

GENERAL AGREEMENT ON TARIFFS AND TRADE

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Committee on Anti-Dumping Practices

DISCUSSION ON BASIC PRICE SYSTEMS

Background Note by the Secretariat

At its meeting of October 1980 the Committee requested the secretariat to prepare a note setting out the history of discussion in GATT on the question of basic price systems in anti-dumping procedures (ADP/M/3, paragraph 95). The present note reproduces relevant parts of GATT documents referring to this question.

I. Swedish anti-dumping duties - report of the Panel adopted on 26 February 1955
(BISD, 3 Suppl., pages 82-86)

"ALLEGED INCONSISTENCY OF THE SWEDISH DECREE WITH THE
PROVISIONS OF PARAGRAPH I OF ARTICLE I AND OF ARTICLE VI

4. The Italian delegation contended that the system of basic prices, as an anti-dumping procedure, represented by itself an infringement of the provisions of the General Agreement for the following reasons:
- (a) it discriminated against low-cost producers and deprived them of the competitive advantages to which they were entitled under the general most-favoured-nation clause;
 - (b) that system did not take into account the differences existing in the various exporting countries or the actual price differences between the various qualities of goods on the exporting market; the fixing of uniform prices irrespective of the country of supply and the averaging of different prices of products could not be reconciled with the provisions of Article VI of the General Agreement;
 - (c) the official character of these basic prices would tend to influence unduly the decisions by the Customs Authorities and render ineffective the formal protection which the decree appeared to afford to exporters by providing that the levying and assessment of anti-dumping duties would be related to normal prices as defined in Article VI of the General Agreement;
 - (d) In those circumstances, the basic price system would tend to become a system by which the minimum prices are imposed for the admission of imported goods whether there is dumping or not; this type of protection against efficient producers would deprive low-cost exporters of the price advantage which they enjoy when the protection is administered

through a most-favoured-nation tariff, and change fundamentally the conditions of competition which Italy could reasonably have expected to be protected by the General Agreement.

5. In this connexion, two further arguments were advanced by the Italian representative, namely that the Decree reverses the onus of the proof since the customs authorities are authorized to prevent the import of goods without establishing even a prima facie case of dumping. The importer is in effect prevented from clearing the goods without delay or added costs and is placed at a legal disadvantage by that administrative technique. Finally, the Swedish Decree does not provide for the exemption or refund of duties or taxes in the importing country as required in paragraph 4 of Article VI of the General Agreement.

6. The Panel considered these various contentions in detail and came to the conclusions which are summarized in the following paragraphs.

7. Regarding the alleged discrimination against low-cost producers, the Italian argument was as follows: it is agreed that the cost of production of nylon stockings is different in the various supplying countries. In the absence of anti-dumping duties, the low cost producer has a substantial price advantage as compared with the high-cost producer. If the high-cost producer subsidizes its exports to the extent necessary to bring down its export price to the level of the Swedish price, he would not be affected by the Swedish anti-dumping regulations. On the other hand, the low-cost producer, if his normal price was equal to or lower than the Swedish basic price, would have lost his price advantage if he were to sell without dumping. If, in order to meet the changed conditions of the competition, he were to resort to dumping practices, he would have to pay in full the anti-dumping duty, even if the amount of dumping in his case were much lower than in the case of the high-cost producer. The Italian Government considered that this would amount to a discrimination against the low-cost producer.

8. The Panel considered that this argument was not entirely convincing. If the low-cost producer is actually resorting to dumping practices, he forgoes 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.

9. 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.

10. 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 provision of Article VI. The Swedish representative stressed that the basic prices were fixed in accordance with that principle...

11. The second part of the Italian argument is to the effect that the basic price system groups the various types of stockings into categories and that the average price for each category differs from the actual price for the various products included in the same category. As an example, the Italian representative indicated that the Swedish Decree provides for the price of SKr 46 for the 60 gauge stockings and for SKr 40 for the 51-54 gauges, a differential of SKr 6 which is substantially different from the actual price differential on the Italian market which does not exceed SKr 2. In those circumstances, the administration of the system cannot guarantee that only consignments of dumped goods would be subjected to an enquiry. If the price of SKr 40 is correct for the 51-54 gauges, the price of SKr 46 for the 60 gauge would be too high, and the consignments of 60 gauge stockings would be delayed or subject to uncertainties for an indefinite period although the goods would have been exported at a normal price.

12. As regards the contention that the official character of the basic prices would unduly influence the actual decisions on alleged anti-dumping practices, the Panel was not in a position to come to any definite conclusion since no evidence was submitted by either party regarding the way in which individual cases have been settled. In view of the fact, however, that, before October, the basic price was actually used as a determining factor and of the statement by the Swedish representative that the basic prices have been fixed by the Swedish authorities as a result of an official enquiry, it would be reasonable to suppose that the customs authorities would be guided to a large extent by those basic prices. Since, however, the determining factor would be in any case the domestic price in the exporting country, if it is lower than the basic price, the Decree would not be inconsistent with the General Agreement if it were applied correctly.

13. The further contention that the basic prices would in effect prevent any import of the product except at a price which would be fixed arbitrarily by the Swedish authorities and might, therefore, nullify any price advantage which low-cost exporters should enjoy did not appear to the Panel to be conclusive if it is assumed that the system would apply to cases of dumping. Of course, if the system were to be applied when the case of dumping is not established, that particular technique might be more prejudicial to the interests of low-cost producers than other anti-dumping techniques.

14. In this connexion, the Swedish representative pointed out that the ordinary customs duties for nylon stockings were comparatively low, and that the Swedish Government did not make use of its right to raise the rate to the level of 25 per cent at which it had been bound. The Italian representative pointed out that, if the Swedish industry were suffering from competition from low-cost producers, such as Italian producers, the Swedish Government would be entitled, under the General Agreement, to raise its customs duties. The Italian Government would raise no objection to such a measure, as it would not deprive Italy of its competitive advantage over other suppliers.

15. The Panel then considered the argument developed by the Italian representative to the effect that the Swedish Decree reversed the onus of the 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. The Panel considered that it was not competent to deal with the legal rules which may exist in Sweden regarding procedures before customs authorities or the courts. On the other hand, 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 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.

16. Finally, the Panel noted that there was no disagreement between the parties concerned regarding the obligation to take account of legitimate refund of duties or taxes. The Swedish representative indicated, on behalf of his Government, that the Decree would be applied in a manner fully consistent with the provisions of paragraph 4 of Article VI of the General Agreement. As soon as the Swedish Authorities come to a final conclusion regarding the applicability of paragraph 4 to the Italian refund of taxes and duties - and it is expected that this examination will be completed by the middle of March - the Swedish Government would be prepared to adjust its procedures to take into account such exemptions or refunds which were consistent with Article VI, for such case as may be outstanding and for any future case, provided that the Italian exporters indicate clearly the amount of these refunds on their invoices.

17. The general conclusion of the Panel regarding the consistency of the Swedish Decree with the obligations of the Swedish Government under the General Agreement was:

- (a) that the basic price system was not inconsistent with the most-favoured-nation clause or with the provisions of Article VI,
- (b) but that, in practice, the administration of that system might easily run into conflict with those obligations.

Unless the customs authorities were prepared to decide on the alleged cases of dumping in a matter of days after arrival of the consignment, and unless the basic prices were constantly kept under review to make sure that they did not exceed the actual prices prevailing for all the varieties of stockings on the domestic markets of the most efficient producer, there was a certain danger of discrimination against low-cost producers in individual cases. Constant supervision of the operation of the scheme would also be necessary in order to avoid that it might be turned into a general protection against low-cost producers, even in the absence of dumping practices."

II. Anti-dumping and countervailing duties - second report of the Working Group, adopted on 27 May 1960 (L/1141)

"Basic price systems

11. 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;
- (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."

III. History of negotiations of Article 8(b) of the Anti-Dumping Code (1967)

1. Draft International Code on Anti-Dumping Procedure and Practice -
Note by the United Kingdom Delegation - Spec(65)86 - 7 October 1965:

Provision 17

When the duty levied on each consignment is determined by reference to a basic price (i.e. the lowest price at which it has been determined that the imports would not cause or threaten material injury)

- (i) the basic price shall not be more than the lowest price established for comparison with the export price in any of the supplying countries;
- (ii) the authorities concerned in the importing country shall periodically review the basic price and revise it as necessary in the light of fluctuations in the lowest price in any of the supplying countries;
- (iii) in accordance with Provision 16 the duty shall be refunded in all - cases where the importers or foreign exporters can show that the goods were not sold at a dumped price although they were sold below the basic price.

Rationale

The determination of the anti-dumping duty to be imposed on each importation of the dumped goods by reference to a basic price is, as the Group of Experts concluded, consistent with the purpose of Article VI - namely that action should be taken only against dumped imports which are causing or threatening injury in order to remove or prevent that injury. But the method may give rise to difficulties and dangers in cases where more than one country or, even, more than one supplier is involved; the purpose of this provision is to ensure that the authorities concerned exercise the care necessary to avoid these dangers.

2. Comment by the United States Delegation - TN.64/NTB/W/3, page 3
(10 January 1966):

In those instances where the purpose or effect of price discrimination is to meet competitors' prices in the export market, is it likely that monopolization of the export market would result, or would competition, in the sense of many firms competing in the same markets, be fostered? If competition would be thereby fostered, should a "meeting competition" defense be available to exporters? On the other hand, what is the rôle of protective tariffs if exporters need only satisfy a "meeting competition" test to assure access for their products?

Provision 17 of the United Kingdom Draft Code, by authorizing use of the so-called "basic price" system in effect permits but does not require a limited version of a "meeting competition" defense. According to Provision 17(i), "the basic price shall not be more than the lowest price established for comparison with the export price in any of the supplying countries".¹ In effect, Provision 17 permits a "meeting foreign competition" defense. But, as noted, Provision 17 does not require such defense. Why is Provision 17 discretionary rather than mandatory? Is there a particular reason for not providing a general defense of "meeting competition", both foreign and domestic?

3. Comment by the Japanese Delegation - TN.64/NTB/W/4, page 4 (27 January 1966):

Provision 17 - Basic price

The concept of basic price, as the Group of Experts pointed out, is not as a matter of principle desirable. If, however, the basic price approach is to be accepted, it would be necessary to retain the three conditions set out in the Draft Code.

4. Comment by Sweden - TN.64/NTB/W/10/Add.7, page 3 (4 March 1966):

"In such cases of dumping where more than one exporter is involved the question is, if the duty ought to be adjusted in each case. If the dumping and its scope are estimated individually for each exporter at every time of importation this question might not in principle cause any problem. Such a procedure would, however, in most cases be too complicated. On the other hand a system of fixed rates of duty does not seem to be satisfactory. It would among other things be necessary to check the origin of the imported goods. Moreover it is possible that this system will frequently result in requests for reimbursement of duty paid in excess. From these points of view the best way seems to be to use a method based on a comparison price (basic price), determined in such a way that it does not exceed either the lowest home market price in any supplying country where normal conditions of competition are prevailing, or the home market price unaffected by dumping, in the importing country. This system means that a duty is imposed only with an amount equal to the difference between the actual export price and the basic price. If in individual cases it can be proved that the home

¹ As explained in the October meeting of the Working Group, this Provision would work in the following manner: if the home market price were \$15 in country A and \$20 in country B, and exporters from both countries sold in country C at \$10, dumping duties for both A and B exporters would be limited to \$5; that is, exporters from country B would be permitted to align their prices with the lowest price exporter, even though that price was lower than the home market price in country B. Presumably country B would be permitted to meet the lowest price of any other exporter in country C, even though that other exporter was not initially engaged in dumping.

market price in the supplying country is lower than the basic price laid down, a corresponding reduction in the duty is granted. The advantage of this system is to be found in the fact that imports at prices exceeding the basic price are automatically free from anti-dumping duty. Moreover, this method means that the exporters are given enough room to adjust their prices to the situation of competition in the importing country. Logically the system seems to be in line with the principle mentioned above that the duty should not exceed what is necessary to prevent injury."

TN.64/NTB/W/12/Add.8, page 3 (1 July 1966):

"In order to vouchsafe a reasonable scope for such price adaptation it would have to be accepted that anti-dumping duty must in no case be charged to an amount exceeding that which is required to bring the price to a level where any injury ceases to exist. Should injurious dumping take place from several directions, the duty should, in each case, be limited to the difference between this level and real export price. A suitable system applicable in this case is the so-called basic price method, as described in our earlier statement under point VI C."

5. Comments by Norway - TN.64/NTB/W/10/Add.4, page 2 (29 April 1966)

"Whether the amount of duty should be fixed in the final decision or determined for each consignment by reference to a basic price is probably first and foremost a question of practical adjustment. Thus, the use of basic prices seems to be necessary in certain circumstances in order to facilitate the administration of the measure. The system may, however, be open to abuse and the reservations indicated by the GATT Group of Experts are, therefore, probably necessary."

6. Possible elements to be considered for inclusion in an Anti-Dumping Code Code - List by the secretariat - TN.64/NTB/W/14, Article 9(d) (9 December 1966):

(d) [If several suppliers from one or more countries are involved, anti-dumping duties may be imposed on all imports from all countries of the goods in question found to be dumped and to be causing, or threatening to cause material injury, the duty being equivalent to the amount by which the export price is less than an established basic price, not exceeding the lowest normal price in any of such supplying countries where normal conditions of competition are prevailing and not exceeding the lowest price at which the domestic industry is considered not to suffer material injury.]

7. Draft Anti-Dumping Code - TN.64/NTB/W/16, Article 10, Alternative II, paragraph (d) (3 March 1967):

(d) Within a basic price system the following rules shall apply provided that their application is consistent with the other provisions of this Code:

If several suppliers from one or more countries are involved, anti-dumping duties may be imposed on imports of the goods in question found to have been dumped and to be causing or threatening material injury from the country or countries concerned, the duty being equivalent to the amount by which the export price is less than the basic price established for this purpose, not exceeding the lowest normal price in the supplying country or countries where normal conditions of competition are prevailing. It is understood that for goods which are sold below this already established basic price a new anti-dumping investigation shall be carried out in each particular case, where so is demanded by the interested parties and the demand is supported by relevant evidence. In cases where no dumping is found, anti-dumping duties collected shall be reimbursed as quickly as possible. Furthermore, if it can be found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed.

IV. At the April 1978 meeting of the Committee on Anti-Dumping Practices there was a lengthy discussion of measures taken by the European Communities (basic price system for iron and steel products) and the United States (trigger-price mechanism). This discussion is fully reproduced in COM.AD/48. Excerpts from comments of a general nature are reproduced hereunder:

15. The representative of Canada referred to the measures taken by the European Communities and the United States since the October 1977 meeting of the Committee for the purpose of accelerating anti-dumping investigations under their respective anti-dumping laws for certain steel products. The implementation of the basic price system by the European Communities and the trigger-price mechanism by the United States had, in his view, introduced a new element in the international trading environment for these products. This new approach could have a serious impact on the future operation of the Anti-Dumping Code, particularly if restraint were not exercised. The spawning and proliferation of new anti-dumping methods that departed from established practices and complied neither with the spirit nor with intent of the Anti-Dumping Code, was in his opinion a matter of great concern to the Committee... While the trigger-price mechanism and basic price system might not be technically contrary to the Code, he believed it fair to say that the Code did not in any way envisage the introduction of mechanisms of that kind as a means of facilitating anti-dumping investigations. Such developments, in a time of growing protectionist pressures, could in his view lead to a severe erosion or disregard for international trade rules generally. Moreover, he was sure that each signatory to the Code would, from time to time, be confronted with requests from domestic industries for measures analogous to those now in place for steel products.

16. The representative of Canada explained that the United States trigger-price mechanism presented concerns for the Canadian authorities in spite of the fact that it had been put forward as an adjunct to the

United States anti-dumping system. He underlined that, traditionally, the anti-dumping remedy had been applied on a selective basis to those countries or companies that had been involved in injurious dumping practices. The United States scheme departed from that accepted norm. The requirement that steel exporters selling below trigger price levels demonstrate that they were not dumping was in his opinion an important new element in the United States system and one which could lead to harassment of exporters who were not dumping.... He stressed that unlike Article XIX actions, which applied to all sources on a non-discriminatory basis, the measures and procedures under the Anti-Dumping Code were designed to deal with particular complaints of dumping against imports from specified sources with supporting evidence of dumping and injury. In the Canadian view, the trigger-price mechanism should be operated on the same ground rules.... He concluded that both the Code and the United States Anti-Dumping Act stipulated that in determining the existence of dumping, a comparison should usually be made between selling prices in the domestic and export markets taking into account appropriate adjustment.

17. Referring to the European Communities basic price system for iron and steel products the representative of Canada stated that there were some elements of the system which were causing worry and might need further examination as to their compatibility with the Code as the system was put into force. It was his understanding that the threat of anti-dumping measures was a factor leading certain exporters to negotiate bilateral arrangements. It was in his view questionable whether this was an appropriate use of such measures. It appeared to him that differential treatment would be accorded to those countries which entered into bilateral arrangements with the Communities in comparison to those who did not. The use of anti-dumping procedures in this manner was not, in the Canadian view, appropriate.... There were other questions which in his view required clarification. The Communities had, for example, not made adjustments to reflect changes in exchange rates. Canada had also received no indication whether allowances were being made for different credit terms. In the administration of these measures no provision appeared to have been made for differences in quality. It had been proposed that the importer pay provisional anti-dumping duties and apply for a refund. He underlined, however, that the Code normally placed the burden of proof of dumping and injury on the complainant. The approach of the Communities shifted the onus to the importer/exporter to demonstrate that goods were not being injuriously dumped. Another aspect which in his opinion needed to be clarified was the relationship between basic prices, negotiated prices and the prices which the Communities were trying to maintain on its domestic market. Furthermore, the retro-active cancellation of import licences had led to undue costs and delays for Canadian steel exporters. Also the threat of provisional anti-dumping duties had discouraged some Canadian exporters from continuing to ship steel to the Communities.....

19. The representative of the European Communities was completely in agreement with Canada that in the situation that now had arisen, it was important to try to prevent that trigger or basic price systems spread to other product sectors. He underlined that such a development would be extremely dangerous for the international trade. Having said this, he wished to point out that the basic price system of the Communities was in conformity with Article 8(d) of the Code. The basic price system had been introduced in order to launch anti-dumping investigations and to shorten the time until provisional measures could be taken. He explained that anyone not satisfied with the decisions taken under the basic price system could ask for a separate determination of dumping and of injury in each particular case... He recognized, however, that a number of particular problems might arise when the system was put into practice. He referred in this context to the problems concerning second qualities and burden of proof which had been mentioned by the representative of Canada. He assured that these problems were being studied with a view to arriving at a liberal solution... He added that problems concerning credit terms and exchange rates had not been raised so far. In his view, solutions to such complicated problems must be arrived at that were practical even if some shortcomings could not be avoided as regards equity.

20. The representative of Japan emphasized that the trigger price mechanism should be only temporary and of an emergency nature. It should consequently be maintained only to such an extent and for such a time as might be necessary in order to cope with the exceptional circumstances that the steel industries in the world faced at present. He was also of the view that the mechanisms should be operated in full compliance with the Code. He recalled in this context that Article 5(a) of the Code provided that "investigations shall normally be initiated upon a request on behalf of the industry affected, supported by evidence both of dumping and of injury". The initiation of an investigation on the initiative of the authorities concerned was according to that Article allowed only in special circumstances and on the condition that "they shall proceed only if they have evidence both on dumping and on injury resulting therefrom". He would like to be assured that the trigger price mechanism would be implemented in full compliance with Article 5(a) of the Code. He was also worried about the fact that one of the aims of the trigger price mechanism was to enable a tentative determination to be made "within a period substantially shorter than six months". In his opinion, this caused suspicion that investigations might be conducted in an arbitrary way. He would therefore like to be assured that dumping determinations would not be based upon an arbitrary and insufficient investigation and that an expedited investigation would not lead to the impairment of the interests of the parties concerned.

21. The representative of the United States wished to emphasize that the trigger price mechanism was ~~not a minimum~~ import price scheme. He underlined that all rights of the parties concerned that had existed before were preserved under the mechanism. Consequently, there was no limitation for foreign exporters to sell steel to the United States at any price they chose. The United States industry maintained for their part the right to file anti-dumping complaints. The trigger price mechanism was only a means for the Treasury Department to identify imports that might be presumed to be at less than fair value... He underlined that if a foreign steel producer was able to sell at prices below the trigger price level in his home market and still cover his production costs, that producer was completely free to sell steel at such prices also in the United States... He also believed that the trigger price mechanism was consistent in every detail with the provisions of the Code and he urged those countries which were contemplating to introduce systems similar to the trigger price mechanism to see to it that such systems were firmly based on the Code and that quantitative restraints were excluded....

24. Referring to the basic price system of the European Communities the representative of Japan saw a number of problems as regards the compliance of the basic price system with the requirements of the Anti-Dumping Code. Firstly, the grounds for the calculation of the basic prices were ambiguous. The European Communities had merely announced that the basic prices had been established on the basis of the lowest costs of production in the supplying country or countries where normal conditions of competition were prevailing, but they had given no concrete and explicit information as to how the basic prices to be applied to individual products had been calculated. He asked the European Communities to supply such information in accordance with Article 10(c) of the Code. The second question he wanted to raise concerned the level of the basic prices and the relation to the market prices in the Communities. He said that out of approximately 140 products under the basic price system, there were forty-one products for which the basic prices were set above the levels of the corresponding market prices in the Communities (guide prices, minimum prices). Even if the imports of those forty-one products caused material injury or threat thereof, it was in his opinion sufficient in order to remedy the injury to impose an anti-dumping duty of the amount corresponding to the difference between the market price in the Communities and the price of the imported products. Accordingly, if an anti-dumping duty were imposed on any of the forty-one products by an amount equivalent to the difference between the basic price and the import price, that would constitute an excessive protection in contravention with the latter part of Article 8(a) of the Code. Taking up the third problem, he pointed out that Article 8(d) of the Code defined the basic price as the "basic price established for this purpose, not exceeding the lowest normal price in the supplying country or countries". The regulation in question of the

Communities based the definition of the basic price upon the concept of "the lowest normal price or costs", thus deviating from the wording of Article 8(d) which referred only to the lowest normal price. Furthermore, the Commission of the European Communities had stated in the Official Journal No. L-353 that the basic prices had been "established by reference to the lowest normal costs". In his view, Article 8(d) excluded the possibility of an arbitrary calculation of basic prices. Therefore, the basic prices of the Communities were not justifiable under Article 8(d) of the Code. Passing on to a fourth problem, he stated that the aim of basic price systems under Article 8(d) of the Code was only to provide another way to impose anti-dumping duties. No one was in his view allowed to employ that system for determining the dumping margin, which should be made after a careful examination in accordance with the relevant provisions of the Code. Information available to him indicated however that the Communities had dealt with the basic prices as if they were trigger prices for an initiation of an investigation. The Communities had also determined that there was dumping in those cases where the export price had been found to be below the basic price. In addition, the Communities had introduced the basic price system to simplify the procedures for determination of dumping and injury. To operate a basic price system in such a manner was not, in his view, consistent with Article 8(d) of the Code....

26. The representative of the European Communitiesstressed that the basic prices according to Article 8(d) of the Code had to be based either on the normal prices or on the normal production costs in the exporting countries. Certain calculations were therefore needed. He regretted in this context that no co-operation and no information had been supplied by Japan that could have assisted his authorities in making such calculations. In this situation his authorities had been obliged to carry out the calculations themselves on the basis of available information. He stated that the results of those calculations were by coincidence similar to the trigger prices in the United States where the authorities had got Japanese co-operation for their calculations. For this reason, he concluded that the calculations of his authorities would seem to be essentially correct. In addition he emphasized that the basic price system was only triggering off investigations during the course of which the calculations could be contested by the parties concerned....

29. The representative of Japan stated that he had got the impression that the European reference prices were based on production costs. He asked whether the reference prices were not normally fixed at such a level as to avoid sales at a loss on the European market. He asked also whether a basic price fixed above the level of the reference prices would not remove all threat of injury to the industry.

30. The representative of the European Communities replied that the level of the basic prices corresponded to the level of the lowest normal prices or the lowest normal production costs in the exporting countries, i.e. in most cases Japan. The European prices might in certain cases have been below these normal prices or costs as a result of the price depression that had taken place during the recent years due to dumped imports. He recalled however that the production costs in Europe were as a rule higher than those in Japan and that therefore the basic prices would normally be lower than production costs of European firms.

31. The representative of Japan recalled that according to Article 10 of the Code "provisional measures may be taken only when a preliminary decision had been taken that there is dumping and when there is sufficient evidence of injury". Before taking a provisional measure, an estimation of the dumping margin would consequently have had to be made. In doing such an estimation a price comparison would in his view be needed and for that purpose the cost of production criteria should be resorted to only in the last instance. Since the basic prices were based upon costs of production, they could in his view not be automatically used in the estimation of the dumping margin.

32. The representative of the European Communities replied that in establishing prima facie evidence for the opening of an investigation or for the imposition of provisional duties, there was a different situation when the exporters co-operated and when they chose not to do so. In the Japanese case such a co-operation had been refused. Consequently, a decision had to be taken on the basis of the facts available, i.e. inter alia published studies on Japanese production costs. Referring to the allegation that a comparison should have been made with the Japanese home market price, he stated that the Code prescribed that a comparison should be made that was the most favourable to the exporters. Since the home market price in the normal course of trade had to be higher than the production costs, the latter could then be used for this purpose....