

UNITED STATES - DEFINITION OF INDUSTRY
CONCERNING WINE AND GRAPE PRODUCTS

*Report by the Panel adopted by the Committee on Subsidies
and Countervailing Measures on 28 April 1992
(SCM/71 - 39S/436)*

1. Introduction

1.1 In a communication dated 23 January 1985, which was circulated in document SCM/60, the EEC requested the Committee on Subsidies and Countervailing Measures ("the Committee") to establish a panel to examine a dispute between the EEC and the United States regarding amendments to the definition of industry made in the United States Trade and Tariff Act of 1984 and concerning wine and grape products. This matter had previously been referred by the EEC to the Committee (SCM/54) but it had not been possible for the Committee to resolve the matter under the consultation and conciliation provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade ("the code").

1.2 At its meeting of 15 February 1985 the Committee agreed to establish a panel and authorized the Chairman to decide, in consultation with interested delegations, on its composition and terms of reference (SCM/M/25, paragraph 17).

1.3 At the meeting of the Committee on 5 October 1985, the Chairman informed the Committee that, following consultations with the parties concerned, the composition of the Panel had been agreed as follows (SCM/M/29, paragraph 211):

Chairman:	Mr. Magnus Lemmel
Members:	Mr. Darry Salim Mr. Hielke van Tuinen

At the same meeting, the Chairman decided on the following terms of reference (SCM/M/29, paragraph 21):

"To review the facts of the matter referred to the committee by the EEC in SCM/54 and, in the light of such facts, present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade".

1.4 The Panel met with the two parties on 19 November 1985 and 20 January 1986. In addition, the Panel met on 21 January, 25 February and 26 February 1986. On 26 February 1986 the Panel submitted its conclusions to the parties.

II. Factual aspects

2.1 Subtitle D (General provisions), Section 771 (Definitions; Special Rules) of the United States Tariff Act of 1930 was amended by the Trade and Tariff Act of 1984, Section 612(a)(1), to read as follows (new language is underlined):

"For the purposes of this title -

(4) INDUSTRY -

(A) IN GENERAL - 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."

Further, Section 626(c) of the Trade and Tariff Act of 1984 provides:

"1. No provision of title VII of the Tariff Act of 1930 shall be interpreted to prevent the refiling of a petition under Section 702 or 732 of that title that was filed before the date of enactment of this title if the purpose of such refiling is to avail the petitioner of the amendment made by Section 612(a)(1).

2. The amendment made by Section 612(a)(1) shall not apply with respect to petitions filed (or refiled under paragraph (1) under Section 702 or 732 of the Tariff Act of 1930 after 30 September 1986."

2.2 On 10 September 1985, petitions were filed with the United States International Trade Commission (USITC) and the US Department of Commerce on behalf of the American Grape Growers Alliance for Fair Trade, alleging that ordinary table wines imported from the Federal Republic of Germany, France and Italy were being subsidized and were being sold in the United States at less than fair value. Accordingly, effective 10 September 1985, the Department of Commerce and the USITC had instituted a preliminary countervailing duty investigation. On 28 October 1985 the USITC determined that there was no reasonable indication that an industry in the United States was materially injured or threatened with material injury, or that the establishment of an industry in the United States was materially retarded, by reason of imports from the Federal Republic of Germany, France and Italy of certain table wines which were alleged to be subsidized. In its determination, the USITC found the US industry to be composed of the wineries producing the like product and the grape growers whose grapes are used in the like product. Following the negative determination of the USITC, the countervailing duty investigation was automatically terminated and no countervailing duty was levied.

2.3 In November 1985, the American Grape Growers Alliance lodged an appeal with the US Court of International Trade against the negative determination of the USITC. Should the USITC determination be affirmed in the appeals process, the countervailing duty investigation would remain terminated. However, should the US industry successfully appeal through various possible levels of the US courts, the result could be a court decision requiring resumption of the countervailing duty investigation and the USITC could be required to make a new preliminary determination regarding material injury. The normal investigative process would still have to proceed in those circumstances, and no countervailing duty would be imposed unless in the course of such an investigation, the US Department of Commerce made a final determination that there were countervailable subsidies and the USITC made a final determination that there was material injury to the US industry by reason of the subsidized imports.

III. Main arguments

3.1 The US delegation in the first instance reaffirmed before the Panel the position which it had taken in the Committee deliberations that, in the sense of even the filing of a countervailing duty petition in the United States, the issue was purely hypothetical and not ripe for consideration by a panel. It agreed that when the US industry had filed a petition in September 1985, the dispute had taken on greater immediacy, although no trade prejudice had resulted from the mere filing of a petition. However, the issue had since become moot as a result of the automatic termination of the US countervailing duty investigation following the USITC's negative determination of material injury on 28 October 1985. Termination of the countervailing duty investigation meant that no countervailing duties would be levied regardless of how the legislation at issue might have been interpreted domestically or internationally. In these circumstances, when the practical basis of the dispute had ended, the panel could appropriately conclude that the dispute was resolved without prejudice to the legal merits.

3.2 The US delegation recognized that US law left open the possibility of appeal of the USITC decision to US courts but it suggested that a fair solution would be to suspend the panel proceeding until such time, if any, as a countervailing duty investigation under the law at issue were resumed. The US delegation considered that any material EEC interests would be protected in this way, since such an examination would be timely without being so clearly hypothetical or academic as the dispute at that time appeared to them. The matter contested by the EEC had, so far, no trade effects and the actual effect of application of the US law proved to be nil.

3.3 Expanding on this point, the US delegation argued that for a countervailing duty to be levied against any imports of EEC wine as a result of Section 612(a)(1) it would still require fulfilment of a string of conditions, none of which had yet been met. The courts would first have to find that the USITC erred in the standard applied in terminating the countervailing duty case at the stage of the preliminary determination. The investigation would have to resume. The Department of Commerce would have to find subsidization at the preliminary and final stage and the USITC would have to make a final affirmative determination of material injury caused by the subsidized imports. Even then, Section 612(a)(1) might still not be relevant, since the USITC might find, as was the case in the negative preliminary determination, that the US wine industry was suffering material injury regardless of whether wine-grape growers were included in the industry. The US delegation explained that the negative decision of the USITC in its preliminary determination was based on absence of an adequate causal link between imports and the material injury.

3.4 The EEC delegation considered that the Panel should continue its proceedings in accordance with its terms of reference since the basic issues at stake brought by the EEC before the Panel were not resolved by the USITC's recent decision. Furthermore, the EEC maintained its view that the interests of its exporters continued to be threatened by the existence of the US legislation. In any event, in the new case brought by the US grape growers, the EEC noted that an appeal to the US Court of International Trade requesting a reversal of the negative USITC decision had already been made by the complainants and that in a previous similar case involving the US wine industry, the Court of International Trade had ruled that the USITC had applied an excessively stringent injury test.

3.5 The EEC delegation also noted that provisions of the Trade and Tariff Act of 1984 which, in its view, violated the Code, might be renewed before their expiry at the end of September 1986. In addition, the EEC had observed that new legislative bills pending in the US Congress would seek to extend the concept of definition of industry under the countervailing duty statute so as to associate producers of raw agricultural products with processed agricultural products and even to associate producers of industrial components with producers of end-use industrial products.

3.6 The US delegation maintained that proposals for legislation by US Congressmen or the actual possible practice of other countries referred to by the EEC delegation were not within the panel's terms of reference. These other matters, however, might be a further reason, in the US view, for the panel to exercise caution in a difficult area of Code interpretation, and for the Committee members to examine the generic problem and attempt to arrive at a common interpretation.

3.7 On the substantive issues of the case, the EEC delegation stressed that the amendment to the definition of industry contained in the US Trade and Tariff Act of 1984 constituted a serious departure from the general rule that, in the context of countervailing duty investigations of imports of a particular product, domestic industry was defined in Article 6:5 of the Code as the domestic producers as a whole of the like products. The exception introduced into US law consisted of defining the term "domestic industry", in the case of wine and grape products, to include not only the producers of the like product itself (wine) but also producers of the principal raw agricultural product (grapes) when wine and grape products were being investigated under the Statute. In other words, for the specific product concerned, i.e. wine, under the 1984 Act the domestic industry included producers of a non-like and wholly dissimilar product (in this case grapes). In this context the EEC delegation noted that in a previous case involving the US wine industry, which had been decided on the basis of the unamended version of Section 771 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 (USITC Publication No. 1502, page 10).

3.8 The EEC delegation considered that the US argumentation that grape growers form part of the US wine industry was without foundation. It was even confident that this conclusion was shared by the US Congress when it amended US legislation in 1984. The EEC delegation also noted that the rationale underlying the amendment to US law on the definition of industry was to include grape growers in a category in which they were not included before and to which they did not belong under the previous definition. The EEC noted that in light of the danger of extending this new concept to other sectors, whether agricultural or industrial, and of the difficulty to reconcile it with the clear provisions of the GATT, the Congress then took the precaution of limiting the scope of the amendment to wine and its validity to two years.

3.9 The EEC delegation considered that, in practical terms, the adoption by the US of an amended "definition of industry" for wine and grape products had had and would continue to have two major effects on the conduct of countervailing duty investigations relating to imports of wine and grape products into the United States:

- (i) the producers of the raw agricultural product (grape growers) were permitted under the new law to file petitions alleging that imports of wine are subsidized;
- (ii) the assessment by the USITC of injury to the US domestic industry caused by allegedly subsidized imports of wine had to take account of injury to both wine producers and grape growers.

These effects were not theoretical but actual, as had been seen in the petition submitted on 10 September 1985 by the US grape growers against imports of allegedly subsidized and dumped EEC wine.

3.10 Throughout the dispute, the EEC delegation based its views on the provisions of the Code with respect to the definition of industry. It considered the language of the Code to be precise and unequivocal in that it stipulated that countervailing duties could only be imposed if subsidized imports were causing injury to a domestic industry in the importing country as defined in Article 6:5 of the Code and the footnote to Article 6:1. Three consequences followed from this definition:

- (i) the product "grape" and the product "wine" could under no circumstances be considered as "like" products within the meaning of the Code;
- (ii) grape growers had no standing to file a petition against imports of wine since they did not produce the like product and, in consequence, did not form part of the domestic US wine industry under the Code;
- (iii) the situation of grape growers could not be taken into account when determining whether injury had been caused by imports of wine.

Since the new US definition of industry had the effect of treating the producers of grape as if they were producers of "like" products, the EEC conclusion was that the US law was not in conformity with Article 6:5 of the Code. In addition the EEC delegation concluded that the US, in amending its legislation on the definition of industry, had also violated its obligations under another provision of the Code, namely Article 19:5(a).

3.11 The EEC delegation further argued that the passage by the US Congress of legislation violating US obligations under the Code had had prejudicial effects on the rights of the EEC under the Code in two important ways. In the first place the very existence of the new legislation had created serious difficulties for US importers of EEC wine and for EEC exporters. In the second place this legislation had brought about the case filed by US grape growers against EEC wine exports under the amended law. As long as legislation inconsistent with the Code remained in force, EEC exporters and importers in the US would continue to face serious difficulties and harassment which were bound to affect their business prospects. This situation was the direct result of the existence of a US law which was inconsistent with the provisions of the Code on the points mentioned above. The EEC's and other signatories' rights under the Code would only be safeguarded in this matter when the US law had been brought fully into conformity with the provisions of the Code as Article 19:5(a) required.

3.12 While maintaining its position that the Panel should suspend its proceedings, the US delegation offered a number of comments affirming the conformity of Section 612(a)(1) of the Trade and Tariff Act of 1984 with Article 6:5 of the Code. In applying this law, the USITC had found the US industry to be "composed of the wineries producing the like product and the grape growers whose grapes are used in the like product". On the other hand, Article 6:5 of the Code provided that, "in determining injury, the term 'domestic industry' shall ... be interpreted as referring to the domestic producers ... of the like products ...". The proper question, therefore, was not, as the EEC delegation contended, whether grapes were "like" wine, because the US delegation agreed that they were not, but rather whether growers of wine grapes might properly be considered under the Code as part of the industry producing wine. Section 612(a)(1) did not provide that wine-grape growers were by themselves the industry in a case involving wine, but rather stipulated that such growers were part of the wine industry. In applying the law, the USITC consequently had not considered grapes to be "like" Wine but rather considered growers of grapes used in wine as part of the US wine industry, along with wineries (some of which also grew grapes). The US delegation further noted that the EEC's apparent objective in this dispute was to preclude consideration of the effect of subsidized EEC wine on wine-grape growers, an objective which would only have a trade effect if it meant that the EEC could avoid countervailing duties even if subsidized EEC wine were causing material injury to grape growers. However, the purpose of the Code was not to immunize injurious subsidization from a remedy. The issue which the EEC had brought to the Panel would not even arise under Article VI:6 of the General Agreement since that Article required only a finding of injury to "an established domestic industry" without referring to the notion of "like product".

3.13 The US delegation considered that there was an obvious relationship between grapes and wine and that, even with modern wine-making techniques, wine was essentially grapes that had been crushed and allowed to ferment. The majority of grape varieties used in wine were grown for no other purpose than to produce wine. It also pointed out the differences in the structure of the wine industry in the EEC and the United States. In the EEC most wine producers grew their own grapes while in the United States it was less likely that a winery would grow its own grapes. However, in both cases grape growing was inextricably linked to wine production, and it would be impossible for the EEC wine-maker to assess the economic health of the grape growing aspect of wine production from the rest of the process of making wine. That interdependence was no less merely because ownership of grape vines was in different hands from ownership of a winery. The EEC's argument would, therefore, lead to the wholly inequitable result that the condition of the grape grower might be assessed in a countervailing investigation of wine when the grape grower made his own wine (as in the EEC) but not if he sold his grapes to a winery of which he owned no part (as was more often the case in the United States). Such a result would be wholly inequitable when the American wine-grape grower was no less dependent on wine production than his EEC counterpart - and no less a part of the wine industry. It would also ignore the obvious economic and commercial relationships within the wine industry and make the definition of industry vary by country according to the accident of the structure of the national industry.

3.14 The US delegation noted that the Code recognized the particular relationship between agricultural products in their natural state and the possible need for processing to market these products in international trade. Article 9 of the Code prohibited export subsidies on products other than certain primary products". The EEC granted export subsidies on wine. The EEC therefore presumably considered that wine was merely grapes (the product in its natural state) which had undergone such processing as was customarily required to prepare the grapes for marketing in substantial volume in international trade. The Code's definition of primary product (footnote to Article 9) was, therefore, no less pertinent to the scope of the industry that might be injured by subsidization than to the scope of producers whose exports might be subsidized. The US delegation held the view that it was not acceptable, legally or equitably, to interpret the Code to permit subsidies on the export of wine as if wine were processed grapes, while denying consideration of the effect of imports of subsidized wine on grape growers as part of the wine industry. If wine-grape growers were considered the beneficiaries of export subsidies on wine, then it was clear that domestic growers of grapes used for wine were properly within the scope of the domestic producers of wine who might be injured by subsidized wine imports. In short, wine could not logically be considered a primary product under the Code unless wine-grape growers were considered to be producers of wine. The US delegation considered that, on this basis alone, the panel could clearly find that, with respect to any product that was "primary" within the, definition of the Code, domestic producers of the product in its natural form might be considered a part of the domestic industry.

3.15 The US delegation also noted that, apart from the obvious inequity that the EEC's apparent "test" would create between EEC and US wine-grape growers, this would produce absurd results in this and other cases: the scope of the US industry would immediately change if vineyard owners purchased wineries or vice versa. Cattlemen would be excluded from the industry in beef cases, and growers of perishable commodities would automatically be excluded from cases involving processed imports, if these ranchers or growers did not own the essential processing facility, but would be included if they did own the facility. The US delegation cautioned against creating this absurd result, clearly not required by the Code.

3.16 The US delegation also considered that the enactment of Section 612(a)(1) , explicitly directing the USITC to consider wine-grape growers as a part of the US wine industry, had proved to have no practical consequence in the actual application of the US law. In its preliminary determination, the USITC had found that there had been a reasonable indication of material injury to the US wine industry, whether or not wine-grape growers were included, but that there had been insufficient causal link to

the imports under investigation. Indeed, exclusion of wine-grape growers from the industry would make no difference in any case where the condition of the "independent" processor was the same as the farmer. On this basis, it argued that the whole issue raised by the EEC was of little consequence, even theoretically. However, the absence of any practical consequence in the dispute and the limited practical consequence of the issue even in theory was not a satisfactory reason to narrow the availability of relief from injurious subsidized imports.

3.17 The EEC delegation contested the US interpretation of Article VI of the General Agreement (see paragraph 3.12 above). The EEC delegation recalled that in 1959 the CONTRACTING PARTIES had already adopted a report which addressed Article VI and provided that "... as a general guiding principle, judgements of material injury should be related to ... national output of the like commodity concerned". (BISD, 8S/150, paragraph 18). This principle had been subsequently incorporated in the Code under Article 6:5 and made more precise. The present text was unequivocal and left no possible room for doubt as to how domestic industry should be defined.

3.18 The EEC delegation disagreed with the US reasoning that the economic interdependence between grape growers and wine producers justified that the former was accorded the same measures of protection as the latter against unfair trade practices. It pointed out that such economic interdependence existed in many sectors, agricultural as well as industrial. However, the Code restricted the definition of industry to producers of goods having the same characteristics as the imports concerned. Under these rules it was clear that economic interdependence of two industries was not a factor relevant in countervailing and anti-dumping investigations.

3.19 As to the question of whether these rules are inequitable or not, the EEC delegation considered that a broadening of the frontiers of the actual disciplines of the Code would open a Pandora's box and would lead to effects opposite to those desired by most if not all negotiators of the Code. In any case, such broadening of the actual definitions was not a matter for unilateral interpretation but would require instead a rewriting of the Code provisions. The EEC delegation argued that the dispute on this issue had arisen because the US Congress had seen fit to substitute its judgement on what was equitable in place of what the Code actually stated. Irrespective of whether the existing provisions were perceived to be equitable or not, the EEC delegation considered that Code signatories should ensure that they were applied unless they were modified through global negotiation.

3.20 As to the difference in the structure of the wine industry in the EEC and the United States, the EEC delegation pointed out that a major part of its grape growers produced their own wine. Insofar as this was the case, under the Code they were part of the wine industry. In the United States the situation was different. Grape growers did not, in general, produce wine and thus they could not be subsumed in the category of "domestic producers of the like product" as defined in Article 6:5 of the Code. If the structure were different there would have been no need to amend the US law and give grape growers standing which they did not have beforehand.

3.21 The US delegation noted that the EEC had indicated that EEC grape growers should be considered as producers of wine at least insofar as these grape growers or wineries. Therefore, unless the EEC was arguing an ad hominem standard under the Code, the EEC had to consider that the key test laid in ownership of the facility that last processes the product. With that ownership, the EEC apparently would accord the right to have the condition of wine-grape growers assessed as part of the production of wine; without it, the EEC argued, that wine-grape grower had to be excluded. In the US view such a test was not warranted under the Code and produced absurd results.

3.22 The EEC delegation disagreed with the argument (paragraph 3.14) that the definition of "primary product" under Article 9 of the Code was relevant for determining the scope of an industry allegedly injured by subsidized imports under Article 6:5. It submitted that these two rules were drawn up for

totally different purposes. On the one hand, the definition of Article 9 which related to Article XVI of the General Agreement was designed to establish a broad categorization between certain primary products and other products in order to draw a simple dividing line between those products for which special rules relating to certain primary products applied and those which fell under the general disciplines of the Code. On the other hand, Article 6:5 which related to Article VI of the General Agreement was designed to determine the scope of the industry for the defence of which anti-dumping or countervailing duties might be applied. Article VI of the General Agreement constituted an exception to the general principles of Article I and therefore had to be subject to a narrow interpretation; in addition, by their very nature, anti-dumping and countervailing duties were discriminatory and a precise definition was therefore indispensable in this context. In any case the use of the definition of "primary product" under Article 9 of the Code for interpreting the definition of industry under Article 6:5 of the Code, as proposed by the US, was impossible since it would go against the explicit wording of Article 6:5 of the Code and the definition of like product. Thus, the fact that an agricultural product, even after processing, was still a "primary product", as defined under Article 9 of the Code, did not mean that, under the different rules of Article 6:5 of the Code, it was a product like the raw agricultural product from which it was produced.

4. Conclusions

4.1 The first question which the Panel considered in the course of its work was the request made by the US delegation that the Panel suspend the proceedings until such time, if any, as a countervailing-duty investigation under the law at issue were resumed. The Panel noted that the decision by the Committee to establish the Panel was taken at a time (i.e. on 15 February 1985) when neither such an investigation had been initiated nor even a complaint had been lodged. The Panel noted that it had been called upon, in its terms of reference, to review the facts of the matter referred to the Committee by the EEC in document SCM/54, and that the issue raised in this document was the conformity of the US law in question (i.e. Section 612(a)(1) of the Trade and Tariff Act of 1984) as such with the provisions of the Code, as required by its Article 19:5(a). The Panel had thus no option but to proceed with its work, as provided for in its terms of reference, irrespective of whether any concrete countervailing duty investigation was under way or whether any countervailing duties based on the above-noted provision were being or had been levied. The Panel was aware of the understanding of the Committee Chairman that it would, in its work, take into account any actual implementation of the legislation in question by the competent authorities of the United States (see SCM/M/29, paragraph 21). The Panel noted in this connection that the USITC in its decision of 28 October 1985 had in fact applied this legislation by stating that in that particular case the US industry was composed of the wineries producing the like product and the grape-growers whose grapes were used in the like product. The Panel therefore proceeded to the examination of the conformity of the law in question with the provisions of the Code.

4.2 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.

4.3 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 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.

4.4 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 (contained in document SCM/1/Add.3/Suppl.1, page 3) 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 analyzed 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.

4.5 The Panel also 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. Furthermore, 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.

4.6 Having found that in fact two separate industries existed in the United States, namely an industry comprising wine-grape growers on the one hand and an industry comprising wineries on the other and having found that Article 6:5 of the Code gave a precise definition of "domestic industry", a definition which in the view of the Panel could not be interpreted extensively, the Panel concluded that Section 771(4)(a) of the US Tariff Act of 1930, as amended by the US Trade and Tariff Act of 1984, was inconsistent with the definition of "domestic industry" contained in Article 6:5 of the Code. Consequently the Panel concluded that the United States had not acted in conformity with its obligation under Article 19:5(a) of the Code.