MINUTES OF THE MEETING
HELD ON 12 JUNE 1995

Chairman: Mr. Mohan Kumar (India)

1. The Committee on Anti-Dumping Practices held a regular meeting on 12 June 1995.

2. The Committee adopted the following agenda:

   A. Election of Vice-Chairman
   B. Legislation and regulations (ADP/1 and addenda)
   C. Semi-annual reports of anti-dumping actions taken within the period 1 July-31 December 1994 (ADP/134 and addenda)
   D. Reports on all preliminary or final anti-dumping duty actions (ADP/W/385)
   E. European Community - Anti-dumping duties on audio cassettes originating in Japan - Report of the Panel (ADP/136)
   F. United States - Imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden - Report of the Panel (ADP/47)
   G. United States - Imposition of anti-dumping duties on gray Portland cement and cement clinker from Mexico - Report of the Panel (ADP/82)
   I. European Community - Anti-dumping investigation on imports of 3.5 inch magnetic disks from Hong Kong - Report of the Panel (ADP/123; ADP/M/44, paragraphs 157-167)
   J. Guidelines for information provided in the semi-annual reports (ADP/122; ADP/M/44, paragraph 73)
   K. Ongoing Panels and other dispute settlement issues
   L. Other business
A. Election of Vice-Chairman

3. The Committee elected Mr. John McNab of Canada Vice Chairman of the Committee.

B. Legislation and regulations

4. The Chairman recalled that a process for the review of legislation and regulations was planned in the WTO Committee on Anti-dumping Practices. The Chairman proposed that this review process not be repeated in this Committee.

5. The Committee so decided.

C. Semi-annual reports of anti-dumping actions taken within the period 1 July-31 December 1994

6. The Chairman recalled that an invitation to submit semi-annual reports under Article 14.4 of the Agreement was circulated on 27 January 1995 (ADP/134). Pursuant to the decision of the WTO Committee at its 21 February 1995 meeting, semi-annual reports for that period were to be submitted to the WTO Committee, and had been on the agenda of that Committee’s meeting that morning. Semi-annual reports notified to the WTO Committee on Anti-Dumping Practices are deemed also to be a notification under Article 14.4 of the Agreement, pursuant to the Committee’s decision regarding Avoidance of Procedural and Institutional Duplication at its meeting of 21 February 1995 (ADP/135). However, anti-dumping actions taken in the second half of 1994 were, obviously, taken pursuant to the requirements of the Tokyo Round Agreement. Consequently, as was noted at the WTO Committee meeting that morning, actions taken in the second half of 1994 were perhaps most appropriately discussed in this Committee.

7. The Chairman noted that Austria, the Czech Republic, Egypt, Finland, Hong Kong, Hungary, Indonesia (Observer), Malaysia (Observer), Malta (Observer), Nicaragua (Observer), Norway, Poland, Romania, the Slovak Republic, Slovenia, Sweden, Switzerland, and Trinidad & Tobago (Observer) had notified that they took no actions during the period.

8. No report was received from Pakistan. Of the 17 reports received by the Committee, all but four had been circulated to Parties in all three working languages. The reports of Brazil, India and the United States had not yet been translated, but had been circulated in at least English. The report of Mexico was only received by the Secretariat during the previous week, and had not yet been circulated to Parties, and therefore could not be considered at this time. As was noted at the WTO Committee meeting, the Secretariat would be circulating by 1 July an addendum to ADP/134, which would summarize the status of notifications, including a list of Parties which have not yet notified.

9. The delegate of Hong Kong noted that Turkey had reported an investigation involving non-refillable pocket flint lighters imported from Hong Kong. Hong Kong thanked the Turkish delegation for the update on the outcome of the investigation provided just prior to the meeting. However, Hong Kong remained concerned because it had only recently, in March, become aware of the investigation despite its having been commenced in September of 1994. Hong Kong found it unfortunate that the Turkish authorities had not informed it of the initiation of the investigation. While Turkey, as an Observer to the Committee, was not obligated by the Code to inform Hong Kong of the initiation, early notice of anti-dumping actions would be appreciated in the future. Even in the absence of any action against imports from Hong Kong, Hong Kong remained interested in information about the complaint and investigation, including matters concerning initiation. Hong Kong was pursuing the matter with the Turkish Consul General in Hong Kong.

10. The Committee took note of the statements.
D. Reports on all preliminary or final anti-dumping duty actions

11. The Chairman recalled that a list of the notifications of preliminary and final anti-dumping actions received by the WTO Committee on Anti-Dumping Practices had been circulated to Parties in ADP/W/385. In view of the Committee's decision on Avoidance of Procedural and Institutional Duplication, these notifications to the WTO Committee on Anti-Dumping Practices were deemed also to be notifications to the Committee. Copies of the official notices of such actions taken by Australia, Canada, the European Community, Korea, New Zealand, Singapore, and the United States, had been made available in the Secretariat for review. The Chairman noted that at its meeting on 21 February 1995, the WTO Committee decided that Members could indicate in their reports whether actions were taken under the Tokyo Round Agreement, or the Uruguay Round Agreement. Some Parties did so, others did not. To the extent that an action reported was taken under the Tokyo Round Agreement, as was noted in the WTO Committee meeting, it might be more appropriately discussed during this meeting.

12. The Committee took note of the Chairman's statement.

E. European Community - Anti-dumping duties on audio cassettes originating in Japan - Report of the Panel

13. The Chairman recalled that its regular meeting in October 1992, the Committee established a Panel in this dispute. The Committee was informed on 29 April 1993 of the terms of reference and the composition of the Panel. The Report of the Panel was circulated to the Committee in ADP/136 on 28 April 1995 and Corr.1 of 8 June 1995. The Chairman thanked the members of the Panel for their work in this matter. As the members of the Panel could not attend this meeting, the Chairman read the following statement on behalf of the Chairman of the Panel.

14. "The dispute before the Panel concerned the imposition by the European Community of definitive anti-dumping duties on imports of audio cassettes from Japan. Japan claimed that the European Community was in breach of its obligations under Articles 2, 3 and 8 of the Agreement.

(a) The Panel met with the parties to the dispute on 8-9 February and 10 May 1994.

(b) The Panel submitted its findings and conclusions to the parties to the dispute on 11 April 1995. The Panel circulated its Report to the Committee on 28 April 1995 after having been informed that the parties had not arrived at a mutually satisfactory solution.

(c) The conclusions of the Panel are summarized in paragraphs 453 - 457 of the Report.

(d) The Panel concluded with respect to the preliminary objections of the Community that:

(i) the claim of Japan that the Community's methodology for selecting the export models to be used in a comparison of price undercutting was inconsistent with Article 3 was not within the terms of reference of the Panel and thus was not properly before the Panel;

(ii) the allegations raised by Japan in sections 3.3.2.1 and 3.3.2.2 of its first submission regarding factors within the control of the Community industry that allegedly were responsible for any injury suffered by the industry were not identified during conciliation and thus were not properly before the Panel;
(iii) the remaining claims and/or arguments to which the Community had raised preliminary objections on the grounds that they had not been raised in the conciliation phase and/or were not within the terms of reference of the Panel could be considered by the Panel;

(iv) the Panel was not precluded from considering the claims of Japan regarding "zeroing" and "asymmetry" on the grounds that Japan lacked a "legal interest" in those claims.

(e) The Panel concluded with respect to the averaging methodology used by the Community in the comparison of export prices and normal values, that:

(i) assuming arguendo there existed a generalized obligation of "fair comparison" derived from Articles 2:1 and 2:6 and that this obligation applied to the use of averaging methodologies in the comparison of export prices and normal values, the information before the Panel did not permit it to find that the application of the Community's averaging methodology in this case had been inconsistent with that obligation;

(ii) the application of the Community's averaging methodology in this case was not inconsistent with the requirement of Article 2:1 of the Agreement that a Party calculate the dumping margin on the basis of "export" prices and "comparable" prices for the like product in the market of the exporting country.

(iii) Article 2(13) of the Community's Basic Regulation was not mandatory legislation inconsistent with the Agreement.

(f) The Panel concluded with respect to Japan's claims regarding a so-called "asymmetrical" comparison of the export price and normal value, that:

(i) the Community, by failing to make due allowance on its merits for differences in indirect selling expenses, and with respect to profits related to differences in the functions performed by the seller in the domestic and export markets, which differences could affect price comparability, had acted inconsistently with its obligations under Article 2:6 of the Agreement;

(ii) Articles 2(9) and 2(10) of the Community's Basic Regulation were mandatory legislation inconsistent with Article 2:6 of the Agreement because they precluded the making of due allowance, on its merits, for differences in indirect selling expenses and with respect to profits related to differences in the functions performed by the seller in the domestic and export markets, which differences could affect price comparability.

(g) The Panel concluded with respect to the construction by the Community of a normal value, that:

(i) the Community had not acted inconsistently with Article 2:4 by reason of the fact that it had derived an amount for profit in constructing the normal value for three types of "normal" type cassettes from data relating to all sales of the like product by that exporter in the Japanese market;
(ii) the Community had not acted inconsistently with its obligations under Article 2:4 of the Agreement by using in the construction of certain normal values an amount for selling, administrative and selling costs based on a cost-of-manufacture allocation methodology.

(h) The Panel concluded with respect to the Community’s affirmative final determination of material injury that:

(i) the cumulation by the Community of the effects of dumped imports from Japan and Korea was not inconsistent with its obligations under Article 3:4 of the Agreement by reason of the fact that imports of the like product from the two countries operated in "distinct markets";

(ii) the Community had not acted inconsistently with its obligations under Article 3:1 of the Agreement by reason of its alleged failure to take into account certain criteria which it normally took into account when deciding whether to cumulate the effects of dumped imports from more than one Party;

(iii) it was neither necessary nor appropriate for the Panel to reach Japan’s claim that the Community had failed to establish that there had been a significant increase in the volume of dumped imports from Japan;

(iv) it was neither necessary nor appropriate for the Panel to reach Japan’s claim that the Community had failed to establish that there had been significant price undercutting by dumped imports from Japan;

(v) the Community’s affirmative injury determination was not inconsistent with Articles 3:1 and 3:2 of the Agreement by reason of the methodology used by the Community to calculate an average margin of price undercutting;

(vi) the Community had not acted inconsistently with Articles 3:1 and 3:2 of the Agreement by reason of its failure to establish that dumped imports from Japan had, through other than price undercutting, caused price suppression or depression;

(vii) the Community had not failed to establish that dumped imports from Japan were, through the effects of dumping, causing injury to the Community industry within the meaning of Article 3:4 by reason of Japan’s argument that an increase in the price of imports of audio cassettes from Japan to their normal value would not have led to a general increase in the prices of audio cassettes in the Community market.

(i) One member of the Panel disassociated himself from a number of aspects of the conclusions of the Panel relating to asymmetry. This member concluded that, with respect to Japan’s claims regarding a so-called "asymmetrical" comparison of the export price and the normal value:

(i) the Community, by failing to make due allowance on its merits for differences in indirect selling expenses, which differences affect price comparability, had acted inconsistently with its obligations under Article 2:6 of the Agreement;
(ii) Articles 2(9) and 2(10) of the Community's Basic regulation were mandatory legislation inconsistent with Article 2:6 of the Agreement because they precluded the making of due allowance, on its merits, for differences in indirect selling expenses, which differences could affect price comparability;

(iii) with regard to profits, the Panel did not have before it the information relating to the nature of the domestic operations which would permit it to reach a conclusion that the Community had failed to make any necessary adjustments relating to profits to ensure a fair comparison, nor could the Panel conclude that the Community had not made a fair comparison, or that it was precluded from doing so by its Basic regulation in respect to profits.

(j) The recommendations of the Panel are set out in paragraphs 459 and 460 of the Report. The Panel recommended that the Committee request the Community to reconsider its determination in light of its obligations under the Agreement. In the view of the Panel, if that reconsideration resulted in a determination that the imported product was not dumped, then the Community should revoke its anti-dumping duty and reimburse the duties collected. If it determined that those imports were dumped, but to a lesser extent than the duties actually imposed, it should reimburse the duties collected to the extent of the difference. The Panel further recommended that the Committee request that the Community bring its Basic Regulation into conformity with its obligations under the Agreement.

(k) The Panel wished to express its appreciation to the parties to the dispute and to third parties to the dispute for their cooperation in the work of the Panel."

15. The Chairman enquired whether the Committee was in a position to adopt the Panel’s Report.

16. The delegate of Japan thanked the Chairman, the Panel Members, and the Secretariat for their dedication and thoroughness. Japan welcomed the Report and strongly recommended the Committee to adopt it at this first opportunity, despite the fact that several of Japan's claims were rejected by the Panel, and Japan was therefore not completely satisfied with the outcome. In particular, Japan disagreed with the Panel's conclusion with respect to the issues of zeroing and cumulation. Regarding zeroing, Japan could not accept the view, expressed in paragraph 354 of the Report, that the Community's methodology is as likely to be neutral or downwardly biased as it is to be upwardly biased, when compared with a transaction-to-transaction methodology.

17. Nevertheless, the delegate of Japan observed that the Panel had accepted Japan's claim regarding one of the major issues before it, asymmetry. He briefly explained that, under the asymmetrical comparison used by the Community, indirect selling expenses and profits are deducted in the calculation of constructed export prices for sales of Japanese exports through affiliated parties in the Community, but indirect selling expenses and profits are not deducted in the calculation of normal values. Thus, the deduction of indirect selling expenses and profits in export prices and the normal values is asymmetrical. The Panel had judged that the Community’s law and practice of asymmetrical comparison was in violation of Article 2:6 of the Code. This practice had caused and continued to cause immense unfairness to Japanese exporters, particularly wherever the exporter established a significant presence in the importing country. Under the practice condemned by the Panel, merely to provide services in support of product sold in the importing country itself led to a finding of dumping. The broader and more comprehensive such support, the larger the dumping margin which would be found to exist. This perverse methodology had rightly been condemned by the Panel. As a result, the Committee should now request the Community to reconsider its determination in the light of its obligations under the Agreement. If, after reconsideration, the Community determined that the imported product was
not dumped, then the Community should revoke its anti-dumping duty and reimburse the duties collected. If it determined that those imports were dumped, but to a lesser extent than the duties actually imposed, it should reimburse the duties collected to the extent of the difference.

18. Furthermore, the Japanese delegate continued, the Panel had also concluded that asymmetry was a mandatory part of the Community’s system, and therefore recommended that the Committee request that the Community bring its basic regulation into conformity with its obligation under the Agreement. Japan welcomed these recommendations and urged the Committee to endorse them by adopting the Report.

19. He noted that some Parties might argue that adoption of the Report would serve no purpose in light of the new Agreement, but Japan did not agree. In the first place, one of the principal purposes of maintaining the Code and this Committee in existence was to deal with situations such as this. Having embarked on these proceedings, Japan believed itself entitled to see them carried to a conclusion, which should be the adoption of the Panel Report by the Committee and the implementation of its recommendations by the Community.

20. Secondly, the question of the relevance of the Panel’s interpretation should be discussed in the light of how issues are examined under the Tokyo Round Code.

21. By adopting the Report, the Committee would put an end to a wrong which had been causing serious damage for many years to exporters in an increasing number of countries. At a time when the use of anti-dumping procedures seems likely to expand, the report serves as an important reminder of the principle of fairness which must underlie anti-dumping actions. Finally, he pointed out that the WTO should be guided by decisions under the Tokyo Round Dumping Agreement. Adoption of the Report would be important for the implementation of the new dumping regime.

22. The representative of the European Community also thanked the Members of the Panel for their work. He observed that the Report had only been circulated six weeks ago, and the Community therefore needed more time to consider it. The Report touched on a number of complex issues and the adoption or rejection of the Report would have consequences for the Community’s practice, the Community’s law, and perhaps on the future interpretation of the WTO Agreement for anti-dumping.

23. He did not wish, however, to express any criticism or a negative view concerning any of the Panel’s findings, and did not intend to make any comments on what the Japanese delegate had called perverse methodology. His position was completely neutral, and merely sought the Committee’s understanding that such a complex matter needed more consideration and study.

24. The delegate of Canada stated that his authorities, too, had only begun their review of this Panel Report, and at this stage, Canada had neither negative nor positive comments.

25. The representative of Hong Kong also thanked the Panel for their efforts. Hong Kong believed that, although the Panel’s decision was under the Tokyo Round Code, its findings had implications under the new Anti-Dumping Agreement, and could establish persuasive authority on certain issues. While Hong Kong was still considering the Report in depth, he shared some early views on it.

26. Hong Kong agreed with the Panel’s analysis on the issue of asymmetry, that the Code required that all differences which would affect comparability of the export price and normal value should be taken into account. Selling expenses, whether direct or indirect, as well as profits made by the seller in the domestic market should also be adjusted in establishing normal value. In Hong Kong’s view, the Community’s existing practice of asymmetry was in fact a kind of discrimination especially against consumer-branded products. Such products, for which proximity to consumers is essential, are sold by manufacturers through sales organizations established within each market. The indirect selling expenses incurred for such products, therefore, constitute a substantial portion of the total selling expenses. To ignore altogether such indirect selling expenses would, in Hong Kong’s view, artificially
inflate normal value and subsequently distort the determination of dumping and the dumping margin.

27. Hong Kong also supported the Panel’s views regarding Articles 2(9) and 2(10) of the Community’s Basic Regulation, and therefore, supported the Panel’s conclusion that Articles 2(9) and 2(10) were mandatory legislation inconsistent with Article 2:6 of the Agreement. Hong Kong urged the Community to bring its legislation into conformity with the Code. Hong Kong noted that the Community’s new Anti-Dumping legislation once again restricted the factors for which adjustment would be made by providing in Article 2(10) an exclusive list of all the differences affecting price comparability. Indirect selling expenses such as advertising, distribution and market expenses, as well as other differences which would affect price comparability, were still not allowed adjustments in establishing normal value.

28. With regard to the Panel’s finding on burden of proof, Hong Kong noted that the Panel had placed the burden of proof on the complaining party which was incompatible with the Code. This obscured the important fact that anti-dumping actions are contingent protection authorized by the GATT which should be used with great care, restraint, and only when clearly based on evidence. Given that Article VI of the GATT provides for an exception to general m.f.n. principles, and as such should be interpreted restrictively, the burden of proof should not have been placed on the complaining party. It should be up to the party seeking action under the Code to prove that the conditions justifying the exception are fulfilled.

29. The delegate of Hong Kong made a number of specific comments on the Panel’s findings. Regarding paragraph 358, on price comparison methodology, Hong Kong believed it should be for the Community to prove that it had met the requirement of fair comparison rather than for Japan to prove that the Community had breached that requirement. Regarding paragraphs 410, 411, 426, and 427, on the injury determination involving cumulation of dumped imports from Japan and Korea, the position of the Panel seemed to be that as long as Japan was unable to prove that the Community had acted inconsistently with its obligations under the Code, the Community’s actions were assumed to be compatible with the Code. The Anti-Dumping Code contains no explicit reference to a practice or rule on cumulation. The Panel’s findings imply that for those areas in which the Code does not have specific guidelines, whatever actions are taken by anti-dumping users could be permissible. This is a point of concern in view of the lack of precision of the Anti-Dumping Code. Hong Kong believed the Panel could have taken the opportunity to attempt a fair, liberal interpretation of the Code in light of its objectives.

30. With respect to the findings regarding claims not properly before a Panel, Hong Kong noted the Panel’s view that the statement of a claim required the identification during the conciliation phase not only of the obligation under the Agreement allegedly violated, but also of the detailed action or factual situation allegedly giving rise to an inconsistency with the Agreement. In Hong Kong’s view, this appears to be unduly idealistic. Hong Kong considered it unjustifiably harsh to require the complaining party not only to bear the burden of proof, but also to identify such proof during the conciliation phase. As an anti-dumping action is an exception to general m.f.n. principles, the burden of proof should rest on the party taking such action. Accordingly, it should be sufficient, at least during the conciliation phase, to identify the legal provisions alleged to be violated. Parties should be allowed to expand on claims identified in a more general manner in previous procedural stages and should be allowed to raise new claims during the procedure, if these are based on facts which only came to light during the consultation or conciliation stage. The Panel’s views in this case followed the Salmon Panel Report, which had raised the same concerns as those expressed here. This is one of the controversial issues on which no consensus had been reached by the Committee despite the adoption of the Salmon Panel Report in September of 1994. Hong Kong was concerned that Panel Reports could establish precedents or strong, persuasive authorities even about controversial issues where the Committee’s position was unclear.
31. Regarding the Panel's views on the issue of "zeroing" of prices of sales at prices above normal value, Hong Kong agreed with the Panel that Articles 2:1 and 2:6 could be taken together and interpreted to give rise to a requirement of a fair comparison which applied to any aspect of the comparison of normal values and export prices, including the use of averaging techniques. However, Hong Kong had reservations on the use of a transaction to transaction methodology as the benchmark in determining what is a fair comparison. The existence of dumping and its effect of injury caused would normally be considered over a representative period of time. It would be fair to look at the aggregate result of dumping because the total effect of injury could be diluted or repaired by negative dumping margins which should, therefore, be allowed to offset positive ones. Even if a transaction to transaction comparison could be accepted as a benchmark, for argument's sake, the averaging method employed by the Community should not be universally applicable in all cases. The Panel had not ruled that the Community methodology was fair, it only found that there was no information before the Panel demonstrating that the methodology had led to a worse result than what would have resulted from a transaction by transaction methodology. As noted by the Panel in paragraph 353, there might be situations where the Community's methodology would produce an outcome inconsistent with the Code, for example, when the exporter rigorously maintained equal domestic and export prices. In Hong Kong's view, the Panel's acceptance of the Community's operating methodology should be confined to the factual circumstances of the present case.

32. Hong Kong recognized the Panel's conclusion in paragraph 350 that Article 2 did not require the use of an average to average price comparison methodology. However, Hong Kong disagreed that it therefore followed that the Community's methodology was justified in light of the fair comparison objective of Article 2. The Panel could have attempted to assess advantages and disadvantages of the two methodologies and decided which methods might better achieve the fair comparison objective.

33. Hong Kong pointed out that the findings of the Panel in this regard were no longer relevant under the new Anti-Dumping Agreement. The Panel's reasoning was based on an assumed preference for a transaction-by-transaction methodology. Article 2.4.2. of the new Agreement provides for an equal preference for an average to average methodology and identifies the Community's methodology as subsidiary in comparing normal value and export prices. In Hong Kong's view, the Panel's findings in paragraphs 357 to 358, that both averaging methods are equal from a legal viewpoint, can therefore no longer be maintained under the new Agreement.

34. With regard to the findings on cumulation effects, Hong Kong found the Panel's analysis in justifying the cumulation of effects of different dumped products unconvincing, as it was based simply on the lack of explicit provisions. In Hong Kong's view, the Panel erred in dismissing Japanese claims regarding little volume increase and effects on prices of domestic products, and its decision was based on inherently flawed logic. Hong Kong observed that the layout of Article 3 suggested that there should first be an objective examination of the volume of dumped imports and their effect on prices in the domestic market for like products etc., before there is a determination whether injury has been caused. If the volume increase of Japanese imports and their effects on prices of domestic products were found to be minimal, then Japanese imports could hardly be a contributing factor to the material injury. It would be difficult to cumulate their effects with Korean imports for determination of injury caused by Japanese products.

35. Hong Kong was of the view that the Panel's interpretation runs contrary to the basic principle that anti-dumping action is only justified in cases of injurious dumping. Moreover, that interpretation could lead to clearly arbitrary results, since it would make the possibility of adopting anti-dumping measures against an exporting country dependent on whether or not other countries are included in the scope of the investigation. Hong Kong emphasized that the Panel's findings on cumulation are no longer well founded under the new Anti-Dumping Agreement. Article 3.3 had made cumulation conditional on fulfilment of certain criteria, including consideration of the "conditions of competition..."
between imported products and the like product." Hong Kong also noted that, as was pointed out by Canada during the proceedings and reported in paragraphs 271 to 276 of the Report, the Community market had grown by 30 per cent over the relevant period and the absolute volume of the Community's domestic products had increased by 8 per cent. In Hong Kong's view, it was not difficult to see that the increase in demand in the Community's market could have been generated by imports. Hong Kong had difficulty seeing this as casing injury to the domestic industry.

36. The delegate of Korea expressed great interest in the Report, which could be used as a guideline for the future application of the WTO Agreement. Korea was studying the Report, but needing more time, reserved the right to express its position in the next meeting.

37. The representative of Singapore welcomed the Report by the Panel, in particular with respect to the issue of asymmetry, which was a mandatory part of the Community system. Singapore urged the Committee to endorse the Panel's recommendation that the Community bring its basic regulation into conformity with its obligations under the Agreement.

38. The representative of Brazil expressed two basic concerns with the Panel's decision. The first related to the narrow interpretation adopted by the Panel with regard to issues raised during consultations and conciliation. The second dealt with the Panel's views on the methodology used by the Community to determine the existence and extent of dumping. As other delegations had noted, while this view on the Community methodology might apply to this specific case, it might not be true for other situations, and so should not be taken as the rule. Brazil supported Japan's request that the Community conform its law and practice to the findings and recommendations of the Panel.

39. The representative of Australia joined those delegations that had expressed a need for further examination of this complex Report, with its implications for the rules on anti-dumping under the Tokyo Round Code and potential influence on interpretation of the WTO Agreement on Anti-Dumping. Australia agreed with a number of the conclusions of the Panel, but based on a preliminary examination of the Report also had some reservations. For example, in paragraph 374 the Panel appeared to conclude that to interpret the term "differences affecting price comparability" as excluding differences in indirect expenses would be inconsistent with the fair comparison objective of Article 2:6. In Australia's view, the better conclusion would have been one that recognized differences in indirect expenses could constitute a difference affecting price comparability sufficient to warrant a due allowance. Regarding paragraph 377, he noted the Panel's conclusion that adjustments for profit-related different functions may be required in some circumstances. Australia believed that the view of the minority Member, that profit adjustments could be accommodated by a level of trade adjustment, might well be the preferred view.

40. The Australian delegate also commented on the process and on the nature of the recommendations, as distinct from the conclusions of the Panel. Australia agreed with the Panel's approach, as set forth in paragraph 338, to dealing with preliminary objections to the inclusion of issues following the agreement of the parties. Clearly, to take another approach would tend to provoke the need for separate Panels on those issues that have been excluded. However, the Panel had elsewhere in the Report emphasized the importance of matters being considered in conciliation at the time of the establishment of the Panel. Australia understood the Panel's thinking as based not so much on the issue of ambush of the defendant, but rather on the theoretical conciliation role of the Committee and the rights of third parties to be alerted. It was not clear how that reasoning was consistent with the conclusion in paragraph 338, with which Australia agreed.

41. Finally, he noted that Australia had consistently made the point, with respect to other Panel Reports before this Committee and the Subsidies Committee, that in Australia's view, Panels should
limit themselves to recommendations regarding bringing a measure into conformity with the Agreement. The recommendations of this particular Panel seem to go beyond that.

42. The delegate of Norway stated that Norway concurred with the Panel’s conclusion concerning asymmetry. Other points of interest in the Report include the issues of burden of proof, zeroing, and cumulation. With respect to the Panel’s views regarding issues not raised during conciliation and whether these issues were to be considered within the Panel’s terms of reference, the delegate of Norway observed that the Panel referred to and endorsed the argumentation and conclusions of the Salmon Panel. However, one of the criticisms against the Salmon Panel’s conclusions was precisely that it did not consider a number of claims made by Norway to be within its terms of reference, because they had not been adequately raised at the consultation and conciliation stages. While Norway agreed that actions giving rise to an inconsistency with the Agreement should be identified during conciliation and at the time of the request for establishment of a Panel, Norway would warn against narrow procedural requirements that bar substantive information from being considered by a Panel, because particular elements related to a claim may only have been recognized in the process of conciliation.

43. The representative of the United States agreed that more study of this decision was necessary and therefore could not agree to adoption at this time. Two principle concerns with the Panel’s decision could already be identified. Regarding asymmetry, the decision appeared to impose an interpretation of Article 2:6 of the 1979 Anti-Dumping Code which is not required or specified in the Code and therefore imposed an obligation on the European Community beyond what the Parties had actually agreed to in the Code. Second, the Panel had recommended that the European Community recalculate the dumping margin and either revoke the order or reimburse excessive duties collected. These remedies are specific. The United States’ position with respect to specific remedies was well known in this Committee: the United States believe that the Panel should limit itself merely to recommendations, and this decision goes beyond that.

44. The delegate of the United States observed that a delegate had stated that Article VI is a derogation of the general m.f.n. obligations in the GATT and therefore there is a specialized burden of proof with respect to anti-dumping measures. This issue was properly left unaddressed by the Panel. In the United States’ view, the burden of proof that should apply is found in Article 2:6, which provides that "due allowance shall be made in each case on its merits for differences affecting price comparability." In the United States’ view, these words indicate where the burden lies and that there should not be any specialized burden in these cases. The United States hoped that in the future, discussion of this Report would be limited to the Report itself, and not to more esoteric discussions of Article VI as a derogation of the GATT or having a specialized place within the GATT. The United States believe that Article VI is an inherent part of both GATT 1947 and GATT 1994.

45. The representative of Japan observed that the Report was distributed to the parties to the dispute on 11 April, and therefore in Japan’s view, there was no reason for the Community to say that it had not had enough time to study the Report. This issue had been the subject of discussion for several years, and Japan was dissatisfied with the attitude of the Community, and dissatisfied that the Committee did not adopt this Report at this first opportunity. Japan strongly requested the Committee to adopt this Report at the earliest opportunity. Japan might demand that a special meeting be held in this matter.

46. The representative of the European Community expressed his regret at the dissatisfaction of the Japanese delegate. However, in the Community’s view, six weeks’ time for reflection and study of such a complicated and complex document was not enough. Indeed, it appeared from the discussion that other delegations shared that view. Moreover, the Community noted that Japan had taken two years to make up its mind whether to take this case to a Panel. Given that time lag, it was difficult to see what was so urgent now, and there was good reason to conclude that the matter could wait until the October meeting for further discussion.
47. The Committee took note of the various statements made.

48. The Chairman reminded delegations that it is the right of any delegation to request a special meeting.

F. United States - Imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden and the Report of the Panel

49. The Chairman reminded delegates of the monotonous regularity with which this Panel Report has appeared on the agenda of Committee meetings. This was the twelfth meeting at which this Panel Report had been considered. Chairmen in the past had urged the parties to reach a satisfactory solution. Unfortunately, it did not appear that a satisfactory solution had been reached as yet.

50. The delegate of the United States reminded the Committee that the United States had not been able to agree to the adoption of this Panel Report for two reasons: first, the substantive findings with respect to the initiation of the investigation and second, the specific and retroactive remedy recommended by the Panel. She noted, however, that there were developments, unrelated to the Panel Report, which should be of interest to the Committee. In February 1995, the petitioners in this investigation filed a request for partial revocation of the anti-dumping order, with respect to the seamless product, with the Department of Commerce. The request sought liquidation of all currently unliquidated entries, dating back to approximately December 1990, without imposition of anti-dumping duties. The Department of Commerce was currently considering this request, and the United States would report future developments to the Committee.

51. The representative of the European Community noted that the Community had in the past supported the United States' reason for not accepting the Panel's ruling based on the recommendation of a specific remedy. The Community did not want to abandon that position, because in the Community's view, the role of a Panel is to find violations or inconsistencies, but not to give clear advice or orders to any Party concerning what must be done in order to bring its law and practice into line with the Codes. The Community hoped that the United States could consider the request from its own industry for partial revocation of the Order positively, and that by the next Committee meeting there might be a practical solution for the companies involved in this dispute.

52. The Committee took note of the statements made and agreed to revert to the matter at a future meeting if any delegation so wished.

G. United States - Imposition of anti-dumping duties on gray Portland cement and cement clinker from Mexico - Report of the Panel

53. The Chairman recalled that this Report had also been before the Committee at every regular meeting since October 1992. While Mexico had asked at every meeting for adoption of the Report, the United States had not been in a position to adopt the Report. In addition, the Chairman noted that there have been bilateral efforts to reach a mutually satisfactory solution in the matter.

54. The representative of Mexico observed that this was the seventh time that the Committee considered this Report. Mexico again recommended that the United States revoke the anti-dumping duty Order and return the amounts that had already been paid under that order. The United States had always respected its international commitments, but in this case, in spite of numerous requests for the adoption of the Panel's Report, the United States opposed such action. Mexico expressed concern that the United States had not only failed to abide by the provisions of the Anti-Dumping Code and made use of the limitations of the dispute settlement system of the GATT, in maintaining the anti-dumping duties but had, in fact, increased those duties during the administrative reviews.
55. The Mexican delegate reminded the Committee that the United States and Mexico had held consultations in an attempt to resolve this problem. Much time had passed since the initiation of these consultations. Mexico hoped that, at this point, the consultations would lead to a rapid and full solution to this problem. Otherwise, Mexico would have to request the adoption of the Panel Report even before the next regular meeting of this Committee.

56. The representative of the United States observed that it was good news for both the United States and Mexico that the issue of Mexican cement was being considered at the highest levels. Secretary Blanco of Mexico and Secretary Brown of the United States had this matter under their consideration and had directed their staffs to review all legal options for revoking the anti-dumping Order in a manner which would be consistent with United States' law and in the interests of the United States industry. The United States took this effort very seriously, and intended to continue it as long as necessary.

57. She noted, however, that the United States' objections to the Panel Report still stand. The United States believed that the Panel erred in its substantive finding concerning initiation and in considering arguments that had never been raised to the administering authority or in consultations, and in recommending a specific and retroactive remedy. Notwithstanding these objections to the Report, the United States were willing to look at this commercial problem with Mexico on a bilateral basis.

58. The Committee took note of the statements made and agreed to revert to this matter at a future meeting if any delegation so wished.

H. United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden - Report of the Panel

59. The Chairman reminded Parties that this Report had been considered by the Committee at its two last meetings. At the last regular meeting, Sweden urged adoption of the Report but the United States were not at that time in a position to agree to adoption of the Report.

60. The representative of the United States stated that the United States were not prepared to agree to the adoption of this Panel Report, for the same reasons as cited in prior meetings: first, the nature of the specific and retroactive remedy recommended by the Panel, second the use of non-record information in making its decision, and third the existence of related domestic proceedings. She noted that the issue was before both the Department of Commerce and the International Trade Commission, and in the United States' view, the Panel Report could not be addressed until the domestic proceedings were completed.

61. The representative of the European Community observed that while the Community had always supported the argument that a Panel should not recommend a specific remedy, in this case the specific remedy element in the recommendation of the Panel Report was relatively small, if not negligible. The Panel's recommendation that the United States should review the case was made in the belief that such review had already been initiated. Apparently, the Panel thought it would recommend something which had already been done. The main point was the question whether the defendants in that case, the Swedish companies, had a right to have a review. Although there were several steps to go through, the Community understood that such a review was in progress. The Community asked whether the United States could speed up that review, which had gone on for some time already.

62. The Committee took note of the statements made and agreed to revert to this at a future date if any delegation so wished.
63. The Chairman observed that the protracted non-adoption of Panel Reports is regrettable from the perspective of a credible dispute settlement system. Should the parties so wish, he would be happy to assist in consultations to assist in reaching a mutually satisfactory solution of these matters. More than anything else, he urged bilateral efforts to settle these matters and see whether the Panel Reports could be adopted.

I. European Community - Anti-Dumping Investigation of Imports of 3.5 inches Magnetic Disks from Hong Kong

64. The Chairman observed that this matter too had been discussed by the Committee at each of its meetings since October 1992. At its last regular meeting, the Committee decided to revert to this matter at its next meeting. No new statements had been received from the parties concerned.

65. The delegate of Mexico noted that at the previous meeting of the Committee, Mexico had stated that its participation in the import market of the European Community was very small. Mexico had also indicated its interest in staying out of the investigation, noting that Mexican participation in the market had declined from 1992 to 1993. Referring to the Community’s semi-annual report, he noted that there were no figures listed as either provisional or final duties for Mexico. He therefore enquired of the Community whether this meant that Mexico was no longer under investigation. If this was not the case, he asked what the position of Mexico in this case was.

66. The representative of Hong Kong noted that while Hong Kong had no new statement to make, Hong Kong continued to reserve its rights under the Code to pursue the matter further. He observed that the Community had since 1991 initiated anti-dumping proceedings against imports of 3.5 inch magnetic disks originating in twelve countries altogether. As a result of that, over 90 per cent of total imports of the product into the Community were now subject to anti-dumping investigations or duties.

67. The representative of the European Communities observed that this matter was indeed an old one. The Community had given Hong Kong information concerning all the elements of substance which had been requested. In addition, there had been bilateral contacts with the delegation of Hong Kong in Brussels. It was quite clear that Hong Kong and the Community had different views on this particular matter. The Community had made a considerable effort to explain its point of view to the Hong Kong Administration. The Community believed the matter had been sufficiently discussed in the Committee and that, while Hong Kong could include this item on the Agenda as many times as it considered necessary, the Community believed there was no necessity of continuing.

68. Regarding Mexico, the delegate of the Community regretted that he did not have all the information available, but expressed his willingness to provide the information requested on a bilateral basis. He stated his understanding that there were no provisional measures as the investigation was still continuing.

69. The Committee took note of the statements made and agreed to revert to the matter at a future meeting if any delegation so wished.

J. Guidelines for information provided in the Semi-Annual Reports

70. The Chairman reminded the Parties that at its last regular meeting, the Committee decided to revert to this matter at its next regular meeting. This matter was also the subject of discussion in the WTO Committee on Anti-Dumping Practices. To avoid duplication and save time, the Chairman proposed that the Committee merely take note of the discussion in the WTO Committee on Anti-Dumping Practices and decide not to address this matter any further.
71. The Committee so decided.

K. **Ongoing Panels and Other Dispute Settlement Issues**

72. The Chairman brought the Committee's attention to the matter of the dispute involving Canada-Anti-Dumping Duties on Imports of Beer from the United States. He informed the Committee that on 7 March 1995, the Chairman of the Panel considering the matter of the imposition of anti-dumping duties by Canada on imports of beer from the United States, Mr. Peter Hamilton, sent a letter informing the Chairman that the parties to the dispute had finalized a mutually satisfactory agreement and wished to terminate the Panel proceedings without circulation of the Report. The text of the letter was as follows:

"I am writing to you in my capacity as Chairman of the Panel on Canada Anti-Dumping Duties on Imports of Beer from the United States. I would like to inform you that on 3 January 1995, I received a letter from the two parties to this dispute indicating that they had finalized their mutually satisfactory agreement and conveying their joint wish to terminate the Panel proceedings without circulation of the Panel Report. In light of this request, the Panel has decided not to circulate its Report and considers that its work is concluded."

The Chairman thanked the Panellists for their work on this matter and expressed his satisfaction that the parties to the dispute were able to reach a mutually satisfactory solution.

73. The Committee took note.

L. **Other Business**

74. No items were raised under other business.

75. The Chairman proposed that, in accordance with the decision taken by the Committee at its June 1981 meeting, the next regular meeting of this Committee be held in the week of the 30 October 1995.

76. The Committee agreed.

77. The meeting was adjourned.