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GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 15 JULY 1982

Chairman: Mr. M. Ikeda (Japan)

1. The Committee on Subsidies and Countervailing Measures met on 15 July 1982 in a restricted session. The following items were on its agenda:

A. Matter referred by India to the Committee under Article 17:1 of the Agreement (Certain Domestic Procedures of the United States)

B. Issues raised owing to the United States' preliminary determination in the countervailing duty investigation concerning certain steel products exported by the European Communities.

A. Matter referred by India

2. The Chairman recalled that the Indian position had been explained in document SCM/20 and the discussion at the April meeting had been summarized in document SCM/M/11, paragraphs 64 through 79. At the request of some representatives, the United States delegation had circulated the communication containing US responses to the specific points raised by India in document SCM/Spec/17.

3. The representative of India said that the issue which he had raised went back two to three years and during this entire period the Government of India had made sincere efforts to resolve these issues amicably between the two governments. If he had nevertheless asked for conciliation under the Code, it had been precisely because his Government could not afford to wait for bilateral solutions while access to the US market had unjustifiably been curtailed over a long period of time. All the same his Government wished to emphasize its willingness to resolve these issues practically and in a spirit of goodwill and co-operation with the Government of the United States.

4. As the Indian position had been explained in SCM/20 he wished only to refresh the memory of the Committee referring back to the essence of the points made by India and commenting on the paper which the Government of the United States had circulated to the members on these issues. The first point raised by India was non-extension of the injury criteria for industrial fasteners to India; second, improper methods and principles of calculating countervailing duties in case of some products like industrial fasteners, iron metal castings, and leather footwear and uppers, and third, improper retroactive application of countervailing duties on some items like leather footwear and uppers. As to the first point he recalled that on the assertion

of the Government of the United States itself, the obligation of the Subsidies Code were effective as between India and the United States from 25 September 1981, the day when the US Government withdrew its invocation of Article 19:9 with respect to India. However on that day certain countervailing duties had been imposed by the US Government on Indian industrial fasteners and at that time, unjustifiably, the US Government had not extended to India the benefit of the injury criteria. He believed that this was in complete violation of the obligations of the US Government under Article 4 of the Subsidies Code which clearly provided that countervailing duties should not be imposed or continued if there was no determination of the injury and of the subsidy. If either of these two did not exist on 25 September 1981 it was wrong for the US Government to impose or continue a countervailing duty against the imports from India of these items but this was precisely what had been done.

5. Referring to SCM/Spec/17 he said that it was deficient in many ways because it did not cover the essential points raised in SCM/20. Firstly the US paper spoke about certain duty free fasteners. That was clearly only a part of the problem. There were eight or nine lines in the industrial fasteners on which the countervailing duty had been imposed and it so happened that two of these items were duty-free and the US Government was bound by its own law, irrespective of the Subsidy Code, not to impose countervailing duty on duty-free items without giving India the benefit of the injury criterion. Although these two items had become duty free on 6 January 1982 only recently had the countervailing duties imposed on them been tentatively withdrawn.

6. He further said that the main problem before the Committee was not the obedience of the US Government to its own law, but its obligations before this Committee and before GATT. That problem had not been resolved so far because the Government of the United States had not yet given India the benefit of the injury criterion on industrial fasteners as a whole and countervailing duties continued to be applied. Therefore the explanation that the US Government had given in SCM/Spec/17, paragraph A, was not at all covering the grievance that India had and certainly it did not cover the fact that the US Government was violating Article 4 of the Code. Although he noted with satisfaction that at least on two items some steps had been taken, he was gravely concerned that whereas the US Government had given a lot of weight to its own law, it had given absolutely no weight to the multilateral agreement which it had signed. This was of grave concern not only to India but to the Committee as a whole and to GATT itself. In bilateral consultations his delegation had been told that perhaps there was some law in the United States which prohibited them from giving India the benefit of the injury criterion in this case. But the Committee was not concerned with that aspect. It was concerned with the obligations under the Code and if there did exist any such law, then the Committee would expect the US Government to amend its legislation or at least to empower itself so that its obligations under multilateral disciplines did get discharged fully and effectively.

7. Coming to the subject of methods and principles of calculating countervailing duties in case of items such as industrial fasteners, iron metal castings and leather footwear and uppers, he said that this was a matter of continuing importance not only for India but for all those countries against which the US authorities would think of imposing a countervailing duty. There were some disturbing features in these methods and principles. It was well accepted in the GATT and in the Code that the refund of indirect

taxes was not a subsidy. However the US authorities had brought out in their own internal structure certain methods as to how to calculate the amount of a subsidy and how to get at that part of subsidy which was not indirect taxes. These methods were not in conformity either with GATT or with the Subsidies Code. The Indian Government line was simple. The relevant factor was whether in the payment that had been made on the exported products at the time it crossed the border, there was an indirect tax element or not. Supposing that the Indian Government had paid $100 on these goods: if out of that it could prove that $50 were a refund of indirect taxes, then the US Government was bound to exclude those $50 from the countervailing duties. However the US Government insisted on some sort of historical linkage which was neither called for nor based on the GATT and the Subsidies Code. Furthermore the US authorities had themselves recognized that at least a part of the payment undoubtedly compensated in some measure for indirect taxes and yet they had imposed the countervailing duty to the full extent of the compensatory payment that India had made. This was patently wrong. While determining other cases the US authorities had found that Cash Compensatory Support (CCS) payments were significantly greater than the level of indirect tax borne by the product. That meant CCS payments did include essentially an element of the indirect tax borne by the product and yet in both cases the US authorities had imposed the countervailing duty to the full extent of the subsidy. This again was going beyond the rights of the Subsidies Code. In the case of leather footwear and uppers the US authorities had imposed countervailing duties on these products in 1979 and at that time they had excluded the indirect tax. However in 1982, on the same products, on the same rate of payment, on the same rate of indirect taxes as in 1979, they had not admitted it as exclusion. Perhaps this was because they had evolved some new principles of what they called the linkage which was not in conformity with the obligations under the GATT or the Subsidies Code.

8. Referring to the retroactive application of countervailing duties on leather footwears and uppers, he recalled that the US authorities had in October 1979 made a final determination of the countervailing duty. Now in 1982, they had changed the rate of this duty and they had made it applicable not from February 1982, when they had changed the rate, but from 1980. He considered this as a complete violation of Article 5 of the Code because he felt that a duty once established should be applied until it was revised and the revised duty should be applied only of the date on which the revision had been made. If the revised rate was applicable from the date when the duty was first imposed it amounted to a retroactive application. However there was only one provision in the Code for retroactive application of duties, that was Article 5. The US position was that they had taken this action not under Article 5 but under Article 4. However Article 4 did not permit a country to impose countervailing duties retroactively. Nevertheless the US authorities had imposed a duty of 4 per cent, but had subsequently revised this rate and imposed a higher rate not from February 1982 but from 1980. It would appear to anybody as nothing else but retroactive application and once it was retroactive, then the conditions of Article 5 had to be followed. The US authorities had used Article 4 in 1979 when the final determination had been made. Now they said that it was in accordance with their law that if after the final determination they found that a rate should be higher, they would charge a higher rate. This was certainly not provided for in the Agreement at all. The United States might have it in their law but it was not in the Subsidies Code. Once the final determination had been made, the rate of duty was determined and if the US authorities decided to redetermine it at a later

stage, then the new rate should be applicable only from the date on which the new determination had been made because if it were applied from the former date, it would be a retroactive application. So whereas it might be in the US law, it was not in the Subsidies Code and therefore the main aspect for the Committee to determine was about the correctness or the incorrectness of the retroactive duty on leather uppers.

9. He concluded by saying that his Government had proceeded in a spirit of co-operation and understanding for a very long time. It had hoped that all these problems would be solved but unfortunately they had not. It had been his Government's expectation that rules and practices for the application of subsidies and countervailing duties would evolve which would, in the language of the preamble of the Code, provide greater uniformity and certainty in their implementation. However the experience with the implementation of the Code by the United States, the only developed country which had so far imposed countervailing duty on Indian exports, had been exactly the opposite to these expectations. This concerned not only India, but other Signatories as well, and also non-Signatory contracting parties who were wishing to join the Code in the future. Because their decision regarding joining the Code would depend on how the existing Signatories, and particularly the major Signatories, were evolving their own rules and procedures on this subject. He thought that in this year of the GATT Ministerial meeting, when a stock-taking of the results of the Tokyo Round was very much in the minds of all GATT contracting parties, such fundamental issues needed careful consideration and examination.

10. The representative of the United States drew the Committee's attention to the copies of the preliminary determination with respect to the administrative review of the Countervailing Duty Order covering duty free fasteners from India which had been circulated to the members of the Committee. That determination had been made on 13 July and would appear in the Federal Register on or about the 19 July. The determination represented the view of the United States regarding its obligations under US law and the Code with respect to the provision of the injury test in the case of fasteners. With regard to the injury test with respect to duty free fasteners he was advised that the matter was currently under investigation at the US Court of International Trade and for this reason, the US could not comment further on this aspect of the issue. With regard to duty free fasteners which accounted for the vast majority of imports, the next administrative step would be the rendering of the final determination by the Commerce Department. This determination might be issued after thirty days had elapsed from the date of publication of the preliminary determination.

11. With respect to the calculation of the countervailing duties in the case enumerated in paragraph B of SCM/Spec/17 and the linkage, he reiterated his position that the actions taken and methodologies employed were fully consistent with the letter and spirit of the Code. As he understood it, the CCS payment included two elements: A tax rebate and an export payment. This payment varied apparently from product to product as did apparently the ratio of the alleged tax rebate component to the export payment. The Government of India did not fully explain how the tax element was calculated in these cases. Surely, the United States could not be expected to conclude that the incidence on taxation for particular products in India had been reasonably calculated if the Government of India could not or would not provide evidence of or an explanation of the basis of its calculations. On 19 May, the United States

provided to the Government of India a written explanation of a procedure which would enable the United States to reach a conclusion in this matter. He expected the Government of India to respond to these proposals.

12. Concerning the issue of product coverage in the case of leather footwear and uppers, the United States had requested that the Government of India provide information on a range of samples which would enable the United States to reach a decision as to the criteria employed by the Government of India in establishing CCS rates for various types of footwear. He had to point out that the administrative record in this case contained a definition provided by the Government of India to the United States through its counsel which differed from the subsequent representations by the Government of India. The sole interest of the United States in this matter was to determine, based on the evidence, criteria employed by the Indian authorities themselves. Again, the United States was acting in good faith in this and all other matters raised by the Government of India in document SCM/20. It was acting within the letter and spirit of the Code.

13. He further said that the representative of India alleged that the United States had failed to give credit for some indirect taxes. The US inability to give that credit was frankly not its fault. The investigating authorities were in possession of no information which would enable them to guess as to what the legitimate tax incidence might be. In both anti-dumping and countervailing duty investigations, the authorities in the importing countries were necessarily dependent upon exporters or exporting governments to supply the necessary information which would enable them to make the required determination. The representative of India had also noted that there had been a change in the treatment of the CCS payments between 1979 and 1982. This was correct. In approving the Trade Agreements Act of 1979, Congress had made it clear that it disapproved of the old US standard. The new standard incorporated in the Act included the linkage test. These standards were in full conformity both with the letter and spirit of the Code.

14. With regard to retroactivity he recalled that Article 5 of the Code dealt essentially with events that occurred during an investigation between the point when the authorities reached a preliminary determination and the final determination. It set forth standards on retroactivity, reaching back before the point of investigation or before the point of preliminary determination. The US authorities had always adhered closely and faithfully to those standards. Once the final determination had been made and an order issued in a case, as had been done in the case of footwear, countervailing duties were not automatically imposed. Instead a deposit of estimated countervailing duties was required. Once a certain period had passed, a review was conducted to determine what was the precise amount of the subsidy and consequently of the countervailing duty. Once that review was concluded, the results were published and then duties were assessed. In an overwhelming majority of instances, including both countervailing and anti-dumping duties, the results were that assessed duties were lower than deposits and the difference had been refunded. If the representative of India had his way, in most cases the United States would be assessing more than the actual imposition of duties. This was why they did not follow that course In no instance could it be considered to be a retroactive application. It was an accurate reflection of the subsidies that existed on the particular exports.

15. The representative of India said that he had just heard about a litigation going on in the US Court on the matter of the injury test benefit

to India on industrial fasteners. That had been cited as a reason that the US Government might not be in a position to comment on this. However the internal law was not relevant in the Committee. In the Committee, India, as a Signatory, had a right to ask whether as of 25 September 1981 the United States was or was not going to give India the benefit of the injury test. If the answer would be that the US law prohibited it, then the United States would have to make a commitment to change the law, to make it consistent with its obligations under the Code. As to the retroactive application, his understanding was that the 1979 Countervailing Duty Order was a final determination and a certain amount was levied and charged. The Government of the United States could revise it. But once it had been revised, it had to be applicable from the date on which the revision had been made. Or alternatively, the procedure of provisional and final determination should again be followed in this case. He considered this practice of keeping the whole thing fluid neither liberal nor permissible under the law and under the Subsidies Code. Because under the Subsidies Code, if one had to apply an amount of duty retroactively one had to follow Article 5. On the other hand, one was quite free to use Article 4:4 but then it could not be made retroactive.

16. Referring to the question of availability of information he wished to mention that the methods and methodology followed in very highly industrialized countries might not be exactly the same as those followed in countries like India. For example, in India the industrial fasteners production units were spread throughout the length and breadth of the country because this was still a low technology affair. Consequently it would not be possible to introduce the same type of sophistication as perhaps the United States would expect their own units to do.

17. He concluded by saying that the matter brought by his Government before the Committee was a very important one. The question really was whether GATT itself, whether the Committees themselves had a jurisdiction over implementation of multilateral obligations contained in various codes or whether the court of a Signatory country had jurisdiction in this. He did not wish to seek the opinion of the Committee on this right away although he was quite sure the opinion would be only one on this but he only wanted to underline that this was a fundamental point which had been raised not only for this Committee but for the GATT system as a whole and for any international contractual obligation.

18. The representative of the EEC said that he had already made it clear at the last meeting of the Committee that he had sympathy with the Indian case. The first problem was the injury test. Article VI of the GATT had provided for an injury test in countervailing cases since 1948 and an injury test had been provided for under the Subsidies Code and consequently no countervailing duty should be collected or should have been collected without an injury test. Consequently he could only urge both parties to come to a quick solution of this problem. The second problem was the much more complicated problem of retroactivity. In this case he had an understanding for the American position that the procedure was clearly not under Article 5 of the Code. On the other side he had a lot of sympathy for the Indian position that there was a real problem under Article 4 because the particularity of the American system was that there was no fixed and final countervailing duty collected at a fixed rate from the date of the determination but there was only a security deposit. Had the US not followed this system which had a lot of advantages, but just

applied the system which the EEC had, namely that of fixed rate of duty as of the moment of the determination, there would clearly have been an element of retroactivity in the situation which the representative of India had just presented. If the EEC had fixed the duty and then two years later come to the result that they should have been higher it would not have been possible to retroactively increase the duty because a mistake had been made in assessing the duty at the moment of the final determination. The American system was different and consequently there was a problem. Initially, there had been a determination, the result of which had been a relatively low countervailing duty. Subsequently there had been a new estimation with a higher countervailing duty which had to be assessed retroactively. There was a real problem and it should be discussed in the Committee.

19. Referring to the problem of the restitution of internal taxes he said that it was quite clear that as long as the restitution limited itself to what had been collected it did not constitute subsidies. The US position was that there were doubts as to whether these export restitutions had been initially intended to compensate the internal taxes. On the other side, the Indian party said that in fact they compensated these taxes. Consequently there was a conflict between intention on the one side and facts on the other side. Under the GATT, it had never been stated very clearly what was decisive - intention or fact. Could one stick to facts or had one to prove that the intention from the beginning of the system had been to grant the payment only in order to compensate for the internal taxes. The US had addressed to the Indian Government some kind of questionnaire in order to sort it out. The question of what kind of methodology should be applied would interest everybody in the Committee. It would also be in the common interest of this Committee to establish guidelines on what kind of linkage had to exist between restitution and the payment of internal taxes.

20. The representative of the United States said that with regard to the question of retroactivity the representative of the EEC had in essence made one of the points which he wished to emphasize himself. Article 5 simply did not apply to the factual situation that the Government of India had raised. Article 5 applied to the period of time between a preliminary and a final determination in a subsidy investigation and nothing else. The factual situation raised by India concerned solely entries made subsequent to the US final determination, subsequent to the Countervailing Duty Order. The Code in Article 4:2 simply said that no countervailing duty should be levied in excess of the amount of a subsidy found to exist. His Government faithfully adhered to that. He appreciated the concern of the Indian Government that under the US system there was a period of uncertainty and there were situations where the final duties could be greater than determined to exist in an earlier period. He thought that this uncertainty was a relative small price to pay as compared with the unfair and far more arbitrary perspective assessment of countervailing duties regardless of what the subsidy really might be. No government in an importing country could constantly and quickly recalculate the amount of subsidies. The United States endeavoured to do so once a year. What had been assessed in this instance was in no sense retroactive and it could not be properly argued that the US practices were in conflict with either the letter or the spirit of the Code.

21. With regard to indirect tax standards and particularly the linkage test, he said that the investigating authorities had already found CCS payments to be a properly quantified and properly linked rebate of indirect taxes in at

least one case, on textiles, and they were prepared to do so again on condition that appropriate information on calculation of the tax incidence was available. He believed that this requirement was fundamental, given the tax structure in India and in other countries. It was often very difficult to have any idea of what the tax incidence was on particular exported products. If one did not know what the tax incidence was and one intended to rebate those taxes, by what logical process could one determine what that rebate should be and what that export payment should be? The US investigators had made what they considered to be reasonable and not unfairly burdensome requests to the Government of India to supply them a minimal amount of data reflecting their calculations of the tax incidence, and because of the lack of adequate response the present disagreement had arisen. He expressed his hope that in the very near future, this would be resolved to mutual satisfaction.

22. The representative of India said that when the US authorities had found that the cash payment was higher than the indirect tax, they had imposed a countervailing duty to the full extent of the cash payment. In the case of textiles, they had found that the indirect tax element was either equal to or higher than the cash payment. In the other three cases, they had found that the cash payment was higher than the indirect tax payment and they had imposed full duty. This was why he was so concerned about the US methods and strongly believed that the United States, in formulating their principles and guidelines, should duly recognize that certain rights had accrued to India and that India could refund the indirect taxes. It was not a question of US authorities asking for a set of data and the Government of India not providing it. In fact there had been a very long process of exchange of information, exchange of data and of discussions, formal and informal, at various levels. The problem now was how it should be solved and since it had not been solved so far, his Government thought of using the good offices of the Committee.

23. The representative of Australia said that he had already expressed his views on this matter and despite the fact that SCM/Spec/17 had been considered in Australia, his Government's reaction was that notwithstanding the contents of that document, the concerns that he had earlier expressed had not been entirely allayed. Basically the concerns related to the failure of the United States to accord an injury test in respect of industrial fasteners and of footwear, the non-application of the Code to India in a manner which might be construed as contrary to India's rights under Article 14 and the manner in which the United States was interpreting the retroactivity provisions of the Code. In particular, indications by the United States that it was conducting an expedited review gave no assurance that the review would address India's rights to the injury test. He agreed with the representative of India that the issues before the Committee did not concern Signatories to the Code only. They had implications for all contracting parties to the GATT in view of their obligations under Articles I and VI. He noted that the United States asserted in the final paragraph of its paper that it believed it was inappropriate for the Committee at this stage to take any substantive action on the request made by India. However, it was his view that these were issues which should be addressed by the Committee since there remained considerable uncertainty as to whether India's rights had been observed and whether the United States was using its legislation and procedures solely to fulfill its obligations under the Code or whether, through discriminatory application of the injury test and the use of retroactive duties, it might indeed be bringing pressure on Signatories or even potential Signatories to conform with what the United States considered to be the obligations under the Code. For these

reasons he had sympathy for the request made by the representative of India and he hoped that the Committee would be able to protect India's rights under the Code.

24. The representative of the United Kingdom speaking on behalf of Hong Kong said that he had earlier supported the request by India and he would do so again. He recalled that there had been earlier problems between the two governments involved and he hoped that these problems would find a satisfactory solution. In relation to the injury test, it seemed that the questions which had been asked by India required a definite reply because they involved a problem of US compliance with the Code. The Committee was not concerned with the US domestic legal structure. It was concerned with the compliance with international obligations. On the question of the methods and principles he said that under Article 4:2 it was clear that when fixing the countervailing duty, one could not exceed the limit of the subsidy. On the question of retroactivity he said that Article 5 of the Code contained specific references to retroactivity and no one could deny the right to take actions within this Article. However, the United States argued that it was taking action under Article 4. He could see nothing in Article 4 which gave a definite right to take a retroactive action. Had it been so, Article 4 would have contained a specific provision for it. He further said that the case of India was also relevant for those who were not present in the room but who might wish to join this Code. These questions had to be solved in a way which would be satisfactory to both parties but also for those who were waiting and many of them were developing countries.

25. The representative of New Zealand said that the failure by the United States to apply the benefit of the injury test to a Code member had been of particular concern to his authorities. Recent events in this regard gave him some encouragement that there might be, in the end, a satisfactory conclusion on this particular issue. However, the heart of the problem was the application by the United States of the injury test in compliance with the requirements of the Code. He noted that the matter was before the US Court and hoped that it would be satisfactorily resolved to confirm the existing multilateral obligations of the United States. He further said that the question of retroactivity had been of considerable concern to him and he wanted to ask how a Signatory who had problems with a retroactive application of countervailing duties could seek redress if he could not do it under Article 5. He also endorsed the comments made by several speakers about the importance of the issues to those who were not members of the Code but who might be thinking of joining it. He did not think that the Code was a satisfactory agreement for reasons related to the items of particular interest to his country in international trade, but he did not wish to elaborate on this at that point in time. He concluded by saying that the main concern with respect to the Indian complaint was related to the ability of the United States to strictly apply the provisions of the Code and to the conformity of US regulations and practices with Articles I, VI and X of the General Agreement. He felt that the Indian Government was justified to feel considerable impatience on the issues and he trusted that they would be brought to a speedy conclusion.

26. The representative of the United States said that the United States did not dispute that since 25 September 1981, it had been an obligation under the Code to provide an injury test to imports from India. The current law had, however, posed certain difficulties. His Government had already taken certain

concrete steps with regard to the import of certain fasteners to revoke the finding. With regard to dutiable fasteners, the issue was in court and would be decided within the US legal system. As he had stated before, it was entirely possible that the US courts would find that the US law required or permitted the application of an injury test to dutiable fasteners from 25 September 1981. With regard to retroactivity, he felt that there was not a clear understanding within the Committee on the exact nature of the US action. In the context of the Code and very specifically in the context of Article 5 which was the only place where retroactivity was discussed, that word was used and a concept existed only to describe how far back the authorities in an importing country might reach and under what conditions they might do so to apply countervailing duties to imports that would otherwise not be subject to countervailing duties. In the context of the Code, as well as in the context of the United States law, that retroactivity concept arose primarily in what was called critical circumstances, when, under certain very rigid criteria, one might assess countervailing duties upon imports made up to 90 days prior to the preliminary determination that subsidies existed. In the case presently being discussed the concept of retroactivity was of no use, particularly not in the Code sense. He hoped that no one disputed the fact that the entries in question were clearly subject to countervailing duties. They were inscribed in the Countervailing Duty Order issued well before this particular merchandise was imported. The sole question really was what was the amount of the subsidy. The US authorities had calculated and assessed what they believed was the accurate amount. The fact that the accurate amount of the subsidy was finally higher than the estimated amount did not constitute retroactivity in the Code sense.

27. He further referred to the Indian contention that when the export payments in question exceeded the leviable taxes, the United States had countervailed the whole amount. The applicable standard should have been to countervail only the amount by which export payments exceeded indirect tax refunds, if the tax credit was given for legitimate indirect taxes properly calculated and linked. It was not a simple concept and there had been, on occasions, misunderstandings or failures of proper or clear communications on both sides. It was his belief that there should be no more misunderstandings and that both governments would resolve these problems to their satisfaction in the very near future.

28. The representative of Sweden said that the Nordic countries shared the concerns of the previous speakers. He certainly appreciated the technical complications involved but he considered it to be of crucial importance that the injury criteria was applied with regard to all Signatories to the Code. It was his hope that a mutually satisfactory solution would be found that would confirm the strict application of the injury criteria in the case before the Committee.

29. The representative of Brazil expressed his full sympathy for the case made by India in the Committee. He could agree with the remarks made by Australia, EEC, Hong Kong, New Zealand and the Nordic countries and he wished to emphasize that it was very important that the injury test should be fully granted to India in this case. He also considered that the calculation of the countervailing duty should be made in an objective way removing any subjective element like intentions. At the same time, he hoped that both parties would make all efforts to solve these questions in a satisfactory way.

30. The representative of India thanked the representatives who had expressed their sympathy for his case and emphasized that the case was of importance not only to India but to the working of the Code itself. When the working of the Code came into such great strain within hardly a year and a half of its inception, it put many doubts into the minds of non-Signatories. He thought that all efforts should be made to ensure that the MTN Codes would not be the exclusive preserve of a small number of contracting parties and that they should be run in such a manner as to encourage non-Signatories to join the Codes. Referring to the issue regarding injury criteria for industrial fasteners which was a matter of litigation in the US courts, he noted the US representative statement that a possibility existed that the decision of the court might be in favour of extending injury criteria to India which would solve the problem. He said that although he had very great respect for the US courts which were some of the most objective courts in the world and very independent, he maintained that the main issue was that a Signatory should not need to wait for what the court of another Signatory would say. Should Signatories or contracting parties subject their rights to the decisions which the courts - however respected they might be - might take? In his opinion it was not so. It would be a satisfactory outcome for India if the US courts decided in a favourable manner. But that would not solve the problem. The problem was whether GATT itself, whether Code Committees themselves, had a jurisdiction in such cases or whether the court of a Signatory country had the jurisdiction. He did not wish to seek the opinion of the Committee on this at this meeting but he wanted to stress its importance for the GATT system as a whole or for any international contractual obligation. He also, like the representative of the United States, was looking forward to quick resolutions of all these problems which would be satisfactory to everybody.

31. The Chairman said that the Committee had heard the opinions of the two parties concerned and of several Signatories. He trusted that the two parties concerned would report back the contents of the various interventions for the consideration of their respective authorities and that they would make their best efforts to find a quick and equitable solution. The Committee would revert to this matter at its next meeting. The date for this meeting would be decided by the Chairman in consultation with interested delegations.

US preliminary determination concerning certain steel products

32. The representative of the EEC recalled that on 10 June 1982, the Department of Commerce had published the preliminary determinations of subsidization in the countervailing duty investigations in respect of certain steel products from the United Kingdom, the Netherlands, France, Italy, F.R. of Germany, Belgium and Luxembourg. These investigations covered a volume of trade estimated at close to 3 million net tons with a value of $1.3-1.5 billion. He said that apart from the magnitude of the trade involved, the determinations raised important and novel issues under the Code on Subsidies and Countervailing Duties. In some instances, the US preliminary determinations represented a complete departure from hitherto undisputed interpretations of the GATT and the Subsidies Code and were, in the Community's view, in direct conflict with the letter as well as the spirit of these Agreements. In other cases, they were based on extreme and unilateral findings on issues never decided before, some of which had deliberately been left unresolved for further negotiations among Signatories. They were also arbitrary or based on disputable economic premises or logic. These decisions

called into question the delicate balance of advantages reached during the Tokyo Round negotiations. They had implications for many countries and industries currently exporting to the United States.

33. He stressed that the GATT and the Code on Subsidies and Countervailing Duties laid down a certain number of criteria and conditions which had to be met before countervailing duties could be imposed. There had to be a subsidy granted directly or indirectly on the production, manufacture or export of a product. In his view it was obvious from texts of the Code that any such subsidy had to involve a charge on the public account. He also considered that this subsidy had to adversely affect the conditions of normal competition. In the absence of any such distortion, subsidies, other than export subsidies, were recognized by the GATT as important instruments for the promotion of social and economic policy objectives against which no action was envisaged by the Code. Furthermore there had to be material injury to a domestic industry and it had to be demonstrated that such injury was caused by the subsidized imports, through the effects of the subsidy.

34. Referring to the method used by the US to determine the amount of subsidy he said that it had never been contested in the past, that where a firm received a capital investment grant of 1,000, the subsidy amount of 1,000 had to be allocated over the useful life of the equipment purchased such as steel plant. This approach resulted in an annual countervailable subsidy of 66.6, given a useful life of 15 years. However, in the present case the US applied a concept which concentrated on the hypothetical benefit to the recipient rather than the actual amount of the financial contribution of the government. They thus assumed, in the case of a British steel maker, for instance, that the value of the amount received was equivalent to that which would have been received if the money had been placed in a London bank at an annual interest rate of 15.6 per cent. After 15 years this would have meant that an initial amount of 1,000 would have been blown up to 2,565. Under this concept, the subsidy would be countervailed at an annual rate of 171, i.e. a rate three times as high as under previous practices. It was the Community's assertion that this new US approach was neither compatible with GATT nor was it realistic. Firstly Article VI:3 clearly stated that no countervailing duty should be levied in excess of the amount "granted", thereby placing the emphasis on the financial contribution of the government rather than on any nebulous benefit to the recipient. Secondly the Illustrative List annexed to the Subsidies Code set out eleven specific types of export subsidies. The last item, (l), referred to "any other charge on the public account constituting an export subsidy". The clear inference from this was that the preceding items also involved a charge on the public account and that it was this charge which constituted the Subsidy. This was borne out by the wording of the items themselves which repeatedly used such terms as "provision", "delivery", "remission", "exemption" or "grant" by governments. Accordingly the traditional interpretation of Signatories, including the US, had been that the amount countervailable was the amount of the financial contribution of the government. Thirdly it was completely unrealistic to calculate a theoretical benefit to the subsidized firm or to the government, as though either of them had put the amount granted into a bank account. The subsidized companies had no other choice but to use the money for the purpose for which it had been granted. The government's prime function, on the other hand, was certainly not to place money at the highest possible return.

35. Referring to the US approach to the question of loans and loan guarantees he said that similar issues arose as in the case of grants. The Community maintained that it was contrary to GATT principles to impose countervailing duties at a rate higher than the amount granted. Hence the only legitimate way to assess the amount of a subsidy involved in a loan or a loan guarantee was to compare the rate of interest, or the fee charged to the company for the guarantee, with the rate at which the government borrowed the funds or the costs incurred when operating a guarantee programme. He considered that the US authorities again had abandoned these GATT principles by creating a hitherto unknown distinction between creditworthy and uncreditworthy companies. In the case of creditworthy companies they compared the rate of interest charged to the company for the loan with the rate which the company, nor the government, would have been charged under normal commercial terms. The result was that countervailing duties could be applied in the absence of any financial contribution of the government. In the case of uncreditworthy companies the loans were treated as grants and were therefore subject to the inflatory calculations discussed above, a practice which brought the amount of the subsidy up to completely unpredictable levels.

36. As to regional aids he said that they simply compensated for the industrial, economic and social disadvantages of certain regions, e.g. Mezzogiorno, Berlin. They were common practice throughout all industrialized countries. They did not involve any trade distortion, which was a precondition for the imposition of countervailing duties. He further said that the Subsidies Code expressly stated that Signatories of the Code did not intend to restrict the right of Signatories to use such aids to achieve certain social and economic policy objectives which they considered desirable, such as the elimination of industrial, economic and social disadvantages in specific areas. Nevertheless the US authorities had countervailed against the full amount of all regional aids granted and in doing so they had failed to take account of the lack of trade distorting effects. They had also failed to comply with the GATT principle that such duties should be less than the total amount of the subsidy if such lesser duty would be sufficient to remove the injury to the domestic industry. He considered that the use of countervailing duties in a manner which neither took into account the degree of trade distortion inherent in a subsidy nor the degree of injury caused thereby clearly interfered with international trade in a way not intended by the Signatories of the Code. On the contrary, the Signatories, when reaching agreement on the Code had been desirous that countervailing measures should not unjustifiably impede international trade. This, however, was the effect, in practice, of the recent US determinations.

37. He further said that the US determinations had raised a completely new issue by deciding that the infusion of government equity into private companies could be countervailable. While the US authorities had decided not to countervail in cases where the government had purchased shares on the open market at market prices, they had found that a subsidy existed where the government had purchased shares directly from the company at a price higher than the market price ruling sometime before the purchase. This determination was clearly based on erroneous economic premises insofar as it did not take into consideration the fact that the intrinsic value of the shares, based on asset value, might be more than their market price and that an investor might be prepared to pay a premium for control of the company and its assets. It was also quite normal that a rational investor paid a premium over the market price if he had reason to believe that new management and the infusion of

capital would allow a rate of return greater than in the past and therefore greater than the stock market had anticipated. Where there was no market price for the shares bought by the government the determination was that a subsidy existed up to the amount of the difference between the return to the government and the average return on industrial investment in the country concerned. Thus, if in a country the average return on industrial investment was 15 per cent this amount would be applied to the steel industry. He considered that this was totally arbitrary. It followed from GATT that the decisive criterion for whether a subsidy existed was the charge on the public account and the investment should, therefore, be treated as a long-term loan by the government and the long-term return to the government should be measured against the rate at which the government borrowed the money to make the investment. After all, the GATT was not an investor's guide and the purpose of Article VI was certainly not to ensure that government decisions were based strictly on the same criteria as were applied in the private sector.

38. He concluded by saying that his delegation would welcome a thorough discussion in the Committee of these important issues with a view to reaching a consensus and thus avoiding further unilateral action which might affect the practices of all Signatories including subsidies granted by the United States itself. He urged the United States Government to review their preliminary determinations taking into account the points he had just made. He recalled that parties to the 1967 Anti-Dumping Code had bitter experience with the unilateral US interpretation of the injury test and he did not want history to repeat itself.

39. The representative of the United States said that the problem raised by the EEC went back at least to the mid-1970's, when it had become apparent that there would be serious excess capacity of steel production in the world. The United States could have set up protective barriers to limit steel imports, as other countries had done. Instead it had gone to great lengths to keep its market open to imported steel. The US Government had persuaded the domestic steel industry to withdraw anti-dumping complaints in 1978 by setting up a Trigger Price Mechanism (TPM) which had been established to allow imports from all countries to continue, perhaps at less than fair value, while avoiding injury to the US industry. In October 1980 a revised TPM had been established again to obtain withdrawal of the cases against EC producers. Again it had come down, when certain EC producers decided to flout the TPM by shipping well below the trigger price levels, notwithstanding overwhelming evidence of injurious subsidization and sales at less than fair value. Meanwhile, some US trading partners had asked for continued patience, saying that they were undertaking restructuring to eliminate outmoded, uneconomical production facilities. With a few clear exceptions, this "restructuring" had appeared to be a vehicle for governments to underwrite the costs of their industry's modernization, a luxury not available to the steel industry in the US, or indeed in many other countries, including certain EC member states. For example, the West German steelmaker's association had recently estimated the total government financial assistance spent or committed for other EC steel industries for the period 1975-83 at the sum of $70 billion.

40. He stressed that with respect to the countervailing duty investigations, the determination reached by the Department of Commerce on 10 June 1982 was a preliminary one and that there were numerous opportunities under US law for all interested parties to comment upon these preliminary results. Hearings in

each of the investigations had already begun and post-hearing briefs might be submitted. Final determinations in the countervailing duty cases on carbon steel products would be made by 24 August, taking into consideration all comments made by all interested parties in the ordinary hearing process.

41. He said that normally he would be quite reluctant to discuss preliminary determinations made by the Commerce Department in the Committee, except during the semi-annual meetings where recent countervailing duty determinations were normally notified and reviewed. This view was based upon the prematurity of discussing merely preliminary determinations, the numerous opportunities for comment on determinations under US domestic law both in writing and orally, and finally the availability of the regularly scheduled meetings for review of recent determinations. However, in view of the request of the EEC his Government agreed to discuss the preliminary determinations at this meeting. At the outset, however, he wished to clarify some limitation on his ability to discuss these cases. First, in order to assure fairness to all interested parties in the investigations, he was required to describe the communications made at this meeting in the public record of each of these cases. This requirement was designed to ensure maximum transparency in the proceedings and fairness to all parties concerned, and was fully consistent with the Subsidies Code. If any delegation wished its comments to be considered confidential, he would appreciate an express request to that effect. He would still have to record the confidential communication, but in a classified memorandum, and then make public only a non-confidential summary. Second, he wished to stress that full opportunities under US law remained for all interested parties to comment in detail upon the Department's preliminary determinations. In view of these opportunities, he did not feel it was appropriate within the context of this meeting to address particular allegations concerning treatment of specific subsidies to specific companies. He was willing instead to discuss very briefly the broad concepts employed and the general methodologies of subsidy calculation which the Department had used in reaching its preliminary determinations. These statements reflected the rationale of the preliminary determinations, not a prejudgement of the final determinations. Finally, none of the US statements at this meeting should be construed to prejudge the outcome of any of these investigations. While he was convinced that the preliminary determinations were fully consistent with the Subsidies Code, he did not exclude the possibility of modifying final determinations as appropriate.

42. He wished also to say that when the Code had been negotiated and finally concluded in 1979, governments of all countries represented here had striven to agree upon international rules which would apply to countervailing duty cases. His Government had followed those rules scrupulously. Where the governments had not been prepared to discuss or agree upon rules, the Code consequently remained silent. In dealing with issues upon which the Code was silent, the US adhered to the general guidelines for application of countervailing duties laid down in the Code. While he endorsed footnote 15 of the Subsidies Code which stated that "an understanding among Signatories should be developed setting out the criteria for the calculation of the amount of the subsidy", in no way did this language proscribe the calculation of subsidies until a consensus on methodology could be reached. Moreover, any dispute concerning the manner in which the Department was conducting these investigations was a matter which could be brought up as appropriate both in US courts and in the Committee meetings.

43. He said that regarding many of the issues raised by the representative of the EEC the fundamental concept underlying the use of the present value methodology was that a subsidy was the benefit received by a company, not an amount that the government had given. If the United States was to take the Community's position on the word "granted" literally, it could countervail against benefits that were granted but not actually dispersed to the recipient. If the intent of assessing countervailing duties was to offset or neutralize the negative or distortive effects upon trade or the injury created by subsidies, that possibly could not be accomplished unless those same countervailing duties had the effect of eliminating that distortion. The present value methodology recognized the very fundamental economic and commercial fact that money received today was far more valuable than the same nominal amount of money received over time. This methodology which was used in the US preliminary determinations was a widely used tool of financial managers around the world. Article 4 of the Code and Article VI of the GATT prohibited collection of countervailing duties in excess of the full amount of the subsidies determined to have been granted. The term "amount" clearly referred to the amount in real rather than nominal terms. If the Code and the GATT were interpreted as proposed by the EEC, subsidized firms would obtain an unfair advantage over unsubsidized firms which would not be fully offset even by the imposition of countervailing duties. He could not agree with any such interpretations sanctioning unfair trade practices and consequent distortion in international trade. He wanted to emphasize that the present value concept had not been used in every calculation that had been made. It only came into play in those situations where a particular subsidy had to be allocated over a period of time greater than one year. In such a situation the present value methodology was reflecting and capturing the real value of the amount of a subsidy to the company in each of the years over which it was allocated. It was therefore extremely misleading to assert that the United States was countervailing an amount greater than that which had been received. The calculation merely reflected the value in each successive year of the allocated portion of the subsidy.

44. He further said that the representative of the EEC asserted that one had to measure a subsidy by virtue of its cost to the Government as opposed to its benefit to the recipient. This approach was fundamentally inconsistent with any objective desire to offset subsidies and the effect of subsidies and it was not, in any sense, mandated by the GATT or by the Subsidies Code. Certain items in the Illustrative List did indicate - inferentially at least - measurement in terms of cost to the Government. Other items in that list clearly implied that a subsidy might exist without regard to whether there had actually been any cost to the Government, as for example items (c) and (d) on that list. And in any event, the case under discussion regarded domestic subsidies and therefore the Illustrative List was not relevant.

45. Referring to the question of treatment of uncreditworthy companies he said that it was an innovation as the US Department of Commerce had never had to deal with the occurrence before. But the concept of recognizing that an uncreditworthy company received a greater benefit than a creditworthy company, all other terms and conditions being the same, was both economically logical and in no way contrary to the Code. He believed the representative of the EEC might have unintentionally oversimplified the methodology used in determining whether a company was uncreditworthy. First, where there had been a valid, specific allegation of corporate uncreditworthiness, the US Department of Commerce examined the investigatory financial history of the company to see if

the allegation had substance. This examination took place only for companies alleged to be uncreditworthy. Determination of creditworthiness had not become a standard investogatory step for all cases. The determinations were made after extensive examination of the financial characterstics of the firms under investigation. Investigators had calculated a variety of financial ratios common in the assessment of creditworthiness in the banking industry. These ratios included examinations of the relative importance of debt equity as the source of capital, measurement of the ability of the company to service its debt from earnings generated from its production operation, and a thorough examination of the value and frequency of both operating losses and total net earnings losses generated by the company. Where there had been a history of substantial and/or deep losses, the Commerce Department agreed with the petitioners. Where it had been determined that in the absence of subsidies, the company would not have access to debt from private lenders, it was believed that the comparison of the subsidized debt to a national benchmark was inappropriate. By definition, a truly uncreditworthy company could not have access to a nation-wide benchmark loan at any reasonable interest rate. Therefore, another methodology had to be chosen to calculate the possible subsidy for it. The investigators believed that the loans in question, whether directly from the Government, or guaranteed by the Government because of their great risk, had very low status and a low probability of repayment. In reality, they were most analogous to an infusion of equity. Therefore, these loans were treated as such, equal to the amount of the principal of the original loan. It was not quite accurate to say that these loans had been treated as grants. The investigators applied their equity methodology in the calculation of the subsidy effect but in calculating an equity subsidy, they consistently applied the subsidy that would arise if the amount were treated as a grant, as a maximum or ceiling on the subsidy in any given year.

46. Referring to the question of the calculation of subsidies on loan guarantees he said that the basic dispute here, once again, was whether a subsidy should be measured by virtue of cost to the Government or benefit to the recipient. He believed, in the context of a loan guarantee, that a subsidy existed to the extent that the loan gave the company the benefit of debt at a rate cheaper than that company could obtain in the commercial market, and that the appropriate standard for comparison was the private-sector cost of debt. The actual cost to the Government of raising the funds, be they on the open market, through government bonds or through taxation, was not relevant în the calculation of the subsidy, because it reflected government valuation policy rather than commercial considerations.

47. As to the question of regional aids he detected no disagreement with the proposition that regional aids could be subsidies. He had found so in these cases and he had found so in many earlier cases. He disagreed most strongly, as a matter of principle and as a matter of Code construction, with the concept that no subsidy existed unless, and until, it had a trade-distorting effect in the exporting country. Even if the Code mentioned that concept - it did so in the context of exhorting exporting countries to be careful when instituting domestic subsidies - nowhere was it said and nowhere was it implied that a particular practice or a particular benefit had to have a distorting effect on trade in an exporting country before it could be considered as a subsidy, before it could even be determined whether it caused material injury to an importing country.

48. He also said that a strong and persuasive argument had been made that with regard to regional-aid subsidies, they should be calculated by offseting from the amount of the subsidy any additional cost or disadvantage incurred by the recipient of the subsidy in accepting that regional aid. He believed that this argument had a great deal of superficial appeal and very little practical worthwhile application. First, it was very difficult, sometimes impossible, to clarify in any rational, reasonable way what the additional cost of locating an industry in disadvantaged or depressed area might be. Secondly, and more imporantly, as between a relatively more prosperous and a less prosperous area of the same country, there were almost certain to be a mix of pluses and minuses, of benefits and detriments. It could never be stated categorically that locating in a less prosperous area would be nothing but a disadvantage to the company, for example, almost certainly that company would incur lower wage costs. Frequently, it would have lower transportation costs, depending upon where its markets were. There would be many other advantages such as lower land costs. The point he was making was that the concept of adjustment of a gross subsidy amount on regional aids was necessarily a two-way street. There could be advantages as well as disadvantages and therefore it simply could not be quantified.

49. Referring to the criteria proposed by the representative of the EEC for any countervailing duty action he said he could agree with two of them, namely that, in any event, material injury and causality had to be shown. For reasons that he had already explained, he could not agree that subsidies could exist only if there was a charge on the public account: that was not mandated by the Code, and the concept ignored the reality of the vast economic power that a government had and of the many ways it could aid specific industries at little or no cost to the government but of great benefit to the recipient. And neither could he agree that a subsidy had to have a trade-distorting effect in the exporting country.

50. He said that many of the preliminary decisions were on issues for which there was no precedent. That, in itself, could not be considered improper or contrary to the Code. For the most part, the Code simply did not address the decisions that the United States had made. However, the mechanism existed within the Committee for the kind of discussion and negotiation that could lead to agreements and clear understandings on many of the issues that the United States was compelled to address in these cases. Until such time, it was neither accurate nor fair to criticise the United States for making decisions in cases where it had little or no choice but to do so.

51. The representative of Sweden speaking on behalf of the Nordic countries said that as this meeting had been called on short notice and there had been no official documentation to allow delegations to analyse the many intricate GATT-related problems that resulted from the steel conflict between the United States and the EEC. These problems were still being studied in the capitals of the Nordic countries and his remarks would therefore have to be of a preliminary nature. One basic question raised by the EEC was whether a subsidy should be calculated on the basis of its cost to the government concerned or on its hypothetical benefit to the recipient company. In the opinion of the Nordic countries, there was every reason for parties to exercise prudence and restraint in their interpretations of this key element of the Code.. The Code was the result of difficult negotiations where the interests of different parties had had to be carefully weighed and considered in almost every detail. Interpretations should therefore be as close to the

letter of the Code as possible. Generally speaking, subsidies should be calculated on the basis of actual government expenses for subsidies. Assessment of subsidies on the basis of hypothetical benefits to recipient firms should be avoided for several reasons, one being that such assessment might prejudice the interpretation of the Code in a way that may impair its effective implementation in the future. Another good reason for caution was that such hypothetical assessments by their very nature almost had to be arbitrary. The possible subsidy effect of government acquisitions of equity was another matter of interpretation which was of great importance for the future implementation of the Code. Here again, he would caution against calculation of subsidy effects which were based on more or less arbitrary assumptions on what the market price for the equity might have been. Such calculations might eventually result in a bias against government ownership as such. The Nordic countries would also seriously question the United States position on loans to firms that for one reason or another were deemed uncreditworthy. To regard such loans as equity infusions were arbitrary decisions that did not seem to have any foundation in the Code.

52. He further said that if a subsidy was designed merely to offset locational or other special disadvantages of the firm concerned and not to offer any additional benefits, he would find it hard to see how such a subsidy could cause serious injury to industries in other countries. The EEC had raised a number of questions that resulted from the difficult problem of defining what constituted a subsidy and how the subsidy effect should be calculated. These questions were not fully answered either in the General Agreement or in the Subsidies Code. The Group of experts appointed by the Committee had laboured with these problems for some time, so far without making much progress. The problems before the Committee clearly indicated the need for renewed and vigorous efforts to complete the task of this Group. It would also be necessary for the Committee to discuss these matters in depth if the necessary consensus on interpretations of key elements of the Code was to be achieved. It was through the gradual evolution of case law that the Subsidies Code should be interpreted, not through unilateral interpretations by individual contracting parties. The GATT was, however, quite clear on one point. In a countervailing case, the importing country must be able to demonstrate injury caused by the allegedly subsidized imports. This aspect had to be of central importance in the assessment of whether the cases before the Committee were in conformity with GATT or not.

53. The representative of the EEC said that the US argumentation did not solve the problem. He acknowledged that there were certain limitations for the US administration under national law but that was not the issue to discuss here. What he was interested in was not the internal US law on offsets but the Code and the compliance of the US authorities with the rules of the Code. Although the Code was not over-precise, nevertheless it gave a lot of guidance and especially the Illustrative List gave very precious guidance on how to calculate a subsidy. This guidance had not been respected and there was a total disagreement on the basic question of how to measure a subsidy, in particular whether to look at the cost to the government or at the potential benefit to the recipient. One could read the Code however one wanted, from Article 1 to Article 19 and from Article 19 to Article 1, but the notion of hypothetical benefit did not exist anywhere but everywhere one would find the word "granted", the word "amount" and the other terms which he had cited in the beginning of his intervention.

54. Referring to the US contention that it was laid down nowhere in the Code that there should be no countervailing against subsidies which had no trade-distorting effect he urged the US representative to look at the Preamble of the Subsidies Code and at Article 6:4 which had been drafted after very careful negotiations, and which made a very clear distinction between injury on the one side and the effects of the subsidy. Article 6:4 laid down very clearly that, in addition to the injury, there had to be effects of a subsidy. As to the determination of creditworthiness, he could not agree that the US authorities had measured very carefully the different parameters which were relevant for the assessment of creditworthiness. It was the assertion of EEC exporting firms that this had not been made and that oversimplified criteria had been applied. Furthermore the US authorities had to work under very considerable time-pressure. There were thirty-five investigations against the EEC to be carried out under strict time-limits and under such time-limits, which had never been approved in the Code, it was difficult to assess exactly at what moment a factory had become creditworthy or not. Consequently, he very much urged the US authorities to pay the greatest attention to these problems when making their final determination. It was his understanding that the thumb rule which had been applied in most cases was just that of the first year in which a firm made losses. This was too simple and therefore in their final determination the US authorities should be very careful about this aspect.

55. He further said that in order not to prolong the discussion he would not insist on one very important aspect of creditworthiness calculation, namely the use of double accounting. The US authorities had used the debt equity ratio to support their finding of uncreditworthiness and had followed the method of calculating the debt equity ratio which was completely inconsistent with the characterization of loans as infusion of equity capital for purposes of calculating the subsidy. The loan was treated as debt of a company in evaluating its debt equity ratio for purposes of determining the uncreditworthiness but such determination having been made, the subsidy value of such a loan was then calculated as an infusion of equity for the purposes of countervailing. This was double-accounting and the US authorities should seriously consider this fact in reaching their final determination.

56. As to the problem of equity infusion he agreed to a certain degree with the US representative insofar as the determination had been made that equity infusion did not consitute a subsidy if a government acquired shares on the market. However the problem would arise if the government paid a price higher than the market price. In such a case the US authorities considered that the difference between the market price and the price paid by the government constituted a subsidy. This was oversimplicity as this did not take account of the fact that the assets of a factory could be much more valuable than the market value of shares at a given point in time. Even a private investor was frequently willing to pay some premium for acquiring the control of a company.

57. The point where he most disagreed with the US representative was the determination that when there was no stock-exchange price for shares at a given moment and when a government nevertheless had acquired such shares at a certain price then the return of the government should be measured against the average return of the manufacturing industry in the country of exportation.

Comparing a return of a given industry with the average return of all industries in a country was extremely arbitrary and he wished to protest very strongly against such a method.

58. The representative of Canada said that he shared the concern expressed by the EEC representative over the new US interpretation of what constituted a subsidy and how its amount should be calculated. This interpretation raised a serious question about its consistency with the Code provisions and might have serious consequences for world trade and development. He agreed with the EEC suggestion that the Committee should be urgently looking at these questions in a detailed way. The Committee had a clear responsibility in the development of multilateral guidelines for the calculation of subsidies. The Group of Experts, established to look at the question of calculation of subsidies should be directed by the Committee to hold a detailed discussion on an urgent basis and report back to the Committee as soon as possible.

59. The representative of India said that the utmost care should be taken to ensure that the amount of a countervailing duty was not higher than the amount of the subsidy. Any use of methods based on subjective criteria or domestic legislation of individual Signatories was neither wise nor prudent. He declared his delegation's readiness to participate in further work of the Committee or its bodies aiming at resolution of this matter.

60. The representative of Austria said that his preliminary reaction was that some of the arguments put forward by the US delegation were not justified under the Code. On the other hand he shared most of the arguments presented by the EEC. It was very important that the Code be scrupulously applied, in particular its provisions regarding injury and calculation of a subsidy. Signatories should avoid unilateral interpretations or going beyond what was in the Code.

61. The representative of Spain said he was concerned by the problem as it demonstrated that the Code contained several points which needed further clarification and agreed interpretation. He supported the representative of the Nordic countries that further efforts should be made to arrive at a common understanding of the Code's provisions and to fill certain lacunae which still existed.

62. The representative of Japan expressed his concern that two major trading partners were engaged in such an important dispute involving a very substantial amount of trade. One of the important problems in this dispute was that there were no agreed rules on the calculation of subsidies and therefore the first priority should be given to resolve this problem. The appropriate form for this exercise was the existing Group of Experts which should be revived and should complete its work as soon as possible and report to the Committee.

63. The representative of the United States said he agreed that there was an urgent need to reach an agreement within the Committee on how subsidies should be identified and calculated. Signatories who had expressed this view had, at the same time, acknowledged that the issues raised were in the areas which had never been covered previously and about which the Code was silent. Accordingly nobody could talk in terms of inconsistency with the Code. Referring to remarks made by some previous speakers he said that the calculations made by the US Department of Commerce were certainly not

hypothetical but were based on the best judgement as to what the real benefit to the recipient was. In his previous statement he had presented his point of view, not in the terms of the US law but in the terms of the Code provisions and therefore he considered that allegations made as to the rôle of the US domestic law were, in this context, irrelevant. As to the question of equity participation he wished to explain that according to the US approach a government equity participation was not, per se, a subsidy. Only if that participation was inconsistent with commercial considerations could it become, possibly, a subsidy. If, after a careful examination of each specific case, a conclusion was reached that the investment by a government had been a reasonable investment at the time it had been made, the finding was that of no subsidy, irrespective of what happened to the company afterwards. Only if the equity infusion was a clear and convincing bad investment, the finding was that it might be a subsidy if the company failed to return what the market averages had returned in that country. He believed that this approach was sound and fair and fully consistent with the Code. He concluded by saying that when a vacuum existed in the Code, it was not reasonable or fair to criticise someone who was compelled to fill that vacuum. There were no agreed rules on the calculation of the amount of a subsidy. The absence of such rules had not rendered the United States, or any other Signatory, unable to proceed with its investigations and it would be absurd to expect such a Signatory to go to the Committee for a ruling on each unresolved issue. The concrete problems which arose because of the existence of such issues were a strong incentive to have further negotiations and to agree on appropriate rules.

64. The Chairman said that the matter deserved very careful and detailed consideration by the Committee. It seemed desirable to give some time to Signatories for reflection and examination of relevant documentation. The Committee would revert to this matter at a date to be fixed by the Chairman in consultation with interested delegations.

65. The representative of Canada said that his delegation was somewhat disappointed that no decision had been taken as to an early meeting of the Group of Experts. He hoped that, given the concern expressed in the Committee, such a decision could be taken at this point in time instead of leaving it to some future undecided date. The representative of the EEC said that he fully supported the representative of Canada. He thought that after the summer recess the Group should meet not later than in conjunction with the regular session in October. The representative of the United States said that he too could agree with previous speakers but he thought that some time was needed to allow Signatories to better define their positions.

66. The Chairman said that as the Committee might meet in September to continue its consideration of this matter, the Group of Experts could meet shortly afterwards. At any rate he would be in touch with delegations to establish the most appropriate date for such a meeting.

67. The representative of the EEC said that he could accept the Chairman's suggestion if there were no unforeseen circumstances. If, however, such circumstances happened then it might be necessary to meet urgently. The representative of Canada said that the Chairman's suggestion was too vague regarding the meeting of the Group of Experts. He would prefer that the Committee decided now to have such a meeting instead of postponing this decision to a future meeting.

68. The Chairman said that, given the possibility of unforeseen developments, the most practical course of action was to authorize him to fix such a date and that he would be in very close touch with interested delegations on this matter.