on glacé cherries, on which the requisite Article 3 consultations had been held.

24. Regarding the glacé cherries case, he said that the glacé cherry industry had unique features in terms of the relationship between white cherries and the final product, in that white cherries were grown in conjunction with red cherries for reasons of good horticultural practice. The white cherry harvest in Australia was used almost entirely for the manufacture of glacé cherries, the process involving the intermediate step of brining. Thus, the raw agricultural food was dedicated completely to the particular processed food. There was complete vertical integration of the industry and a close relationship existed between the movement in prices paid for white cherries and those received by the processors of glacé cherries. There was effectively one industry involved, and its product was glacé cherries. The industry was therefore a classic example of the reasoning behind the recent amendment of the Australian legislation

concerning the definition of domestic industry. The relevant examination had found material injury to the industry caused by dumped and subsidized goods. Australia had repeatedly expressed its preparedness to consult with the Community on this case and accepted the Community's right to use appropriate Code procedures, including at the present conciliation meeting under Article 17. The rôle of the Committee was, as the Community's communication in SCM/150 itself argued, to judge Australia's action against Code provisions, namely whether the action was consistent with Article 6:5 as supplemented by footnote 18 to Article 6:1. Australia strongly contended that it was, and urged acceptance of this fact by the Committee.

25. The representative of the EEC said that regarding glacé cherries, it was true that Article 3 consultations had been going on for some time and had allowed the Community to clarify its position as to the substance of this case. Unfortunately, they had not led to a mutually satisfactory solution, mainly because once legislation had been passed, it was difficult for the administering authorities to take decisions different from what the legislation prescribed. He said that the argument just developed by the Australian delegation was a perfect illustration of the danger the Community saw in this type of provision. Fresh cherries and glacé cherries were clearly two different like products, no matter how closely linked the producers were, and the Code defined domestic industry only in terms of the product which was "like" the imported product. The Community rejected the notion that examination by the Committee of domestic legislation whitewashed that legislation of any faults it might have under GATT. In this particular case, the Community had made it clear throughout the process of examination that the Community did not regard the legislation as being consistent with the Code; the fact that the Committee had concluded its examination did not give the legislation a clean bill of health. Regarding the nature of the legislation, he said that it seemed clear to the Community that as the legislation was in contradiction with substantive provisions of the Code - such as those of Article 6 - it was necessarily in contradiction with Article 19 which obliged signatories to enact countervailing duty legislation in conformity with the substantive provisions of the Code. The Community was pleased to hear from Australia that the legislation was discretionary. He urged Australia, in the spirit of conciliation of the present meeting, to make a commitment either to amend the legislation or to assure Code signatories that it would be applied consistently with the provisions of the Code, in particular Article 6. He noted that regardless of the differences of view on the 26 March meeting, Australia had again indicated that it did not consider this matter fit for consultation under any provision of the Code. However, the language of Article 17 was as follows: "In cases where matters are referred to the Committee for conciliation failing a mutually agreed solution in consultations under any provision of this Agreement, ...". Thus, it seemed to go without saying that if one of the parties, for any reason, refused to consult, there could not be a mutually agreed solution, and the other party had the right to resort to Article 17.

26. The representative of Australia said that his delegation regarded the examination of Australia's legislation as a serious matter and held to the view that legislation per se was not a suitable subject for Code dispute settlement procedures. Australia had made the point that there was a legitimate and normal process available to the Community in relation to actions that had been taken. He was not in a position to make any commitment to amend the legislation, as it was already in conformity with the Code. Australia differed with the Community, rejecting its claim that the present meeting constituted a valid Article 17 conciliation on the legislation per se.

27. The Chairman said that having heard the differing views of the delegations of the EEC and of Australia on the questions of procedure and on the so-called "validity" of the Committee's meeting of 26 March, he wanted to address these issues before proceeding any further. In so doing, he wanted to separate what he would call the procedural aspects of this matter from the substantive ones. Regarding the procedural aspects, Australia contended that insufficient notice had been given of the 26 March meeting at which the Community had requested consultations under Articles 3 and 16 of the Code, and that no real consultation had taken place at that meeting. He said that it was true that the matter had been included on the agenda of the March meeting with quite short notice, and that no substantive consultation could reasonably be considered to have taken place at that meeting. However, he drew the Committee's attention to certain subsequent events. These were that the Community, on several occasions during the three and a half months since the March meeting, had made further efforts to hold bilateral consultations with Australia on this matter, and Australia had failed to reply, finally making it clear in writing to the Community that it had no intention of consulting on the matter raised by the Community with respect to the legislation. Thus, it seemed clear that a process under Article 16 had been initiated at the March meeting which had then been followed up, during the course of the next several months, by the Community in its further requests for consultations. As to the substantive aspects of this matter, i.e. Australia's contention that legislation itself could not validly be examined under dispute settlement provisions, he said that a signatory of the Code had the right under Article 16 to request consultations "on any matters relating to the operation of the Agreement or the furtherance of its objectives". Therefore, prima facie the Code did not preclude consultations on legislation if a signatory considered that such legislation affected the operation of the Agreement or the furtherance of its objectives. Furthermore, Article 17:1 referred to "consultations under any provision of this Agreement". In addition, there were precedents in the Committee and in disputes examined under Articles XXII and XXIII of the General Agreement for the examination of legislation by panels under dispute settlement provisions.

28. The representative of Brazil said that his delegation was concerned over the precedential value of decisions taken by the Committee. He wanted to take this occasion to repeat the position taken by Brazil on a

similar matter, which was the wine and grape panel report (SCM/71) which had recently been accepted by the United States, and the question of legislation per se being subject to dispute settlement procedures under the Subsidies Code. Brazil would be very concerned should decisions on preconditions for a panel reached along the lines of those in the wine and grape case be considered established precedent, as the ruling by the Chairman seemed to imply. He reiterated his delegation's reservation regarding this issue. The Community had said that examination of legislation in the Committee did not whitewash it; Brazil agreed. The Committee did not pronounce itself definitively, in abstract, on legislation during its regular examination of national legislation, and the Committee should not be asked to do so through the dispute settlement procedures. Only when legislation resulted in actual damage to another signatory's interests should the Committee agree to the recourse to dispute settlement procedures. He noted that the Community had requested conciliation on two grounds, one abstract and one specific. His delegation believed that dispute settlement proceedings in this case could develop only on the basis of the specific issue - the one concerning imports by Australia of glacé cherries from France and Italy - and not on the abstract issue.

29. The representative of the United States said that his delegation strongly disagreed with the Community's assertion that Clause 7 of the Australian legislation was on its face inconsistent with the provisions of the Subsidies Code. The United States believed that on its face, the legislation was consistent with the Code when it provided that in the case of processed agricultural products, where there was a single line of production and a commonality of economic interest, growers as well as processors were legitimately part of the domestic industry for purposes of the Code. The wine and grape case was not a precedent to the contrary. The latter case said only that where a domestic legislature stated that grape growers were part of the wine industry, this was clearly not sufficient to establish what the domestic industry was comprised of. However, where there was a reasoned standard - as was the case in the US legislation, the Australian legislation and certain other signatories' legislation - such legislation was clearly not on its face inconsistent with the Code.

30. The representative of Canada said that regarding the question of the definition of industry with respect to standing and injury, Canada had some sympathy for the concerns raised by Australia in respect of its legislation. Canada believed that the current Code provisions could result in anomalous situations, particularly in the agricultural sector. Canada had proposed language on standing - in the Uruguay Round subsidies and agricultural negotiations - to clarify such situations, and continued to believe that this was the best approach to resolving this issue. Canada agreed with the Community's contention that the Committee's review of legislation did not "whitewash" it, and also questioned Australia's continued resistance to consultations on a matter which was germane to the operation of the Code.

31. The representative of Colombia said that his delegation supported the view that Code provisions should be interpreted strictu sensu. This was particularly true regarding the definition of domestic industry and "like product", which were definitive definitions for appropriate application of the Code provisions. Should signatories act in a contrary way, this would destroy the very principles underlying the Code. Colombia believed that in principle, "like product" should be defined as it was in the Code, in other words, identical or as similar as possible. The Community was bringing these matters to the Committee in order to ascertain whether the case at hand involved like products. However, the existence of a vertical industry was not sufficient to determine that the two products involved were like products. He said that it was clear that the Committee's examination of legislation did not give the latter a clean bill of health, as the legislation might well be inconsistent with the Code and yet maintained, despite the review. Should a signatory bring a specific case of allegedly Code-inconsistent legislation to the Committee, the Committee would have to examine it.

32. The representative of Hong Kong expressed his delegation's concerns, as already expressed in the context of the Committee on Anti-Dumping Practices, regarding the Australian legislation and particularly the definition of domestic industry and its implications for the definition of like product. Hong Kong maintained the view that signatories had to stick to the strict interpretation of footnote 18 to Article 6:1 of the Code, which contained no explicit reference to vertical integration or economic link. Hong Kong shared the Chairman's interpretation of Articles 16 and 17 of the Code and agreed that the Committee should have the authority to examine the legislation of any signatory, including under dispute settlement proceedings.

33. The representative of New Zealand associated his delegation with Canada's comments on the substance of this issue.

34. The representative of Australia said that his delegation had listened carefully to the Chairman and to other signatories; however, in regard to the Chairman's analysis of the two elements at issue, Australia did not consider that any legitimate process under the Code had been initiated on 26 March or subsequently followed up, or that the present meeting was a valid conciliation meeting in relation to Australia's legislation per se. He reiterated that Australia did not accept that its legislation was within the scrutiny of the dispute settlement provisions of the Code.

35. The Chairman suggested that, in light of the statements made by delegations and in particular in light of Australia's most recent statement, the Committee adjourn for a short time in order to allow him to conduct informal consultations with the two parties on this matter.

The Committee adjourned.

36. When the Committee reconvened, the Chairman said that he had taken careful note of the statements by both parties, and encouraged the delegations of the EEC and of Australia to make further efforts to reach a mutually satisfactory solution consistent with the Code as provided for in Article 17:2.

37. The representative of Australia said that his delegation appreciated the Chairman's efforts and would reflect on his recommendation. However, he reiterated Australia's strongly held position that the Subsidies Committee had no jurisdiction over Australia's legislation per se, that no valid Article 16 process had been launched on or subsequent to 26 March 1992 on this issue, and that therefore the present meeting did not constitute a valid Article 17 procedure other than in the case of glacé cherries, where the requisite Article 3 consultations had taken place.

The Committee took note of the statements.

Other Business

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

38. The representative of the United States said that recent press reports indicated that Daimler-Benz and the German Government were in the final stages of working out the commercial reason for the difficulty that had led to the Panel proceeding on the German exchange rate scheme. His Government believed that when this occurred, the commercial reason at the root of the difficulty in this matter would cease to exist. The United States would therefore hope that the Community would be in a position to reflect on the adoption of this report when it next appeared before the Committee. It was the present intention of his authorities to seek adoption of this Panel report at the Committee's next meeting, whenever that might occur. The United States reserved the right to request a special meeting for this purpose or to add this item to the agenda of any meeting that might be requested by another signatory.

39. The representative of the EEC said that he would report the United States' statement back to his authorities. He reminded the Committee of the Community's position as stated at the 28 April 1992 meeting (SCM/M/59), which referred not only to the substantive trade dispute with the United States concerning Airbus but also to certain principles underlying the Panel's findings. These principles had caused considerable concern in the Community, and the Community's further reflection on this issue would be guided both by the practical trade side of this dispute and by those principles.

40. The representative of the United States said that he took the Community's statement as a willingness to explore, with an open mind, all possibilities. The United States would certainly reciprocate in this effort.

The Committee took note of the statements.