

GENERAL AGREEMENT ON

RESTRICTED

SCM/M/64

30 March 1993

TARIFFS AND TRADE

Special Distribution

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 25 JANUARY 1993

Chairman: Mr. Gerry Salembier (Canada)

1. The Committee on Subsidies and Countervailing Measures ("the Committee") held a special meeting on 25 January 1993.
2. The Chairman noted that the Committee had before it two matters. First, there was a request from the United States under Article 17:1 of the Agreement for conciliation regarding a countervailing duty investigation by Brazil on imports of wheat from the United States. Second, there was a request by the EEC under Article 17:3 for the establishment of a panel concerning the imposition by Brazil of provisional and definitive countervailing duties on milk powder and certain types of milk from the EEC. However, the United States had indicated it would like to withdraw the first item from the agenda. The Chairman therefore requested the agreement of the Committee to proceed to the second item.
3. The representative of Brazil stated that it was up to the Chairman to decide how he wanted to proceed, and if he wanted to delete the item from the agenda. However, he wanted to say a few words about the matter. He thanked the delegation of the United States for this very concerted step, and for the spirit of co-operation that characterized the contacts between the two governments on this matter. He informed the Committee that further to the reply by Brazil to the US questions of 9 December 1992 referred to in Brazil's communication to the Committee (SCM/157), a second meeting for consultations was held in Brasilia on 12 January 1992. The consultations had proved so far to be very useful in clarifying the factual situation. Further consultations were scheduled in principle for late last week, but the representative of Brazil did not have additional information regarding them. All this was being done with a view to arriving at a mutually agreed solution according to the Code.
4. The Chairman thanked the representative of Brazil for his comments, and suggested that the Committee take note of them. He proposed to proceed to the matter of the request by the EEC for the establishment of a panel concerning the imposition by Brazil of provisional and definitive countervailing duties on milk powder and certain types of milk from the EEC. The Committee so decided.

5. The Chairman recalled that the Community sought conciliation with respect to the imposition of provisional duties in a communication dated 6 July 1992 (SCM/149), which matter was taken up in a special meeting of the Committee on 21 July 1992. The Community subsequently sought conciliation with respect to the imposition of definitive duties in a communication dated 7 October 1992 (SCM/151), which matter was discussed in the Committee's regular meeting of 28 October 1992. The Committee was now considering a request by the EEC under Article 17:3 of the Agreement in a communication dated 23 December 1992 (SCM/155) that the Committee establish a panel to review the matter, in accordance with the provisions of Article 18:1. He asked the representative of the EEC to introduce this item.

6. The representative of the EEC recalled that, following the opening of an investigation, Brazil imposed a provisional countervailing duty on imports of milk powder and certain types of milk from the Community in April 1992, and subsequently imposed a definitive countervailing duty in August 1992. On both occasions, after examining the motivation and the procedure involved in imposing these duties, the Community concluded that Brazil had in neither case fully respected its obligations under the Subsidies Code, and requested consultations with Brazil under Article 3 of the Code immediately following imposition of both the provisional and the definitive duties. Unfortunately, neither of these consultations had led to a mutually agreed solution. The Community then in both cases requested conciliation under Article 17 of the Subsidies Code. Conciliation with regard to the provisional and definitive duties took place in the context of meetings of this Committee on 22 July 1992 and 28 October 1992, respectively. Subsequent to this conciliation, it had not proved possible to develop a mutually acceptable solution through conciliation under Article 17:2 of the Code, and the EEC therefore requested the Committee to establish a panel in accordance with Articles 17:3 and 18 of the Code in order to have the facts of the matter reviewed and the rights and obligations of the Community and Brazil clarified.

7. The representative of the EEC stated that the Community requested that such a panel be established to find that the provisional duty on imports of milk powder and certain types of milk from the EEC was imposed in violation of Articles 1 and 5:1 of the Subsidies Code because (1) it was imposed without any preliminary investigation having been carried out; and (2) no evidence was presented in Brazil's determination of April 1992 which could lead to a preliminary affirmative finding of the existence of a subsidy or of sufficient evidence of injury. Furthermore, no grounds or preliminary evidence was adduced in the determination that provisional measures were necessary to prevent injury being caused during the period of the investigation. Thus, Brazil had imposed provisional duties merely on the basis of data from the complaint without carrying out a preliminary investigation or even informing any of the parties concerned and giving them the opportunity to provide information. Article 5:1 of the Code stated that provisional duties could only be imposed following a preliminary affirmative finding of the existence of a subsidy, and of sufficient

evidence of injury. The Community submitted that such a preliminary affirmative finding could not be made without some preliminary investigation. The investigating authorities could not just base themselves on the complaint because they needed to make an affirmative finding which could not be independent of the complaint. Therefore, they needed to give an adequate opportunity to the parties concerned to provide evidence. Furthermore, the investigating authority had to be in a position to judge that provisional measures were necessary to prevent injury being caused during the period of the investigation before they could apply such measures. The investigating authority could only put itself in such a position by gathering a certain amount of evidence.

8. With respect to the imposition of the definitive duty on imports of milk powder only, the representative of the EEC stated that it violated Article 6:1, 6:3 and 6:4 of the Code because, first, no attempt was made to examine the impact of these imports on the domestic industry as required by Article 6:1(b), the criteria for which are elaborated in Article 6:3 of the Code. He noted that, apart from a vague reference to stagnant production, which was contradicted by other data made available to the Commission, the definitive duty determination contained no mention of the situation of the domestic industry with regard to the economic factors set out in Article 6:3. In fact, Brazil's position in consultations and correspondence was that the existence of a subsidy and of a price differential between the imports and the domestic product constituted by themselves sufficient evidence of injury to a domestic industry. Therefore Brazil clearly believed that it was not necessary to examine the impact of the imports on the domestic industry and had therefore violated Article 6:1(b) in imposing these measures. In addition, it had not been demonstrated that there was any causal link between the imports and any material injury to the domestic industry as required by Article 6:4. In particular, Brazil made no attempt to examine whether factors other than the allegedly subsidized imports, as set out in Article 6:3, were causing injury.

9. Regarding the definitive countervailing duty imposed on certain types of milk, the representative of the EEC insisted this violated Article 6 of the Code because no evidence had been provided of the existence of material injury having been caused by such imports. On the assumption that such findings would be made, the EEC also requested that the panel recommend that the countervailing duties imposed illegally by Brazil on the imports of milk powder and certain types of milk originating in the EEC be immediately lifted.

10. The representative of Brazil stated that there were no new allegations in document SCM/155 and in the EEC intervention. Brazil had replied to all analogous allegations by the EEC, both during bilateral consultations and during the conciliation phase, so far, before this Committee. It would not attempt to provide the Committee today with detailed technical information additional to that which had already been presented, for the reasons that followed. The EEC had brought two main areas of arguments before this Committee: (a) the alleged lack of evidence of subsidies; and (b) the alleged lack of evidence of injury.

In relation to the alleged lack of evidence of subsidies, it was astounding that the EEC should even want to mention this point before the Committee. The subsidies in question were notorious, one of the main obstacles, if not the main obstacle, to a successful conclusion of the ongoing multilateral trade negotiations. More specifically, the EEC complained that Brazil did not carry out an investigation because the questionnaire was sent to the Community after the imposition of provisional duties, and that Brazil made no attempt to identify the exporters concerned. His delegation had already explained to the Committee that the EEC representatives in Brasília were offered from the very beginning, from February last year, long before the opening of the investigation, ample opportunity for presenting evidence. They snubbed it. There was no better word to describe their behaviour. And they had snubbed it ever since. The Community systematically hampered the investigation. They refused co-operation in the attempt by Brazilian authorities to verify not only the identification of exporters, but any element whatsoever contained in the complaint and of interest to the investigation. They rejected the endeavours by Brazilian authorities in Brasília and by the Mission of Brazil in Brussels to fulfil the obligations under Article 3:2 of the Code. The information expected from the responses to be given to the questionnaire was not essential for the investigation - and this must be clearly understood - but would certainly have helped to clarify the factual situation so as to arrive at a mutually agreed solution. Under Article 4:5, for example, if the EEC could agree to eliminate, or limit, the subsidization, or take other measures concerning its effects. And yet the questionnaire, to which the Community seemed to attach vital importance, and which the Community acknowledged was received at the latest in May 1992, had not been responded to until this very day. The questionnaires presented by the EEC on the steps taken by Brazil in the investigation were responded to by Brazil. The questionnaire presented by Brazil was not. A brief note, with photocopies of the complex EEC legislation and of bulletins of statistics attached, could not be considered a reply and would be sneered at if any country presented it to Brussels, during a Community investigation.

11. It was also to be clarified that the date of 18 May 1992 mentioned in paragraph 4 of document SCM/155 was, in fact, the date the Mission of Brazil in Brussels, after repeated refusals by the EEC to take seriously the offer of consultations and accept the existence of a questionnaire in the Portuguese language, delivered a translation of the questionnaire in French. Portuguese is the language of one of the member States. At the same time that overworked Brazilian officials in its Mission in Brussels were striving to translate the questionnaire into French, in an additional and unfruitful sign of goodwill, the tone of the Community's rhetoric was illustrated in this sentence of a communication from May last year: "The Commission is frankly not prepared to be used as a mailbox on behalf of third countries in countervailing duty investigations." The Community made repeated attempts to delay the process by insisting that the bilateral consultations be held in Geneva. Countries victimized by countervailing and anti-dumping investigations

by the Community had to go to Brussels. The EEC, with all their means and resources, could not and did not send experts to Brasília.

12. The Brazilian delegation did not expect that representatives in the Committee would gape in surprise at this account. The EEC had shown in relation to Brazilian requests for information the same attitude this Committee had learned to expect from the Community, which was reflected in its unwillingness to furnish evidence explicitly requested by the Committee. He recalled some facts. In May 1991, the EEC presented its latest full notification on subsidies, pursuant to Article XVI:1 of the General Agreement. Australia, then, as it was her right, finding the information incomplete, requested in writing clarification and comments from the EEC on estimated effects of both agricultural subsidies and subsidies for coal (document SCM/W/247 of 22 October 1991). When the matter came under discussion before the Committee during the special meeting of April 1992 (document SCM/M/60), the representative of the EEC offered some answers to some of the questions on coal. "Regarding the other questions put by Australia (on agriculture), he said he was not in a position to add any further clarification" (this was a quotation from paragraph 51 of the report of that meeting). The representative of Australia specifically said that his delegation was interested to know whether the Community would provide replies to the questions with respect to agriculture. He also said that, in this connection, and quoting from paragraph 55 of that report: "His delegation hoped that members of the Committee would respect the process by which questions were submitted and replies given." The representative of Brazil added his word of concern and asked if the replies were forthcoming. The representative of the EEC announced that he would report Australia's statement and "see what could be done" (paragraph 56).

13. Australia's request was based on solid ground. Article XVI:1 of the General Agreement established that a party granting a subsidy which operated directly or indirectly to increase exports should notify in writing "of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product (...) exported from its territory and of the circumstances making the subsidization necessary." If there was anything on the matter of subsidies that was not controversial in the GATT and in the Code it was that they should be notified properly. For the largest and richest trading actor in the world, it should be more than obvious that it had at least to honour these uncontroversial provisions. Nevertheless, and no matter how much Australia, supported by Brazil, had insisted to obtain a reply, the EEC had so far failed to comply with their obligations. This topic was last discussed at the meeting last October. On that occasion, again in violation of their obligations, and in contempt to the Committee, the representative of the Community stated that "he could not add to what he had already said on this item". Now, almost two years after a very specific request for information, the EEC had yet to fulfil its obligations.

14. All this illustrated very clearly the difficulty one had in trying to obtain information on details of the subsidization of primary

products by the Community. But the information at the disposal of the investigating authorities in Brazil was more than conclusive. Their decision on the existence of the subsidies was not difficult to make. It was based not only on the arguments in the complaint, as the EEC insisted, but on unquestionable available evidence and on specific technical studies. The existence of subsidies was more than evident to all, except to the Community itself.

15. The representative of Brazil noted that the EEC delegation stated during the October 1992 meeting that "It appeared that in the case in hand, Brazil had chosen to ignore those parts of the Subsidies Code which did not suit it." It was surprising that the delegation of the Community should raise before this Committee the point on selective application of provisions. The Community, and not Brazil, had done just that, and abundantly, in this case. They selectively applied provisions of the Code and of the GATT, picking and choosing only those provisions, principles and guidelines that best suited their arguments and failing to respect a host of their obligations. Having mentioned how they had been failing to honour the obligations under Article XVI of the General Agreement, he mentioned other provisions the Community had chosen to ignore.

16. With respect to the alleged lack of evidence of injury to the Brazilian industry, the Community had already been presented with irrefutable evidence of the injury it was causing to producers in Brazil by just about any of the parameters in Article 6. They knew it and they knew that any impartial observer would agree. The richest and most influential trading actor in the multilateral trading system asked that a panel be established to decide that obvious subsidization was not obvious and that the obviously subsidized products it exported to a developing country with obvious and acute social and economic problems and obviously suppressed comparative advantages for agricultural production were not injurious. The truth was, as all delegations know, that what the Committee was dealing with today was injury in a broader sense and in a much more serious way. Trade in agricultural products was, and mainly due to the EEC's unreasonable privileges, heavily distorted and injurious. This was not new, of course, but the situation was becoming worse, as the case before the Committee today clearly showed.

17. For some years now authoritative voices had been saying the same. In 1982, Ministers, through the Ministerial Declaration of November 1982, acknowledged that: "There is widespread dissatisfaction with the application of GATT rules and the degree of liberalization in relation to agricultural trade". Former Director-General of GATT Olivier Long underlined in a book in 1985: (1) that "there is a big gap between obligation and performance in the field of agricultural trade"; (2) that "agriculture has been virtually excluded and insulated from the process of trade liberalization"; (3) that there is "excessive and unwarranted use of GATT provisions referring specifically to primary products and thus to agricultural products, such as export subsidies"; (4) and that "the implementation of the Agreement is largely paralyzed

in the agricultural sector". In 1986, in launching the Uruguay Round in Punta del Este, the Ministers made a similar evaluation.

18. The Punta del Este declaration and all the other voices mentioned also dealt with the situation of developing countries. Reality itself is somewhat dramatic here. Olivier Long, a neutral and privileged observer, was unambiguous as to the "reasons and justification" for "tolerance" in the treatment of developing countries. "They are the result", he saw clearly, "of economic, political and moral imperatives." He was right, of course. Economic, political and moral imperatives should not be limited only to situations of humanitarian emergency with easy media coverage. The best way to avoid humanitarian emergency was to stop in due time contributing to the degradation of the social and economic situation of developing countries. Specifically in relation to Brazil, the Contracting Parties learned during the examination of Brazil's trade policy, in October last year, that, although faced with acute economic problems, among which the servicing of the foreign debt, which imposed on the country the creation of large trade surpluses (PG. vi), Brazil had made sweeping changes to liberalize its market. In this situation, also according to the secretariat report, "Brazil, which ranks as one of the world's leading exporters of agricultural products", "and is richly endowed in natural resources and human capital", "could perfectly be self-sufficient in food production". Brazil's ravaging social problems could then begin to be mitigated. The Chairman of the Council, in his conclusions for the TPRM, stated that the Council had "acknowledged that Brazil's ability to continue its liberalization and reform would be greatly facilitated by a supportive external environment."

19. The largest and richest trading actor in the world was certainly not heeding the impartial findings by the experts, the conclusions of the Council and the uncontroversial words of the Chairman. The Community was not offering, by the factor dealt with in this case before the Committee, any support to Brazil. The situation was absurd. All that has been said along the years had taken a perverse turn. A developing country liberalized, opened its markets, contributed for a healthier trading system, at the same time that it serviced a foreign debt whose volume was beyond its control, and was reciprocated the way we see today. The expression "without reciprocity" contained in previous historical decisions was certainly not meant to be interpreted this way.

20. Clearly, there was no place for subsidized export of EEC milk to Brazil. The subsidization did enough damage to Brazil in the internal market of the Community, where Brazil could, given fair conditions, occupy a reasonable part of the market as exporter of agricultural products. And subsidization injured Brazilian potential exports to third markets. But furthermore, the EEC hurt Brazil in its own market. And it was inconceivable that the EEC occupied the market for agricultural products in Brazil itself with subsidized products which competed with the unsubsidized Brazilian like product, as well as with

the like products from other sources, particularly from other developing-country producers, including neighbouring countries.

21. Today, the EEC, due to subsidies, was responsible for about half the world production and half the world trade in skimmed milk, as well as more than half the world's initial stocks of the product, thus performing, by itself, a deciding rôle in international price definition for the product, which was in marked decline. By subsidizing heavily as it did, and otherwise protecting its market, the EEC helped to perpetuate the violation, or, at least, the unsatisfactory implementation of the concepts behind the following provisions, inter alia, to which the Community or its member States were signatories: (1) Article X, XVI and XX(b) of the GATT, (2) Articles 10:2, 10:3 and 11 of the Code. The EEC also plainly failed to abide by the obligations related to the special treatment due to developing countries, as provided for in Part IV of the General Agreement and in the Preamble to the Code. All this the Community had chosen to ignore when it brought this request for a Panel in the Committee against a developing country that did not grant agricultural subsidies, struggled to develop its resources, and, at the same time, had to disburse annually more than \$10,000 million as interest on its debt to creditors, partially to the Community itself, and that had not been able to rely for a decade now on any significant foreign investment. In this light, the contention by the representative of the EEC, during the meeting of October 1992, that "Brazil had chosen to ignore those parts of the Subsidies Code which did not suit it" seemed to emanate from the wrong source and to be addressed to the wrong destinee. For all this, Brazil rejected all claims by the EEC in document SCM/155 that Brazil had failed to comply with any provision of the Code. He sought the guidance of other delegations on how to proceed.

22. The representative of the EEC stated that this case was not about the subsidization of milk powder in the Community. It was about the lack of respect for procedural obligations in the conduct of countervailing duty investigations. We did not know whether subsidies granted or not by the Community had caused injury to the Brazilian industry. If Brazil had carried out a proper investigation, we would know and we could discuss it. The Brazilian delegate told us it was so, but that did not result from the investigation. The representative of the EEC stated that he could but would not make a long speech about the relevance of Brazil's arguments. He could also contest the accuracy and truth of many of the statements regarding the Community's conduct in this investigation and state that they were false. However there was a principle in the GATT that one should not contest the statements made by contracting parties, so he would not say anything more about the truth or relevance of Brazil's arguments. With respect to the possibility of a mutually satisfactory solution, the representative of the EEC found it scandalous that illegally imposed countervailing duties could be used as a weapon to extract undertakings from a signatory. If a hint of a suspicion of such could be attributed to the Community, the Committee would be up in arms. Thus, he believed that a mutually satisfactory

solution in this case was most unlikely. As for the technicalities of whether Brazil had in fact violated the provisions of the Code as maintained by the EEC, Brazil had the right to disagree with the EEC. This was precisely the reason why the EEC asked the Committee to establish a panel to solve this dispute.

23. The representative of Uruguay stated that this discussion was surprising. There were participants in the meeting that had implemented agricultural support policies which externalized their costs. These policies not only had caused serious distortions in international markets for agricultural products but had also been detrimental to an appropriate development of agriculture throughout the world. The result of such policies in some countries was devastating. Agriculture potential had been cancelled out, with catastrophic effects from the social and economic point of view. For other countries, the effects had also been extremely detrimental. For years Uruguay had suffered from the consequences of such policies. It had lost very important income because of the virtual elimination of certain markets and no less important, due to the detrimental effects of these practices on the international market and on the prices of agricultural products, which had dropped. These resources could have been devoted to development. Therefore, it was difficult to understand why certain countries were intent on such adverse policies.

24. The representative of Uruguay stated that now the legitimate rights of a country to protect its production against heavily subsidized exports were being challenged. A technicality was being used to make possible the continuation of trade practices which were totally contrary to the philosophy on which the multilateral trading system is based. The Uruguay Round attempted to solve this situation and subject agriculture policies to a certain discipline. This situation clearly demonstrated the need to reach agreement in the Uruguay Round. Uruguay believed that the establishment of a panel as requested by the EEC was not necessary. The EEC did not have a valid case. The mere mention of the lack of demonstration of the existence of subsidies was astonishing, since their existence was notorious, as could be seen in the Official Journal of the EEC where restitutions were published by the dozens. Further, how could there any doubt that the EEC's sales injured the Brazilian industry? The subsidies caused injury to Brazil's domestic industry, and were also detrimental to the exports of countries such as Uruguay. Uruguay did not subsidize exports as it did not have the resources of the treasury of a developed country, and with a long frontier with Brazil was being subjected to a form of unfair competition which had no limits. Uruguay shared in the statement by Brazil in this regard. It was not appropriate for a panel to be established. This would create a dangerous precedent for using instruments of the system in order to perpetuate policies which were contrary to the liberalization of trade and the greater transparency of trade which constituted its very essence.

25. The representative of Colombia stated that the Committee had a basic obligation to act objectively in the light of any situation before

it. This should also be the position taken by members of the Committee. In the view of the Colombian delegation, there were two issues, on the one hand respect for procedures and on the other hand the substance. These two aspects were intimately linked. In this case, the Committee first had to see if there were substance to apply the procedures and then if there were procedures to apply the substance.

26. The representative of Colombia saw very clearly that if the procedures had been complied with, if consultations had been held and if conciliation had taken place, then the Committee would have to recognize that there was a right to the establishment of a panel. That was very clear. Article 18 stated that the Committee shall establish a panel when the corresponding steps have been complied with. So it was practically an obligation imposed on the Committee. The Committee was facing a difficult and delicate case, because it involved one of the crucial sectors in the multilateral trading system, which is agriculture. But it was not for this reason that the Committee could fail to comply with one of its obligations. It was up to the Committee and the Chairman to give an interpretation of the parameters.

27. The representative of Finland stated that the Nordic countries had consistently followed the view that a participant's right to a panel where it found that its rights or obligations had been impaired should be maintained and should not be obstructed by procedural gimmicks or manoeuvres. Without going to the question whether subsidies existed or not, the Code provided the right to use subsidies in certain cases but it also provided how to investigate whether subsidies had caused injury and whether countervailing duties were warranted. In this case, the procedural requirements had been fulfilled and the Committee should establish a panel according to the wishes of the EEC.

28. The representative of Hong Kong endorsed the intervention of Colombia, which described the difficult and delicate situation before the Committee very clearly. He added two remarks. First, he was sympathetic to the Brazilian government, which considered that the product was of vital importance and that Brazil's social and economic development was seriously hampered by the subsidized product from the EEC. Second, he noted that from the documents before the Committee the offer of consultations was first made by Brazil as early as January or February 1992, which was roughly three months before the imposition of the provisional countervailing duty. Had this consultation been accepted and conducted, matters might not have reached the stage where the Committee had to consider a request for establishment of a panel.

29. The representative of New Zealand noted that the representative of Colombia had some useful and interesting points to make. New Zealand shared fully the concerns about the impact of subsidized sales of agricultural products on non-subsidizing suppliers, and welcomed the opportunity to work closely with Brazil and others on these matters in the Uruguay Round. New Zealand supported the right of any importing country to apply a countervailing duty against subsidized goods, including agricultural products, where such action was consistent with

the terms of the relevant GATT instruments. New Zealand also supported the right of signatories to resort to dispute settlement, including any request for a panel which satisfied the formal requirements laid down in the relevant GATT instrument. It seemed to New Zealand to be a natural consequence of unilateral trade liberalization coupled with a proliferation of agricultural subsidies that importing countries would increasingly seek to resort to their rights under the relevant GATT instruments to protect their producers from unfair competition. New Zealand would be concerned if it appeared that the Committee was being used as a means to score points in what might understandably be something of an evolutionary process.

30. The representative of Switzerland stated that the discussions showed there was little chance that conciliation between the EEC and Brazil would be successful. The Swiss policy in such cases was that when conciliation was not successful and procedures for establishment of a panel had been fulfilled, as Switzerland considered them to be here, a party seeking establishment should get its right. Therefore, the Committee should decide to establish a panel.

31. The representative of Australia did not have all the information available to the parties in this case, and so would not comment specifically on the merits. There were two basic principles that concerned Australia. Australia did not wish to condone disregard of Code procedures, which were designed to protect the interests of all parties involved in countervailing cases. Nevertheless, it was concerned at the increasing tendency for disputes over procedural matters to be used to frustrate achievement of the central objectives of the Subsidies and Countervailing Code. Subsidies were recognized as unfair trade and were only tolerated in specific circumstances, i.e., in respect of certain primary products. The central purpose of the Code was to lay out arrangements under which importing countries incurring injury from imports receiving subsidies could address such injury without unjustifiably impeding international trade. Australia recognized the right of the EEC to dispute settlement processes under the Code, but the Committee needed to carefully consider the impact of the tendency for preoccupation for procedural issues at the expense of addressing the substantive issues. Australia was becoming increasingly concerned at the automaticity of adopting terms of reference for conciliation drawn up in such a manner that panel considerations might result in what might arguably be a legitimate final outcome being overturned solely on the basis of a narrow technical focus on procedures. It would be most unfortunate to permit the Code to degenerate into a mechanism for sheltering predatory subsidization practices rather than as a means of addressing the trade-distorting effects of such measures.

32. The Chairman stated that the Committee had heard the views of the parties to this dispute. A number of other signatories had expressed their views, in particular regarding the distinction between the procedural and substantive matters in this case. He proposed that the Committee take a brief recess to allow him to consult informally with

the two parties to the dispute on the procedural matter before the Committee.

33. The representative of Brazil stated that he did not oppose adjournment of the meeting. Brazil's position was that establishment of a panel was premature. It was an attempt by the EEC to bring to Geneva the consultations it refused to have in a meaningful way in Brasília, in spite of the Brazilian authorities' efforts to bring them to the consultations table. To date, and after the EEC's insistence that consultations be held in Europe, only two sessions of bilateral consultations had been held in Brasília with local albeit very competent EEC officials. The EEC had not yet replied to the questionnaire to which they referred in their document and which they acknowledged they had had since May. At the same time, the Committee in these busy times of the Uruguay Round had hardly had an opportunity to look fully into the matter so as to be able to give guidance to the parties under Article 17:1. A panel was a burdensome, costly process for the parties, especially for those whose capital cities were far away and whose governments didn't have financial resources for travel and associated expenses. It was also important for the Committee and for the GATT secretariat, faced right now with a number of other difficult tasks including important and complex matters being examined by other panels - unlike this one, which was a very simple matter.

34. The representative of Brazil stated that, with all due respect, the request had a tint of intimidation and of harassment. The EEC could count with an impressive deployment of highly knowledgeable officials for every bit of bureaucratic whim, whereas Brazil was busy trimming down its bureaucracy so as to have more public money to pay off its financial debt to international creditors, many of them in the Community member countries. In these circumstances, Brazil wished that the Committee would consider extending and intensifying the conciliation efforts and that the EEC would consider being responsive to the inequality of fortunes separating the parties and withdraw this request for this unnecessary panel. There were grounds for a mutually satisfactory solution. Brazil wished to explore with the Community the possibilities offered, although the first reaction by the EEC was a negative one, under Article 4:5 of the Code, the interpretation of which given by the EEC this morning was clearly not comprehensive, or under other provisions.

35. The representative of the EEC stated that, having heard the views of some of the members of the Committee, he could understand the concerns that the substance of this issue caused for many of them. His point was precisely that this substance was never discussed where it should have been, because of procedural violations. The EEC did not bring to the attention of the Committee the matter of subsidization of Community exports and their impact on the Brazilian market. That matter could be brought to the attention of the Committee if Brazil wished to do so. The EEC had brought to the Committee's attention the matter of violation of countervailing duty procedures. The EEC was the last member of the Committee to want to contest any signatory's right to

resort to countervailing duties to counter injurious subsidization. There were procedures for doing so. The EEC followed them, other signatories followed them, there are often disagreements about whether these procedures had been correctly followed, and there were panels on this. There was nothing extraordinary or dramatic about this. The EEC did not see the reasons for turning this into a drama.

36. In general terms, the EEC had a conciliatory attitude in all cases. The EEC had never claimed that Brazil had violated its obligations under Article 3 of the Code, and it never would. Brazil had fully observed its obligations in respect of Article 3. The EEC contested the violation of other rules. It only cited the rules it thought were being violated. Consultations had taken place. The EEC had been confronted with an attitude very much like that it confronted today and on previous occasions by the Brazilian authorities. Contacts had taken place and had not led to a mutually acceptable solution, and the same occurred during the conciliation period. Two consultation processes and two conciliation meetings had been held, admittedly on formally different grounds - the imposition of provisional and of definitive duties - but the heart of the matter was pretty much the same. No solution had been agreed, so the EEC had made its request.

37. The Committee decided to allow a brief adjournment of the meeting to allow the Chairman to conduct informal consultations with the parties to the dispute.

38. When the Committee reconvened, the Chairman noted the statements made by the signatories and the positions taken regarding the EEC's request for a panel, including the Brazilian view that it would be premature to establish a panel at this time. This matter raised an issue of importance to the effective functioning of the dispute settlement mechanism under this Agreement. The question before the Committee was whether a signatory was entitled to the establishment of a panel once consultations and conciliation had been held and the specified period of time had passed.

39. The Chairman noted that there was no precedent in this Committee where a signatory had been denied the establishment of a panel once these requirements had been fulfilled. Further, he noted that under similar provisions in the Anti-dumping Agreement, the Anti-dumping Committee recently had rejected efforts by a party to block establishment of a panel.

40. Of course, it was necessary to look at the text of the Agreement to resolve this matter under the Agreement. The Chairman wanted to provide a short explanation of those provisions. Article 17:1 of the Agreement provided that, "In cases where matters are referred to the Committee for conciliation failing a mutually agreed solution in consultations under any provision of this Agreement, the Committee shall immediately review the facts involved and, through its good offices, shall encourage the signatories involved to develop a mutually satisfactory solution." Article 17:2 of the Agreement stated that "Signatories shall make best

of conciliation." Article 17:3 stated that, "Should the matter remain unresolved, notwithstanding efforts at conciliation made under paragraph 2 above, any signatory involved may, thirty days after the request for conciliation, request that a panel be established . . ."

41. As the Chairman had stated when he introduced this item, the EEC made a written request for conciliation with respect to the imposition by Brazil of provisional duties on imports of milk powder from the EEC on 6 July 1992 (SCM/149), and the matter was taken up in a meeting on 21 July 1992 (SCM/M/61). A request for conciliation regarding definitive duties was made on 1 October 1992, and taken up by the Committee on 28 October 1992 (SCM/M/62). At that latter meeting, Brazil did not oppose the EEC's request for conciliation (paragraph 66).

42. Thus, conciliation had taken place in this matter. Nearly four months had passed since the second request for conciliation was made, far longer than the 30 days required by Article 17:3. Brazil maintained that the possibilities for conciliation had not yet been exhausted. However, the Community clearly was of the view that no mutually satisfactory solution could be achieved. Many months had passed and it was undisputed that the matter remained unresolved. Thus, the requirements of Article 17:3 of the Code had been fulfilled.

43. Article 18:1 provided that "The Committee shall establish a panel upon request pursuant to paragraph 3 of Article 17." The request by the EEC having been duly made, the Committee had to assume its responsibilities and establish a panel. The Chairman believed that no signatory intended to contest an Article of the Code which it had accepted and ratified. In this situation there was no need to make a ruling from the chair. The Agreement required that the Committee establish a panel in this case. The Committee so decided.

44. The Chairman further noted that Article 18:1 set out the terms of reference that normally applied to panels under the Agreement. While the parties could propose modified terms of reference if they so agreed, they had not done so in this case. In accordance with Article 18:1, therefore, he proposed that the terms of reference of this panel be as follows:

"To review the facts of the matter referred to the Committee by the EEC in SCM/155 and, in light of such facts, to present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement."

45. The representative of Brazil stated that he understood the Chairman to be using the terms of reference of Article 18:1 of the Code. Yet the Chairman had inserted a qualification on the basis of the EEC document. There were two parties to this case. He wondered why the Chairman limited this. Both parties had brought cases.

46. The Chairman stated this his reference in his proposed terms of reference to document SCM/155 was simply an elaboration or additional precision with respect to the words "the matter" in the second sentence of Article 18:1. "The matter" was in fact the matter referred to the Committee for conciliation under Article 17:1. Hence, the reference to the EEC document, which was standard in the drafting of standard terms of reference, was only there to serve that place-holder purpose.

47. The representative of Brazil stated that he understood the Chairman's explanation, and agreed that the terms of reference should be based on the standard terms of reference of Article 18:1. But he could not accept that it be qualified in any way so as to limit the examination by the panel of facts brought to the case by Brazil. He could accept a clause referring to "all the aspects of the matter as presented to the Committee by the EEC and Brazil," but he could not accept the terms of reference as read.

48. The Chairman proposed that, in light of the comments from the delegation of Brazil regarding the proposed terms of reference, the Committee authorize him to conduct consultations with the parties regarding any possible modified terms of reference agreed by the parties for this panel.

49. The representative of the EEC stated this this was agreeable to the EEC. He pointed out that he considered the right to have terms of reference in accordance with Article 18:1 as a right of any signatory. The Chairman had explained that the reference to the EEC document was a purely factual one that did not in any way tilt the examination of the panel towards the views of the EEC as opposed the the views of Brazil on this matter. As always the EEC was ready to discuss with the Chairman and the other party to the dispute the possibility of modified terms of reference if they could be so agreed.

50. The Committee so decided.

51. The representative of Korea stated that the establishment of a panel was the Committee's obligation and a signatory's right. But through his observations during the exchange of views this morning, he realized that there was no understanding about the facts of the case, much less any interpretation of the Code, and he hoped the parties would continue to make best efforts to reach agreement before the matter was referred to a panel.

52. The representative of the United States reserved the US right to participate as a third party in the proceeding. He also indicated the full support of the US delegation for the Chairman's interpretation of what the Korean representative had referred to as the Committee's obligation on the establishment of a panel. He added strongly the US view that the right of a signatory to a panel, which was express in the Subsidies Code and had become enshrined more recently in the GATT as a result of the Montreal mid-term rules, was an absolutely essential element for the proper functioning of dispute settlement. Chairman Lacarte in the dispute settlement group had been successful in pushing this concept through as a matter of general GATT practice and it was very important that in this Code

the Committee continue the unbroken record of separating out the procedural aspects of any signatory's right to a dispute settlement panel from the substantive aspects of the merits of a particular case. Those substantive aspects were for the panel to decide, and it was not appropriate to discuss them in the guise of whether the right to a panel was appropriate.

53. The representative of Australia reserved its right to participate in the panel.

54. The representative of Japan welcomed the establishment of a panel, but noted that for an amicable solution the efforts of both parties were essential. Both parties needed to listen to the position of the other party very carefully. He did not know the details of the contacts made between the two parties, but hoped the case could be solved on the basis of mutual understanding and respect.

55. The representative of Brazil stated that Brazil was more than confident that its reasons would be confirmed by the panel. He believed the decision to establish the panel at this stage was not the best one for the reasons he had explained. He was not addressing the principle behind it. Brazil would cooperate with the Chairman and the EEC to try to solve the matter in the best and least costly way for the Committee and the parties.

56. The Chairman proposed, in accordance with Article 18:3, that the Committee authorize him to decide, in consultation with the parties concerned, the composition of the panel. He would begin these consultations promptly. The Committee so decided.