

ARTICLE VI

ANTI-DUMPING AND COUNTERVAILING DUTIES

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I. TEXT OF ARTICLE VI AND INTERPRETATIVE NOTE AD ARTICLE VI

Article VI

Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
 - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.*

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

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

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

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

(b) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

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

Interpretative Note *Ad* Article VI from Annex I

Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

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

Paragraph 6 (b)

Waivers under the provisions of this sub-paragraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

II. INTERPRETATION AND APPLICATION OF ARTICLE VI

A. SCOPE AND APPLICATION OF ARTICLE VI

1. Institutional background

In the Kennedy Round of multilateral trade negotiations, the 1967 Agreement on Implementation of Article VI was negotiated, and entered into force on 1 July 1968. In the Tokyo Round of multilateral trade negotiations, two agreements relating to Article VI were negotiated, and entered into force on 1 January 1980: the 1979 Agreement on Implementation of Article VI, and the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII. The 1967 agreement was limited in participation to those contracting parties and the EEC which had accepted it; the 1979 agreements were limited in participation to contracting parties that had accepted them, or governments not contracting parties to the GATT which had acceded to them.

In the Uruguay Round of multilateral trade negotiations, new agreements were negotiated, which are included in Annex 1A of the WTO Agreement, entered into force with it on 1 January 1995, and bind all Members of the WTO: the 1994 Agreement on Implementation of Article VI, and the Agreement on Subsidies and Countervailing Measures. Information is provided in this chapter from relevant panel reports and decisions under the 1967 and 1979 agreements and in GATT practice, but not on the WTO agreements.

See further at page 252.

2. Scope of Article VI

(1) “Dumping”

During the London meetings of the Preparatory Committee, in the discussions of the Technical Sub-Committee on Article 11 of the US proposed Charter on anti-dumping duties, it was stated that “the discussion had shown that there were four types of dumping: price, service, exchange and social. Article 11 permitted measures to counteract the first type. It would obligate members not to impose anti-dumping duties with respect to the other three types. It seemed to be generally agreed that exchange dumping was a question for the Fund to consider. Social dumping was a matter for consideration by the Committee studying industrialization”.¹

The Report of the Sub-Committee at the Havana Conference which considered and extensively debated the article of the Charter on anti-dumping and countervailing duties noted regarding the text of this Article, “The Article as agreed to by the Sub-Committee condemns injurious ‘price dumping’ as defined therein and does not relate to other types of dumping”.² The Report of another Sub-Committee which considered the general exceptions to Chapter IV, the commercial policy chapter of the Charter, noted as well that, in discussing an amendment to the provision corresponding to GATT Article XX(d), “designed to exempt measures against so-called ‘social dumping’ from the provisions of Chapter IV, the Sub-Committee expressed the view that this objective was covered for short-term purposes by paragraph 1 of Article 40 [XIX] and for long-term purposes by Article 7 [on worker rights] in combination with Articles 93, 94 and 95 [on dispute settlement]”.³

The 1960 Second Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes that “the Group decided that what was generally known as freight dumping did not fall under the provisions of Article VI”.⁴

¹EPCT/C.II/48, p. 1.

²Havana Reports, p. 74, para. 23; see also E/CONF.2/C.3/C/18, p. 3. In 1948 this Article of the Havana Charter was brought into the General Agreement and replaced the prior text of Article VI; see Section III below.

³Havana Reports, p. 84, para. 19.

⁴L/1141, adopted on 27 May 1960, 9S/194, 199, para. 27; concerning freight dumping see further SR.13/16, Spec/326/58, and Spec/343/58.

(2) Measures under Article VI

See the material below at page 237 on “Use of measures against dumping or subsidization other than anti-dumping or countervailing duties on imports”.

3. Paragraph 1**(1) “dumping ... is to be condemned if it causes or threatens material injury ...”**

The first sentence of Article VI:1 was drafted at the Havana Conference “as a preamble to Article [VI] ... which would, in effect, constitute a general condemnation of the practice of dumping”.⁵ In discussions at the Review Session in 1954-55, in connection with the rejection of a proposal to add a clause specifically obligating contracting parties to prevent dumping by their commercial enterprises, it was agreed to add the following statement to the Working Party’s Report:

“In connexion with the effect of Article VI on the practice of dumping itself, they agreed that it follows from paragraph 1 of Article VI that contracting parties should, within the framework of their legislation, refrain from encouraging dumping, as defined in that paragraph, by private commercial enterprises”.⁶

(2) “the price of the product exported”

In the 1959 Report of the Group of Experts on “Anti-Dumping and Countervailing Duties”

“... the Group noted that although paragraph 1 of Article VI of the General Agreement refers to the price at which products are introduced into the commerce of another country, the same paragraph later speaks of the price of the product ‘exported’. The Group concluded that the latter was a guide as to how the ‘dumped price’ should most appropriately be established. The Group further noted that Article VI also stipulated that ‘due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability’. In view of this, it seemed that the essential aim was to make an effective comparison between the normal domestic price in the exporting country and the price at which the like product left that country.

“The Group took the view that it was the export price that had to be compared with the normal domestic price and agreed that the export price would ideally be the ex-factory price on sales for export; an equally satisfactory price would be the f.o.b. price, port of shipment. In the exceptional case where the actual f.o.b. price on an invoice could not appropriately be used (for example, where the export sale was between associated houses), the export price might be taken to be a notional f.o.b. price calculated by making adjustments such as would normally be made to convert a c.i.f. or other price to f.o.b. The aim should in any event be to arrive at a price which was genuinely comparable with the domestic price in the exporting country”.⁷

In the Second Report of the Group of Experts on “Anti-Dumping and Countervailing Duties”

“It was noted that it sometimes happened that importers sold imported products at a loss, for example, in order to gain a foothold in a market. However, provided that the f.o.b. export price of the article was not below the normal domestic value of the comparable article in the country of export, this was not dumping in the GATT sense. It could become dumping if the importer were in some way recompensed for his loss by the exporter. If a refund or any other consideration was given by the exporter, this should be taken into account in determining the export price and if the consequent export price was less than the normal value, the result would be a dumping price”.⁸

⁵E/CONF.2/C.3/C/18, p. 2.

⁶L/334 and Addendum, adopted on 3 March 1955, 3S/222, 223, para. 4; discussion at SR.9/41 p. 2.

⁷L/978, adopted on 13 May 1959, 8S/145, 146, paras. 5-6.

⁸L/1141, adopted on 27 May 1960, 9S/194, 199, para. 28.

(a) *“hidden dumping by associated houses”*

See Interpretative Note to paragraph 1. See also Articles 2(e) and 2.5 of the Agreements on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1967 and 1979 respectively⁹ which provide: “In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine”.¹⁰

(b) *Indirect dumping*

The Report of the Review Working Party on “Other Barriers to Trade” provides as follows:

“The Working Party also agreed that in the case where goods are not imported directly from the country of origin but are consigned to the country of importation from an intermediate territory, it would be in accordance with the terms of Article VI to determine the margin of dumping by comparing the price at which the goods are sold from the country of consignment to the country of importation with the comparable price (as defined in paragraph 1 of Article VI) in either the country of consignment or the country of origin of the goods. It is of course understood that where goods are merely transhipped through a third country without entering into the commerce of that country, it would not be permissible to apply anti-dumping duties by reference to prices of like goods in the country”.¹¹

The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes that:

“In their examination of the problem of the determination of the normal value or the domestic market price in the exporting country the Group then considered the question of dumping of goods where the exporting country is not the producing country of the goods concerned... The Group noted that since the wording of Article VI, paragraph 1(a), referred only to the comparable price in the exporting country, there was some doubt whether action against indirect dumping was strictly in accordance with the letter of the Agreement. However, despite this doubt, the Group were generally of the opinion that it was reasonable for countries to have the right to protect themselves against indirect dumping (whether of processed or unprocessed goods), particularly in view of the provision of Article VI which permits the imposition of countervailing duties to offset the effects of subsidies whether these are granted in the producing country or the exporting country, and in this connection the Group noted the conclusions recorded in paragraph 5 of the report of the Review Working Party on Other Barriers to Trade (BISD, Third Supplement, page 223)”.¹²

See also Articles 2(c) and 2:3 of the Agreement on Implementation of Article VI of the General Agreement of 1967 and 1979 respectively¹³, which provide: “In the case where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transhipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export”. Similarly, Article 2:11 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII provides that “In cases where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the provisions of this

⁹15S/25; 26S/172.

¹⁰26S/173.

¹¹L/334, adopted on 3 March 1955, 3S/222ff.

¹²L/978, adopted on 13 May 1959, 8S/148, 149, para. 11.

¹³15S/24, 25; 26S/171, 172.

Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the country of importation”.¹⁴

(3) “normal value”

(a) Criteria for determining normal value

Paragraph 1 of Article VI sets out three ways to determine the normal value of the exported goods. The Panel Report on “Swedish Anti-Dumping Duties” notes in this respect:

“The Panel was of the opinion that if the Swedish authorities considered that it was not possible to find ‘a comparable price in the ordinary course of trade for the like product when destined for consumption in the exporting country’, no provision in the General Agreement would prevent them from using one of the other two criteria laid down in Article VI”.¹⁵

The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” contains a discussion of the order in which the criteria of paragraph 1 of Article VI should be used:

“The Group had some discussion on whether the criteria in paragraph 1(b)(i) and paragraph 1(b)(ii) of Article VI were alternative and equal criteria to be used at the discretion of the importing country, or whether paragraph 1(b)(ii) could only be used in cases where it had not been possible to determine a normal market value under paragraph 1(a) or paragraph 1(b)(i) of Article VI. The Group was of the opinion that paragraph 1(b)(i) and paragraph 1(b)(ii) laid down alternative and equal criteria to be used at the discretion of the importing country but only after it had failed to establish a normal market value under paragraph 1(a) of Article VI ... The Group thought that no order of priority for these two criteria could be imposed but, though it might often be easier to collect the necessary information for the use of the criterion under paragraph 1(b)(i), the use of the criterion under paragraph 1(b)(ii) was sometimes preferable in that, since it was normal and reasonable for different prices to be charged in different markets, the use of the criterion under paragraph 1(b)(i) could often produce misleading results. The Group agreed that the criteria under paragraph 1(b) of Article VI could only be used where no domestic price existed as defined in paragraph 1(a) or in cases where there were sales to the home market but where it was not possible to determine normal value from these sales, for example because they did not fall within ‘the ordinary course of trade’ as required in paragraph 1(a)”.¹⁶

See also Articles 2(d) and 2.4 of the 1967 and 1979 Agreements on Implementation of Article VI respectively: “When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin”.¹⁷

(b) “the comparable price ... for consumption in the exporting country”

The 1959 Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes:

“The Group discussed the problems that arose from the fact that rarely was there only one selling price of a product on the domestic market. More frequently, there was a whole range of different domestic prices for a particular product, varying according to the quantity sold and the terms of individual contracts. The Group agreed that, despite the difficulties of determining the normal domestic

¹⁴26S/59.

¹⁵L/328, adopted on 26 February 1955, 3S/81, 89, para. 28.

¹⁶L/978, adopted on 13 May 1959, 8S/145, 148, para. 10.

¹⁷15S/24, 25; 26S/171, 172.

price in the exporting country where these circumstances occurred, it would not be desirable to adopt a uniform system of averaging of relevant price quotations; such a system could in certain circumstances nullify attempts to deal with genuine dumping and could in other circumstances lead the importing country to conclude that there was a margin of dumping where in fact dumping had not occurred. The Group agreed that the use of weighted averages should be confined to cases where it was impossible to use a more direct method of establishing the normal domestic price".¹⁸

In the 1962 Panel Report on "Exports of Potatoes to Canada," the Panel examined a complaint by the United States concerning the imposition by Canada of an import charge on potatoes in addition to the bound specific duty, as a result of the application under the Canadian Customs Act of "values for duty" on potatoes imported below a certain price.

"The Panel ... considered that there was no basic difference between the price, in the ordinary course of trade, of exported potatoes and potatoes intended for domestic consumption in the United States. The Panel felt that the problem for Canadian producers was caused by specific climatic differences which could in certain years give rise to exceptional difficulties. The Panel concluded that the imposition of an additional charge could not be justified by Article VI of the General Agreement, since the main requirement laid down in paragraph 1(a) of the Article was not satisfied, namely that the price of the product exported from one country to another was less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."¹⁹

(c) *"the cost of production in the country of origin plus a reasonable addition for selling cost and profit"*

The Panel on "Swedish Anti-Dumping Duties" notes, concerning the anti-dumping measures examined by the panel:

"The Panel concluded that, in effect, the Swedish authorities were relying on the third criterion [in Article VI] which related to the cost of production. The Panel felt that the use by the Swedish authorities of a weighted average as between the Italian prices could only give a rough estimate of the normal price and that if this approach were retained, it would be reasonable to expect that, if the average included not only the 'unmarked' and 'marked' first-choice stockings of a given type, but also the second and third choices of the same type, the results would be more accurate".²⁰

The Second Report of the Group of Experts on "Anti-Dumping and Countervailing Duties" notes:

"It was presumed by the Group that the term 'production costs' included all those items involved, directly or indirectly, in the cost of producing an article. While the precise apportionment of these costs to various headings might differ in various countries, the term would normally cover such items as, for example, the cost of materials and components, labour, general over-heads, depreciation on plant and machinery and interest on capital investment.

"The Group noted the provision in paragraph 1(b)(ii) of Article VI that to the cost of production, when this criterion was being used for the determination of normal value, there was to be 'a reasonable addition for selling costs and profit'. The effect of this was to construct what might be regarded as a national ex-factory sales price on the domestic market of the exporting country in circumstances where there was no such actual price or not one that could be used for the determination of normal value. As in the case of 'production costs', the practices of various countries differed on the items to be included under the heading of 'selling costs'. Typical examples were such items as advertising costs and sales commission. The Group agreed, however, that whatever the particular method used for determining both production and sales costs the aim should always be to arrive at a normal value which was genuinely comparable with the

¹⁸L/978, adopted on 13 May 1959, 8S/145, 147, para. 9.

¹⁹L/1927, adopted on 16 November 1962, 11S/88, 93, para. 17.

²⁰L/328, adopted 26 February 1955, 3S/81, 89 para. 30.

export price. Only thus could it be properly determined whether or not merchandise was being sold at less than its normal value in the meaning of Article VI²¹.

The Panel Report on “New Zealand - Imports of Electrical Transformers from Finland” examined the imposition of anti-dumping duties in respect of a sale of two custom-built large power transformers.

“... The Panel noted that - in the absence of a domestic price in Finland for custom-built transformers of this kind - the New Zealand authorities had based their determination of normal value on the cost-of-production method foreseen in Article VI:1(b)(ii). The Panel also noted that Finland, while not objecting to the use of this method as such, had contested the individual elements of the calculation as being too high, resulting in a constructed price much higher than the actual price of the Finnish exporter. In the Finnish view, the New Zealand authorities should have instead used the cost elements provided by the exporter. The Panel, having heard the arguments put forward by both sides and having perused the documents submitted, concluded that the Finnish exporter, whether through its own fault or not, had not provided all of the necessary cost elements which would have enabled the New Zealand authorities to carry out a meaningful cost-of-production calculation on the basis of the information supplied by the exporter alone. ... In the view of the Panel, the New Zealand authorities were therefore justified in making a cost calculation, where necessary, on the basis of price elements obtained from other sources.

“The Panel then considered the evidence put forward by both sides as to the appropriateness of the cost elements used by the New Zealand authorities in arriving at their decision that dumping had occurred. The Panel noted that this evidence was of a highly technical nature, especially because it related to complicated custom-built products. It also noted that Article VI did not contain any specific guidelines for the calculation of cost-of-production and considered that the method used in this particular case appeared to be a reasonable one. In view of this and having noted the arguments put forward by both sides as regards the costing of certain inputs used in the manufacture of the transformers, the Panel considered that there was no basis on which to disagree with the New Zealand authorities’ finding of dumping ...”²²

(d) “like product”

During discussions at the Havana Conference it was stated that the words “like product” “meant in this instance the same product”.²³ The 1959 Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes as follows:

“In discussing the meaning of the term ‘like product’, the Group agreed that this term should be interpreted as a product which is identical in physical characteristics subject, however, to such variations in presentation which are due to the need to adapt the product to special conditions in the market of the importing country (i.e., to accommodate different tastes or to meet specific legal or statutory requirements). Some members drew attention to the fact that such an approach was also in conformity with the [statement cited above] concerning the term ‘like product’ ... where it is stated that the words “‘like product’ meant in this instance the same product’. For the purpose of an adjustment as mentioned above, however, downward or upward corrections of the price of the like product should be permitted so as to take into account the differences in the type of the products destined for the home market and for the various export markets.

“The Group pointed out that the meaning of ‘like product’ as agreed by them should not be interpreted either too broadly so as to cover products of a different kind with higher prices on the internal market, nor too stringently so as to elude the application of paragraph 1(a) of Article VI.

“During the discussion of the term ‘like product’ the Group found some discrepancy in the English and French texts of paragraph 1 of Article VI. In the English text the words ‘*the* like product’ are used and in the French text the words ‘*un* produit similaire’, which are slightly vaguer, are used. The Group

²¹L/1141, adopted on 27 May 1960, 9S/194, 196, paras. 12-13.

²²L/5814, adopted on 18 July 1985, 32S/55, 66-67, paras. 4.2-4.3.

²³E/CONF.2/C.3/SR.30, p. 5.

nevertheless thought that this slight discrepancy between the two texts would have no practical effect if the term 'like product' were interpreted as suggested by the Group".²⁴

Articles 2(b) and 2:2 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement respectively, as well as a footnote to Article 6:1 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, contain the following definition:

"Throughout this Code [Agreement] the term 'like product' ('produit similaire') shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration".²⁵

See also the material on "domestic industry" below at page 245.

(e) *Note 2 Ad Paragraph 1: "imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State"*

The addition of Note 2 Ad Paragraph 1 was agreed in the Review Session of 1954-55. The Report of the Review Working Party on "Other Barriers to Trade" notes that "The Working Party considered a proposal by Czechoslovakia for amending sub-paragraph 1(b) to deal with the special problem of finding comparable prices for the application of that sub-paragraph to the case of a country all, or substantially all, of whose trade is operated by a state monopoly. The Working Party was not prepared to recommend the amendment of the Article in this respect, but agreed to an interpretative note to meet the case".²⁶

The Report of the Working Party on the "Accession of Poland" records:

"With regard to the implementation, where appropriate, of Article VI of the General Agreement with respect to imports from Poland, it was the understanding of the Working Party that the second Supplementary Provision in Annex I to paragraph 1 of Article VI of the General Agreement, relating to imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, would apply. In this connexion it was recognized that a contracting party may use as the normal value for a product imported from Poland the prices which prevail generally in its markets for the same or like products or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable".²⁷

The same text appears in the Report of the Working Party on "Accession of Romania",²⁸ a text similar to the second sentence of this paragraph appears in the Report of the Working Party on "Accession of Hungary".²⁹ See also Articles 2(g) and 2:7 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement respectively, which provide that "This Article is without prejudice to the Second Supplementary Provision to paragraph 1 of Article VI in Annex I of the General Agreement".³⁰ See also Article 15 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.³¹

²⁴L/978, adopted on 13 May 1959, 8S/145, 149, paras. 12-14.

²⁵15S/24, 25; 26S/171, 172; 26S/56, 65 fn. 1.

²⁶L/334, adopted 3 March 1955, 3S/222, 223 para. 6; see also proposals at W.9/86, Spec/93/55.

²⁷L/2806, adopted on 26 June 1967, 15S/109, 111, para. 13.

²⁸L/3557, adopted on 6 October 1971, 18S/94, 96 para. 13.

²⁹L/3889, adopted on 30 July 1973, 20S/34, 37, para. 18.

³⁰15S/24, 26; 26S/171, 173.

³¹26S/56, 74-75.

(f) *Special problems of developing countries*

The 1975 Report of the Working Party on “Acceptance of the Anti-Dumping Code” records that:

“It appeared from communications from developing countries and from the discussion in the Working Party that the fundamental problem for developing countries in respect of possible anti-dumping measures against their exports was that the home market prices in developing countries for domestically manufactured products were, for various reasons, in most cases higher than those obtainable in the export markets. In order to find outlets abroad for their manufactures, developing countries were thus compelled to sell at prices which could be termed ‘dumped’ under the criteria of Article VI of GATT and the Anti-Dumping Code, although there were no intentions of causing injury or of dumping in the traditional sense of the word on the side of the exporters. A solution would therefore have to be based on the recognition that in the cases of developing countries it was not reasonable to use home market prices or production costs as normal values in dumping investigations”.

...

“The Working Party, not being able to agree on a solution to the problems referred to it by the Council, considered that it should limit itself to reporting to the Council the opinions expressed in the course of its deliberations.”³²

Article 13 of the 1979 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, which was agreed in the Tokyo Round, provides that:

“It is recognized that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code. Possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries.”³³

On 5 May 1980 the Committee on Anti-Dumping Practices established under the 1979 Agreement adopted decisions concerning the application and interpretation of the Agreement, including the following:

“The Committee, cognizant of the commitment in Article 13 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under the Agreement, takes the following decision concerning the application and interpretation of the Agreement in relation to developing countries:

“(i) In developing countries, governments play a large rôle in promoting economic growth and development in accordance with their national priorities, and their economic regimes for the export sector can be different from those relating to their domestic sectors resulting *inter alia* in different cost structures. The Agreement is not intended to prevent developing countries from adopting measures in this context, as long as they are used in a manner which is consistent with the provisions of the General Agreement on Tariffs and Trade, as applicable to these countries.

“(ii) In the case of imports from a developing country, the fact that the export price may be lower than the comparable price for the like product when destined for domestic consumption in the exporting country does not *per se* justify an investigation or the determination of dumping unless the other factors mentioned in Article 5:1 are also present. Due consideration should be given to all cases where, because special economic conditions affect prices in the home market, these prices do not provide a commercially realistic basis for dumping calculations. In such cases the normal value for the purposes of ascertaining whether the goods are being dumped shall be determined by methods such as a comparison of the export price with the comparable price of the like product when exported to any third country or with the cost of production of

³²L/4239, adopted on 21 November 1975, 22S/27, 28, paras. 4 and 14.

³³26S/184. See also references to “special regard” in Article XXXVII of the General Agreement.

the exported goods in the country of origin plus a reasonable amount for administrative, selling and other costs”.³⁴

(4) *Comparisons between normal value and export price*

The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” discusses adjustments for differences affecting price comparability:

“The Group first considered the problem of the determination of the normal value or the domestic market price in the exporting or producing country in the light of the definition in paragraph 1(a) of Article VI [price-to-price comparisons]. ... some members of the Group took the view that if there were differences in [quantities sold in the home market and quantities exported] these should be taken into account in order to meet fully the requirement in paragraph 1 of Article VI that ‘due allowance shall be made in each case for differences in conditions and terms of sale’. The Group recognized that, while it was logical and reasonable to make adjustments to take account of different quantities and that countries should follow the general principle of adjustments in each case, difficulties might nevertheless arise in securing the necessary information on which such adjustments should be based. Furthermore, it was thought that each case had to be considered on its merits in the light of the objective of comparison of like quantities.

“The Group further agreed that in order to effect a true comparison between the export price and the normal value of the product in the home market, countries should aim at a comparison of prices at the same level in the trade - e.g., wholesale - and at the same date or dates as near to each other as possible. They should also take into account any such relevant factors as differences in taxation.”³⁵

“... For the purposes of an adjustment ... downward or upward corrections of the price of the like product should be permitted so as to take into account the differences in the type of the products destined for the home market and for the various export markets”.³⁶

See also Articles 2(f) and 2.6 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement respectively:

“In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in paragraph [(e)][5] of Article 2 allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made”.³⁷

(5) *“introduced into the commerce”*

Canada initiated anti-dumping proceedings against certain electric generators exported by Italy, on the basis of prices bid in response to requests for tenders, but before the generators in question had been imported. In a Request for conciliation under Article 15:3 of the 1979 Agreement on Implementation of Article VI concerning this action by Canada, the EEC referred to the terms of Article 2:1 of the Agreement (“if the export price of the product concerned”) and from this drew the conclusion that “this implies that there must have been exports of the product concerned before there can be dumping”.³⁸ The Canadian representative maintained “that both Article VI of the GATT and Article 2 [of the Agreement] were clear in that dumping was regarded as pertaining to the situation where a product of one country was introduced into the commerce

³⁴ADP/2, Decisions of 5 May 1980, 27S/16, 17.

³⁵L/978, adopted on 13 May 1959, 8S/145, 146-147, paras. 7-8.

³⁶*Ibid.*, 8S/149, para. 12.

³⁷15S/26, 26S/173. See also discussion at 26S/270-271.

³⁸ADP/M/11, para. 53; ADP/16, p. 3.

of another country at an export price which was less than the comparable price in the country of exportation. In the case of the bids, both of these conditions were fulfilled. He added that the effective implementation of Article VI and the [Agreement] would be frustrated if importing authorities were unable to deal with such contractual arrangements at time of tender”.³⁹

4. Paragraph 2

(1) “a contracting party may levy on any dumped product an anti-dumping duty”

The 1955 Panel Report on “Swedish Anti-Dumping Duties” examined a Swedish Decree imposing a basic price scheme under which an anti-dumping duty was levied on imports of nylon stockings whenever the invoice price was lower than a minimum price fixed by the Swedish Government. The Panel noted:

“... Article VI does not oblige an importing country to levy an anti-dumping duty whenever there is a case of dumping, or to treat in the same manner all suppliers who resort to such practices. The wording of paragraph 6 supports that view. The importing country is only entitled to levy an anti-dumping duty when there is material injury to a domestic industry or at least a threat of such an injury”.⁴⁰

As regards the burden of proof of facts justifying the imposition of anti-dumping duties, the same Panel Report notes:

“The Panel ... considered the argument developed by the Italian representative to the effect that the Swedish Decree [on a basic price scheme for stocking imports] reversed the onus of proof since the customs authorities can act without being required to prove the existence of dumping practices or even to establish a *prima facie* case of dumping. ... it was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts had been established. As this represented an obligation of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged.”⁴¹

“... The Italian delegation contended that the main injury suffered by exporters was due to the fact that the Swedish Government was levying an anti-dumping duty on Italian stockings although it had not established that the export prices of the products were less than the normal value of those products as required in Article VI of the GATT. The Panel agreed that if the Swedish Decree was being applied in such a manner as to impose an anti-dumping levy in the absence of dumping practices, the Italian Government ... could claim an impairment of benefits.

“The Swedish representative stated that it appeared doubtful to his delegation that the CONTRACTING PARTIES could consider that question and that it was the right of the national authorities to decide whether dumping had really taken place. The Panel agreed that no provision of the General Agreement could limit in any way the rights of national authorities in that respect. But for the reason set forth in paragraph 15 above, it would be reasonable to expect from the contracting party which resorts to the provisions of Article VI, if such action is challenged, to show to the satisfaction of the CONTRACTING PARTIES that it had exercised its rights consistently with those provisions”.⁴²

In the Report of the Group of Experts on “Anti-Dumping and Countervailing Duties,” “the Group agreed that it was essential that countries should avoid immoderate use of anti-dumping and countervailing duties, since this would reduce the value of the efforts that had been made since the war to remove barriers to trade. These duties were to be regarded as exceptional and temporary measures to deal with specific cases of injurious dumping or subsidization”.⁴³ The Report sets out “understandings on various points” in the field of anti-dumping. The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes that “There was agreement that decisions concerning the application of anti-dumping measures should be taken at a

³⁹ADP/M/11, para. 54.

⁴⁰L/328, adopted on 26 February 1955, 3S/81, 83, para. 8.

⁴¹*Ibid.*, 3S/85-86, para. 15.

⁴²*Ibid.*, 3S/87-88, para. 22-23.

⁴³L/978, adopted on 13 May 1959, 8S/145, para. 4.

high administrative level and that all such decisions should be published in an official form. It was also suggested that the reasons for the decision should be made public ...⁴⁴ See also the discussion in the Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties⁴⁵ of investigations in exporting countries, governmental or administrative hearings in importing countries, and contacts between governments concerned prior to the imposition of anti-dumping or countervailing duties.

See also Articles 8 (“Imposition and Collection of Anti-Dumping Duties”) and 9 (“Duration of Anti-Dumping Duties”) of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 4 (“Imposition of Countervailing Duties”) of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁴⁶

(2) *Basic price systems*

The Panel Report on “Swedish Anti-dumping Duties” examined two variations on a “basic price” system for anti-dumping proceedings. At first, “an anti-dumping duty was levied whenever the invoice price was lower than the relevant minimum price fixed by the Swedish Government, the importer being entitled to obtain a refund of that duty if the case of dumping was not established. [In a later system] basic prices ... were retained as an administrative device enabling the Swedish Customs Authorities to exempt from anti-dumping enquiries any consignment the price of which was higher than the basic price: the actual determination of dumping policies and the levying of the anti-dumping duty were related to the concept of normal value ... The anti-dumping duty is assessed in relation to the basic price only when that price is lower than the normal value of the imported product”. The Panel found as follows:

“The Panel recognized ... that the basic price system would have a serious discriminatory effect if consignments of the goods exported by the low-cost producers had been delayed and subjected to uncertainties by the application of that system and the case for dumping were not established in the course of the enquiry. ...

“As regards the second argument relating to the fact that the basic price system is unrelated to the actual prices on the domestic markets of the various exporting countries, the Panel was of the opinion that this feature of the scheme would not necessarily be inconsistent with the provisions of Article VI so long as the basic price is equal to or lower than the actual price on the market of the lowest cost producer. If that condition is fulfilled, no anti-dumping duty will be levied contrary to the provisions of Article VI”.⁴⁷

The Second Report on “Anti-Dumping and Countervailing Duties” discusses “pre-selection systems” (in which an anti-dumping investigation is conducted with respect to imports below a particular price, and anti-dumping duties are applied only after a specific complaint has been investigated and a finding of dumping and material injury made); and “basic price systems”.

“The Group recognized that, where basic price systems were operated so as to limit anti-dumping action in a particular case to the margin of dumping judged to be materially injurious, these systems were fully within the terms of Article VI and in fact constituted part of a pre-selection system. Nevertheless, the majority of the Group considered that such systems might be open to abuse and they were not therefore in favour of their adoption. Most members of the Group felt that it was, in any case, understood that the basic price system was satisfactory only provided that:

- (a) the basic price was less than, or at most equal to the lowest normal price in any of the supplying countries;

⁴⁴*Ibid.*, 8S/145, 151, para. 21.

⁴⁵L/1141, adopted on 27 May 1960, 9S/194.

⁴⁶15S/31-32, 26S/180-181, 26S/61-62.

⁴⁷L/328, adopted 26 February 1955, 3S/81, 84, paras. 9-10.

- (b) domestic importers or foreign exporters had in all cases the opportunity to demonstrate that their products, although they were sold below the basic price, were not sold at a dumping price; and
- (c) the governments using this system periodically revised the basic price on the basis of the fluctuations of the lowest normal price in any of the supplying countries”.⁴⁸

Article 8(d) of the 1967 Agreement and paragraph 8:4 of the 1979 Agreement on Implementation of Article VI of the General Agreement set out rules for the application of a “basic price system”. In October 1981, the Committee on Anti-Dumping Practices adopted an Understanding on Article 8:4 of the Agreement providing, *inter alia*, that

“The Committee agreed that basic price systems as provided for in Article 8:4 were intended exclusively as a device to facilitate the calculation and collection of anti-dumping duties following a full investigation for each country and product concerned, and for supplies concerned, resulting in a finding of injurious dumping. However, the Committee recognized that the wording of Article 8:4 contained ambiguities and, in the light of different possible interpretations, concluded that Article 8:4 is not essential to the effective operation of the Agreement and shall not provide the basis for any anti-dumping investigation or for imposition and collection of anti-dumping duties.

“At the same time, the Committee discussed special monitoring schemes, in so far as they are related to anti-dumping systems. The Committee recognizes that such schemes are not envisioned by Article VI of the GATT or the Agreement and it is of the view that they give cause for concern in that they could be used in a manner contrary to the spirit of the Agreement. The Committee agreed that such schemes shall not be used as a substitute for initiating and carrying out anti-dumping investigations in full conformity with all provisions of the Agreement ...”.⁴⁹

(3) *Initiation of investigations*

The Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties provides that: “The Group agreed that, since the criterion of material injury was one of the two factors required to allow anti-dumping action, the initiative for such action should normally come from domestic producers who considered themselves injured or threatened with injury by dumping. Governments would, however, have the right to take such initiative when the conditions set forth in Article VI existed”.⁵⁰

The Report of the Panel, under the Agreement on Implementation of Article VI, on United States - Anti-dumping Duties on Gray Portland Cement and Cement Clinker from Mexico”, which has not been adopted, examined the initiation of the anti-dumping investigation which had led to the measures in question. The investigation had been initiated on the basis of a petition which alleged that domestic industries in two regions of the United States had been injured or threatened with injury by dumped imports of gray portland cement and cement clinker from Mexico, and asserted that the petitioners accounted for a majority of domestic production of gray portland cement in the markets in those regions. The Panel examined this matter on the basis of Article 5:1 of the Agreement, which provides: “An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry⁹ affected ...”. Footnote 9 declares: “As defined in Article 4”. Article 4 in turn provides a definition of “industry”. The Panel found that “in Article 5:1, the term ‘on behalf of’ involved a notion of agency or representation, and that a petition had to have the authorization or approval of the industry affected, the term ‘industry’ being defined in Article 4”.⁵¹ The Panel also found that “‘the producers of ... almost all of the production within such market’ would satisfy the definition of ‘industry’ for the purpose of initiation”.⁵²

⁴⁸L/1141, adopted on 27 May 1960, 9S/194, 195-196, para. 11.

⁴⁹ADP/M/6, 30S/68 (adoption); 28S/52 (text). See also discussion of various systems in the Committee on Anti-Dumping Practices, 25S/18-21.

⁵⁰L/1141, adopted on 27 May 1960, 9S/194 para. 5.

⁵¹ADP/82 (unadopted), dated 7 September 1992, para. 5.20.

⁵²*Ibid.*, para. 5.23.

“The Panel ... noted that the term ‘on behalf of’ involved a notion of agency or representation and that Article 4 provided the definition of the term ‘industry’ in Article 5:1, on behalf of which the petition had to be made. In the case of a national market, one of the two definitions of industry according to Article 4:1 was domestic producers whose collective output of the like products constituted a major proportion of the total domestic production of those products. Thus, in a national market, evidence of ‘support by a major proportion’ would meet the requirement under Article 5:1 because there would be evidence of support for the petition by the industry concerned. However, the Panel considered that in view of the fact that Article 5:1 required that an industry in a regional market be defined as ‘producers of all or almost all of the production within such market’, support for a petition by producers accounting for a major proportion of the production in that market would not be adequate to satisfy the requirement that a petition had to have the authorization or approval of the producers of all or almost all of the production in the regional market. ...

“Accordingly, the Panel concluded that the producers in a regional market in respect of whom injury had to be found, namely ‘the producers of all or almost all of the production within such market’, were the producers by or on behalf of which the request for initiating an anti-dumping investigation in a regional market had to be made under Article 5:1.⁵³

“... the Panel concluded that the United States’ initiation of the anti-dumping investigation on gray portland cement and cement clinker imported from Mexico was inconsistent with Article 5:1 because the United States’ authorities did not satisfy themselves prior to initiation that the petition was on behalf of producers of all or almost all of the production in the regional market. ...”⁵⁴

The 1993 Panel Report on “United States - Measures Affecting the Imports of Softwood Lumber from Canada” examined the consistency with the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of a decision to self-initiate a countervailing duty investigation:

“The Panel noted that the self-initiation of a countervailing duty investigation was subject to the provisions of Article 2:1 of the Agreement. This Article provided in relevant part:

‘An investigation to determine the existence, degree and effect of any alleged subsidy shall normally be initiated upon a written request by or on behalf of the industry affected. The request shall include *sufficient evidence* of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Agreement⁶ and (c) a causal link between the subsidized imports and the alleged injury. If in *special circumstances* the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have *sufficient evidence* on all points under (a) to (c) above’. (emphasis added)

“Whereas the Agreement called for ‘sufficient evidence’ and identified the subject matter on which such evidence was to be adduced, the Panel noted that no specific guidance was given as to what might constitute sufficient evidence. The Panel thus proceeded to consider the meaning of the term “sufficient evidence” in Article 2:1 guided by the customary principles of international law on treaty interpretation, according to which treaty terms were to be given their ordinary meaning in their context and in the light of the treaty’s object and purpose.

“The Panel considered that the concept of sufficiency of evidence had to be judged in relation to the particular action contemplated in Article 2:1 of the Agreement, that of initiating a countervailing duty investigation, as was made clear in Article 2:3 which referred to ‘sufficient evidence *to justify initiating an investigation*’. (emphasis added) In the view of the Panel, the initiation requirement in Article 2:1 reflected a careful balancing of the rights and obligations of the parties, in particular between (1) the interest of the import-competing domestic industry in the importing country in securing the initiation of a countervailing duty investigation and (2) the interest of the exporting country in avoiding the potentially burdensome

⁵³*Ibid.*, paras. 5.26, 5.28.

⁵⁴*Ibid.*, para. 5.34.

consequences of a countervailing duty investigation initiated on an unmeritorious basis. With regard to the second of these, the Panel considered that in applying the appropriate standard to a review of the decision of a national authority to initiate a countervailing duty investigation, it should in particular be sensitive to the intended anti-harassment function of Article 2:1.

“In analysing further what was meant by the term ‘sufficient evidence’, the Panel noted that the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination. At the same time, it appeared to the Panel that ‘sufficient evidence’ clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just any of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement. Whereas the quantum and quality of evidence required at the time of initiation was less than that required to establish, pursuant to investigation, the required Agreement elements of subsidy, subsidized imports, injury and causal linkage between subsidized imports and injury, the Panel was of the view that the evidence required at the time of initiation nonetheless had to be relevant to establishing these same Agreement elements.

“The Panel recalled Canada’s position that ‘sufficient evidence’ in the context of initiation meant ‘that amount of proof which ordinarily satisfies an unprejudiced mind’. The Panel further recalled the United States’ position that ‘sufficient evidence’ meant ‘evidence that provides a reason to believe that subsidies may exist and that the domestic industry may be injured by reason of the subsidized imports’. The Panel was not persuaded of the correctness of either of these proposed standards. In the Panel’s view, the Canadian proposed standard suggested a level of proof more suitable to a determination made at a stage of the process subsequent to initiation rather than to the initiation itself. As for the United States’ proposed standard, the Panel agreed that ‘reason to believe’ was an appropriate yardstick, but that it was not the *potentiality* of the existence of subsidy or injury for which there had to be a reason to believe but rather a reason to believe that those two elements *existed*. This interpretation was confirmed by the wording of the last sentence of Article 2:1 which made clear that the investigating authorities ‘shall proceed only if they have sufficient evidence [of the *existence* of subsidy, injury and causation]’. In the view of the Panel, therefore, the term ‘sufficient evidence’ in the context of initiation of a countervailing duty investigation was to be interpreted to mean ‘evidence that provides a reason to believe that a subsidy exists and that the domestic industry is injured as a result of subsidized imports’.

“The Panel noted that it was the rôle of the national investigating authority in the importing country, not that of the Panel, to make the necessary determinations in connection with the initiation of a countervailing duty case. This point was underlined by the language in Article VI:6(a) of the General Agreement, which provided:

‘No contracting party shall levy any ... countervailing duty on the importation of any product of the territory of another contracting party unless *it determines* that the effect of the ... subsidization ... is such as to cause or threaten material injury ...’. (emphasis added)

“The rôle of the Panel was thus not to determine whether there was sufficient evidence for initiation but to review whether the national authorities in the importing country had made the initiation determination in accordance with relevant provisions of the Agreement.

“The Panel considered that in reviewing the action of the United States authorities in respect of determining the existence of sufficient evidence to initiate, the Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities. Rather, in the view of the Panel, the review to be applied in the present case required consideration of whether a reasonable, unprejudiced person could have found, based upon the evidence relied upon by the United States at the time of initiation, that sufficient evidence existed of subsidy, injury and causal link to justify initiation of the investigation.

“The Panel noted the argument of Canada that Article 2:1 required a higher standard of sufficient evidence to self-initiate a countervailing duty investigation than to initiate based upon a petition. The Panel noted that the relevant portion of Article 2:1 stated the following:

‘If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above.’

“In the view of the Panel, Canada's claim was not well-founded in that there was nothing in the text of Article 2:1 to suggest a different level of evidence for self-initiation than for initiation pursuant to petition. Moreover, the Panel could not discern any purpose under the Agreement which could be served by a different level of ‘sufficient evidence’ in the case of self-initiation. The Panel recalled Canada's contention that the words ‘only if’ in the sentence cited above suggested a higher standard for self-initiation than for initiation based upon a petition. However, the Panel considered that the words ‘only if’ in the above context referred only to the elements mentioned in the second sentence of Article 2:1, not to a different level of ‘sufficient evidence’. What was required in addition to ‘sufficient evidence’ was the existence of ‘special circumstances’.”⁵⁵

The 1994 Panel Report on “United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway” also addressed the issue of initiation of an investigation, finding that “A ‘written request ... on behalf of the industry affected’ ... meant a request on behalf of the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.”⁵⁶

“The Panel then turned to the question of the duty incumbent on investigating authorities to ensure that their actions with regard to the treatment of written requests for the initiation of anti-dumping investigations were consistent with their obligations under Article 5:1. The Panel considered that, in light of the requirement in Article 5:1 that a written request be by or on behalf of the industry affected and contain certain evidence, the investigating authorities could not, consistently with Article 5:1, initiate investigations automatically in response to any written request received. The requirements of Article 5:1 clearly implied a duty for the authorities to evaluate each such written request to ascertain whether it contained the required information, and to screen out those requests that failed to provide it. The investigating authorities therefore had to evaluate whether a written request for the initiation of an investigation was made “on behalf of” the industry affected.

...

“The Panel noted that the Agreement did not provide precise guidance as to the procedural steps to be taken for such an evaluation, and considered that the question of how this requirement is to be met depends on the circumstances of each particular case. In the Panel's view, this question, or in this case the steps the United States was required to take as a prerequisite to initiating an investigation, had to be evaluated on the basis of the information before the investigating authorities at the time of the initiation decision. ...”⁵⁷

The Panel concluded on the basis of its evaluation of the facts that “Under these circumstances the Department of Commerce could, in the Panel's view, reasonably treat this request as being ‘on behalf of the industry affected’ and the initiation was not inconsistent with the United States’ obligations under the Agreement.”⁵⁸

(4) Provisional measures

See Interpretative Note 1 to paragraphs 2 and 3; this Note was added at Havana “to answer any doubt that a Member could require security for the ‘payment of anti-dumping or countervailing duty pending final determination of the facts in cases of suspected dumping or subsidization’.”⁵⁹

⁵⁵SCM/153, adopted on 27 October 1993, paras. 330-336.

⁵⁶ADP/87, adopted by the Committee on Anti-Dumping Practices on 27 April 1994, para. 357.

⁵⁷*Ibid.*, paras. 358, 360.

⁵⁸*Ibid.*, para. 362.

The Group of Experts on Anti-dumping and Countervailing Duties in its 1959 report discussed, *inter alia*, the question of provisional anti-dumping measures.

“It was recognized that in certain circumstances the use of such measures might be justified in order to limit the material injury to a domestic industry, even though it was noted that Article VI made no mention of them. On the other hand, it was generally felt that provisional measures should be used sparingly and for the shortest possible time in order to interfere as little as possible with normal trade and in order that they should not assume a protectionist character. For this reason, any such measures should preferably be introduced after the responsible administration of the importing country had carried out an initial confidential investigation that revealed that there was a serious case to consider further. Moreover, where possible, the provisional measures should not lead to a situation in which either the exporter or the importer of the product under investigation would suffer if the eventual decision were not to impose an anti-dumping duty. The Group agreed that it was desirable that such provisional measures should not be of retroactive application and that they should preferably take the form of bond or cash deposits as mentioned in Interpretative Note 1 to paragraphs 2 and 3 of Article VI. Furthermore, they should be based on provisions which would, as far as possible, permit the importer to determine the maximum duty which could be assessed”.⁶⁰

See also Article 10 (“Provisional Measures”) of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 5 (“Provisional Measures and Retroactivity”) of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁶¹

(5) *Retroactive effect of an anti-dumping duty*

The 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties provides: “The Group stressed that final decisions should not have any retroactive effect, except that in cases where provisional measures were applied it should be permitted to collect anti-dumping duties against the merchandise covered by such provisional measures”.⁶² See also Article 11 (“Retroactivity”) of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 5:9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁶³

(6) *Duration of validity of anti-dumping duties*

The same Report provides: “It was generally agreed that anti-dumping duties should remain in place only so long as they were genuinely necessary to counteract dumping which was causing or threatening material injury to a domestic industry. In this connexion it was noted that any country imposing a duty would naturally be free to review it and the Group agreed that it might well be desirable for it to do so from time to time in the light of information at its disposal. It was further agreed that it should be open to exporters of the product concerned, if they considered that they had the necessary evidence, to request the importing country to carry out a review of the facts”.⁶⁴ See also Article 9 (“Duration of Anti-Dumping Duties”) of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 4:9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁶⁵

(7) *Use of measures against dumping or subsidization other than anti-dumping or countervailing duties on imports*

Paragraph 7 of Article VI in the General Agreement as agreed in October 1947 (and paragraph 6 of the corresponding Article in the Geneva Draft Charter) provided that “No measures other than anti-dumping or countervailing duties shall be applied by any contracting party in respect of any product of the territory of any other contracting party for the purpose of offsetting dumping or subsidization”. The record of the discussions at

⁵⁹Havana Reports, p. 75 para. 27.

⁶⁰L/978, adopted on 13 May 1959, 8S/151-152, para. 23.

⁶¹15S/24, 32-33; 26S/171, 181-182; 26S/56, 61-62.

⁶²8S/151.

⁶³15S/24, 33-34; 26S/171, 182-183; 26S/56, 62.

⁶⁴*Ibid.*, 8S/151-152, para. 23.

⁶⁵15S/24, 32; 26S/171, 181; 26S/56, 63.

Havana notes: “The Subcommittee [on Article 34 of the Charter] agreed to the deletion of paragraph 6 of the Geneva Draft which expressly prohibited the use of measures other than anti-dumping or countervailing duties against dumping or subsidization. It did so with the definite understanding that measures other than compensatory anti-dumping or countervailing duties may not be applied to counteract dumping or subsidization except insofar as such other measures are permitted under other provisions of the Charter”.⁶⁶ After the close of the Havana Conference, the Working Party in the Second Session on “Modifications to the General Agreement” agreed to take the Havana Charter article into the General Agreement, entirely replacing the original Article VI. The Report of this Working Party notes:

“The working party, endorsing the views expressed by [the Subcommittee on Article 34 at the Havana Conference] agreed that measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization except insofar as such other measures are permitted under other provisions of the General Agreement”.⁶⁷

The Report of the Review Working Party on “Other Barriers to Trade” includes the following passage:

“With respect to paragraph 3 of Article VI, the Working Party considered a proposal submitted by New Zealand which would have permitted under certain circumstances the use of quantitative restrictions to offset subsidization or dumping. This proposal did not receive the support of the Working Party, and has not been recommended”.⁶⁸

Article 16:1 of the 1979 Agreement on Implementation of Article VI of the General Agreement provides that “No specific action against dumping of exports from another Party can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement”; Article 19:1 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement provides that “No specific action against a subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement”. Identical footnotes to each of these paragraphs provide that “This paragraph is not intended to preclude action under other relevant provisions of the General Agreement, where appropriate”.⁶⁹ The Preamble of the 1979 Agreement on Implementation of Article VII notes that “valuation procedures should not be used to combat dumping”.

The Panel Report of 1988 on “Japan - Trade in Semi-Conductors” notes as follows with regard to quantitative restrictions or other measures imposed on exports by an exporting country:

“ ... Having found Japan to have acted inconsistently with Article XI:1, the Panel examined Japan’s contention that its measures, being designed to prevent dumping, were justified by the spirit of Article VI, which condemned dumping. The Panel noted that Article VI:1 declared that dumping was to be condemned if it caused or threatened material injury to an established industry or materially retarded the establishment of an industry and that Article VI:2 allowed contracting parties to levy a duty on dumped products, subject to certain specified conditions. The provision was silent on actions by exporting countries. The Panel therefore found that Article VI did not provide a justification for measures restricting the exportation or sale for export of a product inconsistently with Article XI:1.

“The Panel proceeded to examine the contention of the EEC that the measures maintained by Japan to prevent dumping were contrary to Article VI because that provision gave the exclusive right of preventing dumping to the importing countries. The Panel noted that Article VI provided importing countries with the right to levy anti-dumping duties subject to certain specific conditions but was silent on actions by exporting countries”.⁷⁰

⁶⁶Havana Reports, p.74, para. 25; E/CONF.2/C.3/SR.30, p. 6.

⁶⁷II/41, para. 12.

⁶⁸L/334 and Addendum, Report adopted on 3 March 1955, 3S/223.

⁶⁹26S/171, 186; 26S/56, 78.

⁷⁰L/6309, adopted on 4 May 1988, 35S/116, 159, paras. 120-121.

5. Paragraph 3

(1) *“bounty or subsidy”*

See also the material below concerning the relationship between Article VI and Article XVI, and the material concerning the definition of a subsidy under Article XVI:1.

The Second Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” records:

“With respect to the meaning of the word ‘subsidies’, a large majority of the experts considered that it covered only subsidies granted by governments or by semi-governmental bodies. Three experts considered that the word should be interpreted in a wider sense and felt that it covered all subsidies, whatever their character and whatever their origin, including also subsidies granted by private bodies. It was agreed that the word ‘subsidies’ covered not only actual payments, but also measures having an equivalent effect”.⁷¹

The 1994 Panel Report on “United States - Measures Affecting Imports of Softwood Lumber from Canada” examined a claim that the initiation of a countervailing duty investigation was inconsistent with the Agreement on Interpretation and Application of Articles VI, XVI and XXIII because under the circumstances there could be no subsidy from sales of timber from public lands.

“...the Panel recalled Canada's contention that the theory of economic rent taught that the exaction of economic rent - or revenue collection - for access to a natural resource such as timber could not cause any countervailable market distortion, in terms of an increase in the output or a decrease in the price of products made from the timber, which could constitute a subsidy. According to Canada, the granting of the right of access to the land on which the trees were standing and the collection of revenue (stumpage fees) from those granted the right of access was not the sale of a good. The tree became a good only once it was cut down and turned into a log. The Panel further recalled Canada's argument that stumpage fees were a component of the total cost of making logs but that they were not part of the per unit production cost or variable cost of producing the logs in that the stumpage fee did not influence the marginal cost of producing the next unit of product. The Panel then recalled the United States' contention that the administratively set stumpage fees in the Canadian provinces reduced the cost of the input product (logs) to the forest products industries, thus conferring a benefit on those industries.

“Reviewing these arguments, the Panel considered that assuming that Article XVI of the General Agreement and Part II of the Agreement only covered measures that had trade effects and that this trade effects characteristic also applied to countervailable subsidies under Article VI of the General Agreement and Part I of the Agreement, and assuming further that the theory of economic rent was relevant to the question of whether a governmental measure could have trade effects, the applicability of these arguments in the present case was nonetheless an empirical issue, in that it was not possible to determine without further investigation whether stumpage pricing practices in Canada affected the volume or pricing of lumber. The Panel noted in this regard, as argued by the United States, that there were also a number of studies suggesting, contrary to the argument of Canada, that stumpage fees did in fact affect prices and output of lumber. In the Panel's view, whereas the setting of the price for access to the natural resource in and of itself might relate only to the revenue collection function of government and might not constitute a benefit in connection with the harvesting or extraction of that resource, if the conditions of access were such that stumpage was available only to a specific group of enterprises, then the stumpage programme could potentially be considered as a benefit in connection with the right of access to harvest the resource.”⁷²

(2) *“the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation”*

The 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties refers to “the provision of Article VI which permits the imposition of countervailing duties to offset the effects of subsidies

⁷¹L/1141, adopted on 27 May 1960, 9S/194, 200, para. 34.

⁷²SCM/162, adopted by the Committee on Subsidies and Countervailing Measures on 27 April 1993, paras. 346-347.

whether these are granted in the producing country or the exporting country”.⁷³ The Second Report in 1960 of the same Group notes as well:

“Paragraph 3 of Article VI stipulated that no countervailing duty could be collected beyond the ‘estimated’ amount of the bounty or of the subsidy granted. In order to arrive at this estimate, the majority of the Group considered it normal, and at least desirable, that the country which became aware of the existence of a subsidy and which ascertained the injury which this subsidy caused, should enter into direct contact with the government of the exporting country. It was also desirable that the latter country should give information requested without delay. This would after all be in its own interest in that it would avoid the imposition of a countervailing duty on its exports at a rate which, failing this information, might be fixed at too high a level”.⁷⁴

The 1991 Panel Report on “United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada”

“... noted in this respect that the words in Article VI:3 ‘to determine’ and ‘estimated’ as well as the practices of the contracting parties under that provision, as reflected in Part I of the Subsidies Code, indicate that the decision as to the existence of a subsidy must result from an examination of all relevant facts. The Panel considered that the issue was not whether the United States had applied a methodology for establishing facts consistent with Article VI:3 but rather whether the facts which the United States did take into account were all the facts relevant for the determination it has made. The Panel therefore proceeded to examine whether the United States, by basing its determination that pork production is subsidized in Canada on a finding that the conditions set out in Section 771B had been met, had demonstrated that it had taken into account all facts necessary to meet the requirements of Article VI:3”.⁷⁵

See also the Guidelines on Amortization and Depreciation adopted by the Committee on Subsidies and Countervailing Measures.⁷⁶

(3) Multiple currency practices

See Interpretative Note 2 *Ad* paragraphs 2 and 3, which provides that “Multiple currency practices can in certain circumstances constitute a subsidy to exports ... or a form of dumping by means of partial depreciation of a country’s currency ... By ‘multiple currency practices’ is meant practices by governments or sanctioned by governments’. See also material on multiple exchange rates under Article XVI; see also the memorandum of the International Monetary Fund on multiple currency practices, annexed to the Report of the Review Working Party on “Quantitative Restrictions”.⁷⁷

6. Paragraph 4

(1) “exemption ... from duties or taxes”

The Panel on “Swedish Anti-Dumping Duties” examined the application of Article VI:4 where an anti-dumping scheme applied to products benefiting from an export rebate of duties and taxes. “... the Panel noted that there was no disagreement between the parties concerned regarding the obligation to take account of legitimate refund of duties and taxes”.⁷⁸

The 1977 Working Party Report on “Suspension of Customs Liquidation by the United States” examined a United States Federal court ruling that remission and exemption by Japan of consumption taxes on exported consumer electronic products was a countervailable export subsidy. Pending appeal of this decision, final duty payment (liquidation) of entries of these products had been held in suspense. The Working Party Report notes that

⁷³L/978, adopted 13 May 1959, 8S/145, 149, para. 11.

⁷⁴L/1141, adopted on 27 May 1960, 9S/194, 200, para. 35.

⁷⁵DS7/R, adopted on 11 July 1991, 38S/45.

⁷⁶SCM/64, adopted on 25 April 1985, 32S/154ff.

⁷⁷L/332/Rev. 1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 200.

⁷⁸L/328, adopted 26 February 1955, 3S/81, 86 para. 16.

“All but one member of the Working Party expressed views on the legal aspects of the matter. They agreed that the Japanese tax practices in question were in full accord with the provisions of GATT, its established interpretation as well as established practice of the GATT. They also agreed that, should the court decision be upheld finally and if countervailing duties were imposed, the imposition of such duties would be in contravention of the provisions of the GATT including Article VI:4 and the note to Article XVI, and would constitute a *prima facie* case of nullification or impairment of Japan’s rights under the General Agreement”.⁷⁹

(2) “borne by the like product”

The Second Report on Anti-dumping and Countervailing Duties noted the view of the Group, in relation to Article VI:4, that “If, however, it were established that the exemption or the reimbursement [of duties and taxes] exceeded the real charge which the product would have to pay in the exporting country, the difference could be considered as constituting a subsidy”.⁸⁰

During its consideration of the 1982 complaint by India concerning certain domestic procedures of the United States, the Committee on Subsidies and Countervailing Measures heard differing views concerning the linkage between payment of internal (cascading indirect) taxes and export tax rebates, and the evidence of such linkage which an importing country could require as a condition for making an adjustment to the level of subsidy determined to exist.⁸¹

See also the Guidelines on Physical Incorporation⁸², which were adopted by the Committee on Subsidies and Countervailing Measures, it being stated that these guidelines constituted an understanding on the manner in which signatories intended to calculate the amount of certain subsidies.⁸³

7. Paragraph 6

(1) “it determines ... material injury”

In the Report of the Group of Experts on “Anti-Dumping and Countervailing Duties”,

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

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

- (a) are causing material injury to an established industry; or
- (b) clearly threaten material injury to an established industry; or
- (c) materially retard the establishment of a domestic industry”.⁸⁴

⁷⁹L/4508, adopted on 16 June 1977, 24S/134, 138, para. 15. The court ruling was reversed by higher US courts.

⁸⁰L/1141, adopted on 27 May 1960, 9S/194, 201 para. 36.

⁸¹See SCM/M/11, SCM/M/Spec/7.

⁸²SCM/68, adopted on 24 October 1985, 32S/156ff.

⁸³31S/262 para. 12.

⁸⁴L/978, adopted on 13 May 1959, 8S/145, 150, paras. 15, 17.

See also the provisions on determination of injury for purposes of Article VI, in Article 3 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 6 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁸⁵

In the Panel Report on “New Zealand - Imports of Electrical Transformers from Finland”

“The Panel noted the view expressed by the New Zealand delegation that the determination of material injury was a matter specifically and expressly reserved, under the terms of Article VI:6(a), for the decision of the contracting party levying the anti-dumping duty. It also noted the contention that other contracting parties might inquire as to whether such a determination had been made, but that the latter could not be challenged or scrutinized by other contracting parties nor indeed by the CONTRACTING PARTIES themselves. The Panel agreed that the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned. However, the Panel could not share the view that such a determination could not be scrutinized if it were challenged by another contracting party. On the contrary, the Panel believed that if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, under the relevant GATT provisions, in particular Article XXIII, that its representations be given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the CONTRACTING PARTIES, as had been done by Finland in the present case. To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT. The Panel in this connection noted that a similar point had been raised, and rejected, in the report of the Panel on Complaints relating to Swedish anti-dumping duties (BISD 3S/81). The Panel fully shared the view expressed by that panel when it stated that ‘it was clear from the wording of Article VI that no anti-dumping duties should be levied until certain facts had been established. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged’ (paragraph 15)”.⁸⁶

(2) *Threat of material injury*

The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes that “With respect to cases where material injury is *threatened* by dumped imports, the Group stressed that the application of anti-dumping measures had to be studied and decided with particular care”.⁸⁷ See also the provisions on determinations of threat of injury for purposes of Article VI, in Articles 3(e)-(f) and 3:6-7 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement respectively, and in the first footnote to Article 6:1 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁸⁸ The Committee on Anti-Dumping Practices has adopted a Recommendation Concerning Determination of Threat of Material Injury.⁸⁹

In the course of its examination of an EEC complaint concerning anti-dumping action by Canada, the Committee on Anti-Dumping Practices, meeting in November 1983, discussed whether injury or a threat of injury can be caused by submission of tenders, even if the contract is awarded to other bidders and the offered goods have not been exported.⁹⁰

The Panel Report on “New Zealand - Imports of Electrical Transformers from Finland” provides the following in this regard:

⁸⁵15S/24, 26; 26S/171, 173; 26S/56, 64.

⁸⁶L/5814, adopted on 18 July 1985, 32S/55, 67-68, para. 4.4.

⁸⁷L/978, adopted on 13 May 1959, 8S/145, 150, para. 16.

⁸⁸15S/24, 27; 26S/171, 174-175; 26S/56, 64.

⁸⁹ADP/25, adopted 21 October 1985, 32S/182.

⁹⁰ADP/M/11, paras. 53-56.

“The Panel noted that while the decision of the New Zealand Minister of Customs to impose anti-dumping duties was based solely on material injury having been caused by the imports in question, the New Zealand delegation had also alleged before the Panel the existence of threat of material injury. In view of the high import penetration of the New Zealand transformer market, the significant increase in imports from all sources over one single year and the minimal impact of the actual Finnish imports in question, the Panel saw no reason to assume that imports from Finland would in the future change this picture significantly. The Panel noted in addition that at the time the ministerial decision was taken the Finnish exporter had not attempted to make any further sales to the New Zealand market. The Panel could therefore not agree that the imposition of anti-dumping duties could have been based on threat of material injury in terms of Article VI”.⁹¹

The 1993 Panel Report on “Korea - Anti-dumping Duties on Imports of Polyacetal Resins from the United States” examined an injury determination by the Korean authorities which was partially based on a finding of threat of injury:

“... It followed from the text of Article 3:6 that a proper examination of whether a threat of material injury was caused by dumped imports necessitated a prospective analysis of a present situation with a view to determining whether a ‘change in circumstances’ was ‘clearly foreseen and imminent’. Interpreted in conjunction with Article 3:1, a determination of the existence of a threat of material injury under Article 3:6 required an analysis of relevant future developments with regard to the volume, and price effects of the dumped imports and their consequent impact on the domestic industry.”

...

“... While Korea had argued that reliance on capacity of foreign producers to supply the Korean market was consistent with the Recommendation of the Committee on Anti-Dumping Practices, this Recommendation provided for the consideration of whether there existed ‘sufficient freely disposable capacity of the exporter *indicating the likelihood of substantially increased dumped exports* to the importing country’s market taking into account the availability of other export markets to absorb any additional exports.’ This indicated that capacity *per se* was not a sufficient factor in considering the likelihood of increased import volumes.”⁹²

(3) “to retard materially the establishment”

At Havana, it was stated that if an industry became economically unprofitable because of dumping, this would be covered by “retard materially”.⁹³

Article 3(a) of the 1967 Agreement on the Implementation of Article VI provided, *inter alia*, that “In the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered”.⁹⁴

The 1993 Panel Report on “Korea - Anti-dumping Duties on Imports of Polyacetal Resins from the United States” examined an injury determination by the Korean authorities:

“... if the conclusion [on injury issues in the Korean determination] were to be interpreted to mean that the KTC had made a finding of injury based simultaneously on all three standards of injury, this would necessarily mean that the KTC’s statement was internally contradictory: the KTC could not logically have found that a domestic industry was being injured by dumped imports (which presupposed that such an industry was already established) and at the same time that the establishment of a domestic industry was materially retarded by those imports.”⁹⁵

⁹¹L/5814, adopted on 18 July 1985, 32S/55, 69-70, para. 4.8.

⁹²ADP/92 adopted by the Committee on Anti-Dumping Practices on 27 April 1993, paras. 271, 281.

⁹³E/CONF.2/C.3/SR.30, p. 5.

⁹⁴15S/26. There is no parallel provision in Article 3 of the 1979 Agreement on the Implementation of Article VI.

⁹⁵ADP/92, adopted by the Committee on Anti-Dumping Practices on 27 April 1993, para. 222.

(4) “to cause ... material injury”

The Panel Report on “New Zealand - Imports of Electrical Transformers from Finland” provides in this regard:

“In its examination, the Panel then turned to the question whether the New Zealand transformer industry had suffered material injury as a result of the imports of the two transformers from Finland.... The Panel did not question that this industry had been in a poor economic situation, due to lack of new orders, diminishing orders on hand in certain product categories, declining profitability, a large increase in imports and considerable uncertainty as to new orders. The Panel noted, on the other hand, that the Finnish imports in question ... represented only 2.4 per cent of total sales of the New Zealand transformer industry in 1983. In terms of MVA ratings ... the two Finnish transformers taken together ... represented 1.5 per cent of the sum of domestic production and imports, or 2.4 per cent of total imports. The Panel also considered it significant that imports increased from 1981/82 to 1982/83 by 250 per cent in MVA terms ... and that the imports from Finland represented only 3.4 per cent of this increase. In view of these facts, the Panel concluded that while the New Zealand transformer industry might have suffered injury from increased imports, the cause of this injury could not be attributed to the imports in question from Finland, which constituted an almost insignificant part in the overall sale of transformers in the period concerned. In this connection, the Panel rejected the contention advanced by the New Zealand delegation that, at least as far as material injury in terms of Article VI was concerned, ‘any given amount of profit lost’ by the complaining firm was in some sense an ‘injury’ to a domestic industry. ...

“In view of the reasons contained in the preceding paragraphs, the Panel came to the conclusion that New Zealand had not been able to demonstrate that any injury suffered by its transformer industry had been material injury caused by the imports from Finland. The Panel therefore found that the imposition of anti-dumping duties on these imports was not consistent with the provisions of Article VI:6(a) of the General Agreement”.⁹⁶

The 1992 Panel Report under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII on “Canadian Countervailing Duties on Grain Corn from the United States” examined the countervailing duties in question in relation to, *inter alia*, Article 6:4 of the Agreement; this provision requires that “It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of this Agreement. There may be other factors which at the same time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports”.

“In the view of the Panel, the CIT’s findings of injury and causality were themselves largely based on factors other than subsidized imports: in particular, the factor of a dramatic decline in world market prices resulting in large part from a United States subsidy under the 1985 Farm Bill. Clearly, if there is a general and dramatic decline in world market prices for grain corn, this will affect Canadian producers. It will affect Canadian producers even if Canada does not import any grain corn from the United States, even if it imports grain corn from third countries, even if it is completely self-sufficient in grain corn or, indeed, even if it is a net exporter of grain corn, as it was in some crop years during the period of the CIT investigation. In each case, the Canadian price for corn would still be directly impacted -- in a material way -- by the world price decline. Thus, the price depression experienced in the Canadian market would have occurred in all such cases, and the imposition of countervailing duties would be contrary to Article 6.4, which requires that price depression or prevention of price increases caused by other factors must not be attributed to subsidized imports. Since no case was made by the CIT that *subsidized imports* from the United States were responsible for the decline in prices suffered in Canada, the Panel concluded that the CIT determination was inconsistent with the requirements of Article 6 of the Subsidies Agreement.

⁹⁶L/5814, adopted on 18 July 1985, 32S/55, 69-70, paras. 4.7, 4.9.

“The Panel considered that the purpose of countervailing duties is to allow signatories to counteract injury from subsidized imports, not from a general decline in world market prices. Only a generally applicable import tariff, not however a countervailing duty on imports from a particular country, can normally prove effective in raising the domestic price when there is a general decline in world prices. The fact that in the present case the countervailing duty may have been partially effective in raising the price of grain corn in Canada, in that the United States was the only viable source for imports given the existence of phytosanitary regulations which effectively barred all other imports, does not relieve Canada of the duty of making an injury determination in accordance with Article 6, namely, of showing that subsidized imports are the cause of material injury. ...”⁹⁷

(5) “domestic industry”

The Sub-Committee that considered the Havana Charter article which became Article VI noted in its report: “The Sub-Committee desired it to be understood that, where the word ‘industry’ is used in the Article, it includes such activities as agriculture, forestry, mining etc., as well as manufacturing”.⁹⁸

The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” further notes:

“The Group discussed the term ‘industry’ in relation to the concept of injury and agreed that, even though individual cases would obviously give rise to particular problems, as a general guiding principle judgements of material injury should be related to total national output of the like commodity concerned or a significant part thereof. The Group agreed that the use of anti-dumping duties to offset injury to a single firm within a large industry (unless that firm were an important or significant part of the industry) would be protectionist in character, and the proper remedy for that firm lay in other directions”.⁹⁹

In the Panel Report on “New Zealand - Imports of Electrical Transformers from Finland”

“The Panel accepted the argument put forward by New Zealand that the complaining company represented the New Zealand transformer industry in terms of Article VI of the GATT since its output accounted for 92 per cent of the total domestic production. It found support for this view in the report of the Group of Experts on Anti-Dumping and Countervailing Duties (BISD 8S/145, paragraph 18) which had discussed the term industry in relation to the concept of injury and had concluded that as a general guiding principle, judgements of material injury should be related to total national output of the like commodity concerned or a significant part thereof. In this connection, the Group of Experts did refer to a single firm that was an important or significant part of the industry.

“In its examination whether the New Zealand transformer industry had suffered injury from the imports in question, the Panel subsequently dealt with the argument put forward by New Zealand that this industry was structured in such a way that there existed four distinguishable ranges of transformers, i.e. transformers between 1-5 MVA, 5-10 MVA, 10-20 MVA, and 20 MVA and above, which for purposes of injury determination had to be considered separately. The Panel was of the view that this was not a valid argument, especially in light of the fact that the complaining company, representing - as indicated above - the New Zealand transformer industry, in the year 1982/83 produced the whole range of transformers, most of which in a range (i.e. above 20 MVA) which was not at all affected by the imports from Finland. ... It was thus, in the Panel’s view, the overall state of health of the New Zealand transformer industry which must provide the basis for a judgement whether injury was caused by dumped imports. To decide otherwise would allow the possibility to grant relief through anti-dumping duties to individual lines of production of a particular industry or company - a notion which would clearly be at variance with the concept of industry in Article VI in a case like the present one where both the Finnish exporter and the New Zealand industry were engaged in the manufacture and distribution of power transformers”.¹⁰⁰

⁹⁷SCM/140, adopted on 26 March 1992, 39S/411, 435-436, paras. 5.2.9-5.2.10.

⁹⁸Havana Reports, p. 74, para. 24.

⁹⁹L/978, adopted on 13 May 1959, 8S/145, 150, para. 18.

¹⁰⁰L/5814, adopted on 18 July 1985, 32S/55, 68, paras. 4.5-4.6.

See the definition of “domestic industry” for purposes of determining injury in terms of Article VI of the GATT, in Article 4 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 6:5 and 6:7-9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement¹⁰¹: these definitions provide:

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

A footnote to this paragraph in the 1979 Agreements called for a group of experts to develop a definition of the word “related”. The 1981 Report of this group, adopted by the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures, provides that for the purpose of these provisions, “producers shall be deemed to be related to the exporters or importers only if: (a) one of them directly or indirectly controls* the other; (b) both of them are directly or indirectly controlled* by a third person; or (c) together they directly or indirectly control* a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers”. A footnote to the asterisked words provides that “For the purposes of these Articles, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter”. The report notes that “The experts were of the opinion that the best approach would be to combine certain relevant criteria from the definition in [Article 15 of the Agreement on Implementation of Article VII of the General Agreement] with the requirement that the effect of the relationship was such as to cause the producer concerned to behave differently from non-related producers. At the same time they recognized that, as certain criteria were extremely difficult to evaluate, any such definition should allow sufficient flexibility and should be applied with appropriate care”.¹⁰²

The Panel on “United States - Definition of Industry Concerning Wine and Grape Products” under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, examined a dispute regarding amendments made in 1984 to the United States anti-dumping and countervailing duty laws which had provided that the definition of “industry” for anti-dumping and countervailing duty investigations in the case of wine and grapes would be as follows: “The term ‘industry’ means the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product; except that in the case of wine and grape products subject to investigation under this Title, the term also means the domestic producers of the principal raw agricultural product (determined on either a volume or value basis) which is included in the like domestic product, if those producers allege material injury, or threat of material injury, as a result of imports of such wine and grape products”.

“The Panel based the consideration of the case before it on Article 6 of the Code, in particular its paragraph 5, and footnote 18 to paragraph 1. It noted that Article 6:5 defines the term ‘domestic industry’ as the domestic producers as a whole of the like products (or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products). The Panel also noted that the term ‘like product’ is defined in footnote 18 to Article 6:1 of the Code, and it shared the view expressed by both parties to the dispute that, because of different physical characteristics, wine and grapes were not ‘like products’ in the sense of the Code. In view of the precise definition of ‘domestic industry’, the Panel considered that producers of the like products could be interpreted to comprise only producers of wine.

“The Panel then addressed the question whether, as a consequence of the close relationship between grape and wine production, the wine-grape growers could be regarded as part of the industry producing wine. It noted in this respect that both delegations had stated before the Panel that in the United States, the

¹⁰¹15S/24, 27; 26S/171, 175; 26S/56, 65.

¹⁰²Report to the Committee on Anti-dumping Practices and the Committee on Subsidies and Countervailing Measures, 28S/33, adopted 28-30 October 1981 by both Committees, 28S/47, 28S/28; Agreement on Implementation of Article VII, 26S/116.

structure of the industries was such that wineries did not normally grow their own grapes but bought them from the grape-growers for processing. In view of this situation, the Panel found that, irrespective of ownership, a separate identification of production of wine-grapes from wine in terms of Article 6:6 of the Code was possible and that therefore in fact two separate industries existed in the United States - the growers of wine-grapes on the one hand and the wineries on the other. Bearing in mind its terms of reference, the Panel did not consider it appropriate to examine the structure of the wine industry in other countries or the situation in other product sectors.

“The finding which the Panel reached was supported by the fact that in a previous countervailing duty investigation on wine imports, which had been conducted under the unamended version of Section 771(4)(a) of the US Tariff Act of 1930, the USITC had concluded that it was not appropriate to include grape growers within the scope of the domestic industry. The Panel noted the language of the Conference Report of the US Congress ... which states that producers of products being incorporated into a processed or manufactured article (i.e. intermediate goods or component parts) were generally not included in the scope of the domestic industry that the USITC analysed for the purposes of determining injury. In view of this fact it therefore appeared to the Panel that this had been a reason for the United States to amend the Trade and Tariff Act of 1984, in order to give wine-grape growers standing in countervailing duty proceedings involving wine imports. The Panel thus was of the opinion that it would not have been necessary to change the definition of ‘industry’ in the US Tariff Act of 1930 if wine-grape growers in the United States were part of the wine industry.”¹⁰³

See also the material on “like product” in the context of Article VI, at page 227 above.

(6) *Sub-paragraphs 6(b) and 6(c): Anti-dumping and countervailing duties based on material injury to the industry in a third country*

The first sentence of paragraph 6(b) was added during discussions at the Geneva session of the Preparatory Committee in 1947.¹⁰⁴ The second sentence of paragraph 6(b) and paragraph 6(c) were agreed during the 1954-55 Review Session, as noted in the Report of the Review Working Party on “Other Barriers to Trade”:

“The representatives of Australia and New Zealand originally proposed an extensive amendment to paragraph 6 which would have removed the requirement of prior approval by the CONTRACTING PARTIES before the imposition of a countervailing or anti-dumping measure designed to protect the industry of another exporting country. While this amendment did not receive wide support in its original form, a revised amendment proposed by those two delegations which is confined to countervailing duties, is recommended by the Working Party.”¹⁰⁵

Accordingly, the second sentence of paragraph 6(b) and paragraph 6(c), and the interpretative note to paragraph 6(b), were added to Article VI by the Protocol Amending the Preamble and Parts II and III of the General Agreement, which entered into force in 1957.

The same Working Party Report notes that “During the consideration of this subject by the Working Party, the Netherlands representative presented an oral proposal that the CONTRACTING PARTIES should be given the authority to require contracting parties to impose countervailing and anti-dumping duties against imports of a product from another country which, through the sale of the product concerned at a subsidized or dumping price, causes serious injury to other exporting contracting parties. This proposal was not accepted by the Working Party.”¹⁰⁶

The Second Report of the Group of Experts on Anti-dumping and Countervailing Duties noted the view of the Group that: “As regards the application of anti-dumping duties in the interests of third countries, the Group

¹⁰³SCM/71, adopted on 28 April 1992, 39S/436, 446-447, paras. 4.2-4.4. The legislative proviso regarding wine and grape products has since expired; see SCM/M/59 p. 29-31.

¹⁰⁴See EPCT/103.

¹⁰⁵3S/223-224; see proposal at W.9/214.

¹⁰⁶*Ibid.*, 3S/224, para. 11.

was of the opinion that the initiative should come from the third country involved".¹⁰⁷ Further on this subject, the Group's Second Report provides:

"The Group was of the opinion that the situation of third countries was fully dealt with in Article VI, paragraph 6, which related to cases where countries could levy an anti-dumping duty on behalf of third countries.

"In these circumstances, and contrary to one of the basic principles of Article VI, paragraph 6(a), the imposition of an anti-dumping duty was not contingent upon the existence of injury caused to an industry of the importing country, but upon injury caused or threatened to an industry of one or more third countries which were suppliers of the importing country.

"In order to avoid any misunderstanding, the Group wished to stress that a third country, in order to justify a request to an importing country to impose measures against another country, should produce evidence that the dumping engaged in by the other country was causing material injury to its domestic industry and not only to the exports of the industry of that third country. However, in cases where the importing country granted a request from a third country, anti-dumping measures should not be imposed until and unless the CONTRACTING PARTIES had approved the proposed measure (Article VI, paragraph 6). ...

"In any case, there was no doubt that the initiation of the procedures of resorting to the CONTRACTING PARTIES laid down in Article VI, paragraph 6, should be left to the discretion of the importing country. Consequently, the Group was of the opinion that where the importing country found it impossible or undesirable to grant the request from a third country which claimed injury, the third country had no right to retaliatory measures but could have resort to Articles XXII and XXIII of the General Agreement".¹⁰⁸

The provisions of sub-paragraph 6(b) and 6(c) have, so far, not been invoked and no waiver from the provisions of paragraph 6(a) has been requested.¹⁰⁹

The 1967 and 1979 Agreements on the Implementation of Article VI each include in Article 12 provisions on "Anti-dumping action on behalf of a third country".¹¹⁰

8. Paragraph 7

The Second Report of the Group of Experts on Anti-dumping and Countervailing Duties notes:

"The Group felt that the responsibility for ensuring the adequate implementation of international stabilization agreements affecting certain commodities should, in the first instance, be left to the bodies or institutions provided for in such agreements; this applied regardless of whether the agreements provided for floor or ceiling prices. ... Of course if while conforming with such an international agreement products were sold at a dumping price, recourse to the provisions of Article VI of GATT would be justified".¹¹¹

There is no record of Article VI:7 ever having been invoked formally in the GATT so far, although this may signify that the justification of its use by a contracting party has never been challenged during discussions with other interested contracting parties.¹¹²

¹⁰⁷L/1141, adopted on 27 May 1960, 9S/194, 195 para. 6.

¹⁰⁸*Ibid.*, 9S/198, paras. 21-23, 25.

¹⁰⁹C/W/420, p. 2.

¹¹⁰15S/24, 34; 26S/171, 183.

¹¹¹L/1141, adopted on 27 May 1960, 9S/194, 199, para. 30.

¹¹²CG.18/W/59, p. 16.

B. RELATIONSHIP BETWEEN ARTICLE VI AND OTHER GATT ARTICLES

1. Article I

The 1955 Panel Report on “Swedish Anti-Dumping Duties” examined Sweden’s application of a basic price scheme on imports of nylon stockings, in which any consignment with an invoice price higher than the basic price determined by the Swedish government was exempted from anti-dumping proceedings, and for other shipments dumping margins were related to the concept of normal value in Article VI. The Panel examined, *inter alia*, the claim by Italy that this scheme was inconsistent with Article I because it would exempt from anti-dumping proceedings imports from high-cost producers which were below normal value but above the basic price, and would deprive the low-cost producers of their competitive advantage to which they were entitled under the most-favoured-nation clause. The Panel Report notes as follows:

“The Panel considered that this argument was not entirely convincing. If the low-cost producer is actually resorting to dumping practices he foregoes the protection embodied in the most-favoured-nation clause. On the other hand, Article VI does not oblige an importing country to levy an anti-dumping duty whenever there is a case of dumping, or to treat in the same manner all suppliers who resort to such practices. The wording of paragraph 6 supports that view. The importing country is only entitled to levy an anti-dumping duty when there is material injury to a domestic industry or at least a threat of such an injury. If, therefore, the importing country considers that the imports above a certain price are not prejudicial to its domestic industry, the text of paragraph 6 does not oblige it to levy an anti-dumping duty on imports coming from high-cost suppliers, but, on the contrary, prevents it from doing so. On the other hand, if the price at which the imports of the low-cost producers are sold is prejudicial to the domestic industry, the levying of an anti-dumping duty is perfectly permissible, provided, of course, that the case of dumping is clearly established.

“The Panel recognized however that the basic price system would have a serious discriminatory effect if consignments of the goods exported by the low-cost producers had been delayed and subjected to uncertainties by the application of that system and the case for dumping were not established in the course of the enquiry. The fact that the low-cost producer would thus have been at a disadvantage whereas the high-cost producer would have been able to enter his goods freely even at dumping prices would clearly discriminate against the low-cost producer”.¹¹³

The Second Report of the Group of Experts on Anti-dumping and Countervailing Duties notes:

“In equity, and having regard to the most-favoured-nation principle the Group considered that where there was dumping to the same degree from more than one source and where that dumping caused or threatened material injury to the same extent, the importing country ought normally to be expected to levy anti-dumping duties equally on all the dumped imports”.¹¹⁴

See also Articles 8(b) and 8:2 of the 1967 and 1979 Agreements on the Implementation of Article VI¹¹⁵.

The Report of the Panel on “United States - Definition of Industry Concerning Wine and Grape Products”, established under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement to examine a dispute regarding a provision of the United States anti-dumping and countervailing duty laws, notes that “the Panel held the view that Article VI of the GATT and the corresponding Code provision should, because they permitted action of a non-m.f.n. nature otherwise prohibited by Article I, be interpreted in a narrow way”.¹¹⁶

The 1991 Report of the Panel on “United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada” contains the following finding:

¹¹³L/328, adopted 26 February 1955, 3S/81, 83-84, paras. 8-9.

¹¹⁴L/1141, adopted on 27 May 1960, 9S/194, 198, para. 26.

¹¹⁵15S/24, 31; 26S/171, 180.

¹¹⁶SCM/71, adopted on 28 April 1992, 39S/436, 447, para. 4.5.

“... in conducting [its] examination, the Panel took into account that Article VI:3 is an exception to basic principles of the General Agreement, namely that ... charges of any kind imposed in connection with imports must meet the most-favoured-nation standard (Article I:1). The Panel also noted in this context that discriminatory trade measures may under the General Agreement only be taken in expressly defined circumstances (e.g. Article XXIII:2).”¹¹⁷

In the 1992 Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil,” “The Panel considered that the rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation, within the meaning of Article I:1.”¹¹⁸

“The Panel noted that Article I would in principle permit a contracting party to have different countervailing duty laws and procedures for different categories of products, or even to exempt one category of products from countervailing duty laws altogether. The mere fact that one category of products is treated one way by the United States and another category of products is treated another is therefore in principle not inconsistent with the most-favoured-nation obligation of Article I:1. However, this provision clearly prohibits a contracting party from according an advantage to a product originating in another country while denying the same advantage to a *like product* originating in the territories of other contracting parties.”¹¹⁹

“The Panel found that the United States failed to grant, pursuant to Section 104(b) of the Trade Agreements Act of 1979, to products originating in contracting parties signatories to the Subsidies Agreement the advantage accorded in Section 331 of the Trade Act of 1974 to like products originating in countries beneficiaries of the United States GSP programme, that advantage being the automatic backdating of the revocation of countervailing duty orders issued without an injury determination to the date on which the United States assumed the obligation to provide an injury determination under Article VI:6(a). Accordingly, the Panel concludes that the United States acted inconsistently with Article I:1 of the General Agreement.”¹²⁰

2. Article II

In the 1962 Panel Report on “Exports of Potatoes to Canada”, the Panel examined a complaint by the United States concerning the imposition by Canada of an import charge on potatoes in addition to the bound specific duty, as a result of the application under the Canadian Customs Act of “values for duty” on potatoes imported below a certain price. The Panel found that “the imposition of an additional charge could not be justified by Article VI of the General Agreement, since the main requirement laid down in paragraph 1(a) of the Article was not satisfied” (see page 226 above).

“The Panel came to the conclusion that the measure introduced by the Canadian Government amounted to the imposition of an additional charge on potatoes which were imported at a price lower than Can.\$2.67 per 100 lbs. The Panel considered that this charge was in addition to the specific import duty which had been bound at a rate of Can.\$0.375 per 100 lbs. Since no provisions of the General Agreement had been brought forward for the justification of the imposition of an additional charge above the bound import duty, the Panel considered that the Canadian Government had failed to carry out its obligations under paragraph 1(a) of Article II.”¹²¹

¹¹⁷DS7/R, adopted 11 July 1991, 38S/30, 44, para. 4.4.

¹¹⁸DS18/R, adopted on 19 June 1992, 39S/128, 150, para. 6.8.

¹¹⁹*Ibid.*, 39S/151, para. 6.11.

¹²⁰*Ibid.*, 39S/154, para. 7.2.

¹²¹L/1927, adopted on 16 November 1962, 11S/88, 93, para. 18.

3. Article XVI

During discussions at London on Article II of the proposed Charter on anti-dumping and countervailing duties, it was stated that “Article II would permit countervailing duties to prevent injury, even though the subsidy granted by the exporting country was justified under provisions of the Charter”.¹²²

The Report of the 1954-55 Review Working Party on “Other Barriers to Trade”, which drafted the provisions of Section B of Article XVI, notes that the “Working Party ... agreed ... that nothing in the terms of Section B of Article XVI, relating to export subsidies, should be considered as limiting the scope of consultations envisaged under other provisions of the Agreement or as affecting in any way the right of a contracting party to impose countervailing and anti-dumping duties”.¹²³

The Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties provides: “The fact that the granting of certain subsidies was authorized by the provisions of Article XVI of the General Agreement clearly did not debar importing countries from imposing, under the terms of Article VI, a countervailing duty on the products on which subsidies had been paid”.¹²⁴

The Panel Report on “United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada”

“... noted that the purposes of Article VI and Article XVI were fundamentally different: the former provision provides for a right to react unilaterally to subsidies while the latter sets out rules of conduct and procedures relating to subsidies. It is for these reasons not justified in the view of the Panel to conclude from the references to trade effects in Article XVI:1 that Article VI:3 permits contracting parties to offset the full trade effects caused by a subsidy granted to the producers of a product by levying countervailing duties without it having been determined that subsidies have been bestowed on these other products”.¹²⁵

The Panel on “United States - Definition of Industry Concerning Wine and Grape Products”, which was established under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement to examine a dispute regarding a provision of the United States anti-dumping and countervailing duty laws, found, *inter alia*:

“The Panel ... considered the argument made by the US delegation that Article 9 of the Code was no less pertinent to the definition of ‘domestic industry’ that might be injured by subsidization than to the scope of producers whose exports might be subsidized. The Panel could see no relationship between Article 9 which prohibits the use of export subsidies on non-primary products, on the one hand, and Article 6:5 which contains the definition of ‘domestic industry’ for countervailing duty purposes, on the other. Quite apart from the fact that the two Code provisions in question had a different basis in the General Agreement itself, i.e. Article XVI in the case of Article 9 of the Code and Article VI in the case of Article 6:5 of the Code, the Panel was of the view that the definition of ‘certain primary products’ under Article 9 was made for different purposes than defining ‘domestic industry’ and that it could therefore not be used to interpret an otherwise explicit wording of Article 6:5. The processing permitted under the definition of ‘certain primary products’ could be, and in many instances was, a separate economic process identifiable in terms of Article 6:6 of the Code. Once such a separate identification was possible (e.g. because of the structure of the production), the economic interdependence between industries producing raw materials or components and industries producing the final product was not relevant for the purposes of the Code. There was therefore, in the Panel’s view, no basis for the contention that two products had to be considered as ‘like products’, and consequently the industries concerned to be one and the same, just because a primary product might continue to be considered a primary product even after processing ...”.¹²⁶

¹²²EPCT/C.II/48, p. 3.

¹²³L/334 and Addendum, adopted on 3 March 1955, 3S/222, 226, para. 20.

¹²⁴L/1141, adopted on 27 May 1960, 9S/194, 200, para. 32.

¹²⁵38S/44.

¹²⁶SCM/71, adopted on 28 April 1992, 39S/436, 447, para. 4.5.

4. Article XXIII

See under Article XXIII.

C. AGREEMENT ON IMPLEMENTATION OF ARTICLE VI AND AGREEMENT ON INTERPRETATION AND APPLICATION OF ARTICLES VI, XVI AND XXIII

1. Work done under the 1979 Agreements

The Agreement on Implementation of Article VI of the General Agreement was negotiated in the Kennedy Round of multilateral trade negotiations in the light of the decision of Ministers in 1963 that the Kennedy Round should “deal not only with tariffs but also with non-tariff barriers”.¹²⁷ This Agreement entered into force on 1 July 1968. In the Tokyo Round of multilateral trade negotiations revisions to the 1967 Agreement were proposed to take into account the draft text of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII; the 1979 Agreement on Implementation of Article VI entered into force on 1 January 1980.¹²⁸ Article 16:5 of the 1979 Agreement provides that “Acceptance of this Agreement shall carry denunciation of the Agreement on Implementation of Article VI, done at Geneva on 30 June 1967”. As of 31 December 1979 the 1967 Agreement had been accepted by twenty-five contracting parties including the ten EEC Member States, and by the European Economic Community. Two parties to the 1967 Agreement, Macau and Malta, have not accepted the 1979 Agreement. An updated list of acceptances of the 1979 Agreement appears in the Appendix.

Both the 1967 and 1979 Agreements on the Implementation of Article VI express in their respective preambles the desire of the parties to the Agreement “to interpret the provisions of Article VI of the General Agreement ... and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation”. Accordingly, the respective Articles 1 of both Agreements state: “The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the provisions of this Code.” Article 14 of the 1979 Agreement establishes a Committee on Anti-Dumping Practices constituted of the Parties to the Agreement.

The Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement was negotiated in the Tokyo Round of multilateral trade negotiations, and entered into force on 1 January 1980.¹²⁹ An updated list of acceptances of the Agreement appears in the Appendix tables at the end of this book. In the preamble of this Agreement, the signatories express their desire “to apply fully and to interpret the provisions of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade only with respect to subsidies and countervailing measures ... and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation”. Accordingly, Article 1 of the Agreement states: “Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement”. Part I of the Agreement deals with countervailing duties; other provisions of the Agreement deal with subsidies. Article 16 of the Agreement establishes a Committee on Subsidies and Countervailing Measures constituted of the signatories to the Agreement.

The GATT Secretariat has periodically published a collection of legislation under the title of *Anti-Dumping Legislation*.¹³⁰ Legislation and regulations of parties to the Agreement on Implementation of

¹²⁷Decision of Ministers, 12S/47, para. 3; see Preamble of 1967 Agreement, 15S/24. The 1967 Agreement appears at 15S/24. For the drafting background of the 1967 Agreement, see the documents of the Sub-Committee on Non-Tariff Barriers and other Special Problems, TN.64/SR.1-3, TN.64/NTB/1-; documents of the Group on Anti-Dumping Duties, TN.64/NTB/38-41 and TN.64/NTB/W/1-21; and the draft Code tabled by the United Kingdom in Spec(65)86.

¹²⁸For drafting background on the 1979 Agreement, see documents MTN/NTM/W/232+Corr.1, Add.1/Rev.1, Add.2; MTN/W/241/Rev.1, MTN/NTM/W/232/Rev.1, MTN/NTM/W/248, MTN/NTM/W/258-259 and see generally minutes and documents of the Committee on Anti-Dumping Practices, 1968-1979, in the COM.AD/ series. The text of the 1979 Agreement is at 26S/171.

¹²⁹Text of the Agreement appears at 26S/56. On the drafting history, see documents listed in TA/INF/1/Rev.8, p. 45-50.

¹³⁰*Anti-Dumping Legislation*, published 1958, 1970, 1974, 1977; *Anti-dumping and Countervailing Measures Legislation*, published in loose-leaf format; current edition updated to March 1987.

Article VI and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII are notified to the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures.¹³¹

These two Committees have examined issues relating to administration of anti-dumping and countervailing duty proceedings, and have adopted certain recommendations “constituting an understanding on the manner in which Parties intended to implement certain provisions of the Code. The recommendations have not added new obligations nor have they detracted from the existing obligations under the Code.”¹³² The Committee on Anti-Dumping Practices has adopted the Recommendation concerning Transparency of Anti-dumping Procedures¹³³, the Recommendation concerning Procedures for an On-the-spot Investigation¹³⁴, the Recommendation concerning the Time-limits Given to Respondents to Anti-dumping Questionnaires¹³⁵ and the Recommendation concerning Best Information Available in terms of Article 6:8.¹³⁶ The Committee on Subsidies and Countervailing Measures has adopted Guidelines on Physical Incorporation,¹³⁷ it being stated that these guidelines constituted an understanding on the manner in which signatories intended to calculate the amount of certain subsidies;¹³⁸ Guidelines on Amortization and Depreciation;¹³⁹ and Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies.¹⁴⁰ Both Committees adopted in 1981 the Report of a Group of Experts on the definition of the word “related”: see above at page 246.

2. Co-existence of the 1979 Agreements and the WTO Agreement

In the Uruguay Round of multilateral trade negotiations, two agreements were reached: the 1994 Agreement on Implementation of Article VI, and the Agreement on Subsidies and Countervailing Measures. These agreements are included in Annex 1A to the WTO Agreement and therefore bind all Members of the WTO. In late 1994, the Preparatory Committee for the WTO discussed arrangements for transition from the 1979 agreements to the 1994 agreements. The Preparatory Committee and the Committee on Anti-Dumping Practices each adopted the following decision on “Transitional Arrangements - Transitional Co-existence of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization”:

“The Parties to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as ‘the Agreement’),

“*Noting* that not all Parties to the Agreement meeting the conditions for original membership in the World Trade Organization ... will be able to accept the Marrakesh Agreement Establishing the WTO ... as of its date of entry into force, and that the stability of multilateral trade relations would therefore be furthered if the Agreement and the WTO Agreement were to co-exist for a limited period of time;

“*Considering* that, during that period of co-existence, a Party to the Agreement which has become a Member of the WTO should have the right to act in accordance with the WTO Agreement notwithstanding its obligations under the Agreement;

“*Desiring* to end the period of co-existence on a date agreed in advance so as to provide predictability for policy makers and facilitate an orderly termination of the institutional framework of the Agreement;

“*Decide* as follows:

“1. The Parties to the Agreement that are Members of the WTO may, notwithstanding the provisions of the Agreement, maintain or adopt any measure consistent with the provisions of the WTO Agreement.

¹³¹See the ADP/1/Add. and SCM/1/Add. document series.

¹³²31S/287-288.

¹³³30S/24.

¹³⁴30S/28.

¹³⁵30S/30.

¹³⁶31S/283.

¹³⁷SCM/68, adopted on 24 October 1985, 32S/156ff.

¹³⁸31S/262 para. 12.

¹³⁹SCM/64, adopted on 25 April 1985, 32S/154ff.

¹⁴⁰31S/257.

“2. The dispute settlement provisions of the Agreement shall not apply:

“(a) to disputes brought against a Party to the Agreement which is a Member of the WTO if the dispute concerns a measure that is identified as a specific measure at issue in the request for the establishment of a panel made in accordance with Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement and the dispute settlement proceedings following that request are being pursued or are completed; and

“(b) in respect of measures covered by paragraph 1 above.

“3. The Agreement is herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the Parties may decide to postpone the date of termination by no more than one year.”¹⁴¹

On the same date, the Preparatory Committee and the Committee on Anti-Dumping Practices also adopted a decision on “Transitional Arrangements - Committee on Anti-Dumping Practices”:

“The Parties to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ...

“*Recalling* the Ministerial Decision of 15 April 1994 on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes,

“*Further recalling* that Parties to the Agreement have the right to withdraw from the Agreement at any time, said withdrawal to take effect upon the expiration of sixty days from the day on which written notice is received by the Director-General to the CONTRACTING PARTIES to GATT 1947;

“*Agree* that, in the event of withdrawal by any Party from the Agreement taking effect on or after the date of entry into force for it of the Marrakesh Agreement Establishing the World Trade Organization ... or in case of termination of the Agreement while this Decision is in effect:

“(a) the Agreement shall continue to apply with respect to any anti-dumping investigation or review which is not subject to application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 pursuant to the terms of Article 18:3 of that Agreement.

“(b) Parties that withdraw from the Agreement shall remain Members of the Committee on Anti-Dumping Practices exclusively for the purpose of dealing with any dispute arising out of any anti-dumping investigation or review identified in paragraph (a).

“(c) In case of termination of the Agreement during the period of validity of this Decision the Committee on Anti-Dumping Practices shall remain in operation for the purpose of dealing with any dispute arising out of any anti-dumping investigation or review identified in paragraph (a).

“(d) The rules and procedures for the settlement of disputes arising under the Agreement applicable immediately prior to the date of entry into force of the WTO Agreement shall apply to disputes arising out of any investigation or review identified in paragraph (a). With respect to such disputes for which consultations are requested after the date of this Decision, Parties and panels will be guided by Article 19 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement.

¹⁴¹PC/13, L/7584, ADP/131.

“(e) Parties will make their best efforts to expedite to the extent possible under their domestic legislation investigations and reviews referred to in paragraph (a), and to expedite procedures for the settlement of disputes so as to permit Committee consideration of such disputes within the period of validity of this Decision.

“This Decision shall remain in effect for a period of two years after the date of entry into force of the WTO Agreement. Any Party to the Agreement as of the date of this Decision may renounce this Decision. The renunciation shall take effect upon the expiration of sixty days from the day on which written notice of renunciation is received by the person who performs the depositary function of the Director-General to the CONTRACTING PARTIES to GATT 1947.”¹⁴²

On 8 December 1994 the Preparatory Committee and the Committee on Subsidies and Countervailing Measures also adopted two decisions paralleling those cited directly above, concerning coexistence of the WTO Agreement and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.¹⁴³

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The corresponding Articles in the Havana Charter are Article 34, in the US proposals Chapter III-3, in the US Draft Article 11, in the New York Draft Article 17 and in the Geneva Draft Article 33.

Article VI in the General Agreement as agreed 30 October 1947 was identical to Article 33 of the Geneva Draft Charter except for the provisions corresponding to the paragraph 7 of the present Article VI. At Havana, this Article was further discussed and amended. After the close of the Havana Conference, the second session Working Party on “Modifications to the General Agreement” agreed to take the Havana Charter article into the General Agreement, entirely replacing the original Article VI. The Report of the Working Party notes in this regard:

“While agreeing that there is no substantive difference between Article VI of the General Agreement and Article 34 of the Charter, the working party recommends the replacement of that article, as the text adopted at Havana contains a useful indication of the principle governing the operation of that article and constitutes a clearer formulation of the rules laid down in that article”.¹⁴⁴

The replacement of Article VI was effected through the Protocol Modifying Part II and Article XXVI, which entered into force on 14 December 1948.

Further amendments to Article VI were considered in the Review Session of 1954-55, in the Working Party on “Other Barriers to Trade”. The Report of this Working Party notes that only two amendments were accepted: the amendments to paragraph 6 discussed on page 247 above, and the insertion of the second interpretative note to paragraph 1 discussed on page 228 above. The Review Session amendments to Article VI were effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement, which entered into force 7 October 1957.

¹⁴²PC/14, L/7585, ADP/132. The Agreement on the Transfer of Assets, Liabilities, Records, Staff and Functions from the Interim Commission of the International Trade Organization (ICITO) and the GATT to the World Trade Organization, adopted on 8 and 9 December by the Preparatory Committee for the WTO, the GATT CONTRACTING PARTIES and the Executive Committee of ICITO, provides that “The Director-General of the WTO shall perform the depositary functions of the Director-General of the GATT 1947 after the date on which the legal instruments through which the contracting parties apply the GATT 1947 are terminated. On that date the records of the GATT 1947 shall be transferred to the WTO.” PC/9, L/7580, ICITO/39, para. 5.

¹⁴³Decisions on “Transitional Arrangements - Transitional Co-existence of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization”, PC/15, L/7586, SCM/186; “Transitional Arrangements - Committee on Subsidies and Countervailing Measures”, PC/16, L/7587, SCM/187.

¹⁴⁴GATT/CP.2/22/Rev.1, adopted 1-2 September 1948, II/39, 42 para. 12.

IV. RELEVANT DOCUMENTS

See below at the end of Article X.