

COMMITTEE ON ANTI-DUMPING PRACTICES

Draft Note Recording Discussion at the Meeting of the
Committee on 21-23 September 1970

Attached hereto is a draft note on the meeting of the Committee on 21-23 September 1970. Delegations are invited to inform the secretariat (telephone 34.60.11 ext. 4407) by 19 February 1971 of any comments they may have on the text.

GENERAL AGREEMENT ON TARIFFS AND TRADE

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COMMITTEE ON ANTI-DUMPING PRACTICES

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Chairman: Mr. A. BUXTON (United Kingdom)

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A. General discussion

1. The representative of Japan suggested that the Committee might want to take the initiative of inviting all non-participants to become signatories to the Code. He said that this was especially important in that the Anti-Dumping Code was essentially an interpretation of Article VI and should be implemented by all contracting parties.
2. He also took up the question of the compatibility of the anti-dumping legislations of the signatory countries with the Code. His view was that not only should national legislations be changed to conform to the provisions of the Code but that in taking anti-dumping measures countries should observe more strictly both the letter and spirit of the Code, especially in a time when protectionist tendencies were on the upsurge.
3. The representative of the European Economic Community fully supported the view expressed by the representative of Japan. He noted that the question of wider acceptance of the Code by developing countries was an item on the agenda of the next meeting of the Council and that it would be useful to have an exchange of views in the Committee on this subject.

4. The Chairman suggested that the Committee revert to the question of developing countries' adherence to the Code at a later stage of the meeting with a view to adopting a common position for the meeting of the Council.

B. Examination of national legislation

Greece (L/3252/Add.1)

5. The Chairman recalled for the Committee that the Greek Royal Decree covering procedures for the application and refund of anti-dumping and countervailing duties had been included in document L/3252/Add.1 as had been requested at the previous meeting.

6. The representative of the United Kingdom repeated a question he had put forward at the last meeting regarding Article 2 of the Greek Anti-Dumping Act which contained rules on price adjustments for differences in taxation. He asked whether allowance was also made for other differences affecting price comparability as provided for in Article 2(f) of the Code.

7. The representative of the European Economic Community referred to a number of specific suggestions he had made at the last meeting on how the Greek legislation could be brought into closer conformity with the Code. He recalled that at that time the representative of Greece had said that his authorities were of the opinion that the differences between the Greek Act and the Code were not essential and that these proposals for modification of Greek legislation would be brought to the attention of the competent authorities. He asked whether the representative of Greece had anything to report on changes in legislation.

8. The representative of Greece replied that the Ministry of Economic Co-ordination was presently working on a new text that would bring the Greek legislation into conformity with the provisions of the Code.

Amendment to United States Anti-Dumping Regulations (L/3180/Add.1)

9. The Chairman noted that the amendment covered practices with respect to concluding anti-dumping investigations in which price revisions are made or sales terminated.

10. The representative of Japan said that in his view the spirit of the Anti-Dumping Code was not that anti-dumping action should be taken as punitive counter measures but should be only to prevent injury to domestic industries. It was his view that Article 7(a) of the Code should be implemented in this spirit. He felt that the Amendment to the United States legislation was intended to provide for more strict enforcement of anti-dumping measures and wished to express the concern of his Government in this regard.

11. The representative of the United States noted that the representative of Japan had referred to the "spirit" of the Code. He assumed that there was no question of the legality of the Amendment since Article 7 provided that anti-dumping procedures "may" be terminated without imposition of anti-dumping duties upon the receipt of price assurances or the termination of sales. This in his view clearly indicated that the acceptance of these assurances was at the option of the Government concerned.

12. As far as the spirit of the Code was concerned it was the view of the United States representative that the purpose of the Code was to stop dumping. His Government had found that the previous legislation had, by making acceptance of price assurances almost automatic, actually served to encourage dumping, not halt it.

13. It was the experience of the United States Government that an exporter wishing to break into the United States market would underprice in order to establish his product in the market, without paying any attention to United States Anti-Dumping Legislation. Complaints would not be put forward by domestic industries until the foreign product succeeded in gaining wide acceptance in the United States, at which time an anti-dumping investigation would be initiated. When, after another one to three years, the investigation determined that sales at less than fair value had taken place, the exporter was perfectly willing to offer price assurances as his product had become firmly established in the United States market and therefore underpricing was no longer necessary.

14. The Amendment was intended to make exporters take account of United States anti-dumping legislation before entering the United States market. He stressed that price assurances were refused only in cases where the margin of dumping was not minimal in relation to the total volume of sales.

15. The representative of the European Economic Community associated his delegation with the views expressed by the representative of Japan. He felt United States practice differed from that of the Community and other countries. In the Community the question of whether price assurances would be accepted depended only on factors existing at the time that a determination of dumping was made and not on any previous situation. He recognized that there was no doubt that governments were free to accept or reject offers of price assurances, while pointing out that the only example referred to in the Code was the case where the number of exporters was so large as to make any price arrangement unpracticable. However, he wished to ask the representative of the United States why any such arrangement should be excluded a priori. He did not see the relevance of the size of the margin of dumping to the question of whether price assurances should be accepted, for once the price had been raised there would no longer be dumping. The only factor to be considered should be whether the exporter was prepared to respect the arrangement. In the absence of a better explanation he would have to conclude that the Amendment was incompatible with the spirit of the Code.

16. The representative of the United States referred to the example he had outlined earlier of an exporter gaining a large share of the United States market through dumping. The United States Congress had felt that under the previous legislation the administration was unable to protect domestic industries against dumping. This was the cause of some of the protectionist pressures in the United States for the institution of quotas. He pointed out that this only applied to unfair practices and did not obstruct normal competition.

17. The representative of Canada shared the apprehension expressed by the representatives of Japan and the European Economic Community. He pointed out that if price assurances were accepted early during the course of investigations this could

lessen the effects of the dumping to which the United States representative had referred but could also permit trade to continue at fair prices. The purpose of the Code was not to prevent dumping practices but to give a remedy for injurious dumping. In his view the purpose of the Code had been better served under the previous legislation.

18. The representative of the European Economic Community, supported by the representative of the United Kingdom, said that he could not see how the non-acceptance of price assurances could prevent dumping. Regardless of whether anti-dumping duties were imposed or price arrangements accepted, the cost to the consumer would rise and the dumping would stop. If over a period of time the exporter had succeeded in gaining a large share of the market, then neither anti-dumping duties nor voluntary price increases would make much difference. He shared the view of the representative of Canada that the purpose of the Code was merely to provide a means of stopping dumping when it was causing injury to domestic industries. Dumping in itself was not prohibited by the GATT. Anti-dumping measures were meant to be implemented only when there was evidence of injury or threat of injury.

19. The representative of the United States stated that the objective of the amendment was to enable his Government to act to stop dumping before damage was done. In response to questions that had been asked regarding the practical effects of the non-acceptance of price assurances, he said that in his view exporters would wish to avoid the stigma of being labelled as "dumpers". He recognized that dumping in itself was not prohibited and pointed out that anti-dumping duties would of course not be assessed if there was no determination of injury.

20. The representative of Greece stated that he was sympathetic to the views of the United States representative. A situation such as described by the United States representative could cause irreparable damage to the industry in a developing country. Referring to the recommendation by the CONTRACTING PARTIES that the Code should be applied on as wide a basis as possible, he stated that a too strict interpretation of the spirit of the Code as put forward by the representative of the EEC, might make it more difficult for developing countries to accept it.

21. It was agreed that the United States delegation would prepare an explanation of the procedures involved in enforcing the amendment to their Anti-Dumping legislation.¹

C. Examination of Descriptive Memoranda

22. The Chairman recalled a suggestion by the United Kingdom adopted by the Committee at its September 1969 meeting inviting members to submit memoranda describing the administrative procedures followed in anti-dumping cases which would be examined at the 1970 meeting (COM.AD/9, paragraph 60). In addition to the original United Kingdom memorandum, memoranda had been received from Canada, (COM.AD/5) Norway (COM.AD/6), and Sweden (COM.AD/8).

Canada (COM.AD/5)

23. The representative of the United Kingdom sought clarification from the representative of Canada on four different points of concern to his Government.

- (a) It appeared that under the Canadian legislation the imposition of anti-dumping duties was mandatory upon determination of dumping and material injury, although there was a clause that enabled the Deputy Minister to remove certain goods from the ambit of the legislation. Noting that Article 8(a) of the Code stated that it was desirable that the imposition of anti-dumping duties be permissive he asked for clarification as to whether the imposition of these duties was in fact mandatory in Canada.
- (b) It also appeared that the drawback of customs duties would be taken into consideration in determining "normal value". He sought assurance that this was indeed the case.
- (c) With regard to the notification to the exporters that an anti-dumping investigation had been initiated, he was of the opinion that it was in accordance with the spirit of the Code that this notification should

¹The explanation is annexed to this report; see page 18.

show prima facie evidence of dumping and of injury. In a certain case a British exporter had simply received a statement of the dumping margin with no indication as to how, and from what prices the margin had been calculated. He recognized that the Canadian Government had to respect the confidentiality of certain information but thought that the exporter should be given a clear definition of the charges to which he would be required to answer. For example, exporters often had different prices for the same product depending on conditions of sale, etc. and in these cases it was difficult for the exporter to prepare his defence when he did not know which price was being compared to the "normal value". The United Kingdom representative asked for a clarification of Canadian practice in this regard.

- (d) He also asked whether provisional action was always taken once a preliminary determination of dumping and injury had been made and the case referred to the Tribunal.

24. The representatives of Switzerland, Sweden and the European Economic Community shared the concern of the United Kingdom, especially with regard to the manner in which dumping margins were calculated for products of a complicated technical nature and made according to specification for Canadian customers. In this connexion reference was made to Article 6(b) of the Code which requires that all necessary information should be provided to defendants in anti-dumping cases. The representative of the European Economic Community thought that later on in its meeting the Committee should give consideration to the question of how dumping enquiries should be conducted and investigations carried out.

25. The representative of Canada gave the following replies to the specific questions put forward by the United Kingdom:

- (a) The imposition of anti-dumping duties was mandatory upon a final determination of dumping and material injury. He pointed out, however, that under Section 7 of the Canadian Anti-Dumping Act, the government could exempt certain goods or classes of goods from the application of the Act,

and that this exemption had been granted in a substantial number of cases. This provision, combined with the fact that the government had the authority to remit anti-dumping duties, provided a considerable amount of administrative flexibility. The Canadian legislation was not inconsistent with the provisions of Article 8(a) of the Code which merely suggested that permissive legislation would be desirable but did not make it a requirement for the signatories to the Code.

- (b) He said that he would seek a specific answer from his Government to the question regarding allowance of drawback of customs duties.
- (c) All information not confidential was made available by the Canadian Government to the exporter and the exporting country. He was of the opinion that Canadian practice met the requirements of Article 6 of the Code.
- (d) Although the decision of whether to take anti-dumping measures after a preliminary finding of dumping had been made, was at the discretion of the Deputy Minister, in practice action was always taken either by a provisional duty being imposed or by requiring that a security be posted by the exporter.

26. The representative of Switzerland had concern over the manner in which the Canadian Government carried out anti-dumping investigations whereby producers were sometimes asked for confidential information. He also asked that the term "negligible" dumping margin as referred to in the Canadian Act be more clearly defined.

27. The representative of Canada replied that in many cases, especially those mentioned previously where goods were made to specification, the necessary detailed information could only be obtained from the producing company. In reply to the second question made by the representative of Switzerland, he stated that the decision as to whether a dumping margin was negligible was a matter for administrative discretion and not according to any arithmetical criteria. The Deputy Minister made judgments based on the facts of each particular case with both the dumping margin and the actual or potential injury being taken into account.

Sweden (COM.AD/8)

28. The representative of the United Kingdom referred to paragraph 5 of the memorandum submitted by Sweden which seemed to imply that the question of whether price investigations would be carried out in the exporting country depended on the nature of the product involved, and the conditions in the producing country. He was of the opinion that on-the-spot investigations were necessary in virtually all cases, the only exception being when there was an established world price for a commodity.

29. The representative of Sweden was of the view that nothing in that paragraph excluded investigations in the exporting country but, however, in some cases the availability of information from professional organizations etc. might make investigations unnecessary.

30. Future submissions

The representative of the United States recalled that a memorandum on United States practice with regard to price undertakings would be supplied to the GATT as soon as would be feasible (see paragraph 21 above). The representative of the European Economic Community pointed out that the Commission had so far not developed a practice in anti-dumping cases. The representative of Japan was of the view that his country's administrative practices were quite simple and had been fully explained in L/3182 and hence no additional explanatory memorandum would be required.

D. Examination of reports under Article 16

Canada - Imports of transformers and reactors (COM.AD/10)

31. The representative of the European Economic Community had a number of questions and comments in regard to the procedures followed by the Canadian Government in this particular case. While the Anti-Dumping Tribunal had not found injury and had closed the investigation on power transformers, it had invited the Department of National Revenue to open up an enquiry on any other product in the same sector, and

subsequently an investigation had been initiated on reactors. It was EEC practice, and in keeping with the spirit of the Code, for the authorities to initiate investigations only in response to complaints from industry and not on their own initiative. The larger the sector covered by the investigation, the more chance there would be of finding dumping. If the Canadian authorities were going to examine a whole sector of industry, they should use the same base for determining injury, i.e. there should be injury to the whole sector. In this particular case the exporters concerned had been asked for information in May 1970, and suddenly, without further communication, provisional anti-dumping duties of 50 per cent had been imposed in August. He recognized that Article 6(i) permitted the expeditious application of provisional measures when any interested party withheld the necessary information, but he had been assured by the exporters concerned that this had not been the case. He asked the Canadian representative to explain the basis for the action. He also referred to Article 9(b) of the Code, which obliged the authorities concerned to review the need for the continued imposition of anti-dumping duties. No proof of injury had as yet been presented to the parties concerned and the representative of the European Economic Community doubted whether any had taken place as recent reports had shown the Canadian electrical industries to be in a strong position.

32. The representatives of the European Economic Community and Switzerland also wished to know the criteria used for calculating prices and for determining the margin of dumping of 50 per cent as no explanation had as yet been given. They had particular concern since the products involved had been constructed according to specifications given by Canadian clients, and it was difficult to see how their prices could be compared with those of other products.

33. The representative of Canada explained that the Anti-Dumping Committee had not been able to reach a decision with regard to power transformers because of the coverage of the preliminary determination. The Tribunal had accepted the view of the complainants that the goods covered in the preliminary determination represented too narrow a range of products to permit an assessment of injury, and had requested a broader investigation which was now in progress. The question regarding the basis for the preliminary action was presently being appealed to the court.

34. The calculation of a 50 per cent margin of dumping had been made, as in all cases, by the Deputy Minister on the basis of information available. It was required by law that the Deputy Minister had to be satisfied that his decision had been reached on the basis of evidence.

35. The representative of the European Economic Community expressed concern over the fact that the provisional anti-dumping duties had been so high and that the criteria for determining the 50 per cent margin had not been made clear. Although he recognized that the margin determined by the Tribunal would not exceed the provisional margin, he thought it possible that, if the provisional duties could be levied at a higher rate than necessary, then the margin established in the final determination might also be fairly high. In any case, without knowing the criteria used, it was difficult to form an opinion.

36. The representative of Canada said that his Government shared the view expressed by the representative of the European Economic Community that anti-dumping action should not be used in a punitive manner. The final determination of the dumping margin would be made in accordance with the Code based on the difference between the export price and the normal value. He pointed out that the determination by the Anti-Dumping Tribunal was subject to appeal, first to the Tariff Board and then either to the Exchequer Court of Canada or to the Supreme Court of Canada.

Canada : Imports of glazed cherries (COM.AD/10)

37. The representative of Canada brought to the attention of the Committee that the Anti-Dumping Tribunal had made a final determination of injury in the case of glazed cherries.

38. The representative of the European Economic Community had two questions regarding this case which were based on the information available to him.

- (a) At the time of the final decision, it was stipulated that the rate of anti-dumping duty had not been fixed but would be subject to further examination. He did not see how this could be reconciled with the Code.

- (b) The legal representative of the exporting firm appeared to have been refused access to the files which had been requested in order to prepare the case for the defence. While he recognized that the confidential nature of certain information had to be respected, the Community representative asked why a résumé of the confidential information could not have been provided.

39. The representative of Canada said that he would ask his Government for the requested information, which would be passed on to the Commission of the European Communities.

Canada - Imports of boots and shoes (COM.AD/10)

40. The representative of the European Economic Community expressed some concern with regard to the procedures followed by the Canadian authorities in this case. In some cases, questionnaires had been sent to firms which did not export to Canada and to others which did not even produce the products in question. In one particular case, a Canadian delegate had arrived unannounced at a small firm wishing to examine the accounts. When refused, the delegate had referred to the possibility of preliminary determination of dumping. This action did not seem to be in accordance with Article 6(e) of the Code.

41. He also wished to comment on the content of the questionnaire sent to firms being investigated by the Canadian Government. Often the questions asked could not be answered by the firms concerned even with the best intentions. In addition, answers obtained in connexion with one investigation were sometimes used for others.

42. The representative of Canada replied that it was Canadian practice to consult the governments and firms concerned, in conformity with the Code, prior to beginning investigations. He regretted any administrative lapses that might have occurred.

Greece - Imports of blockboard

43. The representative of Czechoslovakia said that he had learned through unofficial sources that anti dumping duties had been introduced in Greece in April 1970 on blockboard imported from Czechoslovakia and Yugoslavia. He asked whether his information was correct and whether the requirements of Article 6 of the Code had been fulfilled.

44. The representative of Greece replied that he was seeking the requested information from his Government.¹

United Kingdom - Imports of alarm clocks (COM.AD/10/Add.2)

45. The representative of Czechoslovakia said that this matter had been settled to the mutual satisfaction of his country and the United Kingdom in a manner which should serve as an example of how anti-dumping cases should be handled.

United States - Imports of television receivers

46. The representative of Japan referred to a case which had come up after the end of the period covered by the report in document COM.AD/10/Add.4, viz. television receivers. He recalled that at the last meeting of the Committee he had underlined his Government's interest in the administration and interpretation of the provisions of Article 2(f) of the Code, in which it was stipulated that due allowances should be made for differences of various kinds affecting price comparability, including differences in taxation and differences in conditions and terms of sale. These remarks were particularly relevant in the case of the withholding of appraisement on television receiving sets from Japan. He asked, whether, in deciding upon this action, the United States authorities had taken into account the special conditions governing the sale and distribution of television sets in the domestic Japanese market. Among the elements that should be considered were the administrative and financial costs incurred by the distributors which were borne by the manufacturer and discounts and rebate for sale promotion. The representative of Japan expressed the hope that the United States authorities would give adequate consideration to these factors, in conformity with the Code, before reaching a final determination.

47. He also wished to add that, in the view of the delegation of Japan the reasons and criteria as stated in the notice of withholding of appraisement did not meet the requirements of Article 10(c) of the Code, and he felt that these criteria should be notified to the exporters and the representatives of the exporting country in more concrete terms.

¹Subsequently the required information has been supplied to the Czechoslovak delegation by the Greek delegation.

48. The representative of the United States referred to Article 2(f) of the Code and to the parallel provisions of the relevant United States legislation. This legislation required that differences in circumstances of sale be taken into account in any dumping investigation and specifically mentioned differences or credit terms, guarantees, warranties, technical assistance, servicing, advertising and selling costs, and commissions. As far as the rebate of taxes and duties were concerned, sections 203 and 204 of the United States Anti-Dumping Act were very specific. While the United States authorities could not accept every claim made, they would consider every claim that could be substantiated.

49. In regard to the reference made by the representative of Japan to the lack of information contained in the notice of withholding of appraisal, he stated that the general criteria were published in the Federal Register. However, the method of determining prices could not be published without violating confidentiality. He pointed out that officials from the Bureau of Customs had been in continuous contact with the representatives of the Japanese exporters and the American importers and had explained to the Japanese exporters the manner in which the margins had been computed. Obviously, importers could not have access to all the information supplied. These calculations would be discussed at a hearing to be held in the near future with the exporters and importers and, in any case, final determination would be made within three months from the issuance of the withholding of appraisal notice.

United States -- Imports of aminoacetic acid (COM.AD/10/Add.4)

50. The representative of the European Economic Community stated that in this case a price arrangement had been concluded with Japanese exporters who accounted for 40 per cent of United States imports of this product. On the other hand, a French exporter supplying only 10 per cent of total imports had not been given the same opportunity and had claimed not to have had any knowledge of the arrangement with the Japanese. As the French exporter was willing to raise prices in a similar manner, the representative of the Community wished to be assured that if this price increase was implemented the French exports would then not incur anti-dumping duties. He also wished to know what procedure the French exporter should follow.

51. The representative of the United States pointed out that the Japanese exporters had approached the United States authorities at an early point in the investigation and offered price assurances which were accepted. On the other hand the French exporter had not contacted the authorities concerned until after the issuance of the determination of sales at less than fair value. It was not his Government's policy to accept price assurances after a case had been put before the Tariff Commission. However, once the dumping margin was determined, each entry was examined on its own merits; if the exporter raised his price to eliminate the margin, no anti-dumping duty was imposed. The French exporter should make contact with the Bureau of Customs who would advise him as to what price he could sell in the United States without the risk of incurring anti-dumping duties.

52. The representative of the European Economic Community said that he hoped that the United States authorities would review their decision as was envisaged in Article 9(b) of the Code. While recognizing that the authorities concerned had been under no obligation to inform other exporters of the price arrangement with the Japanese, he was of the view that it would be in keeping with the spirit of the Code to inform marginal exporters of an arrangement with the most important supplier and to provide them with the same opportunity.

53. The representative of the United States explained that at the time there had been no representative of the French exporter in the United States to inform of the price arrangement reached with the Japanese exporters. The price arrangement procedures were explained carefully in the questionnaire; therefore, exporters had been aware of procedures. He did not think that the authorities concerned could be asked to make direct contact with overseas manufacturers. When exporters were represented by attorneys in the United States, there was no problem.

United States - Imports of an unidentified product

54. The representative of the European Economic Community referred to a case which had been discussed bilaterally with the delegation of the United States. In this case the product involved had benefited from a duty drawback. According to

the exporters concerned, in calculating the margin of dumping the United States authorities had not taken this fact into account. There had also been a procedural problem: the exporter had asked the competent American authorities to complete their file but had been told that it was too late; the determination of dumping took place only six weeks later. However, the United States delegation had agreed that this decision would be re-examined.

55. In this connexion the representative of the European Economic Community had some general remarks to make with regard to the determination of injury. He recalled that at the time of the signing of the Anti-Dumping Code the delegation of the United States had assured the other signatories that the United States legislation would be applied in accordance with the Code. In the case mentioned above it was stated that since the injury had not been "trivial" it was thus "important". He found it difficult to relate this concept to the criteria contained in the Code. Moreover, it had also been stated that only one producer had complained of injury as a result of the imports concerned. He asked whether the Tariff Commission had made a finding of substantial injury or not.

56. The representative of the United States explained that the complaint regarding the procedure stemmed from administrative problems. He pointed out that in any case a request could have been made for six months withholding, but, at the request of the exporter, no such request had been made. With regard to the question of injury, he recognized that the language used by the Tariff Commission differed from that of the Code. However, in his view the important issue was whether the standards of the Code had been met, and in his opinion they had.

E. Other business

57. The Committee noted the discussion in the Council on 15 July 1970 (C/M/63) regarding the adherence of developing countries to the Anti-Dumping Code, and in this connexion drew up a proposal for the procedure to be followed (Annex II) to be presented to the Council at its next meeting.

58. The Committee also noted that at Working Group 2 of the Committee on Trade in Industrial Products it had been suggested that informal discussions should take place between the members of the Anti-Dumping Committee and certain contracting parties which apparently faced practical difficulties of a procedural nature in adhering to the Code. The Committee agreed that this was a useful suggestion and that its members would be prepared, at the time of the next meeting, to hold such informal discussions with countries which had already expressed their interest in adhering to the Agreement and also with any others which might express such interest in the future.

59. The Committee noted that the texts of the anti-dumping laws and regulations of the parties to the Anti-Dumping Code had been consolidated, as agreed by the Committee (COM.AD/9, paragraph 59), in a booklet entitled "Anti-Dumping Legislation", which was now available.

60. The Committee agreed that members of the Committee should describe the procedures used in price investigations in respect of foreign suppliers and that those members who use standard questionnaires, or other standard documents in such investigations should append such texts to their descriptive notes. The primary objective of the further discussion at the next meeting of the Committee should be to examine whether the procedures were in full conformity with the Code and, secondly, to explore whether a greater degree of harmonization would be possible. It was agreed that the descriptive notes should be submitted to the secretariat not later than on 1 December 1970.

Annex I

COMMENTS BY UNITED STATES DELEGATION ON UNITED STATES POLICY
WITH RESPECT TO VOLUNTARY UNDERTAKINGS

1. Current United States policy with respect to voluntary undertakings

On 26 May 1970, the United States Treasury Department announced revision of its former policy with respect to voluntary undertakings along the following lines:

Price assurances (voluntary undertakings) are now being accepted only in cases where dumping margins are minimal in terms of the volume of sales involved.

2. Applicable Article of International Anti-Dumping Code

Article 7(a) of the Code provides:

Anti-dumping proceedings may be terminated without imposition of anti-dumping duties ... upon receipt of a voluntary undertaking by the exporters to revise their prices ... (underscoring supplied)

3. Consistency of United States policy with Code

It is noted that no member of the Committee on Anti-Dumping Practices contended that the present policy of the United States is inconsistent with the provisions of the Code. In light of the underscored word in Article 7(a), it is obvious that the Code expressly recognizes that each signatory Government has the option of deciding whether or not to accept voluntary undertakings in a particular situation.

During the discussion of this portion of the Code when it was being negotiated, representatives of certain governments, not including the United States, opposed the concept that an anti-dumping investigation could be terminated upon receipt of an undertaking to revise prices. To meet the views of these representatives, it was agreed to include Article 7(b) in the Code. This Article states in part:

- (b) If the exporters concerned undertake during the examination of a case, to revise prices or to cease to export the product in question, and the authorities concerned accept the undertaking, the investigation of injury shall nevertheless be completed if the exporters so desire or the authorities concerned so decide ...

In the face of both the clear language of Article 7 and the negotiating history of the Article, it is apparent on its face that the present United States policy is entirely consistent with the letter and the spirit of the Code.

4. Code definition of "dumping"

Article 2(a) of the Code provides:

- (a) For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

This memorandum will use the terms "dumped" or "dumping" in accordance with the above definition.

5. "Spirit of the Code" with respect to dumping

Dumping is specifically condemned under Article VI of the GATT "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." Similarly, under the provision of the United States Anti-Dumping Act and Regulations, anti-dumping duties are assessed only if dumped imports cause or are likely to cause injury to or prevent the establishment of a domestic industry.

Accordingly, there is no difference of viewpoint, in the opinion of the United States delegation, with respect to the question of the circumstances under which dumping is to be condemned.

On the other hand, it would appear axiomatic that the objective of the Code is not to encourage dumping. Unfortunately, there appears to be some confusion on the subject.

The United States authorities subscribe to, and firmly believe in a outward-looking trade policy. They are convinced that such a policy must remain the cornerstone of its international trade objectives, and of the GATT generally. It does not follow from this, however, that the United States is under an international obligation to encourage foreign commercial penetration of United States markets by means of dumping. It has been the experience of the United States that its earlier policy of quasi-automatic acceptance of voluntary price assurances tended to encourage foreign dumping in the United States. Foreign commercial penetration of the United States markets was thus achieved unfairly as a direct consequence of such dumping practices.

6. Current United States price assurance policy eliminates encouragement of foreign dumping in United States

The following hypothetical example illustrates how the current United States price assurance policy eliminates encouragement of foreign dumping in the United States:

Firm X in a foreign country decides to explore the possibility of selling widgets ("an unnamed article considered for purposes of hypothetical example" - Webster's Seventh New Collegiate Dictionary) in the United States. Firm X first sends a representative to the United States to make an in-depth study of the American widget market. He discovers that the price of widgets in the United States is \$100 a dozen and concludes that if firm X is to introduce its widgets into the United States market under a brand name unknown in this country, the American domestic price must initially be undersold by 20%. Firm X makes a decision to sell its widgets in the United States for \$80 without any reference to, or consideration of, the dumping implications of this decision.

At the \$80 a dozen price, firm X's widgets succeed in establishing a foothold in the United States market. Feeling the sting of firm X's competition, United States widget producers file a dumping "complaint" with the United States authorities. After an exhaustive investigation, the latter determine that dumping margins of \$19 exist, the home market price of widgets being \$99. Firm X immediately offers to raise its price to \$99 a dozen together with simultaneous assurances of no future dumping.

The United States authorities would review firm X's price assurance offer very closely, and would reject it in this hypothetical situation, assuming that firm X's volume of sales in the United States has been substantial, on the ground that the dumping margin is more than minimal in relation to the volume of sales involved. Accordingly, a determination of "sales at less than fair value" would be issued, and the case would be referred to the Tariff Commission for an injury determination. If the Tariff Commission determines no injury - and this is most important - firm X would be perfectly free under the United States law to continue selling widgets in the United States at \$80 a dozen. In such a situation, its dumping practice would not be "condemned". If, on the other hand, the Tariff Commission determines injury, a dumping finding will be issued and firm X widget imports become liable for the assessment of dumping duties as of the date the notice of withholding of appraisement in this case was published in the Federal Register.

Under the United States law, dumping duties are assessed on an entry-by-entry basis, and only to the extent dumping margins may exist with respect to a particular entry. More than likely, in the hypothetical case under consideration, immediately after the publication of the withholding of appraisement notice, firm X (assuming that it acts rationally in terms of the United States law and practice) would take prompt measures to increase its price in the United States to \$99 a dozen, or reduce its home market price by at least \$19; alternatively firm X could terminate its sales to the United States, awaiting the outcome of the injury determination. In these ways, firm X could avoid the impact of heavy dumping duties, notwithstanding the issuance of the dumping finding.

However, the situation in which firm X finds itself is nevertheless quite different than it would have been if price assurances had been accepted. Under United States law, it is the importer, not firm X, who is liable for paying any dumping duties that may be assessable. If firm X offers to reimburse the importer for any dumping duties he may have to pay, the importer becomes liable under the United States Anti-Dumping Regulations for additional dumping duties to the extent the importer accepts such reimbursement from firm X. It is impossible for an importer to avoid liability for outstanding dumping margins in a situation where a dumping finding has been issued.

It can be seen from the above hypothetical example why the current price assurance policy of the United States impels firm X, before it enters the United States market, to examine the dumping implications of the price at which it proposes to sell.

7. Conclusion

The current United States price assurance policy is consistent with:

- (a) the letter of the International Anti-Dumping Code; and
- (b) the spirit of the Code, which certainly cannot rationally be construed as intended to encourage dumping practices.

If a foreign firm is able to sell its product in the United States in fair and open competition, it remains free to do so without fear of intervention under the United States anti-dumping law and regulations. This is the essence of United States trade policy. If on the other hand a foreign firm chooses to undercut United States prices by means of dumping, it will have to take into account the risks of the consequences described in this memorandum.

The United States reaffirms the position from which it has never deviated - it will not assess dumping duties against dumped imports in the absence of an injury determination.

Annex II

ACCEPTANCE OF THE AGREEMENT ON THE IMPLEMENTATION OF
ARTICLE VI BY DEVELOPING COUNTRIES

Suggestions by the Members of the
Committee on Anti-Dumping Practices

1. The members of the Committee on Anti-Dumping Practices have noted the discussion that is taking place in the Council concerning the adherence of developing countries to the Anti-Dumping Code. In order to assist the Council in its deliberations, they wish to make the following suggestions for a procedure to be followed for discussions between the developing countries and the member countries of the Committee on Anti-Dumping Practices.
2. The members of the Committee note the desire of the CONTRACTING PARTIES, expressed at the twenty-sixth session, that the Anti-Dumping Code receive wide and early acceptance. They also note that concern has been expressed by representatives of developing countries that the application of the Code should be sufficiently flexible to meet some of their specific problems and that it has been proposed to create a working party to examine points of concern to the developing countries. They express their readiness to study views of developing countries concerning their needs and their proposals for additional flexibility in the application of the Code within the context of GATT Article VI and the CONTRACTING PARTIES' desire for broad acceptance of the Code.
3. The members of the Committee on Anti-Dumping Practices recommend to the Council that the developing countries be invited to submit, in writing, to the secretariat for examination by the members of the Committee explanations of their specific problems in adhering to the Code and detailed proposals for their adherence and for the application of the Code to their exports.
4. The members of the Committee on Anti-Dumping Practices would welcome the opportunity to discuss these proposals by the developing countries at the time of the next meeting of the Committee at a special session to which representatives of the developing countries would be invited.

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