SUBSIDIES AND COUNTERVAILING MEASURES

Note by the Secretariat

As requested at the meeting of the Group of Negotiations on Goods on 14 April 1987, the secretariat has prepared the attached reference paper which reproduces GATT rules on countervailing measures and on subsidies and summarizes the existing status of discussion of these rules.

Each subject area is divided in the following three parts:

- GATT rules (including relevant decisions of the CONTRACTING PARTIES) and provisions of the Agreement on Subsidies and Countervailing Measures

- a description of the problem

- proposed solutions and/or points raised.
# TABLE OF CONTENTS

## I. Definition and measurement of the amount of a subsidy for the purpose of the imposition of countervailing duties

1. GATT rules  
2. Agreement on Subsidies and Countervailing Measures  
3. Description of the problem  
4. Points raised:  
   4.1 Criteria for determining the existence of a countervailable subsidy  
   4.2 Calculation of the amount of a subsidy  
   4.3 Regional programmes  
   4.4 "Indirect" or "input" subsidies  
   4.5 Equity  
   4.6 Research and development subsidies  
   4.7 Export restrictions  
   4.8 Pricing of natural resources

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>5</td>
</tr>
<tr>
<td>GATT rules</td>
<td>5</td>
</tr>
<tr>
<td>Agreement on Subsidies and Countervailing Measures</td>
<td>7</td>
</tr>
<tr>
<td>Description of the problem</td>
<td>8</td>
</tr>
<tr>
<td>Points raised:</td>
<td>8</td>
</tr>
<tr>
<td>Criteria for determining the existence of a countervailable subsidy</td>
<td>8</td>
</tr>
<tr>
<td>Calculation of the amount of a subsidy</td>
<td>11</td>
</tr>
<tr>
<td>Regional programmes</td>
<td>13</td>
</tr>
<tr>
<td>&quot;Indirect&quot; or &quot;input&quot; subsidies</td>
<td>14</td>
</tr>
<tr>
<td>Equity</td>
<td>19</td>
</tr>
<tr>
<td>Research and development subsidies</td>
<td>24</td>
</tr>
<tr>
<td>Export restrictions</td>
<td>26</td>
</tr>
<tr>
<td>Pricing of natural resources</td>
<td>27</td>
</tr>
</tbody>
</table>

## II. The definition of the concept of "domestic industry"

1. GATT rules  
2. Agreement on Subsidies and Countervailing Measures  
3. Description of the problem

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>II.</td>
<td>28</td>
</tr>
<tr>
<td>GATT rules</td>
<td>28</td>
</tr>
<tr>
<td>Agreement on Subsidies and Countervailing Measures</td>
<td>29</td>
</tr>
<tr>
<td>Description of the problem</td>
<td>31</td>
</tr>
</tbody>
</table>

## III. Issues relating to the determination of material injury

1. GATT rules  
2. Agreement on Subsidies and Countervailing Measures  
3. Cumulative injury assessment  
   3.1 Description of the problem  
   3.2 Points raised

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>III.</td>
<td>33</td>
</tr>
<tr>
<td>GATT rules</td>
<td>33</td>
</tr>
<tr>
<td>Agreement on Subsidies and Countervailing Measures</td>
<td>35</td>
</tr>
<tr>
<td>Cumulative injury assessment</td>
<td>39</td>
</tr>
<tr>
<td>Description of the problem</td>
<td>39</td>
</tr>
<tr>
<td>Points raised</td>
<td>40</td>
</tr>
</tbody>
</table>
4. "De Minimis" subsidy
   4.1 Description of the problem 45
   4.2 Points raised 45

IV. Notifications under Article XVI:1
   1. GATT rules 47
   2. Agreement on Subsidies and Countervailing Measures 48
   3. Description of the problem 48
   4. Main issues:
      4.1 Definition of a subsidy and notifiable measures 49
      4.2 Content of notifications 52
      4.3 Self-incriminating effect 54

V. Subsidies other than export subsidies
   1. GATT rules 55
   2. Agreement on Subsidies and Countervailing Measures 56
   3. Description of the problem 58
   4. Points raised:
      4.1 Regarding Article XVI:1 58
      4.2 Regarding relevant provisions of the Agreement on Subsidies and Countervailing Measures 60

VI. Export subsidies on primary products
   1. GATT rules 61
   2. Agreement on Subsidies and Countervailing Measures 63
   3. Description of the problem 64
   4. Solutions proposed in the Committee on Trade in Agriculture and the Committee on Subsidies and Countervailing Measures 65
   5. Other relevant documents 74
VII. Export subsidies on non-primary products

1. GATT rules

2. Agreement on Subsidies and Countervailing Measures

3. Description of the problem
   3.1 Primary versus non-primary products
   3.2 Subsidization of a primary product component
   3.3 Certain contradiction between Article 9 of the Agreement on Subsidies and Countervailing Measures and paragraph (d) of the Illustrative List
   3.4 Export credits

4. Points raised and proposed solutions regarding subsidization of a primary product component

5. Points raised regarding export credits

VIII. Special treatment for developing countries

1. GATT rules

2. Agreement on Subsidies and Countervailing Measures - Article 14 - Developing countries

3. Relevant Decisions by the Committee on Subsidies and Countervailing Measures

4. Description of the problem

5. Discussion in the Committee on Subsidies and Countervailing Measures

Annex I Guidelines in the determination of substitution drawback systems as export subsidies

Annex II Guidelines on amortization and depreciation

Annex III Guidelines on physical incorporation

Annex IV Draft guidelines for the application of the concept of specificity in the calculation of the amount of a subsidy other than an export subsidy

Annex V Recommendation concerning determination of threat of material injury
I. DEFINITION AND MEASUREMENT OF THE AMOUNT OF A SUBSIDY FOR THE PURPOSE OF THE IMPOSITION OF COUNTERVAILING DUTIES

1. GATT rules

(a) Provisions of the General Agreement

**Article VI:3**

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed directly or indirectly, upon the manufacture, production or export of any merchandise.

**Article VI:4**

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

**Second Note to paragraphs 2 and 3 of Article VI**

Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

(b) Relevant decisions by the CONTRACTING PARTIES

contains observations which are of importance to the question of the definition of the practices in respect of which countervailing duties may be imposed:

"Article VI of the General Agreement provided that an importing country could impose countervailing duties on the products which had received, directly or indirectly, an export or production subsidy, the importation of which caused, or threatened to cause, material injury to a domestic industry. The fact that the granting of certain subsidies was authorized by the provisions of Article XVI of the General Agreement clearly did not debar importing countries from imposing, under the terms of Article VI, a countervailing duty on the products on which subsidies had been paid."

"With respect to the meaning of the word 'subsidies' a large majority of the experts considered that it covered only subsidies granted by governments or by semi-governmental bodies. Three experts considered that the word should be interpreted in a wider sense and felt that it covered all subsidies, whatever their character and whatever their origin, including also subsidies granted by private bodies. It was agreed that the word "subsidies" covered not only actual payments, but also measures having an equivalent effect."

"The Group considered that it was perfectly justified that in conformity with the procedures of paragraph 4 of Article VI, countervailing duties should not be imposed on a product by reason of the exemption of such product from duties or taxes imposed on the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes. If, however, it were established that the exemption or the reimbursement exceeded the real charge which the product would have to pay in the exporting country, the difference could be considered as constituting a subsidy."

Apart from this Report, the CONTRACTING PARTIES have not taken any other decisions concerning the interpretation of the words "bounty or subsidy" in the sense of Article VI:3 and the criteria for the measurement of the amount of such a "bounty or subsidy".
2. **Agreement on Subsidies and Countervailing Measures**

(a) **Relevant provisions of the Agreement**

**Article 1**

Application of Article VI of the General Agreement

Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement.

**Article 4**

Imposition of countervailing duties

2. No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

(b) **Decisions taken by the Committee on Subsidies and Countervailing Measures**

The Committee on Subsidies and Countervailing Measures has adopted Guidelines on the following issues: determination of substitution drawback systems as export subsidies, amortization and depreciation, and physical incorporation (see Annexes I-III).

---

3 The provisions of both Part I and Part II of this Agreement may be invoked in parallel: however, with regard to the effects of a particular subsidy in the domestic market of the importing country, only one form of relief (either a countervailing duty or an authorized countermeasure) shall be available.

4 The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of off-setting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of the General Agreement.

14 As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

15 An understanding among signatories should be developed setting out the criteria for the calculation of the amount of the subsidy.
3. Description of the problem

The provisions in the General Agreement on the application of countervailing duties, the few interpretations of these provisions by the CONTRACTING PARTIES and the relevant provisions in the Agreement on Subsidies and Countervailing Measures offer little guidance as to the types of practices in respect of which countervailing duties may be levied and on the criteria for the measurement of the amount of a subsidy. Two problems have arisen as a result of this situation. Firstly, countervailing measures have sometimes been taken with respect to practices which in the view of the exporting country concerned did not constitute countervailable subsidies. This applies in particular to domestic programmes. Secondly, different methods have been proposed and used to calculate the amount of a subsidy which result in considerable differences in the amount of the countervailing duties. In view of the frequent use of the countervailing duty remedy by some countries and the interests of exporting countries affected by such actions, the current lack of agreement concerning the proper use of countervailing duties is likely to continue to give rise to disputes between contracting parties to the General Agreement or signatories of the Agreement on Subsidies and Countervailing Measures.

4. Points raised

4.1 Criteria for determining the existence of a countervailable subsidy

In the discussions which have taken place in the Committee on Subsidies and Countervailing Measures and in the Group of Experts on the Calculation of the Amount of a Subsidy on general criteria to determine the existence of a countervailable subsidy, three concepts have played an important rôle: (A) financial contribution by a government, (B) specificity, and (C) net benefit to the recipient and adverse effects on conditions of normal competition.

Although the Agreement on Subsidies and Countervailing Measures contains an Illustrative List of export subsidies prohibited under Article 9 and also mentions, in Article 11, some examples of domestic subsidies it should be emphasized that these provisions appear in Part II of the Agreement, dealing with rights and obligations of signatories with regard to the use of subsidies. These provisions do not explicitly address the issue of definition and measurement of a subsidy for the purpose of the application of countervailing duties under Part I of the Agreement.

This Group of Experts was established by the Committee on Subsidies and Countervailing Measures at its meeting of 8 May 1980. The task of the Group is to identify and examine, at a technical level, problems involved in the calculation of the amount of a subsidy, as required by footnote 15 to Article 4 of the Agreement.
(A) **Financial contribution by a government**

The following points have been made on the question as to whether a charge on the public account should be one of the general criteria to determine the existence of a countervailable subsidy:

- "Item (1) of the Illustrative List makes it clear that a charge on the public account is an indispensable prerequisite of any subsidy. This is borne out by the wording of the preceding items which repeatedly use such terms as 'provision', 'delivery', 'remission', 'exemption', 'grant', by governments." (EEC Memorandum on US Final Countervailing Duty Determinations on European Steel Exports, contained in SCM/35)

- "It is suggested that there can be no subsidy in the absence of a financial contribution by government, or in other words that a subsidy presupposes such a contribution. Such an approach would seem to be useful to the extent it underlines that there is a necessary link between a subsidy and the taxation function of government, exercised either directly or delegated to other, private bodies as suggested by a panel report based on a review of Article XVI, set out in BISD 9th Supplement. Paragraph 12 of the report examines the issue of subsidies by a non-government levy. While the panel felt that no hard and fast rule could be set down in view of the many forms action of this kind could take, it nonetheless, clearly stated that 'there was no doubt that there was an obligation to notify all schemes of levy/subsidy affecting imports or exports in which the government took a part either by making payments into a common fund or by entrusting to a private body the functions of taxation and subsidization with the result that the practice would be in no real sense different from those normally followed by governments'. (BISD, 9th Supplement, paragraph 192). There may be similar situations in which a government chooses to direct a private body to carry out certain functions related to the sovereign right of governments to collect revenues and expend them. An examination of the possible subsidy practices enumerated in Article 11.3 of the Code further illustrates the various forms government financial contributions can take. There are practices which involve a direct transfer of funds (e.g. grants and loans); those involving potential direct transfers, or liabilities (e.g. loan guarantees); and those involving revenue foregone or not collected (fiscal incentives such as investment tax credits to specified industries). Such practices would seem to be simply specific examples of the general principle suggested by the panel report in BISD, 9th Supplement, that subsidies exist where the government exercises its authority to impose tax and to expend revenue, whether directly or through delegation of its taxing and authority." (View expressed in the Group of Experts on the Calculation of the Amount of a Subsidy)

- "Item (1) does not limit the definition of a subsidy to a charge on the public account, but rather makes clear that such a charge is included in the universe of subsidies which constitute on their face prohibited export subsidies. Items (c) and (d) of the List show that preferential
treatment for exports, without regard to a charge on the public account, can also constitute a subsidy on its face. These items define as subsidies:

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

Item (1) derives from the original illustrative list of subsidies of 1960, which represented an agreed interpretation of Article XVI:4 of the GATT. However, the Department notes that this list also includes items (c) and (d) of the current List. Since the negotiation of Article XVI:4 in the 1950s there has never been a consensus on an interpretation such as that advanced [in SCM/35]. Rather, it has been generally accepted that the range of activities covered by the term subsidy as used in the GATT is quite broad, including charges on the public account as well as certain activities which do not necessarily involve such a charge." (Communication from the United States concerning Subsidy Determinations on Certain Carbon Steel Products, contained in SCM/36)

B. Specificity

The Group of Experts on the Calculation of the Amount of a Subsidy has submitted to the Committee on Subsidies and Countervailing Measures a paper containing 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, see Annex IV). These Draft Guidelines reflect the view that, as far as subsidies other than export subsidies are concerned, only those measures which are specific to an enterprise or industry or group of enterprises or industries, can be countervailable (domestic) subsidies. Although the Draft Guidelines on Specificity have not yet been formally adopted by the Committee, all signatories regard this concept of specificity as a necessary criterion for the existence of a countervailable (domestic) subsidy. However, the Draft Guidelines do not address the question of whether measures limited to certain regions should be considered to be 'specific'.

1 See footnote 2 in Annex IV, page 101.
C. Adverse effects on conditions of normal competition and net benefit to the recipient

Conflicting views exist as to whether a necessary condition of the existence of a countervailable (domestic) subsidy is that the practice in question adversely affects the conditions of normal competition and confers a net benefit to the recipient:

- "The subsidy must adversely affect the conditions of normal competition. In the absence of any such distortion, subsidies, other than export subsidies, are recognized as important instruments for the promotion of social and economic policy objectives against which no action is envisaged by the Code. It is fundamental therefore that the existence of such trade distortion is established, especially where signatories do not comply with the GATT principle that the amount of any countervailing duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury.

No benefit is involved in government incentives to invest in disadvantaged regions where these incentives are designed solely to compensate the dislocation costs of establishing industries in these regions. Regional aids are recognized in Article 11 of the Code as 'important instruments for the promotion of social and economic policy objectives'. Where they do not confer any benefit they cannot, by definition, adversely affect the conditions of normal competition and therefore cannot possibly be considered as countervailable subsidies." (EEC Memorandum on US Final Countervailing Duty Determinations on European Steel Exports, contained in SCM/35)

- "The language of Article 11 does not prejudice the right of any signatory to countervail against non-export subsidies... The fact that certain subsidies are not prohibited by the Code is not relevant to a determination as to whether such subsidies confer a countervailable benefit in a specific case." (Communication from the United States concerning Subsidy Determinations on Certain Carbon Steel Products, contained in SCM/36)

4.2 Calculation of the Amount of a Subsidy

A. Cost to government versus benefit to the recipient

Regarding the problem of the measurement of the amount of a subsidy a fundamental divergence of views has arisen in the Committee on Subsidies and Countervailing Measures and in the Group of Experts on the Calculation of the Amount of a Subsidy as to whether the measure of the amount of a subsidy should be the cost to the government providing that subsidy or the benefit to the recipient of that subsidy:
"Article VI of the General Agreement provides that a countervailing duty may not exceed the amount of the subsidy 'determined to have been granted'. The use of the word 'granted' rather than 'received' and the absence of any reference to 'value' or 'benefit' indicates clearly that the countervailable amount is the financial contribution of the government rather than the much more nebulous benefit to the recipient. The fact that the benefit to the recipient is not the correct way to measure a subsidy can be demonstrated by looking at the problems involved in measuring the benefit. Frequently, the recipients of grants do not have any possibility to make profitable use of the funds received because they are provided specifically to allow the company to restructure in a socially acceptable way. It is clear therefore that the benefit of a grant to the recipient will vary according to the circumstances of the recipient at the time of receipt. There is therefore no simple or constant measure of the benefit and the difficulty of measuring it shows that, from a practical point of view as well as from a theoretical point of view the correct measure of a subsidy can only be the amount of the financial contribution of the government." (EEC Memorandum on US Final Countervailing Duty Determinations on European Steel Exports, contained in SCM/35).

"... the use of the word 'granted' in Article VI:3 does not control the question of calculation of the amount of the subsidy, but merely refers to the existence of the subsidy. In fact ... Footnote 15 to the Code states: 'An understanding among signatories should be developed setting out the criteria for the calculation of the amount of subsidy.' Were the amount of subsidy always equal to a charge on the public account, such an understanding would be unnecessary. Article 4:2 of the Code states: 'No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist.' The position of the (United States) Department (of Commerce) is that the subsidy is the benefit received by the producer or exporter. In no way does the language of Article 4 of the Code or Article VI of the GATT mandate a methodology to be used by signatories in the calculation of a subsidy as long as no consensus to the contrary exists (as referred to in Footnote 15). As a matter of general interpretation of the Code and the GATT, the omission of language dealing with a specific issue must be seen as a purposeful decision on the part of the signatories to leave the question open." (Communication from the United States concerning Subsidy Determinations on Certain Carbon Steel Products, contained in SCM/36).

B. Allocation of a subsidy over time

The Committee on Subsidies and Countervailing Measures has adopted Guidelines on Amortization and Depreciation (see Annex II). However, these Guidelines only deal with the selection of the time-period over which a subsidy may be allocated and not with the question as to how a subsidy should be allocated over time. In particular, the Guidelines do not address the question as to whether it is appropriate to use present value methodology in
the allocation of a subsidy over time. The lack of agreement among signatories of the Subsidies Code concerning the use of present value methodology is a consequence of the 'cost-to-government' versus 'benefit-to-the-recipient' controversy.

4.3 Regional programmes

Divergent views exist with regard to the question as to when regional aids constitute countervailable subsidies. A first problem raised in this context concerns the interpretation of the 'specificity' principle in relation to regional programmes. A second problem concerns the question if and how account should be taken of additional costs incurred by recipients of regional aids who settle in disadvantaged regions. On the latter issue the following points have been made:

- "No benefit is involved in government incentives to invest in disadvantaged regions where these incentives are designed solely to compensate the dislocation costs of establishing industries in these regions. Regional aids are recognized in Article 11 of the Code as 'important instruments for the promotion of social and economic policy objectives'. Where they do not confer any benefit, they cannot, by definition, adversely affect the conditions of normal competition and therefore cannot possibly be considered as countervailable subsidies." (EEC Memorandum on US Final Countervailing Duty Determination on European Steel Exports, contained in SCM/35)

- "The elimination of industrial, economic and social disadvantages of specific regions and the creation of a balanced infrastructure are objectives pursued by most governments in the world. An important way of achieving these objectives is to establish new industries or to maintain existing industries in disadvantaged regions. It is highly unlikely, however, that industries acting consistent with commercial considerations will settle or continue to operate in such regions unless they are compensated for the additional costs of production, manufacture or transport they incur as compared to the costs incurred in locations which, under a purely commercial point of view, would be the preferred alternative for industrial settlement. Aids granted in the context of such regional policies do not distort comparative advantage and are not countervailable, therefore, to the extent that they do no exceed these additional costs and do not bestow a net benefit on the recipient." (View expressed in the Group of Experts on the Calculation of the Amount of a Subsidy)

- "Subsidies used to alter the comparative advantage of certain regions with respect to the production of a certain product or products are by definition distortive of trade and the allocation of resources, and, therefore, must affect normal competition, including competition with
producers in the market of the importing country."¹ (Communication from the United States concerning Subsidy Determinations on Certain Carbon Steel Products, contained in SCM/36)

4.4 "Indirect" or "Input" Subsidies

The Group of Experts on the Calculation of the Amount of a Subsidy has recently begun to consider the issue of "indirect" or "input" subsidies. One approach suggested to deal with this issue and comments thereon made by experts are reproduced hereunder.

Definition of the problem

Proposal:

"1. Article VI(3) of the GATT refers to indirect as well as direct subsidies. In the case of financial assistance granted by governments on the production, manufacture or growth of a product which is subsequently incorporated into another product, to what extent is there a subsidy on the latter product for the purpose of a countervailing duty investigation?

"2. Any examination of inputs in a countervailing duty investigation should involve only those inputs which are alleged to result in an indirect subsidy or those inputs which it is suspected, during the course of an investigation, are conveying an indirect subsidy to the end-product under investigation."

Comments:

Position A

"It is desirable to make a clear distinction between indirect and input subsidies. As currently drafted the paper refers essentially to input subsidies. It does not deal specifically with indirect subsidies (cited in Article VI(3) GATT) which should be defined as subsidies given to an input producer which are required by the government to be passed through to the downstream processor. The distinction to be drawn between indirect and input subsidies does not require special rules to be drafted to take account of instances of indirect subsidization. On the contrary, it should be possible to agree that the principles outlined in the paper cover the indirect subsidy case also."

¹ In addition, this approach emphasizes that the location of an industry in a particular region often entails both advantages and disadvantages the precise effects of which are very difficult to quantify.
"Since the issue of indirect subsidies has rarely been broached outside the context of upstream subsidies, we believe it would be premature to define indirect subsidies exclusively as those given to an input producer and required by the government to be passed through to the downstream producer, even though we agree that such a subsidy is a countervailable input subsidy. A comprehensive definition of indirect subsidies, in our opinion, is difficult to achieve. At this point, it would seem to be more fruitful to limit the discussion to the subset of indirect subsidies known as 'input' or 'upstream' subsidies, and, at most, note that input subsidies are an example of indirect subsidies."

Methodology for determining when an input subsidy constitutes a subsidy on an end-product

Proposal:

"3. In attempting to determine when and to what extent any subsidy on an input constitutes an indirect subsidy on an end-product for purposes of a countervailing duty investigation, a two-level investigation is required: (1) to determine to what extent a subsidy on an input is being passed through to the end-product and (2) to determine whether any actual or presumed pass-through is specific to certain enterprises either regionally or by sector.

4. It is proposed that the investigating authorities first deal with the issue of the input purchase price as such an analysis may obviate the need for any further examination of the input industry. Thus, as a first step, the input purchase price should be compared to the prevailing market price; i.e. the price established by the relevant market for the input in question at the time of the purchase, due allowance being made for difference in transportation costs and other commercial factors. Where the former was less than the latter, it would be presumed that any subsidy on the input was being passed through. However, it would then be necessary to determine whether this pass-through in the form of a lower price was generally available or whether it was specific in nature. To the extent that the subsidy pass-through was not specific, no indirect subsidy on the end-product under investigation could be presumed and the matter would be terminated. Where the pass-through, however, was deemed to be specific in nature, it would be necessary to examine whether the subsidy on the input was itself specific. If yes, an indirect subsidy would be presumed; if, however, a subsidy on an input was generally available then by definition there could be no subsidy for the purpose of a countervailing duty investigation on the end-product under investigation."
Comments:

Position A

"The principle of a two stage test to determine when and to what extent a subsidy on an input gives rise to a subsidy on an end-product in the context of countervailing duty investigations is soundly based. Support should be given to the approach outlined in the paper under which an investigation is made of the specificity of pass-through of the subsidy on the input as well as the question of whether the subsidy on the input itself is specific."

Position B

"We support the application of the two-stage test with regard to specificity to determine the circumstances under which a subsidy on an input gives rise to a subsidy on an end-product in a countervailing duty investigation. However, we believe it would be more logical if the investigating authorities examine first the availability of a subsidy on an input, since this analysis may obviate the need for any further examination of the input industry."

Position C

"We are not convinced that the principle of a two-stage test with regard to specificity to determine when and to what extent a subsidy on an input gives rise to a subsidy on an end-product in a countervailing duty investigation is logical. We believe that such a two-stage test effectively would make it impossible to countervail indirect subsidies even when the benefit of the subsidy clearly is passed on to the producer of the exported product. Therefore, we disagree with paragraph 3 and the second part of paragraph 4.

We think that, once a countervailable subsidy has been found to exist on an input product, the subsidy is embedded in the product. The question then becomes whether the subsidy has been passed through to the processed product, not whether the subsidy to the input can be disregarded because of the number or types of buyers of the subsidized input.

Clearly in an investigation on ball bearings, for example, countervailable subsidies to the bearings are countervailable in spite of the fact that numerous products can be manufactured using ball bearings. We fail to see why the ball bearings become unsubsidized when investigating authorities examine subsidies to a product which incorporates ball bearings and find that the subsidized input is sold at a lower price which reflects the countervailable benefit on that input.

We suggest the following analysis for determining when an input subsidy is countervailable: first, normally, only domestic subsidies constitute input subsidies. Export subsidies promote the export of the input product
rather than being passed through into the production of a processed product in the same country. There may be exceptions to this general rule; for example, an export subsidy on an input is paid to the final product producer, or an input producer qualifies for an export subsidy based on the ultimate export of the final product, even if the input producer does not export himself. The group may wish to examine such situations in greater detail.

Second, the input subsidy must bestow a competitive benefit on the processed product. Thus, where the input producer and the processed product producer are related; where the pass-through is government-directed, either explicitly, or implicitly through a government-regulated price that is below the unsubsidized cost of production of the input product; or where the downstream producer is paying less for the input than he would pay if he were purchasing it from an unsubsidized supplier, the investigating authorities should continue their examination of the effect of the input subsidy on the final product.

Third, since this is an indirect subsidy and the input represents only some portion of the total value of the final product, the investigating authorities should consider whether the effect of the input subsidy on the finished product is significant. For example, if the value of the input is only 1 per cent of the cost of producing the finished product, even if the subsidies to the input are 50 per cent, the total benefit from the subsidy on the finished product can only equal 0.5 per cent. If the subsidy on the input seems extremely small, the investigating authorities should also consider whether demand for the processed product in the importing country is extremely price sensitive before countervailing an input subsidy."

Proposal:

"5. In cases where the input purchase price is equivalent to the prevailing market price, the investigating authorities may need to investigate further to the extent that the market price is suspected of being unduly influenced by the subsidy on the input in question, and thus, is not a valid test of non pass-through. Validity may be suspected where, for example, the subsidized input producer(s) represent(s) all or a predominant proportion of total sales of that input or where the end-product producer(s) under investigation purchase all or a predominant share of the subsidized inputs such as to unduly influence the market price.

6. Where it is deemed that there is no valid market price for the input, the matter should be further investigated to determine whether the input price is specific. Where it is deemed specific in nature, it would then be necessary to examine whether the subsidy on the input which has given rise to a presumed pass-through of advantage is itself specific. If it is
not, no indirect subsidy for the purpose of the countervailing duty investigation exists. Should the input subsidy be specific however, an indirect subsidy could be presumed to exist.

7. Any determination of specificity would be carried out in accordance with the criteria set out elsewhere for such a determination. In the case of a government mandated pass-through, it would still be necessary to determine whether the input price was specific, and if so, whether the subsidy on the input itself was also specific, to determine whether an indirect subsidy existed.

III. Calculation of the amount of the subsidy

Proposal:

"8. Where there existed a valid market price for an input, the price of the input under investigation was below this valid market price and the subsidy on the input was specific in nature, the amount of the subsidy would be determined by the difference between the valid market price and the price of the input in question."

Comments:

Position A

"In the case of a subsidy being found on an input product for which a valid price exists, the subsidy should be calculated as the cost to the government of providing the subsidy, not by a measure reflecting opportunity cost to the government (difference between the valid market price and the price of the input in question)."

Position B

"As far as the actual calculation of the input subsidy is concerned, the input subsidy should be the amount of the subsidy to the input, not to exceed the difference in the arms-length price and the subsidized price. Thus if the subsidy on the input were 10 per cent, but the difference in the subsidized input's price and the arms-length price of the input were only 6 per cent, 6 per cent would be the amount of the input subsidy passed through to the processed product. Similarly, if the subsidy on the input were 10 per cent and the subsidized input's price was 15 per cent below the arms-length price of the input, the input subsidy would be 10 per cent."

Proposal:

"9. Where a valid market price is deemed not to exist and both the input price and the subsidy on the input were deemed to be specific in nature, the amount of the subsidy could be presumed to be the entire amount of the
subsidy per unit of input. The onus would be on the party affected to convince the investigating authority that the presumption was not valid, either entirely or partially."

Comments:

Position A

"Where a valid price is determined not to exist, the subsidy should again be measured by the cost to the government of providing such assistance provided that this cost is greater than or equal to the benefit of the subsidy to the recipient."

Position B

"We agree with the concept expressed in paragraph 9, absent the second specificity test."

Other comments:

"We deem it also relevant to propose, within the scope of the discussion on the Indirect Subsidies, that this Group examine the possibility of a specific treatment regarding indirect subsidies related to exports from developing countries. We believe that the procedures identified in the decision of the Committee on Anti-Dumping Practices (ADP/2), if duly adapted, could be extended to the treatment of indirect subsidies for the purposes of countervailing duties investigations on developing countries' exports. We suggest that due consideration should be given to all cases where, because special economic conditions affect prices in the home markets of developing countries, these prices do not provide a commercially realistic basis for comparison. In such cases, a subsidy would not be presumed to exist whenever it is offered to inputs incorporated in export products under conditions that do not imply price undercutting of the end-product, on levels lower than the ones observed for a like product exported to any third country. In this case, a subsidy could not be considered as potentially trade distorting insofar as it would not cause adverse impacts on the flow of products."

4.5 Equity

The Group of Experts on the Calculation of the Amount of a Subsidy has considered criteria for determining when government subscription to, or provision of, equity capital constitutes a subsidy. Reproduced hereunder are a proposal on this issue submitted to the Group and comments made by experts on a previous version of this proposal.
"1. When should the investigating authorities consider government subscription to, or provision of, equity capital in a commercial enterprise to be a subsidy?

2. How would the investigating authorities measure the subsidy from the equity infusion?

Proposed approach:

1. Article 11.3 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade recognizes that one form of a subsidy may be the 'government subscription to, or provision of, equity capital'.

2. The signatories understand that government equity participation in a commercial enterprise is not per se a subsidy.

3. In determining whether a government purchase of equity is a subsidy, the investigating authorities should examine whether the government, at the time it made the investment, paid a reasonable price for the equity's value. The investigating authorities should not consider the government's motives for making the investment.

4. The most objective measure of whether the government paid a reasonable price for the equity is to compare the price the government paid the company for the stock with the open market price at the time of the government's purchase. Normally, the investigating authorities may consider the government's equity investment unreasonable and constitutes a subsidy if it finds that the government purchased shares of the company's stock at more than the open market price for that stock at the time the government made its equity investment.

(i) If the government purchased the equity shares from the company, the amount of the subsidy is the difference between the stock and the open market price at the time of purchase.

(ii) If the government purchased the equity in the company from sellers other than the company, there is no subsidy to the company unless the company itself received some or all of the difference between the price the government paid the seller and the open market price at the time of purchase.

The issues of whether and how to allocate an equity subsidy and whether indirect returns unrelated to the present or future value of the company whose shares are purchased should be offset against an equity subsidy are not addressed in this paper.
5. Signatories recognize that in special circumstances buyers in the private sector may pay a premium over the open market price when purchasing stock. The underlying reason for paying a premium above the open market price reflects the purchaser's belief that the current or potential value of the company is greater than the market value of the company (i.e. the current market price of one share of the company's stock multiplied by the number of shares outstanding). The special circumstances illustrating this underlying reason include:

(i) the buyer believes that the sum of the individual values of the constituent parts of the company (its break-up value) is greater than the market value of the company's stock;

(ii) a premium is offered to induce shareholders to sell when the buyer wants to gain majority control or own the company;

(iii) the buyer wants to expand and believes purchasing an existing company is less expensive than starting a new company or expanding his existing operation;

(iv) the buyer believes the company is cash rich and that the share price does not entirely reflect the value of the company, taking into account its cash resources.

If an open market price for stock of a company under investigation exists, there exists a rebuttal presumption that the open market price accurately reflects a reasonable, unsubsidized price a government should pay when purchasing such stock. Responding governments may submit evidence, however, that shows to the investigating authorities that the government was justified in paying a premium above the open market price for the stock.

6. If there is no market price for the equity shares (for example, the stock market in the country is undeveloped and does not list this stock; it has too few stockholders to be publicly traded; the government already owns all the company's stock; trade of the stock has been suspended for some reason), the investigating authorities must use an alternative method of determining whether the subscription to, or provision of, equity capital is a subsidy. As an alternative method of identifying a subsidy, the investigating authorities should examine, among other relevant factors, the past performance and the current and projected financial position of the company at the time the government made its equity investment in order to determine whether at that time the company could have been expected to generate a reasonable rate of return on the government's investment. The investigating authorities should consider the data available to the government when it made its investment decision (i.e. not necessarily used, but which should have been used by a private investor to assess properly the projected return on investment). The investigating authorities may consider the government's investment unreasonable and a subsidy if they determine that at the time the government made the equity investment the company could not have been expected to generate a reasonable return on investment within a reasonable period of time.
7. One method by which to measure the value of the subsidy in such a case would presume that, if the government had not invested in this company, it would have invested in a range of companies whose rate of return on equity would approximate the national average rate of return on equity. The investigating authorities should thus quantify the amount of the subsidy (in accordance with "the reasonable rate of return on investment" method, as described in paragraph 6) by comparing the differences, if any, on an annual basis, between the national average rate of return on equity and the actual rate of return on the government's equity investment. The amount of the subsidy, however, should never exceed the amount of the same subsidy if measured as a grant to the company in the year of the equity investment.

8. An alternative method by which to measure the value of the subsidy where there is no market price for the equity shares would be to examine whether the government maintained the value of the capital invested and covered the interest costs of its investment."

Comments:

Position A

"1. We take note of the basic reasoning that the investigating authority shall consider whether a government infusion is or is not made on conditions that are commercially reasonable.

2. One of our concerns is that, in many respects, it is too vague as to define what is a reasonable or an unreasonable return on investment and what is a reasonable or an unreasonable period of time.

3. We are furthermore somewhat hesitant to accept the notion in paragraph 3 that the investigating authorities should not consider the government's motives for making the investment. It seems reasonable to take into consideration such motives when judging the commercial justification of an investment. Indication of the motives should normally be found in the government's arguments for the intervention. Independent commercial studies may also provide indications on the real motives.

4. When a subsidy is calculated, consideration must be taken also to the policy of dividends of the subsidized enterprise. This question has not been dealt with. Some companies pay low dividends and reinvest most of their profits, thus increasing the value of their stock. Such a policy may be due e.g. to income tax considerations. Other companies prefer to attract equity by paying generous dividends.

5. With regard to paragraph 4 the main problem is to find the appropriate open market price, especially in small economies where there are few other companies operating in the same market and during times of weak financial
performance in the economy. A governmental body may have to pay mark-up to the open market price in order to get control of a company. Such a take over premium is rather common in an ordinary market economy and should therefore be included in the open market price.

6. In paragraphs 6 and 7 we find it unsatisfactory that when the investigating authorities identify a subsidy the examination is based on facts available at the time the government made the equity investment but when the investigating authorities quantify the amount of the subsidy the quantification is based on a comparison between the national average rate of return and the actual rate of return on the government's equity investment. This means that the investigating authorities value subsidies based on information not available to the foreign government at the time the subsidy was given.

7. The notion in paragraph 7 'national average rate of return on equity' is too vague to be practically useful. It should be replaced by a more precise interest rate. Thus, one shall keep in mind that national average differs from the average of the national sector in question and even further from the international sector average. Several alternatives could obviously be possible."

Position B

"The proposal is advanced that the concept to be adopted for determining whether government purchases of equity constitute subsidies should be whether the government paid a reasonable price for the equity's value at the time of the investment decision. While intuitively such an approach seems soundly based, the question is what can be considered to be a reasonable price.

The starting point for determining whether the price is reasonable is whether costs are incurred by the government in making the purchase. These costs must be evaluated at the moment the investment decision is made by the government not after a lapse of time and with the benefit of hindsight. How can these costs be measured?

Clearly where the government obtains equity equivalent in value to its outlay of public funds no cost to the government is incurred. It could be argued that equivalent exchange can be measured solely and simply by whether the government pays a sum equal to the open market price for the stock at the time of the investment. This approach takes no account, however, of a number of factors which may be relevant to the government's investment decision:

- Firstly, the intrinsic value of the shares, based on asset value, might be more than their market price and hence an investor might be prepared to pay more for control of the company and its assets;
Secondly, it would be quite normal to pay a premium over market price if it was felt that new infusions of capital would allow a rate of return greater than in the past and greater than anticipated by the stock market;

Thirdly, as has been pointed out elsewhere, the price of the shares may be influenced by the company's dividend policy;

Finally, the government may have objectives other than favouring the production or export of the goods produced by the company receiving equity infusions which may explain why it is prepared to pay higher prices for the stock.

These factors may not arise in all cases but they should nevertheless be taken into account by investigating authorities in cases where the defendant government argues that they are relevant to the case in question.

With respect to the measurement of the cost to the government, this should be calculated as the difference between the reasonable price in the sense described above and what the government pays for the equity from the company. It is important to bear in mind however that the reasonable price may be greater than the market price. No subsidies result, of course, in situations where the government purchases the company's equity from sellers other than the company itself.

As regards the methodology proposed for dealing with cases where there is no market price for equity shares, the concept should be to base a determination of subsidization on whether the government expected to maintain the value of the capital invested in the company and to earn a reasonable rate of return at the time the investment decision was taken. The key question here is what is meant by 'reasonable rate of return'. The starting point should again be whether the government expected to cover the interest costs of its investment at the time the decision was taken. If the answer to this is affirmative then no subsidy should be presumed to exist."

4.6 Research and Development Subsidies

The following proposal has been made in the Group of Experts on the Calculation of the Amount of a Subsidy suggesting some guidelines to determine when research and development assistance constitutes a countervailable subsidy.

"The examination of government research and development programmes should in the first instance be based on the usual criteria relating to the concept of specificity (guidelines set out in SCM/W/89)."
The objective of research and development assistance is essentially the creation of knowledge for eventual use in various products and production processes.

The examination of R and D programmes needs to be conducted in two phases: first, as regards the assistance programme itself and second, as regards access to the knowledge produced by government assisted research.

Where no selectivity was found to exist at the level of the assistance programme or measure, there would be no subsidy.

Where selectivity was found to exist at the level of the assistance programme or measure, further investigation would be required to determine whether, in the case of the knowledge produced as a result of the research in question, access to the knowledge was restricted.

Where access to the knowledge was not restricted institutionally by a specific government measure, by patent and licensing laws generally, or through the absence of reasonable measures by government to ensure that the knowledge is disseminated, no subsidy could be presumed to exist.

Where restrictions on access to the knowledge exist, a subsidy may or may not exist. The determination of subsidy in this regard is determined in large part by additional criteria used in the actual measurement of a subsidy. One approach, based on the criteria of a subsidy as related to the cost to the granting authority, would conclude that where the granting authority made knowledge available only to a particular enterprise or group of enterprises no subsidy could be presumed to exist to the extent the granting authority recovers its costs of producing the knowledge in question. Equally, where an enterprise obtained a patent or restricted license for knowledge produced by it as a result of government financial assistance, no subsidy would exist to the extent the enterprise returned to the government the full amount of the assistance, due account being made for the loss of value of any assistance over time. A second approach, based on the criteria of a subsidy as covering various presumed benefits to the recipients beyond of the financial assistance extended by governments, would require the recovery or repayment, as the case may be, of the presumed benefits, as well as the elimination of the subsidy.

MEASUREMENT ISSUES

In the case of a company which accepts a series of R and D granted (or other financial assistance), only one of which results in a profitable commercial product, it would seem reasonable to examine the extent to which

1While there may be some advantage derived from the R and D experience by a firm or industry compared to firms who must, for example, assemble a team and start at a somewhat lower point on the learning curve, such an advantage cannot be quantified and is only short term.
the remaining grants were linked to the successful product, to what extent they could be said to have resulted in the success of the one grant, in order to determine the appropriate amount of the total subsidy to allocate to the product. It is recognized that this may be difficult to determine. In any event, there would be an onus on the recipient to provide evidence that the various grants, in whole or in part, were not linked to the success of the grant or assistance in question.

In regard to co-operative R and D grants, where a number of companies share the benefits of a project, allocating the total assistance to each member, or raises the question of whether countervailing an amount in excess of the subsidy is contrary to Article 4.2 of the Code. In essence, this issue only really arises in the context of a 'benefit to recipient' approach."

4.7 Export restrictions

The text reproduced hereunder contains a proposal discussed by the Group of Experts on the Calculation of the Amount of a Subsidy on the question as to whether export restrictions and related measures can constitute countervailable subsidies.

"A. Illustration of the problem

Restrictions on the export of a product are introduced or maintained by governments for a wide variety of reasons. They may be considered necessary, for example, to ensure the availability of certain raw materials to a domestic processing industry where there is a shortage of supply on the domestic market, or in order to encourage exports of finished or part-finished products instead of raw materials as a means of safeguarding employment and of building up the country's industrial base. While the imposition of such restrictions may affect the production and trade of processed goods, the question arises whether an subsidy results from these measures.

2. No per se subsidy

Under the terms of GATT not every government intervention having an effect on trade and competition can be qualified as a subsidy. Indeed, GATT clearly distinguishes between, on the one hand, subsidies and other measures which can also have an impact on trade and international competition. This distinction is relevant because Article VI GATT enables Contracting Parties unilaterally to take protective action against subsidized imports, whereas the GATT does not permit such action against other practices, e.g. quantitative restrictions, import or export taxes, even if these practices can also lead to a distortion of trade.
Quantitative export restrictions are regulated by Articles XI, XII and XX GATT and any alleged violation of these provisions can be pursued only via the GATT dispute settlement procedures.

It follows that export restrictions on raw materials and other input factors do not per se constitute a subsidy to the processing industry.

However, an export restriction may be linked to supplementary governmental measures for example those designed to or resulting in the provision of raw material inputs on preferential conditions to a specific industry. To the extent that these measures are found to be sector specific, then a subsidy may exist. It is important to note, however, that it is the supplementary measures rather than the export restrictions which give rise to the subsidy."

4.8 Pricing of natural resources

An issue which has arisen recently is whether pricing policies for natural resources can constitute countervailable subsidies. At the meeting of the Council held on 17 June 1986 the delegation of Canada made the following statement on this issue:

"Natural-resource pricing policies, because they related both to matters of national sovereignty as well as to comparative advantage, were of fundamental importance to the contracting parties. All contracting parties, whether producers or consumers, had an interest in ensuring that the sovereign right to develop natural resources and maintain the general comparative advantage of natural resource producing countries continued to be recognized. Canada believed in particular that the unilateral right to countervail granted under Article VI and the Subsidies and Countervailing Measures Code (BISD 26S/56) was not intended to be used to negate a country's general comparative advantage. It should be recognized that the precedent set by a move unilaterally to broaden, and in the process make more ambiguous, the concept of subsidy would affect all contracting parties. A wide range of resource and resource infrastructure policies could be affected." (C/M/200, page 12)

This matter has not yet been examined by the Committee on Subsidies and Countervailing Measures or the Group of Experts on the Calculation of the Amount of a Subsidy.
II. DEFINITION OF THE CONCEPT OF "DOMESTIC INDUSTRY"

1. GATT rules

(a) Provisions of the General Agreement

Article VI:6

(a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) Relevant decisions by the CONTRACTING PARTIES

The first Report of the Group of Experts on Anti-Dumping and Countervailing Duties, adopted by the CONTRACTING PARTIES on 13 May 1959 (BISD 8S/145), contains the following paragraph on the term "industry".

"The Group then discussed the term 'industry' in relation to the concept of injury and agreed that, even though individual cases would obviously give rise to particular problems, as a general guiding principle judgements of material injury should be related to total national output of the like commodity concerned or a significant part thereof. The Group agreed that the use of anti-dumping duties to offset injury to a single firm within a large industry (unless that firm were an important or significant part of the industry) would be protectionist in character, and the proper remedy for that firm lay in other directions."

In the second Report of the Group of Experts, adopted by the CONTRACTING PARTIES on 27 May 1960 (BISD 9S/194), the Group stated that:

"... since the criterion of material injury was one of the two factors required to allow anti-dumping action, the initiative for such action should normally come from domestic producers who considered themselves injured or threatened with injury by dumping. Governments would, however, have the right to take such initiative when the conditions set forth in Article VI existed."
2. Agreement on Subsidies and Countervailing Measures

(a) Relevant provisions of the Agreement

Article 2

Domestic procedures and related matters

1. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Article. An investigation to determine the existence, degree and effect of any alleged subsidy shall normally be initiated upon a written request by or on behalf of the industry affected. The request shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Agreement and (c) a causal link between the subsidized imports and the alleged injury. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above.

Article 6

Determination of Injury

5. In determining injury, the term "domestic industry" shall, except as provided in paragraph 7 below, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related to the exporters or importers or are themselves importers of the allegedly subsidized product the industry may be interpreted as referring to the rest of the producers.

6. The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such

---

5 The term "initiated" as used hereinafter means procedural action by which a signatory formally commences an investigation as provided in paragraph 3 of this Article.

6 Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of Article 6.

21 The Committee should develop a definition of the word "related" as used in this paragraph.
criteria as: the production process, the producer's realization, profits. When the domestic production of the like product has no separate identity in these terms the effects of subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

7. In exceptional circumstances the territory of a signatory may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all, or almost all, of their production of the production in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the production in question located elsewhere in the territory. In such circumstances injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of subsidized imports into such an isolated market, and provided further that the subsidized imports are causing injury to the producers of all, or almost all, of the production within such market.

8. When the industry has been interpreted as referring to the producers in a certain area, as defined in paragraph 7 above, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing signatory does not permit the levying of countervailing duties on such a basis, the importing signatory may levy the countervailing duties without limitation, only if (a) the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 4, paragraph 5, of this Agreement and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

9. Where two or more countries have reached under the provisions of Article XXIV:8(a) of the General Agreement such a level of integration that they have the characteristics of a single, unified market the industry in the entire area of integration shall be taken to be the industry referred to in paragraphs 5 to 7 above.

(b) Decisions of the Committee on Subsidies and Countervailing Measures

At its meeting held on 28-30 October 1981 the Committee adopted a Report concerning the definition of the word "related" in Article 6 of the Agreement. Relevant extracts from this Report are reproduced hereunder:

"4. The Group based its discussion on contributions from individual experts and on the definition of the word 'related', contained in Article 15 of the Agreement on Implementation of Article VII of the
GATT (Valuation Code). It was recognized that the matter of defining the word 'related' should be seen as limited to the purposes of interpretation of the term 'domestic industry' in anti-dumping or countervailing proceedings.

5. The experts were of the opinion that the best approach would be to combine certain relevant criteria from the definition in the Valuation Code with the requirement that the effect of the relationship was such as to cause the producer concerned to behave differently from non-related producers. At the same time they recognized that, as certain criteria were extremely difficult to evaluate, any such definition should allow sufficient flexibility and should be applied with appropriate care.

6. Taking into account all the views expressed, the Group agreed to propose the following text for consideration and possible adoption by the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures respectively:

For the purpose of Article 4:1(i) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and of Article 6:5 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, producers shall be deemed to be related to the exporters or importers only if:

(a) one of them directly or indirectly controls* the other; or

(b) both of them are directly or indirectly controlled* by a third person; or

(c) together they directly or indirectly control* a third person; provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers."

3. Description of the problem

The definition in the Agreement on Subsidies and Countervailing Measures of the concept of "domestic industry" in terms of domestic producers of the like product is important both in the context of the requirements laid down in the Agreement with respect to the procedures for the opening of a countervailing duty investigation and in the context of the determination of injury. Two problems have arisen in the Committee on

*For the purposes of these Articles, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.
Subsidies and Countervailing Measures concerning the concept of "domestic industry". Firstly, in a number of countervailing duty cases involving processed agricultural goods conflicting views have been expressed by signatories as to whether producers in the importing country of the agricultural raw material could be considered to be (part of) the domestic producers of the processed product. Some signatories consider that, as the raw material is not "like" the processed product, producers of the raw material cannot be treated as being (part of) the domestic producers of the processed product. Other signatories are of the view that in certain special circumstances where there is a close economic interdependency between the production of the agricultural raw material and the production of the final product it can be legitimate to consider the producers of the raw material as being (part of) the domestic producers of the final product. In February 1985 the Committee on Subsidies and Countervailing Measures established a panel to examine a dispute between the EEC and the United States concerning a provision in the United States' Trade and Tariff Act of 1984 which stated that in the case of wine and grape products the term "industry" should be interpreted as including the domestic producers of the principal raw agricultural product contained in the processed product. The Report of this Panel was circulated on 24 March 1986 (SCM/71) but has not yet been adopted by the Committee on Subsidies and Countervailing Measures (see SCM/M/31 and SCM/M/32). A second problem which has arisen in relation to the definition of "domestic industry" is that divergent points of view exist with respect to the manner in which the competent authorities should verify whether a countervailing duty petition has indeed been filed by or on behalf of the affected domestic industry. One view which has been expressed on this issue is that the relevant competent authorities in the importing country should require the petitioner to establish affirmatively the support of the majority of the producers constituting the domestic industry. Another view is that verification of the standing of a petitioner is required only when members of the domestic industry who are not importers present evidence that the petition has not been filed by or on behalf of the domestic industry affected.

1The validity of this provision expired on 30 September 1986.
III. ISSUES RELATING TO THE DETERMINATION OF MATERIAL INJURY

1. GATT rules

(a) Relevant provisions of the General Agreement

Article VI:6(a)

No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) Relevant decisions by the CONTRACTING PARTIES

The first Report of the Group of Experts on Anti-Dumping and Countervailing Duties, adopted by the CONTRACTING PARTIES on 13 May 1959 (BISD 85/145) contains some considerations on the application of the concept of "material injury" in relation to the imposition of anti-dumping duties.

"At the outset of their discussions on the use of the injury concept, the Group stressed that anti-dumping measures should only be applied when material injury, i.e. substantial injury, is caused or threatens to be caused. It was agreed that no precise definitions or set of rules could be given in respect of the injury concept, but that a common standard ought to be adopted in applying this criterion and that decisions about injury should be taken by authorities at a high level. It was suggested that legislation which provided for 'injury' only should be applied as if the word 'material' were stated therein.

With respect to cases where material injury is threatened by dumped imports, the Group stressed that the application of anti-dumping measures had to be studied and decided with particular care.

In concluding the discussion on the use of the injury concept and in relating it to the term 'industry' it was the general consensus that, before deciding to impose an anti-dumping duty, the importing country should ensure that dumped goods:

(a) are causing material injury to an established industry; or

(b) clearly threaten material injury to an established industry; or

(c) material retard the establishment of a domestic industry".
In the second Report of the Group of Experts adopted by the CONTRACTING PARTIES on 27 May 1960 (BISD 95/194) the Group noted the following with regard to the relationship between application of anti-dumping duties and the most-favoured-nation clause:

"In equity, and having regard to the most-favoured-nation principle the Group considered that where there was dumping to the same degree from more than one source and where that dumping caused or threatened material injury to the same extent, the importing country ought normally to be expected to levy anti-dumping duties equally on all the dumped imports."

The report of the Panel on the imposition by New Zealand of anti-dumping duties on imports of electrical transformers from Finland (BISD 32/S/55) contains the following observations on the question whether a determination of material injury by a contracting party can be challenged by other contracting parties:

"The Panel noted the view expressed by the New Zealand delegation that the determination of material injury was a matter specifically and expressly reserved, under the terms of Article VI:6(a), for the decision of the contracting party levying the anti-dumping duty. It also noted the contention that other contracting parties might enquire as to whether such a determination had been made, but that the latter could not be challenged or scrutinized by other contracting parties nor indeed by the CONTRACTING PARTIES themselves. The Panel agreed that the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned. However, the Panel could not share the view that such a determination could not be scrutinized if it were challenged by another contracting party. On the contrary, the Panel believed that if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, under the relevant GATT provisions, in particular Article XXIII, that its representations by given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the CONTRACTING PARTIES, as had been done by Finland in the present case. To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. It would lead to an unacceptable solution under the aspect of law and order in international trade relations as government by the GATT. The Panel in this connection noted that a similar point had been raised, and rejected, in the report of the Panel on Complaints relating to Swedish anti-dumping duties (BISD 38/S/81). The Panel fully shared the view expressed by that panel when it stated that 'it was clear from the wording of Article VI that no anti-dumping duties should be levied
until certain facts had been established. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that the contracting party should establish the existence of these facts when its action is challenged' (paragraph 15)."

2. Agreement on Subsidies and Countervailing Measures

(a) Relevant provisions of the Agreement

Article 2

Domestic procedures and related matters

1. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Article. An investigation to determine the existence, degree and effect of any alleged subsidy shall normally be initiated upon a written request by or on behalf of the industry affected. The request shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Agreement and (c) a causal link between the subsidized imports and the alleged injury. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above.

4. Upon initiation of an investigation and thereafter, the evidence of both a subsidy and injury caused thereby should be considered simultaneously. In any event the evidence of both the existence of subsidy and injury shall be considered simultaneously (a) on the decision whether or not initiate an investigation and (b) thereafter.

5. The term "initiated" as used hereinafter means procedural action by which a signatory formally commences an investigation as provided in paragraph 3 of this Article.

6. Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of Article 6.
during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

12. An investigation shall be terminated when the investigating authorities are satisfied either that no subsidy exists or that the effect of the alleged subsidy on the industry is not such as to cause injury.

Article 4

Imposition of countervailing duties

1. The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less are decisions to be made by the authorities of the importing signatory. It is desirable that the imposition be permissible in the territory of all signatories and that the duty be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry.

3. When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and to be causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

4. If, after reasonable efforts have been made to complete consultations, a signatory makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this section unless the subsidy is withdrawn.

Article 5

Provisional measures and retroactivity

1. Provisional measures may be taken only 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,
paragraphs 1(a) to (c). Provisional measures shall not be applied unless the authorities concerned judge that they are necessary to prevent injury being caused during the period of investigation.

Article 6

Determination of injury

1. A determination of injury for purposes of Article VI of the General Agreement shall involve an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products and (b) the consequent impact of these imports on domestic producers of such products.

2. With regard to volume of subsidized imports the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing signatory. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing signatory, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3. The examination of the impact on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative

17 Determinations of injury under the criteria set forth in this Article shall be based on positive evidence. In determining threat of injury the investigating authorities, in examining the factors listed in this Article, may take into account the evidence on the nature of the subsidy in question and the trade effects likely to arise therefrom.

18 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the production under consideration or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration.
effects on cash flow, inventories employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

4. It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of this Agreement. There may be other factors which at the same time are injury the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports.

5. In determining injury, the term "domestic industry" shall, except as provided in paragraph 7 below, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related to the exporters or importers or are themselves importers of the allegedly subsidized product the industry may be interpreted as referring to the rest of the producers.

6. The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realization, profits. When the domestic production of the like product has no separate identify in these terms the effects of subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

7. In exceptional circumstances the territory of a signatory may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such

19 As set forth in paragraphs 2 and 3 of this Article.

20 Such factors can include inter alia, the volume and prices of non-subsidized imports of the product in question, contraction in demand or changes in the pattern of consumption, trade restrictive practices of an competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

21 The Committee should develop a definition of the word "related" as used in this paragraph.
market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

8. When the industry has been interpreted as referring to the producers in a certain area, as defined in paragraph 7 above, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing signatory does not permit the levying of countervailing duties on such a basis, the importing signatory may levy the countervailing duties without limitation, only if (a) the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 4, paragraph 5, of this Agreement, and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

9. Where two or more countries have reached under the provisions of Article XXIV:8(a) of the General Agreement such a level of integration that they have the characteristics of a single, unified market the industry in the entire area of integration shall be taken to be the industry referred to in paragraphs 5 to 7 above.

The Committee on Anti-Dumping Practices has adopted a recommendation on the determination of a threat of material injury (ADP/25). This recommendation is reproduced in Annex V.

3. Cumulative injury assessment

3.1 Description of the problem

The term "cumulative injury assessment" refers to the practice whereby the relevant authorities of the importing country assess the causal relationship between subsidized imports and material injury to a domestic industry by considering the combined effect of the allegedly subsidized imports from all countries investigated, or by considering the combined effect of allegedly subsidized imports from one or more countries investigated and allegedly dumped imports from one or more countries investigated (the latter form of cumulation is sometimes referred to as "cross-cumulation"). Compared to the situation where the injury determination is made separately for each exporting country, the cumulative injury assessment increases the likelihood of affirmative findings of injury in particular as regards small suppliers.
The Agreement on Subsidies and Countervailing Measures does not contain any express provision on the question of cumulative injury assessment and conflicting views exist as to whether this practice is consistent with the Agreement. This problem has also been discussed in the Committee on Anti-Dumping Practices, and the Ad-Hoc Group on the Implementation of the Anti-Dumping Code has been instructed to explore the possibilities to find an agreed approach to this issue. So far the efforts made by this Ad-Hoc Group have remained without any result.

3.2 Points raised

Reproduced hereunder is one view expressed in the Ad-Hoc Group on the Implementation of the Anti-Dumping Code regarding the question of cumulative injury assessment:

"1. It is not infrequent that several exporters from one or more countries engage in sales at dumped prices. The dumping margin should be investigated individually for each exporter, but in the examination of material injury caused by dumped imports the question arises whether the effect of the sales of each exporter should be examined individually or whether the object of the injury examination should be the aggregate effect of all dumped imports.

Definition

2. In previous discussions the Ad-Hoc Group has spoken about 'cumulation'. However, the term 'cumulative injury assessment' seems more adequate, because cumulation relates to the particular aspect of assessing material injury in anti-dumping investigations. The term could be defined as follows:

Cumulative injury assessment is an aggregate analysis of the effects of dumped exports on a particular product from (more than one country) (more than one exporter) of the domestic industry.

GATT rules

3. Neither the General Agreement itself, nor the Anti-Dumping Code contain any provisions directly regulating the question of cumulative injury assessment. However, there are several provisions, which may have a certain relevance in this context.

As mentioned in paragraphs 22-24 the Ad-Hoc Group may wish to consider the correct way of making an injury assessment in a case involving several exporting firms in one country. Hereinafter the text covers both alternatives.
4. Article VI:6(a) of GATT says that "the effect of the dumping ... is such as to cause or threaten material injury ...". This provision might be interpreted to mean that in the case of dumping from several sources each dumped sale must have had the effect of causing injury, alone or in connection with other dumped sales.

5. The Anti-Dumping Code contains provisions relevant for examining the question of cumulative injury assessment. Article 3:1 stipulates that an examination must be made of the volume of the dumped imports and of their impact on domestic producers of like products. This provision might be interpreted as a support for the principle of cumulative injury assessment.

6. The requirement of causal relationship between dumped imports and material injury is stressed in Article 3:4. In the injury examination an analysis must be made of all factors contributing to the material injury and the effect of factors other than dumping must be left aside in the injury assessment. Footnote 5 to Article 3:4 contains some examples of such other factors. In the case of small volumes or market shares of dumped imports the causality question appears to be particularly relevant.

7. It follows from the stipulation in Article 3:5 that 'the effect of the dumped imports shall be assessed in relation to the domestic production of the like products' and from the definition of 'like product' in Article 2:2, that only products identical or closely resembling those made by domestic producers can be made subject to a cumulative injury assessment.

8. From the requirement in Article 5:3 of immediate termination of an investigation as soon as it is clear that injury is 'negligible' it follows that cumulative injury assessment cannot be made in all cases.

9. Article 8:2 lays down the rule of non-discrimination between imports from all sources when anti-dumping duties are imposed. It can be debated whether this Article requires non-discrimination also in the injury assessment.

10. However, none of these rules seems to give a clear answer to the central question in cumulative injury assessment, i.e. what is the injurious effect of each individual dumped sale, in relation to the injurious effect of all other sales, dumped or other.

Different situations where cumulative injury assessment may be relevant

11. The situation on the market may vary indefinitely as regards market shares, prices, marketing philosophy and ambitious sales channels, etc. All these factors influence the extent to which
individual cases of dumping cause material injury. For practical reasons this document examines only a few situations of cumulative injury assessment from the point of view of market shares.

(a) several exporters or exporting countries have grosso modo the same market shares,

(b) several exporters or exporting countries have widely varying market shares, and

(c) some exporters or exporting countries have for the time being small market shares, but both the capacity and the intention to expand in the near future.

12. In view of the requirement in GATT and the Anti-Dumping Code of causality and of disregard of external factors causing injury the cases (a)-(c) may be judged as follows:

Situation (a)

13. If the market share of each exporter or exporting country is large enough to cause injury alone there would be no problem. It is more difficult if each exporter or country of export is not alone large enough to cause injury or more than negligible injury, but their combined effect would be injurious. The non-discrimination rule in Article 8:2 of the Code seems to require the same treatment of all dumped imports: either anti-dumping measures shall be taken in respect of all of them or in respect of none. The latter alternative would leave the importing country defenseless in a situation where material injury has occurred, i.e. the provisions of GATT and the Code are inoperative. That would not be a satisfactory conclusion and the most appropriate solution seems to be to apply non-discriminatory anti-dumping measures in respect of all exporters or exporting countries.

Situation (b)

14. In this case the effect of different exporters or exporting countries on the injury situation is different from case (a). Therefore the non-discrimination principle does not seem to require equal treatment of all of them. Each case of dumping should be examined on its own merits. Such an individual treatment would imply a separate examination of the causal effect of each case of dumping on the injury situation, i.e. for each exporter or exporting country the basic question would be: 'What would the injury situation be on the domestic market if this exporter or exporting country were not present?'. If the reply is that the situation would be the same or only insignificantly different, the conclusion would be that this particular exporter or exporting country has not caused material injury.
15. In situation (b) it seems appropriate to discuss the question of market and price leadership and the problems involved in dumping on an undifferentiated market for e.g. bulk products. On such markets each seller other than the market or price leader has no option other than selling at the existing price or to stay out of the market. The behaviour of the sellers, other than the leader, has only a minor influence on the market situation or the price. Consequently there seems to be no causal relationship between the sales of the other sellers and the injury caused to domestic producers.

Situation (c)

16. This situation is similar as the one in (b), except that the question concerning threat of injury has to be considered, see document ADP/W/82/Rev.2

Cumulative injury assessment 'across the codes'

17. Situations may simultaneously occur where some exporters engage in dumping and other exporters benefit from export subsidies for the sale of like products on the same market. Simultaneously low price exporters may compete, without either dumping or subsidization. The overall result of all these low priced imports is material injury to domestic producers. The question arises if cumulative injury assessment of all these imports can be done, or if the material injury resulting from dumped sales, subsidized sales and other low priced sales should be assessed separately.

18. As regards provisions in GATT with relevant for this question, Article VI:5 of the General Agreement prohibits the application of both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidies. The words 'same situation' are not defined and the exact relevance of this wording for the question now being discussed is uncertain.

19. The requirement in Article 3:4 of the Anti-Dumping Code concerning disregard of external injurious factors also seems highly relevant. Footnote 5 to that Article explicitly mentions among such external factors 'the volume and price of imports not sold at dumping prices'. (Similarly footnote 20 to Article 6:4 of the Subsidies Code mentions 'volume and prices of non-subsidized imports'). Neither of the footnotes says 'dumped or subsidized imports'.

20. It is also of some relevance that dumping and subsidization are regarded as different kinds of measures regulated in two separate codes. The existence of two different codes with many different provisions clearly indicates that dumping and subsidization and the material injury resulting therefrom should be assessed separately.
Cumulative injury assessment on the level of countries or on the level of individual exporters

21. It has been regarded as a matter of course that injury resulting from dumped sales by several exporters in the same country is subject to cumulative assessment, without separating the injury causes by different exporters. The legal basis for this practice may merit closer examination.

22. The Anti-Dumping Code provides that an investigation be made in respect of individual firms, not in respect of countries. In a market economy the entity doing business in the firm. I.a. Article 6:5 of the Code mentions explicitly 'the firms concerned' by the investigation. In general the Code speaks of exporters and importers in the sense of enterprises, not of countries.

23. The Ad-Hoc Group may wish to consider correct way of making an injury assessment, e.g. in a case involving several exporting firms in one country, all selling at dumped prices, but some having insignificant market shares or sales volumes in relation to the others.

Conclusions

24. There are no GATT rules directly addressing the question, but several rules could have some relevance. The most important seem to be the requirement for a causal relationship between dumping and material injury and for disregard of factors external to dumping in the injury assessment. GATT further requires that the imported and the domestic products should be 'like', i.e. identical or alike in all respects.

25. The consequence of these rules would be the development of a 'contributing cause principle' implying that for each exporter or exporting country an individual examination should be made as to whether the investigated dumped sale has significantly contributed to the material injury.

26. The contributing cause principle would also imply that terminated anti-dumping cases should be disregarded, because either no dumping or no injury has been found or else the latter has already been eliminated through the measures imposed.

27. External factors would also be low priced imports without dumping or subsidization, whereas cumulative injury assessment of dumped and subsidized imports appears to be contrary to the intention of several code provisions.

28. Cumulative injury assessment should be applied with caution and only after a careful examination in each individual case of the respect impact of dumping and of other factors on the situation of the domestic industry.
4. "De Minimis" Subsidy

4.1 Description of the problem

A question that is often raised in discussions in the Committee on Subsidies and Countervailing Measures of specific countervailing duty cases is the application of countervailing duties in situations where the amount of subsidization is low. While there is a consensus that no countervailing measures should be applied where the amount of subsidization has been found to be de minimis, there is no general rule specifying the level below which a subsidy should be deemed to be de minimis.

4.2 Points raised

The following two views were put forward in the Group of Experts on the Calculation of the Amount of a Subsidy:

(a) "The main objective of Part I of the Code on Subsidies and Countervailing Duties is to ensure that countervailing measures do not unjustifiably impede international trade. Indeed, countervailing investigations tend to have distorting effects on international trade long before countermeasures are taken. Thus, even the mere initiation of an investigation with the threat of measures being taken at a later, uncertain, stage may influence importers in their decisions as to how much they should order, and thereby interfere with established trade patterns.

In stipulating that 'An investigation shall be terminated when the investigating authorities are satisfied either that no subsidy exists or that the effect of the alleged subsidy on the industry is not such as to cause injury.' the Subsidies Code (Article 2:12) makes it clear that no action lies against de minimis subsidies.

It follows from this that countervailing actions and measures may be taken only where the trade distorting effect of the subsidy and its effect on the industry in the importing country so require. No action should be taken or continued, therefore, where it would be clearly out of proportion to the objective sought, in other words, where the effect of the subsidy on the industry in the importing country is not such as to cause material injury.

Whilst the Subsidies Code refrains from defining what constitutes material injury because each and every case has to be judged on its own merits, it clearly assumes, as can be seen from the paragraph quoted above, that even in the absence of any formal determination on injury it can be established that a subsidy is de minimis, i.e. that under no circumstances could it cause material injury.
It is our opinion that a subsidy not exceeding 2.5 per cent of the FOB value of the goods exported should be considered as being unable to cause material injury and therefore de minimis, it being understood that the amount of the subsidy should be determined on the basis of the rules and accounting principles to be agreed by the signatories. It is further considered that such a de minimis rule should apply to the amount derived from the totality of subsidies from which the exports in question benefit and not to individual subsidy programmes. It should be stressed, however, that a determination of a more than de minimis subsidy in no way implies the existence of material injury.

(b) "Article 2:12 of the Subsidies Code provides: 'An investigation shall be terminated whenever the investigating authorities are satisfied either that no subsidy exists or that the effect of the alleged subsidy on the industry is not such as to cause injury'.

However, under the Code, every determination of injury must be made case-by-case on the basis of an evaluation of the factors listed in Article 6. This injury determination cannot be short-circuited by specifying a prescribed level of subsidization below which material injury could not be found. In any event, the obvious differences in size of national markets, size of industries, price-sensitivity of products, and other factors make it impossible to set one such level for all countries and products.

A de minimis rule should apply to the totality of subsidies from which the products investigated benefit, and not to individual subsidy programmes. The investigating authorities may make such a determination before initiation, during an investigation, or in the preliminary or final determination, where national legislation so permits.

There are two alternative (and not mutually exclusive) theoretical justifications for the de minimis concept.

- The first view holds that countervailing duty actions and measures may be taken only when the trade distorting effect of the subsidy and its effects on the industry in the importing country so require. Thus, no action should be taken where it would be clearly out of proportion to the objective sought, or as article 2:12 states, 'where the effect of the subsidy on the industry in the importing country is not such as to cause material injury.'

- The second theory treats the issue of de minimis subsidy as a completely separate issue from the determination of injury in an investigation. If it can be established that the totality of subsidies on the product investigated are minimal (so small per unit that they are practically nonexistent), the investigating authorities may determine that, as Article 2:12 states, 'no subsidy exists'. Thus, as the maxim states, 'de minimis non curat lex': the law does not take notice of minimal matters."
IV. NOTIFICATIONS UNDER ARTICLE XVI:1

1. GATT rules

(a) Article XVI:1

If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any products into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary.

(b) Relevant decisions of the CONTRACTING PARTIES

(i) In 1950 the CONTRACTING PARTIES made arrangements for the reporting of existing subsidies and for the notification of modifications therein and of new measures of subsidization (BISD Vol. II/19).

(ii) The most recent questionnaire to be used for the reporting of subsidies was elaborated in 1960 (BISD 9S/193).

(iii) The procedures for notification under Article XVI:1 which were adopted in 1962, provide for a new and full notification every third year and, in the intervening years, for a notification of the changes that have occurred (BISD 11S/58).

(iv) Recommendations of the Panel on Subsidies, adopted by the CONTRACTING PARTIES on 24 May 1960 (BISD 9S/188) contain, inter alia, some guidelines on how to respond to the questionnaire on subsidies and on subsidies notifiable under Article XVI.

(v) The CONTRACTING PARTIES have also adopted the recommendation that governments, which consider that there are no measures or schemes in their countries requiring notification under Article XVI:1 should so inform the Director-General in writing (BISD 9/193)
2. Agreement on Subsidies and Countervailing Measures

Article 7: Notification of subsidies

1. Having regard to the provisions of Article XVI:1 of the General Agreement, any signatory may make a written request for information on the nature and extent of any subsidy granted or maintained by another signatory (including any form of income or price support) which operates directly or indirectly to increase exports of any product from or reduce imports of any product into its territory.

2. Signatories so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting signatory. Any signatory which considers that such information has not been provided may bring the matter to the attention of the Committee.

3. Any interested signatory which considers that any practice of another signatory having the effects of a subsidy has not been notified in accordance with the provisions of Article XVI:1 of the General Agreement may bring the matter to the attention of such other signatory. If the subsidy practice is not thereafter notified promptly, such signatory may itself bring the subsidy practice in question to the notice of the Committee.

3. Description of the problem

Transparency in the area of subsidies is far from satisfactory. Firstly, only about thirty out of ninety-three contracting parties submit, more or less regularly, notifications under the relevant GATT procedures. Secondly, a number of practices which, at least because of their effects, must be considered as subsidies in terms of Article XVI:1 are not being notified. As there is no agreed definition of subsidy, contracting parties have considerable latitude as to the choice of notifiable practices; it happens that the same practice, having the same trade effects, is notified as a subsidy by one contracting party and considered as not being a subsidy by another. As another example, in the agricultural sector the non-commercial transactions (e.g. food aid) are not

---

1 In this Agreement, the term "subsidies" shall be deemed to include subsidies granted by any government or any public body within the territory of a signatory. However, it is recognized that for signatories with different federal systems of government, there are different divisions of powers. Such signatories accept nonetheless the international consequences that may arise under this Agreement as a result of the granting of subsidies within their territories.
normally notified. Furthermore the question arises whether certain types
of special transactions (such as barter, compensation or buy-back
agreements) contain subsidy elements and should therefore be notified.
Transactions by state-trading or semi-state organizations, either directly
or within the terms of long-term agreements between governments, are not
systematically notified. The transparency in the industrial sector leaves
even more to be desired. Only recently have some contracting parties
decided to fulfill their obligations under Article XVI:1, and in many cases
these notifications are either too general or too partial to be considered
satisfactory. In particular, only some contracting parties were supplying
information on the incidence of the subsidy, the quantitative trade effects
of the subsidy, and the amount of the subsidy, as required under the
questionnaire.

4. Main issues

4.1 Definition of a subsidy and notifiable measures

4.1.1 Relevant decisions of the CONTRACTING PARTIES

(i) In the report on "Operations of the Provisions of Article XVI" adopted
on 21 November 1961, the Panel on Subsidies noted the absence of a general
definition of the term "subsidy" in the General Agreement and "considered
that it was neither necessary nor feasible to seek an agreed interpretation
of what constituted a subsidy. It would probably be impossible to arrive
at a definition which would at the same time include all measures that fell
within the intended measuring of the term in Article XVI without including
others not so intended ..." (BISD 10S/209, paragraph 23).

(ii) The Report, adopted by the CONTRACTING PARTIES on 1-2 September 1948,
on "Modification to the General Agreement" (BISD, Vol. II, page 44) gives
the following interpretations of the phrase "increased exports" in line 3
of Article XVI of the GATT:

"The phrase 'increased exports' ... was intended to include the
concept of maintaining exports at a level higher than would otherwise
exist in the absence of the subsidy ..."

and the Report of the Panel on Review Pursuant to Article XVI:5, adopted by
the CONTRACTING PARTIES on 24 May 1960 (BISD 9S/188) refers to the
above-mentioned interpretation and states:

"Mutatis mutandis this interpretation must apply to the effect on
imports. The criterion is therefore what would happen in the absence
of a subsidy. While the Panel agreed that in most cases such a
judgement cannot be reached only by reference to statistics,
nevertheless, a statistical analysis helps to discern the trends of
imports and exports and may assist in determining the effects of a
subsidy." (paragraph 10)

- a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, e.g. a consumption subsidy, either increase exports or reduce imports;

- a system, under which a government, by direct or indirect methods, maintains domestic prices to producers at above the world price level by purchases and resale at a loss is a subsidy; such purchases would need only to cover part of the production to involve a subsidy and, in determining loss on resale, such expenses as holding stocks should be taken into account;

- there may be other variations of price stabilization where the existence or non-existence of a subsidy would be more difficult to determine; this should be judged by examination of the circumstances of each case, and in order to permit such an examination all cases of price support should be notified, regardless of the precise method used;

- there is an obligation to notify all levy/subsidy schemes affecting imports or exports which are dependent for their enforcement on some form of government action;

- there is an obligation to notify multiple exchange rates which have the effect of a subsidy.

(iv) The Report of the Panel on Review Pursuant to Article XVI:5, adopted by the CONTRACTING PARTIES on 24 May 1960 (BISD 98/188) notes that the GATT does not concern itself with subsidies financed by a non-governmental levy "by private persons acting independently of their governments except insofar as it allows importing countries to take action under other provisions of the Agreement." (paragraph 12)

(v) The Chairman of the CONTRACTING PARTIES at the thirteenth session invited all contracting parties to "provide information on subsidies irrespective of whether in the view of individual contracting parties they were notifiable under Article XVI" (BISD 108/206).
4.1.2 Points raised in the Committee on Subsidies and Countervailing Measures and the Committee on Trade in Agriculture*

- Whenever a contracting party has reason to believe that a subsidy may have a discernible trade effect (direct or indirect) it should notify such a subsidy.

- The final decision to notify or not is left to the judgement of the notifying country. However, such a judgement should be exercised with special care and in cases of doubt as to whether a measure is notifiable, contracting parties should decide in favour of notifying it.

- Given the important objective of transparency, notifications cannot be based solely on an assessment by the granting government or country as to whether a particular programme falls under Article XVI:1.

- Procedures requiring the notification of all measures that could constitute a subsidy would be detrimental to the objective of transparency. Flexible and pragmatic procedures under which essential data could be used in a rational way in order to draw conclusions are preferable.

- The following definition of a notifiable subsidy was advanced: a transfer of governmental resources to a specific area of economic activity in a way which may be discriminatory to alternative potential domestic recipients of this type of transfer. Such a definition would leave out subsidies not designed to benefit one specific user, such as aid to agricultural schools.

- Subsidies with social objectives, in particular those referred to in Article 11:1 of the Agreement on Subsidies and Countervailing Measures may not have any trade effect. However, there should not be an a priori exclusion from notifications of any type of subsidy programme on the presumption that there is no trade effect or that the presumed trade effect is de minimis. This should be judged by examination of the circumstances of each case and notifying contracting parties should exercise such a judgement with special care.

* These points were raised during subsequent discussion in the Committee on Subsidies and Countervailing Measures and, where relevant, in the Committee on Trade in Agriculture (SCM/M/4, 6, 9, 11, 12, 15, 16, 19, 20, 21, 24, 27, 30, 31, 32, SCM/49 and addenda, SCM/W/85, AG/W/5).
Subsidies granted by any government or any public body within the territory of a contracting party should be notified when they have a discernible trade effect and the information is reasonably available, and in any case they should be notified upon request.

Governmental, quasi-governmental or government-supported private monopoly institutions or agencies that buy or sell, and/or lay down regulations covering private trade may have policies or engage in practices that would have meaningful trade effects and which would fall under Article XVI:1. These policies and practices should be notified.

Procedures under Article 7 of the Agreement on Subsidies and Countervailing Measures should be used to effectively fill any gap which may result from incomplete notifications under Article XVI:1. In particular they may be used to obtain an explanation of the reasons for which a specific measure has been considered as not notifiable. Procedures of Article 7 of the Agreement on Subsidies and Countervailing Measures are bilateral at the first stage. If the information requested is not forthcoming at the bilateral stage, any interested signatory has the right, by virtue of Articles 7:2 and 7:3, to bring the matter to the attention of the Committee. Any notification made to the Committee should be circulated in accordance with the established practices.

There might be a certain danger in institutionalizing a system of reverse notifications, in that certain contracting parties might consider that this would dispense them from notifying.

4.2 Content of notifications

4.2.1 Relevant decisions of the CONTRACTING PARTIES

The Report of the Panel on Review Pursuant to Article XVI:5, adopted by the CONTRACTING PARTIES on 24 May 1960 (BISD 98/188), provides that notifications should

- conform so far as possible to the headings and sequence in the questionnaire on subsidies,

- indicate the subsidy per unit or, in cases where it is not possible, notify the sum, if any, which is budgeted for the purpose and give detailed figures for the operation of the measure in the previous year, indicating the total amount, the quantity of the product and the average subsidy per unit,

- include statistical data covering a representative period of domestic production, consumption, imports and exports of the product concerned; these figures should cover the last three years and, when possible and meaningful, a previous representative period
(to be notified only once for that product) preceding the entry into effect of the measure or preceding the latest major change in that measure,

- contain information about the trade effects of any subsidies and an explanation of these effects.

4.2.2 Points raised in the Committee on Subsidies and Countervailing Measures and the Committee on Trade in Agriculture*

- The content of notifications should be sufficiently specific to enable other contracting parties to evaluate the trade effects and to understand the operation of notified subsidy programmes. If subsidies are granted to specific products or sectors, the notifications should be organized by product or sectors.

- The questionnaire on subsidies should be revised in such a way as to simplify the task of preparing notifications and to reduce the margin for subjectivity.

- In many cases it is difficult to quantify the trade effects of a subsidy.

- The difficulty to quantify the trade effects does not exclude a qualitative evaluation in some cases.

- Notifying countries should at least attempt to provide a good estimate of trade effects in quantitative terms.

- The unit amount of a subsidy should be indicated whenever possible.

- Where a subsidy is commodity or sector specific, countries should provide details by commodity on the amount of the subsidy and the value of trade affected.

- Where specific points in the questionnaire have not been addressed in a notification, an explanation should be provided in the notification itself.

- The notification system should be formed in such a way that there is no difference in notifying government aids, whether the country has a strong private sector or a strong state-owned sector.

*See footnote to sub-section 4.1.2.
4.3 **Self-incriminating effect**

4.3.1 **Relevant decisions of the CONTRACTING PARTIES**


"The rôle of Article XVI is providing the CONTRACTING PARTIES with accurate information about the nature and extent of subsidies in individual countries has been partly frustrated by the failure of some contracting parties to notify the subsidies they maintain. To the extent that this is based on the reluctance of contracting parties to expose themselves to charges of non-conformity with the [General] Agreement, it reflects a misinterpretation of Article XVI. Moreover, a contracting party can be required to consult concerning a subsidy, whether or not it has been notified. There seems, therefore, to be no advantage to a contracting party in refraining from notifying its subsidies; on the contrary, notifications may dispel undue suspicious concerning those subsidies not previously notified." (paragraph 19)

4.3.2 **Points raised in the Committee on Subsidies and Countervailing Measures:**

It should be generally recognized that the notification of a measure under Article XVI:1 is without prejudice to its legality in GATT terms, its effects in terms of Article 8 of the Agreement on Subsidies and Countervailing Measures and its nature (i.e. whether or not the notifying country considers that it constitutes an export subsidy or other forum of subsidy in the sense of Article XVI:1 or the provisions of the Agreement on Subsidies and Countervailing Measures).
V. SUBSIDIES OTHER THAN EXPORT SUBSIDIES

1. GATT rules

(a) Article XVI:1

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

(b) Relevant decisions of the CONTRACTING PARTIES


"The intent of the last sentence of Article XVI of the General Agreement is that consultations shall proceed upon the request of a contracting party when it considers that prejudice is caused or threatened and would not require a prior international determination."
(paragraph 29b)

(ii) The Report of the Panel on Subsidies, adopted by the CONTRACTING PARTIES on 21 November 1961 (BISD 10S/201), notes:

"If a contracting party decides that it wishes to consult with another concerning a subsidy it may, depending on the circumstances, have recourse to the specific consultation procedures of Article XVI:1 or the provisions of Article XXII or XXIII. At the Review Session it was made clear that consultations under Article XVI:1 can be initiated by a contracting party which considers that serious prejudice is being caused or threatened without necessity for prior action by the CONTRACTING PARTIES" (paragraph 20).

(iii) The Reports by the Panels on EEC Refunds on Exports of Sugar, adopted by the Council on 6 November 1979 and 10 November 1980 respectively (BISD 26S/319 and BISD 27S/97) contain some indications as to what constitutes a "serious prejudice or a threat of serious prejudice."
"The Panel concluded that in view of the quantity of Community sugar made available for export with maximum refunds and the non-limited funds available to finance export refunds, the Community system of granting export refunds on sugar had been applied in a manner which in the particular market situation prevailing in 1978 and 1979, contributed to depress sugar prices in the world market, and that this constituted a serious prejudice to Brazilian interests, in terms of Article XVI:1."

The Panel also found "that the Community system of export refunds for sugar did not comprise any pre-established effective limitations in respect of either production, price or the amounts of export refunds and that the Community system had not been applied in a manner so as to limit effectively neither exportable surpluses nor the amount of refunds granted. Neither the system nor its application would prevent the European Communities from having more than an equitable share of world export trade in sugar. The Panel, therefore, concluded that the Community system and its application constituted a permanent source of uncertainty in world sugar markets and therefore constituted a threat of serious prejudice in terms of Article XVI:1."

2. Agreement on Subsidies and Countervailing Measures

Article 11:2

Signatories recognize, however, that subsidies other than export subsidies, certain objectives and possible form of which are described, respectively, in paragraphs 1 and 3 of this Article, may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory or may nullify or impair benefits accruing to another signatory under the General Agreement, in particular where such subsidies would adversely affect the conditions of normal competition. Signatories shall therefore seek to avoid causing such effects through the use of subsidies. In particular, signatories, when drawing up their policies and practices in this field, in addition to evaluating the essential internal objectives to be achieved, shall also weigh, as far as practicable, taking account of the nature of the particular case, possible adverse effects on trade. They shall also consider the conditions of world trade, production (e.g. price, capacity utilization etc.) and supply in the product concerned.

Article 11:3

Signatories recognize that the objectives mentioned in paragraph 1 above may be achieved, inter alia, by means of subsidies granted with the aim of giving an advantage to certain enterprises. Examples of possible forms of such such subsidies are: government financing of commercial enterprises, including grants, loans or guarantees; government provision or government financed provision of
utility, supply distribution and other operational or support services or facilities; government financing of research and development programmes; fiscal incentives; and government subscription to, or provision of, equity capital.

Signatories note that the above form of subsidies are normally granted either regionally or by sector. The enumeration of forms of subsidies set out above is illustrative and non-exhaustive, and reflects these currently granted by a number of signatories to this Agreement.

Signatories recognize, nevertheless, that the enumeration of forms of subsidies set out above should be reviewed periodically and that this should be done, through consultations, in conformity with the spirit of Article XVI:5 of the General Agreement.

Article 12:3-5

3. Whenever a signatory has reason to believe that any subsidy is being granted or maintained by another signatory and that such subsidy either causes injury to its domestic industry, nullification or impairment of benefits accruing to it under the General Agreement, or serious prejudice to its interests, such signatory may request consultations with such other signatory.

4. A request for consultations under paragraph 3 above shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question and (b) the injury caused to the domestic industry or, in the case of nullification or impairment, or serious prejudice, the adverse effects caused to the interests of the signatory requesting consultations.

5. Upon request for consultations under paragraph 1 or paragraph 3 above, the signatory believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

Article 13:2-4

2. If, in the case of consultations under paragraph 3 of Article 12, a mutually acceptable solution has not been reached within sixty days of the request for consultations, any signatory party to such consultations may refer the matter to the Committee for conciliation in accordance with the provisions of Part VI.

3. If any dispute arising under this Agreement is not resolved as a result of consultations or conciliations, the Committee shall, upon request, review the matter in accordance with the dispute settlement procedures of Part VI.
4. If, as a result of its review, the Committee concludes that an export subsidy is being granted in a manner inconsistent with the provisions of this Agreement or that a subsidy is being granted or maintained in such a manner as to cause injury, nullification or impairment, or serious prejudice, it shall make such recommendations to the parties as may be appropriate to resolve the issue and, in the event the recommendations are not followed, it may authorize such countermeasures as may be appropriate, taking into account the degree and nature of the adverse effects found to exist, in accordance with the relevant provisions of Part VI.

3. Description of the problem

A number of problems have arisen in the case of production subsidies. The General Agreement does not limit their use, and the requirement not to prejudice the interests of other contracting parties is very vague. In particular it is unclear who has to make the determination of prejudice, how the prejudice should be assessed and whether the obligation to discuss the possibility of limiting the subsidization implies that the subsidizing contracting party must take action to limit the subsidy in question. The Agreement on Subsidies and Countervailing Measures has provided some disciplines as to the effects in the sense that signatories are obliged to seek to avoid causing, through the use of any subsidy, adverse effects to the interest of another signatory. It also established a procedure to determine the existence of adverse effects and to take a remedial action. To the extent that these effects have arisen in the domestic market of the importing country, they have been dealt with through the use of countervailing duties. As the importing country has an efficient deterrent against these effects, the problems result rather from possible abuse of this deterrent. However, regarding adverse effects arising in the domestic market of the subsidising country or in the third country market, the obligations under the Agreement on Subsidies and Countervailing Measures to avoid causing such effects are hardly enforceable.

4. Points raised

4.1 Regarding Article XVI:1 *

(i) The existing Article XVI:1 obligation to discuss the possibility of limiting subsidization which has been determined by the CONTRACTING PARTIES to cause or threaten serious prejudice should be converted into an obligation to take appropriate remedial action.

---

1 These problems are discussed in the background notes dealing with countervailing duties.

* For details see AG/W/9/Rev.3.
(ii) Criteria should be developed to deal with serious prejudice in the form of global displacement and/or lower returns to producers which are dependent economically on access to, and prices prevailing in world markets:

- With regard to global displacement, the situation envisaged is one where, although there is a substantial increase in the overall level of subsidized exports, this is not necessarily reflected in specific markets. In such a case it should be sufficient, in order to establish prima facie serious prejudice, to demonstrate that there is subsidization and that there has been an increase in total exports. The onus of proof would then be on the respondent to show that the increase in exports was not the result of subsidies or assisted operations. In the absence of such a justification, global displacement of other exporters would be taken to have been established, with the result that there would be a concomitant obligation on the respondent to take immediate remedial measures.

- With regard to a link between prices and serious prejudice it is evident that a decline in prices can not be considered, in and by itself, as giving rise to an onus of proof. In these circumstances, a number of elements or indicators should be defined which, if established, either individually or together, would constitute prima facie injury through prices. These elements might include: an increase in subsidized operations in third markets; an increase in stocks associated with a price support system that is not geared to trends in domestic consumption; an increase in subsidies granted either globally or in relation to specific markets. Other indicators might need to be established. What is of fundamental importance, however, is to devise the means by which it would be possible to establish, within the framework of improved dispute settlement procedures, a link between adverse price effects and injury.

- In the application of these indicators, a distinction would need to be made between traditional and sporadic suppliers and between subsidizing and non-subsidizing exporters. A reference period for determining trends (say three years) and criteria for determining relative prices would also need to be considered. For some products, the existence of recognized international commodity exchange quotations would enable a comparison to be made between subsidized export prices and competitive prices. For certain other products, the reference price might be calculated on the basis of a weighted average of the export prices of non-subsidizing suppliers, with the weighting formula also taking account of quality and other relevant factors. In situations where neither of these techniques could be used, and the market is supplied by subsidizing and non-subsidizing exporters, the onus of proof should be on the subsidizer to demonstrate that its export price to a specific market is reasonable.
4.2 Regarding relevant provisions of the Agreement on Subsidies and Countervailing Measures

(i) Report by the Chairman of the Committee on Subsidies and Countervailing Measures concerning uniform interpretation and effective application of the Agreement on Subsidies and Countervailing Measures, contained in SCM/53, paragraph 1:

"In order to avoid differing interpretations as to the scope and application of Article 8, the following interpretative decision could be taken:

(a) Article 8 (Subsidies - General Provisions) is applicable to primary and non-primary products.

(b) Paragraph 4 [of Article 8] does not explicitly cover all potential adverse effects arising from subsidies.

(c) The meaning of footnote 28 [to Article 8] is the following: concerning certain primary products, if the effects of the subsidized exports are to displace the exports of a like product of another signatory from a third country market, then the determination of whether these effects are such as to result in nullification or impairment or serious prejudice should be done under Article 10. The emphasis is therefore on the displacement effect. Other possible effects are not affected by this footnote.

(d) For the above reasons and taking into account footnote 25 [to Article 8], the limitation of application of Article 8, resulting from footnote 28 [to Article 8] would not affect a finding of serious prejudice in the sense of Article XVI:1 under the Code when the effects of a subsidy on certain primary products are other than displacement from a third country market."
VI. EXPORT SUBSIDIES ON PRIMARY PRODUCTS

1. GATT rules

1.1 Article XVI:2 and XVI:3

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product."

1.2 Note to Article XVI, Section B

2. For the purposes of Section B, a 'primary product' is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade."

1.3 Note to Article XVI, paragraph 3

1. The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.

2. A system for the stabilization of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:

(a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market; and
(b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties.

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned."

1.4 Relevant decisions of the CONTRACTING PARTIES

1.4.1 Report by the Working Party on Other Barriers to Trade, adopted by the CONTRACTING PARTIES on 3 March 1955, (BISD 3S/222)

"... in determining what are equitable shares of world trade the CONTRACTING PARTIES should not lose sight of:

(a) the desirability of facilitating the satisfaction of world requirements of the commodity concerned in the most effective and economic manner, and

(b) the fact that export subsidies in existence during the selected representative period may have influenced the share of the trade obtained by the various exporting countries." (paragraph 19)

1.4.2 Panel Report concerning French Assistance to Exports of Wheat and Wheat Flour adopted by the CONTRACTING PARTIES on 21 November 1958, (BISD 7S/46)

Paragraph 15 recalls that "... at both Havana and the ninth session when the provisions of [paragraph 3 of Article XVI] were discussed it was implicitly agreed that the concept of 'equitable' share was meant to refer in 'world' export trade of a particular product and not to trade in that product in individual markets." The Panel proceeded to examine France's share of world exports, basing itself on trade statistics for the pre-war or early post-war years. It examined export unit values to determine whether the increase in France's share could be attributed to the operation of the French subsidy system. "In these circumstances", the Panel wrote, "it is reasonable to conclude that, while there is no statistical definition of an 'equitable' share in world exports, subsidy arrangements have contributed to a large extent to the increase in France's exports of wheat and of wheat flour, and that the present French share of world export trade, particularly in wheat flour, is more than equitable" (paragraph 19). However, the Panel did examine French trade in particular markets (Ceylon, Malaya and Indonesia) to consider whether French export subsidies had caused injury to Australia's normal commercial interests. The Panel concluded that it was "nevertheless clear that French supplies have in fact
to a large extent displaced Australian supplies in the three markets" (paragraph 23). The Panel also found that "there was no inherent guarantee in the [French] system that it would operate in such a manner as to conform to the limits contemplated in Article XVI:3" (paragraph 25).

1.4.3 The Panel report on EEC - Refunds on Export of Sugar adopted on 6 November 1979 (BISD 26S/290)

The Panel considered "that its examination should be based not on the concept of 'free market' introduced by Australia in presenting its contentions but on the concept of 'world export trade' mentioned in Article XVI:3 of the General Agreement... The Panel did not consider it necessary for the purpose of determining whether a market share was a 'more than equitable share of world export trade' to establish market shares in relation to concepts other than those of total world exports, taking into account the fact that a consideration of shares of the free market involved methodological difficulties that would make any comparison difficult." (paragraph 4.9) The Panel also "noted that no definition of the concept 'equitable share' had been provided, and neither had it in the past been considered absolutely necessary to agree upon a precise definition of the concept. The Panel felt that it was appropriate and sufficient in this case to try to analyse main reasons for developments in the individual market shares, and to examine market and price developments, and then draw a conclusion on that basis." (paragraph 4.11) The Panel was of the opinion that the term 'more than an equitable share of world export trade' should include situations in which the effect of an export subsidy granted by a signatory was to displace the exports of another signatory, bearing in mind the developments in world markets. With regard to new markets, traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated should be taken into account in determining what would be 'more than an equitable share of world export trade'." (paragraph 4.17)

2. Agreement on Subsidies and Countervailing Measures

2.1 Article 10

Export subsidies on certain primary products

1. In accordance with the provisions of Article XVI:3 of the General Agreement, signatories agree not to grant directly or indirectly any export subsidy on certain primary products in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product, account being taken of the shares of the signatories in trade in the product concerned during a previous representative period, and any special factors which may have affected or may be affecting trade in such product.
2. For purposes of Article XVI:3 of the General Agreement and paragraph 1 above:

(a) 'more than an equitable share of world export trade' shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets;

(b) with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining 'equitable share of world export trade';

(c) 'a previous representative period' shall normally be the three most recent calendar years in which normal market conditions existed.

3. Signatories further agree not to grant export subsidies on exports of certain primary products to a particular market in a manner which results in prices materially below those of other suppliers to the same market."

2.2 Footnote to Article 10

For purposes of this Agreement "certain primary products" means the products referred to in Note Ad Article XVI of the General Agreement, Section B, paragraph 2, with the deletion of the words 'or any mineral'.

2.3 Article 14:10

Signatories recognize that the obligations of this Agreement with respect to export subsidies for certain primary products apply to all signatories.

3. Description of the problem

The most pronounced difficulties have occurred in connection with the concept of "more than an equitable share" embodied in Article XVI:3 of the GATT. The Agreement on Subsidies and Countervailing Measures (Article 10) attempted to bring precision to Article XVI:3 but it has not always been found to give clear guidance on its interpretation. Consequently a number of disputes involving the concept of "more than an equitable share" have not found a satisfactory solution and in some cases have provoked retaliatory subsidization. The case-by-case application of this concept has revealed its imprecisions and the fact that it largely refers to notions which escape objective criteria. There is, for example, sufficient imprecision in this concept to allow countries using export subsidies to argue that these subsidies do not result in obtaining more than an equitable share. On the other hand it is not always possible to
prove causality between the subsidy and the increased share. Furthermore, it is impossible to derive a general line of case law from the decisions of panels, some of which have given divergent interpretations. It has been relatively easy for panels to determine, on the basis of facts and statistics, whether a subsidy existed and whether there had been an increase in the market share of a country and a decrease in the market share of its competitors. However, divergent interpretations are possible as to the nature and relevance of the "special factors" (referred to in Article XVI:3 of the General Agreement and Article 10 of the Agreement on Subsidies and Countervailing Measures) and "normal market conditions", thus confusing the causality between the subsidization and the increase in the market share. Furthermore, there is a certain ambiguity as to the exact scope of Article XVI:3 of the GATT and Article 10 of the Agreement on Subsidies and Countervailing Measures, the questions of price undercutting, the question of newcomers and the rôle of non-commercial sales.

4. Solutions proposed in the Committee on Trade in Agriculture and the Committee on Subsidies and Countervailing Measures

The proposed solutions can be divided into three groups:

A. Improvements in the existing framework of rules and disciplines

B. A new framework for limiting the use of export subsidies and their adverse effects

C. Uniform interpretation and effective application of Articles 8, 9 and 10 of the Agreement on Subsidies and Countervailing Measures

Reproduced hereunder are excerpts from relevant GATT documents characterizing each of these proposed solutions.

A. Improvements in the existing framework of rules and disciplines

(Recommendations: Draft Elaboration - Note prepared by the secretariat in consultation with the Chairman AG/W/9/Rev.3, pages 16-18)

"51. One body of ideas advanced for improvements in the existing framework of rules and disciplines would involve the predetermination of equitable shares for all significant exporters who subsidize directly or indirectly. The objectives indicated would be to avoid getting bogged down in over-complex systems, to restore the operational character of Article XVI:3, and to enable the equitable share concept to act as a preventive discipline by enabling the subsidizing exporters to ensure in advance that they do not thereby cause serious prejudice. These suggestions are set out in Annex B-I to AG/W/9/Rev.3.

52. In AG/W/9/Rev.1 it was submitted that, as a general proposition, improvements should be sought: (i) which enable cases of specific serious prejudice to the normal commercial interests of other contracting parties to be dealt with under reinforced Article XVI:1 disciplines; and (ii) which
enable the "more than equitable share" principle to operate as a broader safeguard or preventive discipline on the use of export subsidies and their more generalized effects on world export trade in a particular commodity. The following interrelated improvements, which are set out in detail in Annex B-II to AG/W/9/Rev.3, have been suggested as a means of making the existing provisions of Article XVI more operationally effective as regards export subsidies and other forms of export assistance:

(i) the existing Article XVI:1 (second sentence) obligation to discuss the possibility of limiting subsidization which has been determined by the CONTRACTING PARTIES to cause or threaten serious prejudice should be converted into an obligation to take appropriate remedial action in cases involving displacement in individual markets;

(ii) a conventional and readily ascertainable indicator of what constitutes an "equitable share" should be introduced as a reference point for countries using export subsidies, together with general policy guidance for the determination in contested cases of whether a share acquired through the use of subsidies is, or should be treated as, "more than equitable" under Article XVI:3;

(iii) a particular regime should be considered on the subsidization of agricultural primary products which are incorporated in processed agricultural products.

53. A number of alternative or complementary suggestions have been put forward for developing operational criteria on serious prejudice as the principal form, or as one form, of discipline on competition in third markets. These include suggestions:

(i) that criteria should be developed to deal with serious prejudice in the form of global displacement and/or lower returns to producers which are dependent economically on access to, and prices prevailing in, world markets. Certain specific suggestions made in this connection are set out in Annex B-III to AG/W/9/Rev.3;

(ii) that one possibility might be to relate subsidized exports to the import behaviour of the country concerned on the basis that a prima facie case of serious prejudice would exist where subsidized exports exceed a certain proportion of imports;

(iii) that in the context of an approach based on the exercise of moderation and a sense of responsibility and which was consistent with the objectives embodied in the Recommendations, including the specificity of agriculture, there could be value in exploring an obligation to adjust subsidies on the basis of an international finding, as well as in exploring the scope for clarifying the Article XVI:3 concepts.
54. With regard to criteria for determining "more than an equitable share", one suggestion made was that any indicative ascertainment should take account of both past performance and future trends, and that the resultant share should be expressed as a percentage of the world market rather than in quantitative terms. Another suggestion was that "more than an equitable share" should be interpreted to mean any share that could not be obtained without the use of export subsidies, either as a substantive rule or as a point of reference or criterion in any improved disciplines governing the use of export subsidies or other subsidies affecting exports.

55. A further approach proposed would involve an interpretative note to Article XVI:3 along the following lines (this approach is described in more detail in Annex B-IV to AG/W/9/Rev.3):

"A share of world export trade will be deemed to be more than equitable where that share:

(a) exceeds the share that might reasonably be expected to prevail in the absence of the subsidy; and/or

(b) is inconsistent with the objective of satisfying world market requirements of the commodity concerned in the most effective and economic manner; and/or

(c) is acquired or is being maintained with the effect of depressing prices or preventing price increases that would otherwise have occurred; and/or

(d) otherwise contributes, through its existence or effects, to the hindrance of the objectives of the General Agreement, disturbance to the normal commercial interests of contracting parties, or serious prejudice to another contracting party."

B. A new framework for limiting the use of export subsidies and their adverse effects (AG/W/9/Rev.3, pages 19-22)

"57. The issues relevant to the elaboration of this approach can be subdivided under four main headings:

(a) the scope of a general prohibition;

(b) the nature of possible exceptions;

(c) the improvements in the existing rules and disciplines governing the use of subsidies permitted under exceptions;

(d) export subsidies on incorporated agricultural primary products."
Scope of the Prohibition

58. In principle the scope of any general prohibition should be broadly framed so as to cover all relevant export subsidy practices. One alternative would be a general prohibition on the granting of direct export subsidies, i.e., subsidies granted on the occasion of, or in connection with, the export of an agricultural primary product. This would avoid the necessity of prohibiting income or price support arrangements, as well as a host of other indirect or domestic subsidies which may or may not affect exports. Under this alternative, the adverse effects of indirectly subsidized exports would be subject to either the existing or reinforced disciplines of Article XVI relating to serious prejudice. A variant of this alternative would be to define a prohibition on the basis of an illustrative list of direct export subsidy practices.

59. Another alternative would be to simply extend the Article XVI:4 prohibition to agricultural primary products. This would involve a prohibition on granting, directly or indirectly, any form of subsidy on the export of any agricultural product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. This alternative would have the advantage of providing a reasonably ascertainable (price-related) yardstick both for delimiting the scope of a prohibition and for surveillance and enforcement purposes. However, certain deficiency payment arrangements would not necessarily be caught under an Article XVI:4 prohibition.

60. A broader prohibition would be one based on the terminology of Articles XVI:1 and XVI:3. This would involve a prohibition on the granting, directly or indirectly, of any form of subsidy, including any form of price or income support, which operates to increase the export of any agricultural primary product.

61. The following specific proposals or suggestions have been put forward in the course of the elaboration process (the detailed proposals are set out in the relevant Annex to AG/W/9/Rev.3):

(i) that all existing export subsidies, including direct export credits and other forms of export assistance, should be prohibited, except food aid. Existing export subsidies would be permitted temporarily so long as a schedule and phase-out rules are established for each subsidy and the export quantity is gradually reduced (Annex C-I);

(ii) that the entitlement to use export subsidies should be linked to the creation of additional import access opportunities, on the basis of a phasing formula which would differentiate between occasional net exporters and consistent net exporters (Annex C-II);
(iii) that countries which subsidize their exports of agricultural products should negotiate self-sufficiency ratios, with their right to use export subsidies limited to a quantity directly linked to movements in domestic consumption (Annex C-III);

(iv) that a "producer-financed export subsidy" exemption should be developed on the basis of Note 2 to Article XVI:3, with other exceptions or disciplines to be negotiated in respect of food aid and non-commercial transactions, export credits and other related facilities, utilities or services provided by governments, subsidies on incorporated products, transitional arrangements and competition in third markets (Annex C-IV).

62. A common feature of several other suggestions made was that there should be a prohibition in respect of those subsidies, including direct export credits, which were specifically geared to exports and which were the most disruptive of trade in third markets. This prohibition would be coupled with strengthened Article XVI:1 disciplines on the adverse effects of domestic subsidies, and with clear rules on non-commercial transactions and export credits. A proposal based on phasing out and prohibiting direct export subsidies on agricultural primary products, strengthening Article XVI:1 disciplines, and retaining the existing rules on producer financed subsidies is set out in Annex C-V.

Other Suggested Exceptions/Conditions

63. Each of the foregoing suggestions or proposals incorporates one or more exceptions, or defines the prohibition in terms of what may be described as generic exceptions. The following additional or complementary exceptions have been suggested:

(i) an exception in the case of small occasional exporters, linked to access performance and to responsible behaviour on international markets;

(ii) that the linkage between domestic policies and trade measures should form the basis for a category of exceptions which takes account of specific characteristics and problems of agriculture;

(iii) that in a practical negotiating sense, there should be scope for a trade-off between domestic policies which impose effective limits on domestic production and exceptions to a general prohibition;

(iv) that exceptions applicable to an agricultural product in its primary form should also apply to the same product when incorporated in a processed product;

(v) the absorption of a temporary surplus due to a sudden increase in imports of the product in question or possibly of a competing or substitutable product;
(vi) the absorption of a surplus of a product of animal origin, the domestic production of which is stimulated by, or is directly dependent, wholly or mainly on a product, imports of which have increased substantially;

(vii) the re-export of quantities of a product, in its natural or processed form, equivalent to quantities previously imported, such as imports from developing countries at prices above the normal market prices;

(viii) the implementation of a policy to restrict the domestic production of a product or to limit guaranteed support prices in respect of that product (exception applicable to substitutable or competing products);

(ix) meeting the supply requirements of an importing country which is deprived of normal access to the international market or to certain supplying countries as a result, for example, of economic difficulties or certain other specific problems;

(x) sales at prices or on terms which are in conformity with:

- commitments undertaken by virtue of a bilateral intergovernmental agreement relating to an agricultural primary product which is consistent with criteria submitted to the CONTRACTING PARTIES;

OR

- a multilateral international undertaking applicable to an agricultural product and with which at least a specified number of contracting parties are associated.

64. With regard to the conditions that might govern a producer-financed export subsidy exception (Annex C-IV to AG/W/9/Rev.3, paragraph 9), the suggestion was made that it would be necessary to devise disciplines which would ensure that the protected domestic market could not be used to offset the impact of world market trends by, for example, increasing internal guaranteed prices or deficiency payments. One possibility mentioned in this regard was a "standstill", accompanied by suitable surveillance and enforcement arrangements, under which existing government-financed export subsidy levels might be frozen at the outset. This, it was suggested, could be complemented by a freeze, or some other form of restraint, on internal support prices or measures. In either case, the object would be to ensure that the international price would be borne by producers, rather than by consumers. With some such arrangements in place, there would be a basis on which to devise and negotiate a phase-out of government-funded subsidies over what would necessarily have to be a relatively lengthy period. An approach along these lines, it was submitted, would mean that producers would have to adjust progressively to world market conditions and, despite the scope for some degree of dumping or price averaging, it
could lead to a real diminution in the disruption to international markets from subsidized exports. Another issue raised in this context was whether a producer-financed export subsidy scheme was to be accompanied by a parallel and real stabilization of world markets, including the problem of monetary fluctuations.

Rules and Disciplines Governing the Use of Export Subsidies Under Exceptions

65. This is a subject which is addressed in certain of the proposals and suggestions outlined above (see, for example, Annex C-IV to AG/W/9/Rev.3, paragraphs 12 to 14). In general it is foreseen that Article XVI:1 (second sentence) reinforced as appropriate might, at least after a transitional stage, apply to the adverse effects in third markets arising from domestic subsidies and the use of export subsidies under exceptions."

C. Uniform interpretation and effective application of Article 10 of the Agreement on Subsidies and Countervailing Measures (Report by the Chairman of the Committee on Subsidies and Countervailing Measures, contained in SCM/53, paragraphs 11-20)

"11. It seems that a more precise definition of special factors would be very helpful in the practical application of the notion of "more than an equitable share". One possible solution could be to make it clear that special factors are those which can be considered as exceptional and/or temporary and beyond the control of the country subject to the complaint, i.e., not present under normal market conditions. The following are illustrative examples of such special factors:

(i) embargo or similar quantitative limitation on exports of the given product from or imports from the complaining country;

(ii) decision by a state-trading country or a country operating a monopoly of trade in the product concerned to shift, for political reasons, imports from the complaining country to another country or countries;

(iii) natural disasters, crop failures or other force majeure substantially affecting quantities, qualities or prices of the product available for exports from the complaining country;

(iv) existence of a commodity arrangement limiting exports from the complaining country;

The fact that certain actions are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either the GATT or the Code.
(v) significant voluntary decrease in the availability for exports of the product concerned in the complaining country;

(vi) significant non-commercial transactions by the complaining country in the market of the importing country/countries which lead the country/countries subject to complaint to subsidize in order to be competitive.

In assessing the relevance of special factors in each particular case an attempt shall be made to weigh their effects relative to the effects of the subsidy.

12. On the other side, there are other factors which, although they could be described as special features of a given market, are not exceptional or unforeseeable but are within the scope of the commercial considerations characterizing a specific market and therefore should not be considered as special factors within the meaning of Article 10:1. Some examples of such commercial and other considerations are as follows:

(i) historical links between the subsidizing and the importing country/countries;

(ii) changes in consumer taste in the importing country/countries;

(iii) particular taste or dietary demands in the importing country/countries;

(iv) difference in transportation costs and related factors between the subsidizing country and other countries in their exports to the importing country/countries;

(v) geographical and climatic situation of the subsidizing country;

(vi) marketing techniques of respective traders;

(vii) quality of the product in question;

(viii) technological changes or new or increased production capacities in the subsidizing exporting or importing country/countries.

13. The concept of "normal market conditions" plays an important rôle in selecting "a previous representative period". If in a given period the world market conditions were affected in a significant way by one or some of the special factors, then these conditions would hardly be considered as normal. The situation is much less clear if world market conditions are influenced by subsidies granted by one or many exporting countries. The ideal solution would be to seek a period when there were no subsidies.

1 Other than those referred to in paragraph 14(a) and (b).
However, in practice such an ideal approach may not always be feasible. It seems therefore that the fact that subsidies have been used during any period should not necessarily exclude this period as being representative. In selecting such a period one should not lose sight of the fact that export subsidies in existence during the selected representative period may have influenced the share of the trade obtained by the various exporting countries.

14. Special and concessional transactions, despite their apparent non-commercial nature, affect normal market conditions and could have the same practical effects as subsidized sales. This can be easily demonstrated in a situation where a country ties its non-commercial transaction (for example a grant) to a commercial sale of the equivalent amount of a product. The commercial effect of these two transactions would be the same as if the whole delivery were done on commercial terms but benefiting from a 50 per cent subsidy. There is therefore a need to include non-commercial transactions having obvious commercial effects in the volume of world export trade for purposes of Article 10:1. This should not, however, be done in such a way as to discourage their use for humanitarian and economic assistance purposes. One solution could be to agree that for purposes of Article 10:1 of the Code "world export trade" does not include non-commercial transactions in a given market if:

(a) there are no commercial sales at all from the same country to this market; or

(b) the exporting country can demonstrate that the non-commercial transaction has been notified to and found by the FAO Consultative Sub-Committee on Surplus Disposal to be likely to be absorbed by additional consumption in the importing country and where the FAO Usual Marketing Requirements provision contains adequate assurances against resale or trans-shipment.

Non-commercial transactions that do not meet the above conditions (or in cases where doubts may persist on whether these conditions have been met), may constitute subsidized sales and may result in the concerned signatory obtaining more than an equitable share and therefore should be examined on a case-by-case basis.

15. Detailed analysis of hypothetical specific cases would indicate that a certain amount of subjectivity may be involved in determining whether a subsidy has resulted in a country obtaining more than an equitable share. It seems that in order to reduce this subjectivity and to avoid some other difficulties which appeared in the past in relation to the concept of "more than an equitable share", the best approach available under the existing provisions would be to proceed on a case-by-case basis, taking into account agreed interpretations of special factors, normal market conditions, rôle

---

1 As listed in Appendix F to FAO Principles of Surplus Disposal and Consultative Obligations of Member Nations.
of non-commercial transactions, etc. This approach could also be facilitated by the following understanding:

For purposes of Article 10:1 of the Agreement:

In all cases where, in the absence of proof that special factors are responsible, the share of a country granting subsidies on the export of a primary product has increased compared to the average share it had during the previous representative period and that this increase results from a consistent trend over a period when subsidies have been granted "more than an equitable share" will be presumed to exist.

16. For the purposes of applying Article 10:1 it is recalled that there is a consensus among contracting parties that the concept of increased exports in Articles XVI:1 and XVI:3 includes maintaining exports at a level higher than would otherwise exist in the absence of a subsidy.

17. As there may be some doubts as to the linkage between Article 10:1 and 10:2(a) it may be useful to specify that in order to determine "more than an equitable share" it is not necessary to examine what happens in individual markets.

18. In order to avoid that Article 10:2(b) be used in a manner inconsistent with other provisions of Article 10, an understanding could be reached that invocation of Article 10:2(b) shall not override other provisions of Article 10.

19. In respect to the question of newcomers to the world market it may be appropriate to recall that in accordance with Note 1 to Article XVI:3 the fact that a signatory has not exported the product in question during the previous representative period would not in itself preclude that signatory from establishing its right to obtain a share of the trade in the product concerned.

20. The question of price undercutting will certainly require further (more technical) examination and it may be possible to work out certain technical guidelines (for example on the basis of export values). However, one point seems relatively clear, namely that Article 10:3 should be applicable only in a competitive situation, i.e., where at least two unrelated suppliers have been selling to a particular market. The term "unrelated" should be interpreted to mean that they are from different signatories and that there is no market-sharing agreement between them.

5. Other relevant documents

Report of the Panel on the EEC Subsidies on Export of Wheat Flour, contained in SCM/42, deals with a number of points related to the application and interpretation of Article 10 of the Agreement. This report has not been adopted, as yet, by the Committee on Subsidies and Countervailing Measures because of the divergent perceptions in the Committee regarding those points (see SCM/M/14, SCM/M/17 and SCM/M/18, paragraphs 39-59)
VII. EXPORT SUBSIDIES ON NON-PRIMARY PRODUCTS

1. GATT rules

1.1 Article XVI:4

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market ...

1.2 Note to Article XVI, Section B

2. For the purposes of Section B, a 'primary product' is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

1.3 Relevant decisions of the CONTRACTING PARTIES


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

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

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

1 Article XVI:4 entered into force as of 14 November 1962 only for the seventeen countries which have accepted the Declaration giving effect to the provisions of Article XVI:4. These countries are: Austria, Belgium, Canada, Denmark, France, Germany, F.R., Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Switzerland, United Kingdom, United States and Zimbabwe. The Declaration was accepted by the United States "with the understanding that this Declaration shall not prevent the United States as part of its subsidization of exports of a primary product, from making a payment on an exported processed product (not itself a primary product), which has been produced from such primary product, if such payment essentially limited to the amount of the subsidy which would have been payable on the quantity of such primary production of the processed product."
(d) The exemption, in respect of exported goods, of charges or taxes, other than charges in connection with importation, or indirect taxes levied at one or several stages on the same goods if sold for internal consumption; or the payment, in respect of exported goods, of amounts exceeding those effectively levied at one or several stages on these goods in the form of indirect taxes or of charges in connection with importation or in both forms;

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

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

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

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

The Working Party agreed that this list should not be considered exhaustive or to limit in any way the generality of the provisions of paragraph 4 of Article XVI. It noted that the governments prepared to accept the declaration (giving effect to the provisions of Article XVI:4) agreed that, for the purpose of that declaration, these practices generally are to be considered as subsidies in the sense of Article XVI:4 or are covered by the Articles of Agreement of the International Monetary Fund. The representatives of governments which were not prepared to accept that declaration were not able to subscribe at this juncture to a precise interpretation of the term "subsidies", but had no objection to the above interpretation being accepted by the future parties to that declaration for the purposes of its application."

- In the three 1976 Panel reports on Income Tax Practices maintained by France, Belgium and the Netherlands, which were adopted on 7-8 December 1981 (BISD 23S/114, 127 and 137 and 28S/114) "The Panel noted that the contracting parties that had accepted the 1960 Declaration had agreed that the practices in the illustrative list were generally to be considered as subsidies in the sense of Article XVI:4. The Panel further noted that these contracting parties considered that, in general, the practices contained in the illustrative list could be presumed to result in bi-level pricing ... The Panel concluded, however, from the words 'generally to be considered' that these contracting parties did not consider that the presumption was absolute. The Panel considered that, from an economic point of view, there was a presumption that an export
subsidy would lead to any or a combination of the following consequences in the export sector: (a) lowering of prices, (b) increase of sales effort, and (c) increase of profits per unit."

- In the Panel report on Export Inflation Insurance Schemes, adopted on 25 July 1979, (BISD 26S/330) "The Panel noted the conclusions ... according to which the contracting parties which had accepted the 1960 Declaration considered that, in general, the practices contained in the illustrative list would be presumed to result in bi-level pricing ... The Panel held the view that the presumption mentioned above applied equally to practices which were not contained in the 1960 list but which had clearly been identified as export subsidies." (paragraph 12)

2. Agreement on Subsidies and Countervailing Measures

2.1 Article 9: Export subsidies on products other than certain primary products

1. Signatories shall not grant export subsidies on products other than certain primary products.

2. The practices listed in points (a) to (1) in the Annex are illustrative of export subsidies.

2.2 Illustrative list of Export Subsidies

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

1 For purposes of this Agreement "certain primary products" means the products referred to in Note ad Article XVI of the GATT, Section B, paragraph 2, with the deletion of the words "or any mineral".
(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission, or deferral of prior stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowance for waste) in the exported product.

(i) The remission or drawback of import charges in excess of those levied on imported goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes.

1See also footnotes in the original text of the Agreement on Subsidies and Countervailing Measures.
(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(1) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement.

3. Description of the problem

The problems which have arisen regarding the application and interpretation of the relevant GATT provisions related mostly to the four following areas:

3.1 Primary versus non-primary products

The most important qualitative difference in obligations with respect to export subsidies is the difference between primary and non-primary products. Since export subsidies on non-primary products are prohibited - at least as far as certain contracting parties are concerned - irrespective of their effects, while those on primary products are not, the classification of a product into one or the other category may have very serious consequences. However, some contracting parties seem to treat all agricultural products, whether in their natural or in processed form, as primary products, thus subjecting them only to the obligations under Article XVI:3. This has led several contracting parties to consider that the prohibition of export subsidies (Article XVI:4) does not apply to

1See also footnotes in the original text of the Agreement on Subsidies and Countervailing Measures.
processed agricultural products. However, the text of the General Agreement makes it clear that the distinction between Articles XVI:3 and XVI:4 is not between agricultural and non-agricultural products but between primary and non-primary (i.e. processed) products.

3.2 Subsidization of a primary product component

Another problem has arisen under Article XVI:4 of the GATT and Article 9 of the Agreement on Subsidies and Countervailing Measures. The language of these provisions prohibits the use of export subsidies on all processed products. However, it has been a long-standing practice of some contracting parties to subsidize primary product components of exported processed agricultural products. These practices are being strongly contested on legal grounds by some other contracting parties. In addition, those contracting parties considered that if subsidization of a primary component as such were allowed there could, under the existing provisions, be no disciplines effectively applicable to those subsidized primary products contained in exported processed products in so far as Article XVI:3 and XVI:4 of the GATT or Articles 9 and 10 of the Agreement on Subsidies and Countervailing Measures are concerned. It has been impossible to resolve these disagreements because of the basic difference of views on the legality of these practices.

3.3 Certain contradiction between Article 9 of the Agreement on Subsidies and Countervailing Measures and paragraph (d) of the Illustrative List

The view has been expressed that there is a certain contradiction between the flat prohibition in Article 9 of the Agreement on Subsidies and Countervailing Measures and paragraph (d) of the Illustrative List. It has to be recognized that although paragraph (d) contains ambiguities it nevertheless allows an interpretation according to which not only primary components but any components used in the production of an exported product may, subject to certain conditions (i.e. physical delivery of components which are actually available), be subsidized to cover the difference between their domestic and world market prices. In particular, the economic effects on the export market of a system consistent with paragraph (d) could be the same as the effects of a practice to subsidize primary product components of exported processed agricultural products.

3.4 Export credit practices

In various GATT fora concern has been expressed with respect to certain export credit practices. This issue still remains as a potential source of friction. The problem is that some of the obligations under the Agreement on Subsidies and Countervailing Measures have been defined in relation to an arrangement or arrangements concluded and operated, by some contracting parties, outside and independently of the GATT. Moreover, there are divergent views as to whether an export credit at a rate below the actual market rate, but consistent with such an arrangement, is (i)
nevertheless a subsidy although not a prohibited one or (ii) does not constitute a subsidy at all. This question has repercussions as to whether these types of export credits are subject to the notification requirement of Article XVI:1 or not.

4. Points raised and proposed solutions regarding subsidization of a primary product component

4.1 Report of the Panel on the EEC Subsidies on Export of Pasta Products, contained in SCM/43, deals with a number of points related to subsidization of a primary product component. This report has not been adopted, as yet, by the Committee on Subsidies and Countervailing Measures because of divergent perceptions in the Committee regarding those points (see SCM/M/18, paragraphs 1-38 and Suppl.1)

4.2 Report by the Chairman of the Committee on Subsidies and Countervailing Measures concerning uniform interpretation and effective application of the Agreement on Subsidies and Countervailing Measures contained in SCM/53

"2. The language of Article 9:1 seems to be clear, i.e. it prohibits the granting of export subsidies on products other than certain primary products. This prohibition is formulated in an unconditional way, i.e., it does not depend on other considerations, such as primary product component, methods of production or modalities of sale, etc.

3. If Article 9:1 were interpreted to allow the subsidization of primary product components then the scope and impact of Article 9 would be radically reduced as most processed products contain primary components.

4. There would, however, appear to be a certain contradiction between the flat prohibition in Article 9 and paragraph (d) of the Illustrative List. It has to be recognized that although paragraph (d) contains ambiguities it nevertheless allows an interpretation according to which not only primary components but any components used in the production of an exported product may, subject to certain conditions related to the modalities of delivery, be subsidized to cover the difference between their domestic and world market prices. In particular the economic effects on the export market of a system consistent with paragraph (d) could be the same as the effects of the present practices of some signatories to subsidize primary product components of exported processed agricultural products.

5. There is also a certain grey area between Article 9 and Article 10. A country subsidizing exports of a primary product makes it available to foreign producers at a reduced price. It seems therefore economically unsound to refuse the same benefits to its domestic producers. It is also argued that one reason for subsidizing exports of primary products is the need to dispose of surpluses. It seems that the most obvious channel to be used in such a situation is to encourage their domestic consumption, i.e., to offer them to the domestic processing industry at competitive (in relation to the world market) price.
6. If, however, subsidization of a primary component as such were allowed there would, under the existing provisions, be no discipline applicable to those subsidized primary products contained in exported processed products insofar as Article 9 and Article 10 are concerned.

7. There is a need to overcome problems identified above and to avoid possible interpretations which would allow unlimited subsidization on the basis that each processed product contains primary components. Furthermore, there is a need to bridge the gap between Articles 9 and 10 and to address the issue of economic parity in the treatment of domestic producers producing for export and of foreign producers using the subsidized primary products. It is therefore necessary to address certain solutions. The solution should preferably establish a general rule based on an agreed interpretation. If a general rule is not possible, the scope for exceptions should be clearly defined.

8. A solution may be sought through an interpretative decision on paragraph (i) of the Illustrative List. Such a decision could read:

For purposes of Article 9 the Committee decides:

If the imports of a primary agricultural product are subjected to a system for the stabilization of the domestic price or the return to domestic producers, the following interpretation of paragraph (i) of the Illustrative List will apply:

(a) The domestic producer physically incorporating in a processed agricultural product a quantity of the domestic product equal to, and having the same quality and characteristics as, the product available to him on world markets, may obtain the remission or drawback of import charges (including variable levies) which would have been levied on the same quantity of imported product had he chosen to substitute the domestic primary component by the imported primary component.

(b) Any remission or drawback in excess of what was or would have been levied by way of import charges on the corresponding quantity of primary component that has been physically incorporated will be subject to the provision of paragraph (i) of the Illustrative List.

(c) In any case (including a situation where the domestic prices are maintained at a higher level not because of charges on imports but because of quantitative or similar restrictions), the remission or drawbacks shall not be higher than the differences between the domestic price and the world market price of the primary component.

(d) The calculation of the amount of the remission or drawback will be effectuated according to the criteria to be established by the Group of Experts and approved by the Committee.

(e) The Committee shall agree on measures to be taken so as to ensure full transparency regarding the actual amount of remission of drawbacks.
(f) Domestic primary components used in accordance with paragraph (a) above shall be considered as being "internally exported" and, for the purpose of Article 10:1, shall be added to the quantities of the primary product which have been effectively exported.

(g) The methods to be used for the calculation of the amounts "internally exported" shall be developed by the Group of Experts. The Group will also propose measures ensuring full transparency as to the quantities "internally exported".

Paragraph (d) of the Illustrative List of Export Subsidies

9. Paragraph (d) in its present form, and more specifically its last part starting with "... if (in the case of products) ..." opens a door for an unlimited subsidization. In order to avoid a too permissive interpretation of this paragraph the Committee may adopt the following understanding:

The last part of paragraph (d) of the Illustrative List of Export Subsidies, starting with "... if (in the case of products) ..." shall not be taken into consideration in any determination as to the existence of a prohibited export subsidy."

4.3 Recommendations: Draft Elaboration - Note prepared by the secretariat in consultation with the Chairman, AG/W/9/Rev.3, Annex B-II

"Export Subsidies on Primary Products Incorporated in Processed Agricultural Product

18. By virtue of paragraphs 3 and 4 of Article XVI no export subsidy may be granted directly or indirectly on an agricultural product unless it is a primary agricultural product 'in its natural form', or a primary agricultural product which has only undergone 'such processing as is customarily required to prepare it for marketing in substantial volume in international trade'. The prohibition of subsidies on the export of agricultural products other than primary agricultural products as defined, is unconditional. To consider sugar incorporated as an ingredient in biscuits as a primary product in its 'natural form', or baking as a process customarily required to prepare sugar for marketing in substantial volume in international trade, would deprive the Article XVI:4 prohibition of any substance in relation to non-primary agricultural products.

19. One possible interpretation of paragraph (d) of the Subsidies Code illustrative list is that any agricultural primary product used as an input in the production of an exported product may, under certain terms and conditions, be subsidized to cover the difference between the domestic and world market prices of the input. Another possible interpretation would involve construing 'commercially available on world markets to their exporters' to mean that the extent of the permitted subsidization should be limited to the difference between the price of the internally produced
input and the price at which the same input is in fact commercially available to export manufacturers, i.e. the landed duty paid price. That a drawback of duty may be granted to export manufacturers, which would at least favour international trade, is of somewhat doubtful relevance in the present context, as is the fact that export manufacturers in third countries, presumably as a result of more liberal import regimes, may happen to enjoy access to agricultural raw materials at subsidized world market prices.

20. However this may be, the basic issue is one that is not likely to be resolved by splitting legal hairs but rather by deciding whether the widespread practice of subsidizing, directly and indirectly, incorporated primary agricultural products should be permitted, prohibited or limited.

21. One approach involving elements of both limitation and prohibition would be to:

(i) limit the method of subsidization to the supply ex store of the agricultural primary product input to export manufacturers at the world market prices in respect of products for which recognized international price quotations exist;

(ii) subject processed agricultural exports subsidized in accordance with (i) above to the disciplines suggested in respect of a reinforced Article XVI:1 on the basis that serious prejudice would be deemed to exist, unless the subsidizing exporter is able to establish affirmatively that the domestically produced agricultural input has been supplied at a price which is not less than the ruling world market price;

(iii) prohibit the subsidization of agricultural primary product inputs to processed products in respect of which the 'added value' of the input is less than [ ] per cent of the value of the processed product."

4.4 AG/W/9/Rev.3, Annex C-IV

"15. A prohibition on the granting, directly or indirectly, of any form of subsidy, including any form of price or income support, which operates to increase the export of any agricultural primary product, would preclude the use of direct export subsidies on agricultural primary products incorporated in processed products. The supply by producers themselves of agricultural primary products to export manufacturers at prices which they would otherwise obtain on the world market, would obviously not be inconsistent with the prohibition. Somewhat different considerations could come into play where, for example, the proceeds of a mandatory export financing levy were to be used to subsidize the supply of inputs to export manufacturers. It is suggested that one approach would be to adopt the solution suggested in paragraph 21 of Annex B-II as an ad hoc transitional arrangement, with provision possibly being made thereafter for a progressively higher requirement in terms of the added value of the primary component."
4.5 AG/W/9/Rev.3, paragraph 63 (iv)

"... exceptions applicable to an agricultural product in its primary form should also apply to the same product when incorporated in a processed product."

5. Points regarding export credits raised in the Committee on Subsidies and Countervailing Measures (SCM/M/11 and SCM/M/13)

One view was that:

- according to item (k) of the Illustrative List all export credits which were in conformity with the OECD Arrangement in this area did not constitute subsidies and consequently are not notifiable.

- paragraph (k) stated that certain practices were not prohibited export subsidies, on the other hand Article XVI:4 made it clear that all export subsidies were prohibited. Consequently if paragraph (k) considered a practice as not being a prohibited export subsidy it meant that this practice was not an export subsidy at all.

Another view was that:

- the language of paragraph (k) was absolutely clear. It said that certain programmes should not be considered as prohibited export subsidies. It did not say that they were not export subsidies, it only said that they were not prohibited by the Agreement on Subsidies and Countervailing Measures. The notification of a subsidy programme had no implication that there was something illegal about having such a programme. Export credit programmes, if consistent with paragraph (k), were certainly legal under the Agreement on Subsidies and Countervailing Measures, however one should not pretend that these practices were not export subsidies;

- There were certain types of export subsidies which were not prohibited by the Agreement on Subsidies and Countervailing Measures, for example export subsidies for certain primary products. The addition of the words "prohibited by the Code" meant an acknowledgment that there were certain types of subsidies which were prohibited and others which were not. The language of paragraph (k) was clear and nobody would reasonably interpret it that if a practice was not a prohibited export subsidy it was not a subsidy at all. The second part of paragraph (k) provided for an exception to the prohibition contained in the first part and not to the obligation of Article XVI:1 of the GATT.

- paragraph (k) enumerates practices which are forbidden by the Agreement on Subsidies and Countervailing Measures, but it also contains a derogation from the general rule. The second part of paragraph (k) means that the practices covered by it were not
considered as prohibited export subsidies and therefore are not inconsistent with the Agreement on Subsidies and Countervailing Measures. However one should not pretend that they are not subsidies and for this reason the obligation of Article XVI:1 also covers this kind of practice.

Paragraph (k) provides that if export credits granted at such rates as to be considered export subsidies are in conformity with the OECD Arrangement then they are not considered as prohibited practices. This is only a qualification as to the legality or non-legality but it does not change the fact that these practices are subsidies which increase exports and therefore they should be notified. Furthermore these subsidies are countervailable if they cause injury.
VIII. SPECIAL TREATMENT FOR DEVELOPING COUNTRIES

1. **GATT rules**

   Article XVI of the General Agreement does not contain any special provision regarding developing countries. However, the prohibition to use export subsidies on exports of non-primary products is applicable only to those contracting parties which have signed the 1960 Declaration Giving Effect to the Provisions of Article XVI:4 (see page 70). Consequently all developing countries, except one, are not bound by this prohibition.

2. **Agreement on Subsidies and Countervailing Measures - Article 14 - Developing countries (main provisions)**

   2.3 Article 14 - Developing countries

1. Signatories recognize that subsidies are an integral part of economic development programmes of developing countries.

2. Accordingly, this Agreement shall not prevent developing country signatories from adopting measures and policies to assist their industries, including those in the export sector. In particular the commitment of Article 9 shall not apply to developing country signatories, subject to the provisions of paragraphs 5 through 8 below.

3. Developing country signatories agree that export subsidies on their industrial products shall not be used in a manner which causes serious prejudice to the trade or production of another signatory.

4. There shall be no presumption that export subsidies granted by developing country signatories result in adverse effects, as defined in this Agreement, to the trade or production of another signatory. Such adverse effects shall be demonstrated by positive evidence, through an economic examination of the impact on trade or production of another signatory.

5. A developing country signatory should endeavour to enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs.

3. **Relevant Decisions by the Committee on Subsidies and Countervailing Measures**

   3.1 At its 28 March 1980 meeting, the Committee on Subsidies and Countervailing Measures took the following decision on procedures concerning commitments to be undertaken under Article 14:5 (SCM/M/2, paragraphs 5 and 31):
"In accordance with footnote 32 to Article 14:5, countries intending to enter into a commitment under Article 14:5 should notify the Committee in good time. For this purpose they are invited to notify the Chairman of the Committee of the proposed commitments at least forty-five days before the matter is taken up by the Committee."

3.2 This decision was accompanied by a statement by the Chairman concerning the operation of this decision (SCM/M/2, paragraph 36):

"(a) The Chairman will seek to consult informally with signatories and the country proposing to undertake the commitment before formally putting the commitment before the Committee;

(b) when the matter comes before the Committee, signatories of the Agreement may request the Committee:

(i) to seek further clarification and information on the proposed commitment;

(ii) to examine, in the light of the provisions of Article 14:5, the applicability of the provisions of Articles 14:6 and 14:8 to the proposed commitment;

(c) the Committee then takes note of the commitment."

4. Description of the problem

The Agreement on Subsidies and Countervailing Measures provides for special treatment for developing countries regarding export subsidies on non-primary products (as defined by the Agreement, i.e. including minerals) only. It maintains, therefore, the existing legal situation of developing countries under the General Agreement with one important modification, namely that their right to use export subsidies on non-primary products is formally recognized. This right is, however, subject to the qualification that these subsidies shall not be used in a manner which causes serious prejudice to the trade or production of another signatory. The only provision of Article 14 which has been discussed in the Committee on Subsidies and Countervailing Measures is its paragraph 5. The question has arisen as to whether developing countries, when adhering to the Agreement on Subsidies and Countervailing Measures must necessarily make a commitment so that other signatories extend to them the benefits of the Agreement, including the injury test, in the application of countervailing duties. The difficulties in negotiating the commitment referred to above have affected accession of a number of developing countries to the Agreement."
5. Main issues raised and proposals made in the Committee on Subsidies and Countervailing Measures

5.1 Statement by the representative of the United States at the meeting of 8 May 1980

"The representative of the United States believed that the Agreement negotiated on subsidies and countervailing measures in the MTN was one of the most important, perhaps the most important, agreement emanating from the MTN. The United States had long sought greater discipline over the use of subsidies that conferred unfair competitive advantages upon the products of the subsidizing country and believed that the new subsidies/countervailing Agreement was a significant initial step in this direction. He also believed that through the Agreement significant gains had been made in the area of transparency with respect to the use of subsidies, in the area of consultation, conciliation, and dispute settlement procedures at the international level: and in the area of transparency and due process with respect to the administration of domestic countervailing duty laws and regulations. He said that the United States was pleased that the Agreement finally laid out an agreed international framework for taking countervailing actions in respect of problems generated by the use of trade distorting subsidies. He recalled that the United States had taken the necessary legislative and administrative steps to implement fully its obligations under this Agreement, and the relevant United States laws and regulations in the countervail area had been notified in SCM/1/Add.3. He believed it crucial that all signatories implemented the Agreement on a timely basis, both on the subsidies side and on the countervailing measure side, in fulfilment of their obligations. He expected that a systematic review of how signatories had implemented the Agreement would be undertaken by the Committee this autumn. Referring to the procedures for dealing with export subsidy commitments made by developing countries as called for by Article 14:5, he said that his own informal contacts with developing countries had led him to believe that considerable uncertainty remained as to the position of the United States with respect to commitments by developing countries in the export subsidy field. He recalled that the United States' countervailing duty law was enacted in 1897 without an injury test. Under the protocol of provisional application, this law was consistent with the GATT obligations of the United States. When the United States expanded the scope of the countervailing duty law to cover duty-free imports in 1975, an injury test was included for such imports to comply with their GATT obligations. Prior to the negotiation of the subsidies code, the United States still had no injury test in its domestic countervailing law for dutiable merchandise. One of the major objectives of the trading partners of the United States in negotiating this code was to have the United States expand its injury test to dutiable products and to make the test one of 'material injury'. The fundamental negotiating position of the United States had been that they would give other countries a material injury test in their law..."
for dutiable, as well ad duty-free, products in return for increased discipline over other countries' trade distorting subsidy practices. Essentially, this remained their position. With respect to developing countries, he believed that increased discipline entailed commitments by developing countries to bring their export subsidy practices into line with their own particular trade and development needs. In some developing countries, this implied a less rigorous reduction of export subsidies. The United States' position was that it could extent the benefits of an injury test in its law only to those countries that had undertaken increased discipline in the subsidies area. In the case of developing countries, this meant that the United States could only apply its new countervailing duty law to those developing countries that had undertaken commitments with regard to their export subsidies practices. The United States was flexible as to the contents of these commitments, as long as there was a commitment to eliminate export subsidies as soon as possible depending upon a country's competitive and development needs. The United States was anxious to have developing countries sign this Agreement and to extend the benefits of their new countervailing duty law, including an injury test, to them. He said that while he in no way contested the right of any country to sign this code without the commitments he had referred to, his Government would find it impossible to apply their new law to imports from developing countries which did not provide commitments."

(ScM/M/3, paragraph 11)

5.2 Statement by the observer for India at the meeting of 8 May 1980*

"The observer for India joined the observer for Colombia in stressing the concern that the statement by the representative of the United States had caused to developing countries, potential signatories to this Agreement, and the danger that such restrictive interpretations were taking the goal of developing countries' participation further away. He recalled his statement made on behalf of developing countries at the March meeting of the Committee. He was happy to note that the United States were not questioning the right of developing countries to accede to the Agreement without any commitments being made in terms of Article 14:5. He was concerned that despite this recognition, the United States had, in their domestic legislation, provisions which necessitated these commitments, at least in terms of application of the injury test to developing countries. In terms of logic one would tend to draw the conclusion that the United States legislation was not in line with the provisions of the Agreement, not even in line with their interpretation of the provisions of the Agreement. He hoped that the Committee would include this aspect of the United States' domestic legislation in its systematic review. He stressed that several aspects of the

* Other statements on this issue are contained in SCM/M/2, paragraphs 5-38, SCM/M/3, paragraphs 11-24 and SCM/M/19, paragraphs 4-20 and 46-62.
United States policy and of its implementation of the Agreement were still not clear to him. How could one talk about commitments 'across-the-board' in terms of all developing countries? Who would decide what a developing country's competitive needs were apart from that country itself? Would it be an across-the-board decision irrespective of the requirements and needs of a particular developing country? These matters should also be reviewed when the Committee undertook the review of the United States legislation. He also considered it inconsistent with the Agreement that the United States legislation established a link between Articles 14:5 and 19:9. He strongly endorsed the view expressed by the observer for Colombia that this approach nullified benefits under Articles 14:1 and 14:2 and jeopardized the balanced of interests that developing countries had secured in this Agreement." (SCM/M/3, paragraph 18)

5.3 Statement of the Chairman of the Committee at its meeting of 19 March 1985

"First, from the legal point of view there were no obstacles, as such, to acceptance of the Code by any contracting party. The only requirement was a procedural one, i.e. to deposit an appropriate instrument of acceptance with the Director-General of the GATT and following thirty days after, the Code would enter into force for any such contracting party. To say that there were obstacles to acceptance, inherent in the Code, was therefore not correct. The general term of 'obstacles' had been used to cover bilateral problems which might arise between certain contracting parties, in particular the fact that one major signatory was extending benefits of the Code only to those developing countries which had made commitments under Article 14:5. In view of this legal situation he wished to stress that what the Committee had to do here had not so much to deal with legal problems or with general GATT problems but with a practical problem which could hardly be defined in Code terms. This was why a practical solution had been sought. One should therefore look at this solution from a practical point of view and be aware that any attempt to place this solution strictly within the legal framework of the Code may prove unsuccessful. The proposed procedures in SCM/W/86/Rev.2 were voluntary and optional and nobody was obliged to use them and they could not affect, in any way, the existing rights and obligations of Code signatories." (SCM/M/28, paragraph 3)

5.4 Draft Procedures concerning Commitments under Article 14:5 - Proposal by the Chairman (SCM/W/86/Rev.2, paragraphs 2-5)

"2. If a developing country acceding to the Code elects to enter into a commitment it may wish to state that:

(a) it will reduce or eliminate its export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs; and
(b) it will consult with the Committee on any export subsidy practice which any signatory, in the light of paragraph 4 below, considers appropriate to be the subject of a commitment and will take, as appropriate, a Committee's recommendation into account.

3. Any signatory which has reason to believe that a commitment would be appropriate in respect of a specific export subsidy practice of the acceding country may notify such a practice to the Committee.

4. There shall be no presumption that export subsidies granted by an acceding country on a particular product should be the subject of a commitment. Any such contention must be substantiated by positive evidence that one or more of the following conditions holds:

(a) the acceding country is an established supplier*, and the amount of the export subsidy on the product in question has increased* compared to the subsidy received by other suppliers;

(b) the export subsidy in question results in prices of an established supplier being materially below those of other suppliers to the same market;

(c) the export subsidy in question results in the acceding country's supplies of a product to an individual market accounting for more than 50 per cent of all imports of this product into the market concerned;

(d) the export subsidy has been found to cause injury to the domestic industry in the complaining signatory and is subject to a final countervailing duty measure at the time of accession.*

In a situation where any of the above-noted conditions has been demonstrably shown to exist and one or more other countries are granting subsidies on exports to the market in question, the acceding country which can substantiate that its subsidies are equal to or below the average should not be subject, in this market, to more severe disciplines than the other countries.

5. The Committee shall review the practice and shall make an appropriate decision. If, as a result of its review, the Committee concludes that the practice in question should be the subject of a commitment, it shall make a recommendation to the acceding country to include such a practice into its commitment, i.e. to eliminate or reduce the subsidy in question or to eliminate its prejudicial effect."

* See footnotes in SCM/W/86/Rev.2, page 2.
At its special meetings held (in pursuance of the decision of the CONTRACTING PARTIES of 30 November 1984) in March and April 1985 (SCM/M/26 and SCM/M/28), the Committee examined the above-noted proposal (SCM/W/86/Rev.2). Some signatories considered that the procedures as drafted did not adequately address the basic problem relating to the application of Article 14:5 and that the proposed procedures could affect the balance of their rights and obligations. Interested developing country observers in the Committee, however, supported the adoption of the draft procedures. The Committee was unable to agree on the procedures and, in the absence of any other concrete proposals, requested the Chairman to hold further consultations.

5.5 At its meeting held in April 1986 the Committee on Subsidies and Countervailing Measures established a Working Party to examine obstacles which contracting parties face in accepting the Agreement. The Working Party met on 13 June 1986. It had a first exchange of views and requested the secretariat to prepare a note on the operation of Articles 14:5 and 19:9 of the Agreement. This note has been circulated in SCM/W/116.
GUIDELINES IN THE DETERMINATION OF SUBSTITUTION
DRAWBACK SYSTEMS AS EXPORT SUBSIDIES*

I

Drawback systems can allow for the refund or drawback of import charges on goods which are incorporated into another product and where the export of this latter product contains domestic goods having the same quality and characteristics as those substituted for the imported goods. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies annexed to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Code) substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported goods for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to the Code, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market goods may be substituted for imported goods in the production of a product for export provided such goods are equal in quantity to, and have the same quality and characteristics as, the imported goods being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting country to ensure and demonstrate that the quantity of goods for which drawback is claimed does not exceed the quantity of similar goods exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported goods in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting country has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine

*These Guidelines, adopted by the Committee on Subsidies and Countervailing Measures on 1 November 1984, have been circulated in document SCM/58 of 9 January 1985. One issue which is not address in these Guidelines and which has been discussed by the Group of Experts on the Calculation of the Amount of a Subsidy is the limitation of the time period mentioned at the end of paragraph (i) of the Illustrative List of Export Subsidies.
the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with Article 2:8 of the Code, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting country based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the importing country deemed it necessary a further examination would be carried out in accordance with paragraph 2 above.

4. The existence of a substitution drawback provision wherein exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.
ANNEX II

GUIDELINES ON AMORTIZATION AND DEPRECIATION*

1. Certain subsidies exist which should be spread over time. In such cases, the investigating authority in the importing country should determine the appropriate time period, and decide how much of the subsidy should be allocated to each time-period.

2. Financial and accounting theory and practice do not provide any single acceptable method of determining the appropriate time-period over which subsidies should be allocated. However, the method selected by the investigating authorities should be based on reasonable and generally accepted financial and accounting practices. The guidelines in paragraphs 3, 4 and 5 below list reasonable alternatives for the amortization and depreciation of subsidies arising from loans and grants. It is understood that the rationale for the method chosen by the authorities should be explained fully to all interested parties and an opportunity be provided to comment on its reasonableness.

Common issue

3. When an investigating authority determines the average useful life of an asset (or group of assets) for the purposes of allocating subsidies over time:

3.1 The investigating authorities may endeavour to minimize the impact of differences in book-keeping methods on subsidy amounts found;

3.2 The investigating authority should select a reasonable period for the firms being investigated.

Loans

4. When allocating the subsidy arising from a loan:

4.1 The investigating authorities may allocate th subsidy arising from the loan over the life of the loan itself, on the rationale that the loan affects the financial position of the recipient throughout the life of the loan.

4.1.1 A subsidy arising from a medium- or long-term loan may be allocated over the life of the loan.

*These Guidelines, adopted by the Committee on Subsidies and Countervailing Measures on 31 May 1985, have been circulated in document SCM/64.
4.1.2 A subsidy arising from a short-term (1-year or less) loan would be allocated to the year in which the subsidy effect accrues to the firm (i.e. the date(s) of repayments).

4.1.3 A medium- to long-term loan with a floating interest rate may be considered to be a series of short-term loans for purposes of the investigating authorities, since the interest rate(s), and therefore the subsidy amount, for later years may not be determinable at the time of the investigation.

4.2 Alternatively, the investigating authority may allocate the subsidy arising from the loan:

4.2.1 In the case that a subsidized loan is used for the acquisition of physical assets such as plant or equipment used in the production of a particular product or group of products: over a period of time reflecting the life of the physical assets used in such production, on the rationale that the subsidy is conferred on the production of those products.

4.2.2 In the case that the subsidized loan is not used for the acquisition of physical assets such as plant or equipment used in the production of a particular product or group of products designated by the authority providing the loan: over a reasonable period reflecting the average commercial life of assets.

Grants

5. When allocating the subsidy arising from a grant:

5.1 The investigating authorities may attempt to determine a reasonable period based on the average life of assets owned by the firm, or if appropriate, a division of the firm. (The Committee recognizes that this latter determination will depend in part upon the terms of the grant and the corporate structure of the recipient of the grant.) The rationale for this approach is that while the benefit of a grant (that is, elimination of financial obligations the recipient company would otherwise incur) has no exact correlation to the life of any assets purchased with the grant, allocating the grant over the average life of renewable physical assets is one generally practical, fair, and consistent method of allocation.

5.2 Alternatively, the investigating authorities may:

5.2.1 In the case that the grant is used for the acquisition of assets needed to produce a particular producer or group of products designated by the granting authority, allocate
the subsidy over a period of time reflecting the life of the assets so used, on the rationale that the subsidy is conferred on the production of those products.

5.2.2 In the case that the grant is not used for the acquisition of physical assets such as plant or equipment used in the production of a particular product or group of products, allocate such a grant over a reasonable period reflecting the average commercial life of assets.
ANNEX III

GUIDELINES ON PHYSICAL INCORPORATION*

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior stage cumulative indirect taxes levied on goods that are physically incorporated (making normal allowance for waste) in the exported product. Similarly, drawback schemes can allow for the remission or drawback of import charges levied on goods which are physically incorporated (making normal allowance for waste) in the exported product.

2. The Illustrative List of Export Subsidies annexed to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement (the Code) makes reference to the term "physically incorporated" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior stage cumulative indirect taxes in excess of the amount of such taxes actually levied on goods physically incorporated in the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on goods that are physically incorporated in the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding physical incorporation. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are physically incorporated, as part of a countervailing duty investigation pursuant to the Code, investigating authorities should proceed in the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs physically incorporated, the investigating authorities should first determine whether the government of the exporting country has in place and applies a system or procedure to confirm which inputs are physically incorporated and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based

*These Guidelines, adopted by the Committee on Subsidies and Countervailing Measures at its meeting of 23-24 October 1985, have been circulated in document SCM/68.
on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with Article 2:8 of the Code, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting country based on the actual products involved would need to be carried out in the context of determining whether an excess payment occurred. If the importing country deemed it necessary, a further examination would be carried out in accordance with paragraph 1 above.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The signatories note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input which is physically incorporated, a "normal allowance for waste" should be taken into account, and such waste should be treated as physically incorporated. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not physically present in the final product (for reasons such as inefficiencies) and is not recovered, used not sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting country have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

*With respect to inputs, such as catalysts, which are consumed in the course of their use to obtain the exported product and which are not mere aids to manufacture, the relationship between signatories rights to grant remission or drawback of import charges in accordance with the rules laid down in the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention) and its annexes and paragraphs 3 and 4 of these guidelines was not decided.
DRAFT GUIDELINES FOR THE APPLICATION OF THE
CONCEPT OF SPECIFICITY IN THE CALCULATION
OF THE AMOUNT OF A SUBSIDY OTHER THAN
AN EXPORT SUBSIDY*

I

It is recognized that the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade intended that only certain government financial assistance measures - those measures which are granted "with the aim of giving an advantage to certain enterprises" and which "are normally granted either regionally or by sector" (Article 11:3) - were to be considered as subsidies.

II

In seeking to determine whether government financial assistance measures (hereafter referred to as a measure) are specific to an enterprise or industry or group of enterprises or industries (hereafter referred to as certain enterprises), and as such grant an advantage to those enterprises or industries over those available to other enterprises or industries the following considerations shall be taken into account:

(a) A measure may be specific to certain enterprises to the extent that restrictions on access are placed by the granting authority;

(b) In determining whether any restrictions on access to a measure exist, only those restrictions which affect access within the jurisdiction of the granting authority are to be taken into account;

(c) Where the granting authority explicitly limits access to a measure to certain enterprises, such a measure would be specific;

(d) Where the granting authority acts to exclude certain enterprises from access to a measure, specificity may or may not exist;

(e) Where the granting authority establishes certain criteria or conditions for eligibility, no specificity would normally exist to the

* These draft Guidelines were submitted to the Committee on Subsidies and Countervailing Measures by the Group of Experts on the Calculation of the Amount of a Subsidy on 25 April 1985 (SCM/W/89).
extent that the criteria or conditions for eligibility were based on neutral factors and eligibility was automatic once the criteria or conditions were met;

(f) Evidence based on the above may not in certain cases give sufficient guidance for a finding of non-specificity. It may be necessary in those cases for the investigating authority to look beyond any nominal non-specificity of a measure to determine whether the measure is, nonetheless, de facto deliberately granting an advantage to certain enterprises. Any determination of specificity in such cases must be clearly substantiated;

(g) Where neutral criteria are used by governments to determine access to a measure, they must be clearly spelled out in law or regulation and be capable of verification. In this regard, the granting authority should ensure that assistance is granted on the basis of the criteria established.

III

In calculating the amount of the subsidy determined to exist in cases where the different potential subsidy programmes under consideration involve different levels of granting authority (e.g. national, regional, local), only measures found to be specific within the jurisdiction of the granting authority for that measure shall be considered.

1 Neutral factors would normally be economic in nature, and horizontal in application, (i.e. not restricted to certain enterprises or industries); examples would be levels of unemployment, average per capita income, number of employees, amount of equity or revenues, but could also include such factors as incidence of pollution or health and safety standards.

2 It remains for signatories to address the issue of regional specificity.
ANNEX V

RECOMMENDATION CONCERNING DETERMINATION OF
THREAT OF MATERIAL INJURY*

1. Article VI:6 of the General Agreement provides that no contracting party shall levy any anti-dumping duty on the importation of any product of the territory of another contracting party unless it determines that the effect of dumping is such as to 'threaten material injury to an established domestic industry'. Thus, the GATT recognizes that there are certain limited circumstances in which anti-dumping action is justified even before injury has actually materialized, as well as the danger of taking an anti-dumping action too easily and without sufficient evidence of injury or threat of injury. Nevertheless Article VI:1 recognizes that dumping is to be condemned if it threatens material injury to an established industry in the territory of a contracting party.

2. However, Article 3:6 of the Anti-Dumping Code cautions that "a determination of threat of injury shall be based on facts and not merely on allegation, conjecture, or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent." One example given is when there is a convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices.

3. The change in circumstances of which Article 3:6 speaks may also occur during an anti-dumping investigation. Even where the basis for the initiation of an anti-dumping investigation was sufficient evidence of threat of material injury (as well as dumping and causal link), actual material injury may have occurred by the end of the investigation, when the final determination concerning injury is made.

4. On the other hand the change in circumstances during an anti-dumping investigation may also lead to a situation of neither threat of injury nor material injury.

5. It is important to domestic producers that anti-dumping procedures and anti-dumping relief be available in cases where dumping and threat of material injury are present but before injury has actually materialized, as Article VI of the General Agreement recognizes. However, as the Anti-Dumping Code provides, anti-dumping relief based on the threat of injury must be confined to those cases where the conditions of trade clearly indicate that material injury will occur imminently if demonstrable trends in trade adverse to domestic industry continue, or if clearly foreseeable adverse events occur.

*This Recommendation, adopted by the Committee on Anti-Dumping Practices in October 1985, has been circulated in ADP/25.
6. Thus, for a determination of threat of injury to be made consistent with Article 3:6, the predicted future injury must be "clearly foreseen", and must also be "imminent". In addition dumping must have taken place.

7. As any prediction of future injury is based on a forecast of likely effects in the marketplace, an examination of whether future injury is "clearly foreseen" must focus on the reasonableness and reliability of different forecasts.

8. Moreover no matter how reliable a forecast of future injury might be, the time when that injury will actually materialize may be too remote to merit the taking of anti-dumping action. The determination of whether future injury is "imminiment" in this context must depend on the facts and commercial realities in each case.

9. In making a determination regarding threat of material injury, with due regard to Article 3 of the Anti-Dumping Code, the administering authority should consider inter alia such factors as:

   a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importations thereof;

   sufficient freely disposable capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing country's market taking into account the availability of other export markets to absorb any additional exports;

   whether exports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further exports; and

   inventories in the importing country of the product being investigated.

It is understood that no one of these factors by itself can necessarily give decisive guidance but that the totality of factors considered must lead to the conclusion that further dumped exports are imminent and that unless protective action is taken, material injury would occur.