MINUTES OF THE MEETING HELD ON
23-24 OCTOBER 1985

Chairman: Mr. J.Y. Sun (Korea)


2. The Chairman said that the agenda for this meeting had been circulated in the Airgram convening the meeting (GATT/AIR/2208). The Committee adopted the following agenda:

A. Adherence of further countries to the Agreement

B. Examination of national legislation and implementing regulations (SCM/1 and addenda)
   (i) Legislation of Austria (SCM/1/Add.10/Rev.1)
   (ii) Legislation of Canada (SCM/1/Add.6/Rev.1)
   (iii) Legislation of the United States (SCM/1/Add.3/Rev.1 and Corr.1, SCM/W/91/Rev.1)
   (iv) Legislation of New Zealand (SCM/1/Add.15/Rev.1)
   (v) Legislation of Indonesia, Israel, Philippines and Turkey
   (vi) Other legislation

C. Notification of subsidies
   (i) Follow-up of the last review of notifications
   (ii) Up-dating of full notifications (L/5768 and addenda)
   (iii) Improvement of notifications

D. Semi-annual reports of countervailing duty actions taken within the period 1 January 1985-30 June 1985 (SCM/66 and addenda)

E. Reports on all preliminary or final countervailing duty actions (SCM/W/90, 92, 93)
F. Report of the Group of Experts on the Calculation of the Amount of a Subsidy (SCM/W/74/Rev.1, SCM/W/89 and SCM/W/94)

G. Uniform interpretation and effective application of the Agreement

H. Annual review and report to the CONTRACTING PARTIES

I. Other business

(i) Standing of petitioners in countervailing duty cases and problems related thereto

(ii) Procedures for deciding terms of reference of a panel according to Article 18:1 of the Code

(iii) Decision of the USITC regarding imports of wine products from the EEC

(iv) Conditions under which certain signatories decide to initiate proceedings

A. Adherence of further countries to the Agreement

3. The Chairman said that Israel had accepted the Agreement on 19 August 1985 and that it had therefore entered into force for that country on 18 September 1985. He welcomed the representative of Israel and hoped that his delegation would actively participate in the work of the Committee. Israel had made a declaration pursuant to Article 14:5 which had been circulated in SCM/67. This declaration was before the Committee.

4. The representatives of the United States, the EEC, Spain and the Philippines welcomed the accession of Israel to the Code.

5. The representative of Israel stated that his country would have wished to accede to the Code under different terms. His authorities had submitted a commitment after having had contacts with one delegation. It was of the utmost importance that these agreed conditions be accepted at the earliest possible moment. Israel could be counted as one of those countries engaged in overcoming the difficulties certain delegations were facing to accede to the Code.

6. The representative of India reiterated the view of his delegation that membership should be open to as many developing countries as possible. He continued to believe that developing countries were prevented from accession because of certain obstacles. This matter had been referred to in a wider context by another group and in the Council.

7. The representative of Chile shared the views of the previous speakers. In his opinion the Committee should try to encourage the participation of the developing countries without excessive commitments.

8. The Committee took note of the statements made.
B. Examination of national legislation and implementing regulations (SCM/1 and addenda)

(i) Legislation of Austria (SCM/1/Add.10/Rev.1)

9. The Chairman informed the Committee that the representative of Austria was unable to attend the meeting and that therefore the Committee may wish to refer this item to its next meeting.

(ii) Legislation of Canada (SCM/1/Add.6/Rev.1)

10. The Chairman recalled that the Committee had already discussed the Canadian legislation at its last meeting. Some points had been raised by the representatives of the Nordic countries, Japan and Yugoslavia. The Committee had therefore decided to revert to this legislation at the present meeting.

11. The representative of the EEC drew the attention of the Committee to certain commendable definitions in the Canadian legislation, such as material injury which was defined as material injury to the production in Canada of like goods. He requested that the Canadian authorities act in a manner consistent with this definition.

12. The representative of the United Kingdom speaking on behalf of Hong Kong referred to a point raised at the last meeting concerning the definition of subsidy. He recalled that a Panel had reported, in November 1961 (BISD 10S/208), that it would probably be impossible to arrive at a definition which would include all measures within the intended meaning of Article XVI. The Panel had further noted that the absence of a definition had not in practice interfered with the operation of Article XVI. In this respect Hong Kong noted that the definition of subsidy in the Canadian legislation should have full regard to Articles 9 and 11 of the Code and that Hong Kong expected that in countervailing actions, Canada would fully observe the other provisions of the Code, particularly Article 2 on the need to establish a causal link between subsidy and injury.

13. The representative of India recalled that at the last meeting the Nordic countries had raised questions on the definition of sale and the joining of investigations contained in the Canadian legislation, which could lead to the cumulation of imports in injury determinations. He also recalled that Canada had noted that this matter would be discussed in the Group of Experts. Presumably, the Canadian delegation would abide by whatever understanding would be reached in that Group. He further noted that the Nordic countries in the Ad-Hoc Group of the Anti-Dumping Committee had submitted a working paper dealing with the concept of cumulation; he did not know how this would impinge upon the work of the Group of Experts. His delegation had expressed concern before with respect to the Canadian legislation, but also with respect to the US legislation. He was hopeful that the matter could be pursued further and brought to a satisfactory conclusion in the Group of Experts.

14. The Chairman indicated that on the understanding that the Group of Experts would address these questions, the Committee had finished its examination of the legislation of Canada.
15. The Chairman suggested that the Committee should take the US legislation first and subsequently look at the draft regulations. The legislation had been discussed at the April meeting. At that time a number of delegations had expressed concern regarding the definition of industry, up-stream subsidies, cumulation and simultaneous initiation of anti-dumping and countervailing duty cases. The US delegation had given some explanations, but the Committee had agreed to revert to this item at the present meeting. The Chairman further recalled that points raised in connection with the definition of industry were being discussed elsewhere. As to the question of cumulation, the Ad-Hoc Group of the Anti-Dumping Committee had started examination of this issue and its work was certainly relevant to the discussion of this Committee.

16. The representative of India expressed concern over the conformity with the Code of the provisions dealing with up-stream subsidies, cumulation of injury and definition of industry. His delegation was in favour that the Ad-Hoc Group examine these matters, provided that the Indian concerns would be met and that the issues were brought to a resolution before too long.

17. The representative of the United States was prepared to continue the discussion on the question of cumulation in the Ad-Hoc Group. His delegation had taken note of India's comments and wanted to indicate that at this stage it was impossible to reach a final decision on these matters.

18. The representative of India also expressed the concern of his delegation over the definition of sale in the United States legislation. It would appear that the mere fact of making an offer in a tender bid would make it possible for a countervailing duty investigation to be launched.

19. The Chairman reiterated that the Ad-Hoc Group had already started the examination of these issues and would certainly continue to do so. It was understood that any delegation could come back to this issue in the future. The Committee therefore concluded its examination of the United States legislation. As to the draft countervailing duty regulations, it seemed that despite the deadline for comments mentioned in the introductory note to SCM/W/91/Rev.1, the United States delegation was willing to receive any further comments or questions delegations might have.

20. The representative of the EEC referred to the question of definition of sale. The US implementing regulations were designed to clarify concepts in the legislation such as "likely to be sold" and "likely sales". The proposed regulations stated that in cases where no sale had been consumated, consideration might be given to "likely sales", the latter being defined as an irrevocable offer to sell for a period of time. The proposed definition extended the relevant concepts in the GATT Code in a significant way. This could be seen when these definitions were compared with Article VI:3 of GATT which referred only to actual importations; an offer to sell was not sufficient. In addition, Article 2:1 of the Code stipulated that countervailing duty proceedings could only be initiated if there was, inter alia, evidence of the causal link between subsidized imports - not likely imports - and injury. It was evident that the proposed definition
raised serious questions regarding the consistency with the Code. The representative of the EEC further referred to the question of the initiation of proceedings. Proceedings can only be properly initiated when an industry or at least a major proportion of the industry of the like product filed a complaint. However, it resulted from certain decisions taken by the United States authorities that when a petitioner stated that he represented the industry in question or that he had the support of a major proportion of the industry, the US authorities were satisfied and proceedings were initiated. If ultimately it were shown that the petition lacked industry support, then exporters would have been subjected to harm and inconvenience as a result of the failure to verify support for the petition at the initiating stage. The United States authorities had stated that neither the Act nor the regulations required the petitioner to establish positively that he had the support of the majority of the particular industry. It was the view of the EEC that the United States should include in their new regulations the requirement that the petitioner establish affirmatively the support of the majority of the industry concerned.

21. The representative of Canada indicated that he had no comments on the question of definition of sale since in his view there was nothing improper in the US legislation. On the question of the standing of petitioners in countervailing duty cases to which he wanted to refer under "Other business", he had a number of comments to make. His government was particularly concerned about a case involving Canadian exports of whole ground fish and fresh ground fish fillets to the United States and the implications for the administration of the US law on unfair trade practices. The United States investigating authorities had stated, in their recent notice of initiation, that they relied on the petitioners' representation until it was affirmatively shown by others that the petition had not been filed on behalf of the industry concerned. Canada was concerned that the Department of Commerce had initiated countervailing duty investigations against these products without verifying whether the petition constituted "a written request by or on behalf of the industry affected", as required by Article 2.1 of the Code. The Department of Commerce thus put the burden of proof on the exporter rather than on the complainant. The lack of proper verification of the standing of the petitioner created a situation whereby any petition could result in the automatic initiation on the assumption that it was made by or on behalf of the United States industry affected. This practice was not consistent with the United States obligations under the Code and could constitute harassment, uncertainty and a significant expense for foreign exporters. Canada had requested clarification of the matter from the United States in consultations under Article 3.1, but so far no comments had been received. His delegation was interested to know the views of the US delegation before deciding what further action to take on this matter in the Committee at a later stage.

22. The representative of Sweden supported the comments made by the EEC and stated that his delegation had earlier made similar representations to the United States delegation.

23. The representative of the United States stated that the US definition of sale was fully consistent with the GATT and the Subsidies Code. Article VI:3 clearly referred only to the point in time in which a countervailing duty could be levied on a product. It was therefore obvious that it could not be
levied unless an actual importation had taken place. Consequently, the regulations did not contemplate the levying of a duty at an earlier stage. The interpretation proposed by the EEC was not the only valid one. The United States agreed that investigations could only be initiated when there was evidence of subsidy, material injury or threat thereof, and the causal link. This standard for initiation, in certain instances at least, could certainly be met at the stage of irrevocable tender or irrevocable offer. The position of the United States was well-known and the subject matter was being examined elsewhere.

24. The representative of the United States further referred to the question of initiation standards, i.e. what proof is required that a complaint is supported by the domestic industry. The practice of the Department of Commerce was fully consistent with the standard established in Article 2.1 of the Code; the United States authorities did not initiate an investigation unless it was alleged that the complaint was being filed on behalf of the domestic industry; in cases of doubt, the matter was looked into. In the case raised by Canada, it had been alleged that the petition was not filed on behalf of the industry, as was purported to be the case; however, it turned out that the importers were behind these allegations, who were not likely to find a petition in their interest. What the Code required was an expression of opposition from members of the domestic industry who were not importers. In the particular Canadian case, no such evidence had been presented prior to the initiation. If such evidence should subsequently be submitted, the authorities would investigate the matter and if it was concluded that the proceeding was not pursued on behalf of an industry in the United States, the case would be terminated. The US delegate finally reaffirmed his government's position that the provisions were in full conformity with the letter and spirit of the GATT and the Code.

25. The representative of Canada stated that the practice in Canada was to verify the standing of a complainant, and the same was true in the EEC and Australia. The US Department of Commerce had informed the Canadian authorities that it would accept the petitioner's representation unless it was affirmatively shown by others that it did not have standing. Canada did not believe this was consistent with the Code.

26. The representative of the EEC fully shared the remarks of the previous speaker. For his delegation it was obvious that under the Code it was not enough for an investigating authority to accept the allegation of a petitioner that he acted on behalf of the industry. If doubts were raised in this respect it was only proper for the investigating authority to verify the allegation.

27. The representative of the United States agreed that an allegation of acting on behalf of an industry was not enough when it was challenged by a member of the industry with no importing interest. In this case the authorities would verify whether the petition was indeed filed on behalf of the industry on whose name it purportedly was filed. He doubted, however, that in the absence of any legitimate expression of opposition, the US authorities were nevertheless under an obligation to ascertain whether the statement in the petition relating to the support of the industry was true.

28. The Chairman stated that in view of the concerns of many delegations on the question of definition of sale and standing of petitioners, the Committee would revert to these issues at the next meeting.
29. The representative of India wondered whether the United States definition of "likely sale" meant that an irrevocable offer to sell could trigger the commencement of an investigation. The US position would seem to indicate that an irrevocable offer to sell was equivalent to injury under the Code. On the question of cumulation of injury, India maintained that there could be no cumulation of injury across the Codes. His delegation had recently raised this question in the context of the Anti-Dumping Committee. The idea of cumulating injury undermined the protection afforded by the GATT relating to the existence of material injury as a prerequisite for levying countervailing duties. Article 6 of the Subsidies Code emphasized the aspect of volume of subsidized imports; subsidized imports from countries with a negligible share of total imports should therefore be disregarded in the injury determination. If the impact of subsidized imports was cumulated with the imports from established suppliers, a highly inequitable situation would arise. Another problem was the automaticity of the process in the United States system; once a petition was filed, a process was set in motion with the consequent detrimental effects for the exporters. He reiterated that he wanted clarification on these issues.

30. The representative of the United States, referring to the question of "likely sales", said that the proposed regulation simply recognized the possibility that in certain circumstances the action could be initiated at the stage of irrevocable tender. No action would be taken unless it would be determined, depending on the facts in each case, that there was indeed subsidization, threat of material injury and a causal link. In some cases it would not be possible to make this determination at this stage, so that the proceeding would not be carried on to an affirmative decision. In other situations, however, an affirmative decision could be made at this stage and the imposition of countervailing duties would be appropriate. In short, the regulations set out the possibility for action, but that possibility was only used under appropriate circumstances which would obviously depend on the facts of each particular case. On cumulation, the US delegate said that the regulations were those of the Department of Commerce and related solely to subsidization. It was the USITC which dealt with injury and cumulation thereof. He wanted to make it clear that the regulations (SCM/W/91/Rev.1) did not relate to the question of cumulation.

31. The representative of the United Kingdom speaking on behalf of Hong Kong associated himself with the Indian delegation on the question of cumulation in injury determinations. It was his impression that it was now mandatory to cumulate whereas the previous provisions were discretionary. His delegation was concerned that the practical result of this change encouraged petitioners to simultaneously file complaints against as many countries as possible, since this would make it substantially easier for the petitioner to show a larger volume of imports and a greater effect on the domestic industry. This had harmful and unfair effects and could represent harassment for countries with a small volume of exports who were included in investigations against countries with larger export volumes.

32. The Chairman suggested to revert to the US countervailing duty regulations at the next meeting.
33. The Chairman recalled that at its last meeting, the Committee had discussed certain points relating to New Zealand's legislation and customs instructions and had decided to revert to them at the present meeting.

34. The representative of the EEC referred to a question raised at the last meeting of the Committee (SCM/M/27, paragraphs 23 and 24) on the possibility under the New Zealand legislation to take retroactive action in situations of substantial importations. His delegation had expressed concern on this qualification and indicated that the terms in the Code were "massive" imports in a relatively short period. New Zealand had replied that the provisions of the Code were paramount and that he would draw the attention of his authorities to the concern of the EEC. The EEC therefore wanted a clarification as to the meaning of the term "paramount", i.e. whether for instance it was possible for an exporter subject to retroactive action to ask a New Zealand court to apply the provisions of the Code rather than the provisions of the New Zealand legislation.

35. The representative of New Zealand confirmed that the concern of the EEC had been referred to his capital. The response received confirmed his answer at the last meeting; in seeking to interpret the legislation, due attention was paid to the international obligations. There was no question of a conflict but rather that the term used in the legislation was somewhat more vague and open to interpretation than the definition given in the Code which was the definition that the New Zealand authorities had regard to. It was open to anyone to take the matter to the courts; administrative review was possible through a particular act. Under the terms of the legislation, the Minister had the final authority and he also had to have regard to any treaty which the Government had entered into. He would not be able to make a decision without having reference to the Subsidies Code.

36. The representative of the EEC raised the hypothetical question of what would happen if the Minister in his decision disregarded the provisions of the Code and whether his decision could be challenged in the courts. The representative of New Zealand indicated that it was difficult to answer a hypothetical question. He reiterated that his Government abided by its international obligations.

37. The Chairman declared that the Committee had finished the examination of the New Zealand legislation.

(v) Legislation of Indonesia (SCM/1/Add.21), Israel (SCM/1/Add.22), Philippines (SCM/1/Add.23) and Turkey

38. The Chairman said that the Committee had before it a communication from the Government of Indonesia regarding its countervailing duty legislation.

39. No comments were made in this regard.

40. The Chairman informed the Committee that the secretariat had received a statement from the delegation of Israel. Since it was very short and available only in English, the representative of Israel might wish to give an oral explanation about the contents of this statement.
41. The representative of Israel informed the Committee that Israel was preparing its countervailing duty legislation and that the necessary changes to its laws and regulations would be notified to the Committee under Article 19:5(b). Should Israel at any time contemplate any countervailing duty action, such action would be taken in accordance with the Agreement.

Philippines

42. The representative of the Philippines explained that pursuant to Article 19:5 of the Code, his Government would shortly circulate a copy of its legislation. The submission would include the Presidential Decree 1973 which amended sub-section (a) of Section 302 of the Presidential Decree 1464 concerning countervailing duty procedures and the Department of Finance Order No. 300 which contained rules and regulations regarding the enforcement of Section 302, as well as the implementing rules and regulations.

43. The Chairman said that since no communication had been received from Turkey, the representative of this country might wish to inform the Committee about the situation regarding its countervailing duty legislation.

44. The representative of Turkey informed the Committee that no countervailing duty legislation existed in his country. Should it be enacted, it would conform with the Code and would be submitted to the Committee.

45. The representative of Sweden announced that his authorities had recently taken a decision on new legislation concerning anti-dumping and subsidy matters. A notification to this effect would be circulated shortly.

46. The representative of India told the Committee that the amendment to the Indian Customs and Tariff Act had entered into force on 2 September 1985. Copies would be circulated shortly.

47. The Chairman invited the Committee to take note of statements made and declared the discussion on this item terminated. He further noted that the Committee would maintain this item on its agenda in order to allow the signatories to revert to particular aspects of any legislation at a later stage or in the light of the actual implementation of legislation.

C. Notification of Subsidies

(i) Follow-up of the last review of notifications

48. The Chairman recalled that at the last regular session, the Committee had agreed that at every autumn session an item would be included in the agenda to examine the situation in the field of notifications. At its April 1985 meeting the Committee had continued its examination of full notifications submitted in 1984. Since that meeting Portugal and Indonesia had submitted full notifications under Article XVI:1. Those notifications had been circulated in documents L/5603/Add.27 and Add.28, respectively.

(ii) Up-dating of full notifications (L/5768 and Addenda)

49. The Chairman referred to the notifications examined at the previous meeting and said that only six signatories had submitted up-dated notifications (Yugoslavia, Hong Kong, Chile, Spain, Australia and Austria).
He hoped that this meant that there had been no changes to other signatories' full notifications. However, in such a case contracting parties should make a notification to this effect. He was concerned about this unexpected decrease in the number of up-dated notifications; since the Code had entered into force, the Committee had never received such a small number of notifications. In view of the foregoing, he would appeal to delegations to make every effort to ensure that appropriate up-dated notifications would be submitted without further delay.

50. The representative of the Philippines informed the Committee that his government would notify very shortly the following export incentive programmes presently operational under the Omnibus Investments Code, as amended: tax credit on net local content, tax and duty exemption on import capital equipment, tax credit on domestic capital equipment, and additional reduction from taxable income equivalent to 20 per cent of total export sales (L/5603/Add.29).

51. The representatives of the EEC, Sweden and New Zealand informed the Committee that their up-dated notifications would be submitted to the secretariat for circulation in due course.

52. The representative of Switzerland indicated that no changes had occurred since the last submission.

53. The representative of the United States recalled that at the last meeting his delegation had raised the issue of notification of aircraft subsidies. She also informed the Committee that her delegation was prepared to notify the export enhancement programme and the mixed credits programme.

54. The representative of the EEC said that his position on notifications in the aircraft sector was well-known. He was prepared to discuss the matter informally with the United States delegation.

55. The representative of Australia shared the Chairman's disappointment that only six contracting parties had fulfilled their obligation to notify. He hoped that the United States would not be discouraged to pursue the matter of aircraft subsidies in the Committee.

56. The Chairman informed the Committee that two more notifications had been received from non-signatory contracting parties. He reminded the representatives of Egypt, Israel and Turkey that their full notifications had not yet been submitted and expressed the hope that this would be done without further delay. The Committee would revert to these notifications at its April 1986 meeting.

57. The representative of Australia was of the view that the Committee should revert at its next meeting to all notifications submitted between now and then.

58. The Chairman recalled that the Committee had agreed to examine the situation in the field of notifications at every autumn session. However, if it was the wish of the Committee, the issue could be discussed again at the spring session.
(iii) Improvement of notifications

59. The Chairman recalled that at its meeting of 4 December 1984, the Committee had authorized him to establish a small group of experts comprised of representatives who had indicated the wish to participate in order to work out a set of guidelines on notifications and submitting them to the Committee for consideration at the present meeting. Unfortunately, this group had so far been unable to agree on such guidelines and should therefore continue its work and report to the Committee at its April 1986 meeting.

60. The representative of Chile explained that the difficulties in the field of notifications were the result of lack of guidelines in this respect. Since both an excess of information or insufficient information were to be condemned, the Committee should try to strike a balance between these two extremes. Chile was proposing a system of three types of notifications: a complete notification, a simplified notification, and a list of those programmes exempted from notification. His delegation was requesting the secretariat to compile a list of measures which would be the object of complete notifications. In the simplified notifications, only certain essential details would be included, such as the name of the programme, its identification, the pertinent legal dispositions, the coverage, the aims and the funds involved. Programmes which should not be notified would include those with a social content. In short, the purpose of the proposal was to limit the field of notifications which would continue to be submitted every three years.

61. The Chairman advised the Committee that the group of experts would continue the examination of the Chilean proposal contained in document SCM/49/Add.5. The Chairman further indicated that in order to assist this group and the Committee in its effort to improve notifications, the secretariat would circulate a factual note reproducing all decisions taken so far by the CONTRACTING PARTIES on these matters.

D. Semi-annual reports of countervailing duty actions taken within the period 1 January 1985-30 June 1985 (SCM/66 and addenda)

62. The Chairman recalled that an invitation to submit semi-annual reports under Article 2:16 of the Code had been circulated in SCM/66 of 10 July 1985. Responses to this request had been issued in addenda to this document. The following signatories had notified the Committee that they had not taken any countervailing duty action during that period: Brazil, Egypt, Finland, India, Indonesia, Japan, Korea, New Zealand, Norway, Pakistan, Philippines, Spain, Sweden, Switzerland, Turkey, United Kingdom on behalf of Hong Kong, Uruguay and Yugoslavia (Add.1). Countervailing duty actions had been notified by Australia, Canada, Chile, the EEC and the United States. No report had been received from Austria. The Committee would discuss the reports on countervailing duty actions in the order in which they had been submitted:

Australia (SCM/66/Add.2/Rev.1)

63. The representative of the United States referred to the second item in the Australian report concerning cherries in brine from Italy. It appeared that provisional measures had been taken only one day after initiation. If
this was the case, his delegation seriously questioned that a detailed and thorough investigation could have been made in the period between the initiation and the imposition of provisional measures.

64. The representative of Australia said that the case just cited involved both the Subsidies and the Anti-Dumping Codes. Following the completion of the investigation of the dumping complaint which included on-site investigation, it had been decided to pursue the subsidy complaint which had previously been suspended. The date of 4 July 1984 which appeared in the report under initiation had in fact been the date on which the proceedings had been resumed, and provisional measures had been implemented on the basis of full information and knowledge following the on-site investigation under the dumping complaint.

65. The representative of the United States took note of the answer given by the previous speaker. His delegation would probably need more factual information and would seek it bilaterally.

EEC (SCM/66/Add.3)

66. The representative of the United States wondered what the distinction was between applying an undertaking (as in the case of women's shoes) and levying a countervailing duty with a suspension by the same regulation (as in the case of sheets and plates of iron or steel).

67. The representative of the EEC replied that in the case of women's shoes there was no suspension because no duty had been imposed. With regard to the case concerning sheets and plates of iron and steel, duties had been imposed but since an agreement had been reached with the Brazilian Government, the EEC had decided to suspend the duty as long as the Brazilian Government complied with the commitments it had entered into under the bilateral agreement.

United States (SCM/66/Add.4/Rev.1)

68. The representative of Sweden noted with satisfaction that the US administration and later the Court of International Trade had accepted the provision in the Code which stated that a provisional countervailing duty should run only for four months. The speaker then referred to a recent definitive duty decision by the US authorities concerning exports of certain carbon steel products by a Swedish enterprise. His delegation was of the view that the US authorities had made a too negative interpretation of what a subsidy was and of an ordinary commercial capital transfer. The alleged subsidy had never been received by the Swedish exporter, as only a government book-keeping transfer had taken place. Moreover, this also raised the question of whether government equity infusions should be regarded as subsidies. Sweden disagreed with the ITC's calculation of the return on equity capital which compared the exporter's profit after tax with the average Swedish return before tax. The same was true for the calculation of the interest rate for certain loans. Finally, the representative of Sweden expressed concern over the US interpretation of various regional development incentives which would result in these incentives being automatically countervailable.
69. The representative of the United States replied that on the question of equity infusion, the United States authorities had examined the health of the company in question using normal financial analysis methods. The examination of the company’s past, present and future situation had led to the conclusion that the large equity infusion made by the Government of Sweden constituted a subsidy. Moreover, Article 11.3 of the Code provided that equity capital could provide a subsidy. As to the question of the calculation of the return on equity capital, after-tax and not before-tax figures had been used. As to the structure and reconversion loans, the methodology used was fair and accurate; it had taken into account the terms of these loans as well as the comments made by the Swedish authorities. The US had noted in the final determination that these loans did not have a fixed repayment schedule, and that the principal and interest could vary from year to year. On the book-keeping transaction, the representative of the United States indicated that the Government of Sweden had indeed given funds to the Swedish exporter. It had been found that these funds were provided to the latter as a grant for a particular transaction and as such were limited to this particular company and therefore were countervailable. The speaker finally stated that the question of equity was being discussed in the Group of Experts and that she welcomed the continuation of the discussions in that forum.

70. The representative of the EEC noted that the points mentioned by the Swedish delegation raised a certain number of issues of importance. It underlined the urgency of the work to be carried out by the Group of Experts. Pending the outcome of the work of this Group, the United States should take into consideration some of the concerns raised by Sweden as well as some of the concerns already raised in the Group of Experts when the question of equity was discussed.

71. The representative of Sweden echoed the views of the representative of the EEC. He further indicated that his delegation might wish to revert to this matter subsequently.

Chile (SCM/66/Add.5)

72. The representative of the United States recalled that in previous meetings his delegation had expressed concern about the Chilean practice of m.f.n. application of countervailing duties. He wondered whether Chile had any new developments on this matter to report and if the measure notified in the report had been applied on a selective basis against the country which was found providing the subsidy.

73. The representative of Chile explained that his delegation had replied to this question in previous meetings of the Committee. His authorities had increased its customs duty on an m.f.n. basis. There was a certain reticence in his country to the application of countervailing duties. As to the case concerning Argentina in the semi-annual report, no provisional or definitive measures had been taken. He was hopeful that the mere initiation of the investigation would lead to a satisfactory termination of the investigation.

Canada (SCM/66/Add.6)

74. No comments were made.
E. Reports on all preliminary or final countervailing duty actions

75. The Chairman informed the Committee that notifications under these procedures had been received from Canada and the United States and circulated in documents SCM/W/90, 92 and 93.

76. No comments were made.

F. Report on the Group of Experts on the Calculation of the Amount of a Subsidy

77. The Chairman drew the Committee's attention to the fact that the Group had submitted to the Committee "Draft Guidelines for the Application of the Concept of Specificity in the Calculation of the Amount of a Subsidy other than an Export Subsidy" (SCM/W/89) and "Draft Guidelines on Physical Incorporation" (SCM/W/74/Rev.1). Signatories who wished to make comments on any of these papers had been requested to submit them, in writing, to the secretariat by 15 September 1985. No comments had been received on SCM/W/89. The delegation of Chile had submitted comments on SCM/W/74/Rev.1, which had been circulated in SCM/W/94. As to the Guidelines on Specificity, he stated that since no comments had been received, he would propose that the Committee adopt them.

78. The representative of India requested confirmation of his understanding that the Guidelines on Amortization had been adopted since no comments had been received by 15 September 1985. The Chairman responded affirmatively and said that these Guidelines had been circulated in SCM/64.

79. The representative of the United States said that the Guidelines on Specificity was one of the most important papers emerging from the Group of Experts. However, because of the broader implications of the paper, his delegation needed further time to study it. He asked that the adoption of the paper be held over until the next meeting of the Committee.

80. The representative of the Canada mentioned that it was his understanding that the Committee would adopt the Guidelines on Specificity at the present meeting. He expressed regret on the United States' decision and was hopeful that, pending adoption of these Guidelines, other delegations would be guided by the principles incorporated in the paper.

81. The representative of the EEC stated that the paper on Specificity was very important and constituted a cornerstone of the Committee's work on countervailable subsidies. No agreement had been reached on the definition of subsidy (cost to government versus benefit to the recipient), and now on another essential element no agreement was possible either. He strongly regretted that the Committee was not able to adopt the paper before it. The Committee could urge all signatories to apply their legislation in a manner consistent with the contents of the paper but this was not a satisfactory solution. The paper had been examined for months if not for years. In such circumstances he believed it would be more appropriate if all signatories could agree, for the Committee to adopt the guidelines with the reservation of one delegation.

82. The representative of Japan insisted that the paper was of paramount importance for the Committee. He further said that it should be adopted at the present meeting.
83. The representative of India recalled that at the last meeting his delegation had been the only one requesting further time to consider the Guidelines on Specificity. His authorities had examined this paper and were now prepared to adopt it. He also recalled the Chairman's statement that in the absence of comments, the paper would be up for adoption at the present meeting.

84. The representative of Sweden supported the adoption of the paper. He wondered why the United States had not made any comments before 15 September 1985.

85. The representative of New Zealand stated that his delegation was prepared to accept the paper. However, in view of certain discrepancies in the paper, he hoped that the Committee would continue to discuss the issues and find better criteria for item (ii)(d) and the procedures to substantiate de facto specificity.

86. The representative of the EEC pointed out that the paper had been the outcome of long discussions and a process of give and take; for that reason it was impossible for delegations to be satisfied on all points. In the view of the EEC the time for comments had long since passed and the paper should be adopted in its present form. The representative of Australia stated that his delegation was prepared to support a consensus.

87. In response to comments of a procedural nature made by the delegations of India and Chile, the Chairman said that each draft Guideline should be considered on a case-by-case basis. He further stated that the draft Guidelines on Specificity had received the broad support of the Committee. However, since one delegation had expressed concern, the Chairman proposed that the adoption of the document be postponed until the spring meeting.

88. The Chairman then invited the Committee to consider the Guidelines on Physical Incorporation (SCM/W/74/Rev.1).

89. The representative of Chile explained that the concerns of his delegation were fully stated in document SCM/W/94. As could be seen from the Chilean submission, his delegation was not in a position to adopt the Guidelines on Physical Incorporation at the present meeting.

90. The representative of the Philippines said that his delegation was in the same position as the previous speaker.

91. Following consultations, the Committee decided to delete paragraph 4 (a) and (b) of document SCM/W/74/Rev.1 and adopted the Guidelines on Physical Incorporation, as amended. The full text appears in document SCM/68. The Committee further agreed to ask the Group of Experts to give further consideration to paragraph 4 (a) and (b) of SCM/W/74/Rev.1.

G. Uniform interpretation and effective application of the Agreement (SCM/53, SCM/56)

92. The Chairman recalled that in 1983 the Committee had become aware of the existence of divergent perceptions of fundamental issues bearing, respectively, upon the interpretation of Article 10 and the application of
Article 9 of the Code. Other provisions of the Code, in particular Article 8 and paragraph (d) of the Illustrative List, had also been subject to divergent interpretations. This situation had not changed and there was a growing feeling among many signatories that the Committee was in a deadlock situation. Although its activities related to countervailing duty measures proceeded in a satisfactory manner, the subsidy side of the Committee's activities was practically blocked. Even such a relatively simple exercise as the improvement of notifications under Article XVI:1 could not produce results which would re-affirm existing obligations. The most obvious symptom of this situation was the blockage of the dispute settlement procedure with its wider consequences for the GATT dispute settlement procedure in general. There was, however, another symptom, probably more dangerous for the future of the GATT, namely the growing frustration with the operation of the Code which had already led governments to take counter-actions outside the framework of the Code or even the GATT. There was a real danger that these unilateral actions might further escalate. A number of signatories were aware of these dangers and had requested that concrete and urgent action be taken to stop the further degradation of the situation. There were several ways to attain this goal, one of which had been undertaken by two previous chairmen and a small informal group, pursuant to a proposal made by a number of delegations that the Committee undertake a review of those provisions of the Code which created problems, in order to arrive at their uniform interpretation and application. This informal group had submitted a proposal (SCM/53) which constituted an approach to overcome the problems which had been identified and to render the Code more effective. Although he as Chairman had found this proposal to be a possible basis for a solution, he did not exclude that there might be other proposals or other ways to take the Committee out of its present deadlock and to stop the process of degradation.

93. The Chairman went on to say that the suggestion that the Committee should wait for solutions to be elaborated by other GATT fora was not helpful because the work going on there was a long-term project with an uncertain outcome; in the meantime, the Committee could not stay idle. He did not want to repeat all the arguments why the Committee could not abandon its responsibilities, especially as those arguments were well known (for example the previous Chairman's statement in SCM/56) and had never been rebutted in any concrete way. However, the practical consequence of a suggestion that the Committee should wait, was that it should abandon or suspend its responsibilities regarding subsidies and limit its activities to countervailing measures. If some delegations considered that the dispute settlement procedure in the Committee should remain dead, this also would be an important thing to know. If, however, this was not the case, the wait-and-see approach should be abandoned. The Chairman said that he was determined to give any concrete proposal ample opportunity to be fully discussed in the Committee.

94. The representative of the United States said that at the time the United States had accepted the Agreement, it had never imagined that problems would arise in connection with the uniform interpretation and effective application of the rules governing the use of subsidies. His delegation had however, been unpleasantly surprised. The United States still had two outstanding disputes (wheat flour and pasta) which the Committee had been unable to deal with. The rules on subsidies were in a state of disarray and disuse, and for the past eighteen months, the activities of the Committee had
been limited to questions of countervailing measures. However, problems related to the use of subsidies in the agricultural sector continued to exist. The United States would shortly request consultations with the EEC under Article 12 concerning export subsidies which had led to the EEC gaining more than an equitable share of the world market for wheat. It was hoped that this problem could be resolved through consultation or conciliation, but the United States might ultimately have to ask for a panel.

95. On the proposal contained in SCM/53, the US delegate stated that though it was far from perfect, it deserved serious consideration. In the past some delegations had expressed the view that issues relating to agricultural trade were the exclusive domain of other Committee within the GATT and were not to be discussed in the Subsidies Committee. The United States saw the Committee's efforts to restore credibility to the rules on subsidies as complementing and in no way substituting for the work of the Committee on Trade in Agriculture (CTA) to achieve improved rules for export subsidies and agricultural trade generally. The work undertaken in the CTA did not mean that all other GATT bodies charged with administering existing rules could ignore or suspend their responsibilities. The United States did not believe that the existing rules were satisfactory or that mere tinkering with the interpretation or application of those rules could resolve the problems in the long term. For the same reason it did not see the Committee's efforts to arrive at a common interpretation of the existing rules as a stable solution obviating the need for the CTA. No country wanted expeditious results from the CTA more than the United States, but pending those results the United States believed that the Committee must nevertheless try to reach a common interpretation since the current impasse would otherwise produce anarchy. The United States was of the view that there were a number of areas in SCM/53 which deserved the very careful attention of the Committee.

96. The representative of the EEC shared the views of the Chairman on the importance for the Committee to resolve the disputes before it. However, SCM/53 was only an informal paper which did not offer any material solution to these disputes as it only suggested some areas of reflection related to interpretation issues. The Committee had certainly a responsibility under the Code on the question of dispute settlement, but it must not be forgotten that what was at stake was the implementation of provisions concerning exclusively trade in agriculture. The CTA had been created as a result of the 1982 Ministerial meeting to contribute to the implementation of GATT rules in this field. The EEC had always believed that problems of interpretation on agricultural issues would better be dealt with in the CTA. Moreover, the Chairman of the Committee on Subsidies had been asked to seek a solution to the disputes but not to draft new rules nor to propose guidelines on the interpretation of certain provisions. The Committee could certainly resolve the dispute and in this context, the EEC had already informed it of the measures it had taken in respect of exports of wheat flour, i.e. the substantial reduction of export restitutions; likewise, the restitution on pasta had been reduced by approximately 8 ECU. The EEC had thus made a considerable effort so that to settle the disputes, only a problem of principle remained. If it was felt that further discussions were needed to overcome remaining differences over these disputes, his delegation was prepared to fully participate. However, as he had already stated, the modification of rules and interpretation of issues should be discussed in the CTA which had a much broader mandate. As to the US comments on the
possibility that the US might invoke the dispute settlement mechanism in respect of EEC exports, his delegation was reflecting on the possibility of following a similar course of action to defend its legitimate interests in GATT against certain US export practices.

97. The representative of Canada said that Articles 9 and 10 of the Code applied not only to agriculture but to all primary products except minerals, including fisheries and forestry. The present problem in the Committee was not limited to wheat flour and to pasta but related to disciplines with respect to primary products. His delegation considered SCM/53 to be a formal document which Canada was prepared to discuss initially at the present meeting, and to have it referred subsequently to the Group of Experts for further examination.

98. The representative of Japan agreed that SCM/53 should be dealt with in the Subsidies Committee and not in the CTA. This did not mean that the latter could not discuss such a paper in the context of the deliberations on agricultural trade. His delegation, taking into account the importance of the uniform interpretation and the effective application of the Code as well as the importance of the dispute settlement procedures, believed that the paper before the Committee offered a viable solution. The Committee should therefore address this paper very seriously. Since the informal meetings organized by the Chairman had not produced positive results, his delegation believed that further discussions should be organized.

99. The representative of Australia indicated that the Code incorporated obligations and rights, and it was therefore not open to any one party to dictate what the rules should be and how they might be applied. His delegation was particularly concerned with the belief that the result of future negotiations would somehow solve all existing problems. Not only was it difficult to understand why it was thought that these problems could not be solved at the present time, but to agree with the perception that the disciplines emerging from new negotiations on trade in agriculture might in fact be weaker than they were at present. Document SCM/53 was a constructive document which contained an attempt for a uniform interpretation and application of disciplines in the Code. There were parts of it which his delegation was not completely satisfied with, but for example paragraph 15 contained a useful principle for determining the concept of more than an equitable share. Other concepts that were addressed in the document, for example relating to special factors, and the concept of previous representative period were also to be examined. Despite possible shortcomings, SCM/53 provided a very positive starting point for further work in the Committee. The representative of Australia further noted the fact that the European Communities had cut back on the level of restitutions for wheat flour, which was perhaps a recognition of the unfair share of world trade which their exporters would have otherwise acquired. It was rather disappointing, however, that the EEC was not prepared to discuss SCM/53. If the Committee did not address these questions, not only would the disputes not be resolved, but the underlying issues would continue to cause problems for third parties.

100. The representative of Sweden said that SCM/53 represented a compromise formula which the Nordic countries found realistic in the light of the different views which had been voiced in the Committee. Sweden did not think it was fair to criticize the paper just because it did not contain precise
solutions or ready conclusions. The former chairman of the Committee had been careful enough not to propose final solutions but simply certain elements for further discussions. The paper should be looked upon in this light, and the Committee should play a major rôle in further discussions of SCM/53.

101. The representative of Switzerland shared the view that SCM/53 constituted the basis for further discussion and reflection which could lead to the resolution of present and future disputes. As to the criticism that the paper was too normative, theoretical and general, he had understood that when the previous chairman had started consultations, the aim had been to facilitate the understanding of Articles 9 and 10 so as to subsequently solve pending cases. He did not remember that the Committee had mandated the Chairman to solve these two cases. The idea therefore was to elaborate on the interpretation of rules in order to arrive at a general and multilateral understanding. The existence and future activities of the CTA should not interfere with the work of the Subsidies Committee. Both Committees had their respective rôles to play.

102. The representative of New Zealand said that the CTA should find an equitable solution to the problems of agricultural trade. The present situation with regard to agricultural disputes in the Committee on Subsidies was highly unsatisfactory. Signatories to the Code not only had obligations but had certain rights as well; however, for many signatories those rights were inoperable, leading to a severe imbalance of rights and obligations. New Zealand's particular concerns in the Subsidies Committee related to disputes in agricultural trade. SCM/53 had tried to meet existing problems and to deal with questions of interpretation. The Committee had an obligation not just to resolve or propose a solution regarding a dispute but also to present a clear interpretation of the rules. He agreed with the view that paragraph 15 of SCM/53 was very important in that it established a link between subsidization and increased exports. Some elements in SCM/53 constituted a good basis for further discussions in the Committee or in the Group of Experts.

103. The representative of India said that his delegation had taken a constructive approach to SCM/53, and although India might not agree with everything in this paper, it had expressed its willingness to join with others in its detailed consideration. It was also pertinent to mention that the discussions in the Committee, as well as those in the Council or in the CTA, were all directed towards strengthening the GATT and the multilateral trading system.

104. The representative of Uruguay stated that the Committee was confronted with serious problems and although SCM/53 was not perfect, it was a positive document which raised issues of paramount importance. The Committee could not ignore these issues simply because the CTA was interested in them. Uruguay shared the position taken by others to examine the paper in the Committee.

105. The representative of Chile indicated that the paper before the Committee dealt with very important matters and that many crucial issues depended upon its discussion and adoption. Chile approved the paper and its discussion in the Committee. Members of the CTA who were not signatories of the Code would probably have an opportunity to make comments at a later stage.
106. The representative of Spain recalled the difficult cases the Committee had been confronted with. The CTA was dealing with matters of considerable importance which had a bearing on the present work of the Committee. It was probably wise to wait for developments in the CTA. His position was therefore close to that of the EEC.

107. The Chairman said that the Committee had made a very good start in the consideration of SCM/53. The purpose of the present exercise was neither to create new obligations nor to prejudice any future negotiations, but only to make the Code operational within the existing legal framework. The Committee would revert to this item at the next meeting; in the meantime, the chair would convene informal meetings or hold informal consultations if necessary.

108. The representative of Canada, commenting on SCM/53 as it related to Article 8 of the Code, said that his delegation was sympathetic to its objectives. On Article 9, his delegation had considerable problems but was nevertheless prepared to discuss a further strengthening of the obligations contained in this provision. On Article 10, SCM/53 made a useful contribution towards better defining the obligations of the Code. The suggestion to focus on paragraph 15 of the paper was useful and his delegation was prepared to consider this as well as paragraphs 15-20 very seriously. The criteria associated with paragraphs 11-12 were a good beginning. Canada had some concern about the capacity of non-commercial transactions being used in a predatory manner to establish new markets. All in all, his delegation would like to take these questions up in the Group of Experts.

H. Annual review and report to the CONTRACTING PARTIES

109. The Committee adopted the final report, the full text of which appears in document L/5902.

I. Other business

(i) Standing of petitioners in countervailing duty cases and problems related to

110. See paragraph 21

(ii) Procedures for deciding terms of reference of a Panel according to Article 12:1 of the Code

111. The representative of the United States recalled that at its February meeting, the Committee had directed the Chairman, in consultation with the parties, to develop terms of reference for the Panel. At that time, the US had questioned whether the matter was ripe for adjudication by a Panel. The dispute centred on section 612(a)(1) of the Trade and Tariff Act of 1984, which had adopted a new definition of "industry" in anti-dumping and countervailing duty actions involving wine and grape products. It was the US contention that this provision was fully consistent with the provisions of the GATT and the Subsidies Code. The US also believed that it was premature for a panel to attempt to evaluate a law in the absence of a concrete application of a statutory provision by the relevant authorities. The United States delegation considered that the decision by the Chairman at the
meeting of 4 October 1985 to impose terms of reference on the parties raised a number of important legal and procedural issues. As his delegation had stated at the time, the US did not believe that the Committee had authorized the imposition of terms of reference for a panel without the agreement of the parties. Hence, his delegation regarded the Chairman's decision as an unorthodox and unprecedented action in this Committee as well as in the history of the GATT dispute settlement mechanism. Since the other party to the dispute had informed the US delegation that it did not wish to question the decision, the US did not intend to dispute the terms of reference, but he did not regard it as a precedent for the future. The Committee should develop a clear understanding as to how the terms of reference for panels should be decided in future cases so that this question would not again represent a serious issue. He proposed that delegations reflect on the problem and that the item be placed on the agenda of the next meeting of the Committee.

(iii) Decision of the USITC regarding imports of wine products

112. The representative of the United States referred to a development which had renewed the US concerns regarding the ripeness of the dispute and the need for immediate action by the Panel. On 21 October 1985 the ITC had decided that there was no reasonable indication of material injury by reason of allegedly dumped or subsidized imports from Italy, France and the Federal Republic of Germany. Accordingly, under US law, the ITC had voted to terminate the case and no further proceedings were possible at the administrative level. In these circumstances, the US would like to raise again the question of the future work of the Panel. The vote of the ITC would appear to render the matter in question even more speculative and hypothetical. The US delegate said that he saw no point in continuing with the work of the Panel and expressed the hope that it could be terminated or at least suspended.

113. The representative of the EEC said that with respect to the ripeness of the dispute, this had been dealt with extensively in the discussions leading to the decision of the Committee to set up such a panel, a decision which had been accepted by all signatories. As to the question raised by the United States on the way the terms of reference had been decided, he recalled that his delegation had also expressed a reserve at the time. The EEC had no objection to taking this question up at the next meeting of the Committee in more general terms. He welcomed the ITC decision to terminate the case, but it remained the view of the EEC that the existing US legislation was inconsistent with the Code. At any rate, before deciding upon the US request that the panel's proceedings be terminated or suspended, the EEC would have to analyze the ITC decision and examine its implications.

114. The delegation of Canada shared the US concern on the decision to impose terms of reference. Canada did not endorse the Chairman's decision and did not consider that it should have been taken at that particular point in time; it could therefore not be considered as a precedent. His delegation was prepared to discuss this issue as it had important implications for the GATT dispute settlement procedures in general. This matter should be addressed in a broad context of the GATT, e.g. in an informal body or in the GATT Council.
115. The representative of the United States stated that although he could understand that the EEC would want to examine in detail the ITC decision, he would prefer to see the matter suspended. He further recalled the Chairman's understanding "that the Panel would in its work take into account any actual implementation of the legislation in question by the competent authorities of the United States" and indicated that this should be taken into consideration by the Panel.

116. The representative of Japan recalled the position taken by his delegation at the last meeting and wondered what the legal status of the Chairman's understanding was.

117. The Chairman recalled that the Panel's terms of reference, as decided at the meeting of the Committee of 4 October 1985, were contained in document SCM/M/29. He further noted that if there were any delegations which wanted to revert to this question in the future, they should feel free to do so.

(iv) Conditions under which certain signatories decide to initiate proceedings

118. The representative of the EEC recalled a concern, voiced in the Anti-Dumping Committee by his delegation, that there was an increased tendency on the part of certain signatories to start countervailing duty proceedings on the basis of petitions lodged by industries other than the industry producing the like product. This was the cause of some concern and led to undue and inconsistent extensions of the scope of countervailing duty proceedings.

Date of the next regular session

119. According to the decision taken by the Committee at its April 1981 meeting (SCM/M/6, paragraph 36), the next regular session of the Committee will take place in the week of 21 April 1986.