

GENERAL AGREEMENT ON
TARIFFS AND TRADE

RESTRICTED

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PRIORITY ISSUES IN THE ANTI-DUMPING FIELD

Drafting History

Note by the Secretariat

1. At its April 1978 meeting the Committee on Anti-Dumping Practices agreed to discuss at its next regular meeting, to be held in the autumn of 1978, the following priority issues:
 - I. Sales at a loss (including "concept of dumping")
 - II. Allowances relating to price comparability
 - III. Regional protection
 - IV. Price undertakings
2. The Committee requested the secretariat to establish, by mid-June, a background note containing information on the drafting history of the relevant provisions of the Anti-Dumping Code with regard to the four topics mentioned above (cf. COM.AD/W/77 and COM.AD/W/78, paragraph 9).
3. The secretariat has consequently prepared such a note which is reproduced hereunder.

I. Sales at a loss (including "concept of dumping")

A. Provisions of the Anti-Dumping Code

Article 2(d)

"When there are no sales of the like product in the ordinary course of trade in the domestic market ... the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country ... or with the cost of production in the country of origin ..."

B. Introductory remark

The concept of "sales at a loss" has been used in the discussions of the Anti-Dumping Committee and in the drafting history of the Anti-Dumping Code in order to describe a situation where the sales prices do not allow for full cost coverage. Similar problems could have been touched upon even if the term "sales at a loss" had not been used, for instance when questions have been raised concerning price reductions consequent to a general downturn in the business cycle, price reductions in order to gain consumer familiarity and acceptance, and price reductions in connexion with end-of-season or end-of-run "one shot" disposal of goods. In the following, reference has only been made to texts where expressions such as "sales at a loss" or "sales below costs of production" have been expressly used.

C. Excerpt from Reports of the Group of Experts on Anti-Dumping and Countervailing Duties in 1959-60

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

D. Kennedy Round

1. Excerpt from note by the United States circulated in TN.64/NTB/W/3 on 10 January 1966¹

"(4) Should anti-dumping measures apply where a multi-product firm is able to charge a low price in an export market for one product because the price of other products is designed to cover costs of the low-priced product?"

This question relates to question 3, above. In some cases, multi-product firms may consciously determine that costs should be primarily allocated to those products which can best recoup those costs in the market; and that other products should be sold for less.²

¹The note contains a number of fundamental questions, the exploration of which was in the opinion of the United States essential for a proper evaluation of the United Kingdom Draft Code (Spec(65)86).

²One economist has provided the following example:

"What is the average cost of crude oil, gasoline, aviation gasoline, diesel fuel, lubricants, fuel oil, and residual? Marginal costs can perhaps be computed, but how should overhead costs be allocated? The sellers, as all sellers do, allocate overhead costs to those products which can cover them in the market. Residual fuel oil has in the past sold for less than the value of its crude-oil content, in order to be sold at all in competition with coal. As the price of coal has risen, however, it has been possible to shift some part of the overhead costs of the production and refining of oil to the residual product. The day may not be far distant when the by-product which bore no share of overhead costs becomes a principal product which carries some or all of it. Examples of this shift are found in coking coal in the Ruhr. Prior to about 1929, coke for steel was the main product and coal-tar derivatives the by-product. The development of the German chemical and explosives industries in the inter-war period, however, made coke the by-product and resulted in its sale as common fuel even to farmers. Overhead costs, which had been assigned mainly to coke, then became shifted to the coal-tar chemical products." [Kindleberger, International Economics, 271-72 (R.D. Irwin, Inc. 1963)]

The result of such multi-product pricing policy can be export sales of particular products at prices substantially lower than sufficient to recoup the average unit cost of those goods although no differential may exist between home market and export market prices of that particular product. If the theory discussed in question 3, above, has relevance to anti-dumping policy, would that theory also suggest that where one commodity produced by a multi-product firm bears the overhead costs, then the other commodities exported by that firm should be considered as "dumped"?"

2. Excerpt from note on Meeting of Group on Anti-Dumping Policies on 26-27 January 1966 (TN.64/NTB/W/6)

- "I. (4) Should anti-dumping measures apply where a multi-product firm is able to charge a low price in an export market for one product because the price of other products is designed to cover costs of the low-priced product?

If the theory on cost allocation discussed in section I(3) is accepted, it would follow that anti-dumping action should be taken in cases where multi-product firms decide that costs should be primarily allocated to those products which can best recoup the costs in the market while other products are sold for less. Such a pricing policy could result in export sales of particular products at prices substantially below the average unit cost although no differential exists between the domestic price and the export price of that particular product.

Against such pricing policies being considered as dumping it was argued - on the same grounds as in section I(3) - that there was no reason for taking action against particular cost allocation practices unless imports of the product in question caused injury to industry in the importing country. It was also pointed out that investigations into the production costs and pricing policies of multi-product firms would be formidable tasks, even if they could normally be restricted to a limited number of closely related products. It was also stressed that producers, as a normal practice, fix their prices for their running production more on the basis of market conditions than on the basis of proper cost allocation. In the particular case where the product sold below its cost was only sold in export markets, it was recognized that the situation was somewhat different, but it was pointed out that such cases were already covered by paragraph 1(b)(ii) - comparison with the cost of production - of Article VI. The question was asked whether in such cases the whole production cost should be taken into account or only the marginal cost for that particular kind of product."

3. Excerpt from submission by the United States circulated in TN.64/NTB/W/12/Add.5 on 30 June 1966 containing views on items that might be included in an anti-dumping code

"The use of "cost of production" when any comparable sale price can be found is subject to serious objection on both theoretical and practical grounds. Sales at below cost do not necessarily involve price discrimination. For example, domestic as well as export sales at below cost can be normal business practice at times of business depression."

II. Allowances relating to price comparability

A. Provisions of the Anti-Dumping Code

Article 2(f)

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

Article 2(d)

"When there are no sales of the like product in the ordinary course of trade in the domestic market ... the margin of dumping shall be determined by comparison ... with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin."

B. Excerpts from Reports of the Group of Experts on Anti-Dumping and Countervailing Duties in 1959-60

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"The Group noted that although paragraph 1 of Article VI of the General Agreement refers to the price at which products are introduced into the commerce of another country, the same paragraph later speaks of the product "exported". The Group concluded that the latter was a guide as to how the "dumped price" should most appropriately be established. The Group further noted that paragraph 1 of Article VI also stipulated that "due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability". In view of this, it seemed that the essential aim was to make an effective comparison between the normal domestic price in the exporting country and the price at which the like product left that country - not the price at which it entered the importing country.

The Group took the view that it was the export price that had to be compared with the normal domestic price and agreed that the export price would ideally be the ex-factory price on sales for export; an equally

satisfactory price would be the f.o.b. price, port of shipment. In the exceptional case where the actual f.o.b. price on an invoice could not appropriately be used (for example, where the export sale was between associated houses), the export price might be taken to be a notional f.o.b. price calculated by making adjustments such as would normally be made to convert a c.i.f. or other price to f.o.b. The aim should in any event be to arrive at a price which was genuinely comparable with the domestic price in the exporting country."

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"In the course of their discussions, the Group noted that the legislation of some countries did not make provision for adjustments to take account of differences in quantities sold on the home market and quantities exported; some members of the Group took the view that if there were differences in these amounts these should be taken into account in order to meet fully the requirement in paragraph 1 of Article VI that "due allowance shall be made in each case for differences in conditions and terms of sale". The Group recognized that, while it was logical and reasonable to make adjustments to take account of different quantities and that countries should follow the general principle of adjustments in each case, difficulties might nevertheless arise in securing the necessary information on which such adjustments should be based. Furthermore, it was thought that each case had to be considered on its merits in the light of the objective of comparison of like quantities."

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

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

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

C. Kennedy Round

1. Excerpts from Draft Code proposed by the United Kingdom and circulated in Spec(65)86 on 7 October 1965

"Provision 8

When determining dumping in accordance with Article VI:1(a), i.e. by a comparison between the export price and the price of the like product in the domestic market of the exporter,

- (i) the term "like product" shall be interpreted to mean a product which is identical or which is essentially the same the only difference being minor adaptations, e.g. to accommodate different tastes or to meet statutory requirements;
- (ii) where the sale is between an exporter and importer independent of one another the export price shall be based on the f.o.b. or c.i.f. price of the goods; in cases where the c.i.f. or f.o.b. price is considered by the authorities concerned to be unreliable (because of association between the exporter and importer or for any other reason) the export price may be based on the price of any sale of the imported goods between independent buyer and seller in the importing country;
- (iii) the domestic price may be based on the price of any sale between independent buyer and seller in the domestic market of the exporter; normally this will be the price of a sale by the producer to a user or distributor.

Rationale

As the Group of Experts agreed, the difference in meaning between the phrases "a like product" and "the like product" is not of practical significance. It is, however, essential that all the necessary adjustments should be made to the price to take account of minor differences (see also Provision 9 and Rationale).

It is essential also that the prices compared should be truly comparable in that they relate to sales which are comparable and they must, therefore, be compared at a notional common point of sale. In each case this should be the point to which it is most convenient to adjust each of the prices which have been selected as the basis for the calculation. Normally export prices should be calculated from, i.e. based on, the c.i.f. prices (which are usually known by the applicants and can be confirmed by the authorities concerned); only in cases where the importer is associated with the exporter or where it appears that so-called "hidden dumping" or "sales dumping" is taking place (i.e. the importer is being recompensed in some way by the exporter) should the export price be based on e.g. the wholesale price or the price paid by the final customer or user.

The domestic price may be based on a price of a sale at any stage in the distribution of the goods about which reliable evidence can be obtained; in practice such evidence will frequently be provided by the producer in respect of his domestic sales."

"Provision 9

- (a) When comparing the export price with the price of the like product in the domestic market of the exporter such adjustments shall be made to the two prices as are necessary to ensure that they are genuinely comparable; accordingly allowance shall be made for
- (i) differences between the physical characteristics (e.g. accessories, grades, quality) of the exported product and that sold on the home market;
 - (ii) differences in the costs and charges included in one price and not included in the other or for any differences in the value of the same costs and charges which may be included in both prices. Such costs and charges shall include packaging, freight, delivery, insurance, storage and port charges; import duties and taxes, turnover and similar taxes; distributors' (i.e. wholesalers', retailers' and import agents') margins and commissions; advertising and selling costs; discounts and rebates given in respect of any commercial considerations including quantity, cash payments, continuity of orders.

- (b) In cases where there are no exactly comparable sales e.g. where there is no domestic sale of a comparable quantity, the appropriate discount to be allowed shall be calculated by reference to the discounts actually given e.g. in respect of other quantities.
- (c) Where there is a range of domestic prices for the product (even when account is taken of differences in conditions of sale, quantities etc.) the price selected for comparison with the export price shall be one representative of the range of prices within which the greater volume of domestic sales are made.

Rationale

To ensure that the prices relate to sales that are comparable not only must the prices be compared at a common point of sale (see Rationale to Provision 8) but due allowance must be made for all other differences which affect the comparability of the two prices, therefore the deductions or additions made to the export and domestic prices should include allowances in respect of any or all of the items listed above as may be appropriate.

Article VI lays down that "due allowance shall be made in each case for differences in conditions and terms of sale" etc., because conditions, terms etc. vary in each case and cannot, therefore, be subsumed under predetermined formulae."

2. Excerpt from note by the United States circulated in TN.64/NTB/W/3 on 10 January 1966¹

"Provision 9(a) of the United Kingdom Draft Code states, however, that home market and export market prices shall be adjusted "to ensure that they are genuinely comparable" and that

"accordingly allowance shall be made for (i) differences between the physical characteristics (e.g. accessories, grades, quality) of the domestic and export commodities; (ii) differences in the costs and charges included in one price and not included in the other".

¹The note contains a number of fundamental questions, the exploration of which was, in the opinion of the United States, essential for a proper evaluation of the United Kingdom Draft Code.

Unless sub-parts (i) and (ii) of Provision 9(a) are intended to be redundant, then it would appear by ordinary canons of statutory construction that the allowance made for differences in physical characteristics need not necessarily be related to "differences in the costs and charges" reflected in the physical differences.

Regarding quantity discounts, Provision 9(b) states that such discounts, in the absence of similar domestic quantity sales, "shall be calculated by reference to the discounts actually given, e.g., in respect of other quantities". Does this provision assume that a cost justification for quantity discounts on, say, a 100 unit sale can be determined by comparing the discounts given regarding 50 unit sales? Or does this provision provide that a quantity discount is "actually given" so long as the seller intends the price concession to be a quantity discount, irrespective of cost justification?"

3. Excerpt from Note on Meeting of Group on Anti-Dumping Policies on 26-27 January 1966 (TN.64/NPB/W/6)

"Some delegates pointed out that freight charges were an important factor in determining margins of dumping under the present GATT rules; regardless of the criteria which might be adopted in an anti-dumping code the problem needed further study because of the many different situations and circumstances which could arise, for example, should freight charges on exported goods be compared with average freight charges on domestic deliveries or with the highest charges on domestic sales. It was pointed out that it would be difficult, if not impossible, to fix rules relating to freight charges which could be applied automatically in every case, nevertheless amplification of the point was required in Section D of the United Kingdom Draft Code."

4. Excerpt from submission by Norway circulated in TN.64/NPB/W/12/Add.1 on 23 June 1966 containing views on items that might be included in an anti-dumping code

"The export price to be compared with the normal domestic price should normally be the ex-factory or f.o.b. price on sales for export.

The domestic price (or the price for export to third countries) is, however, seldom directly comparable. Article VI says that due allowance shall be made for differences affecting price comparability. The Article does not, however, contain any details as to what these differences may be, let alone to what extent they should be taken account of. The report from the Group of Experts is also rather vague on this point.

Experience has shown that the following factors are fairly frequent:

- (a) the price quoted for domestic sales and export refer to different levels of trade;
- (b) the terms of sales (first and foremost as regards volume) differ;
- (c) the advertising and selling costs are not the same for domestic sales as for exports;
- (d) the physical characteristics of the export article may differ more or less from those of the article sold on the home market;
- (e) the domestic price and the export price do not comprise the same freight, insurance or other charges;
- (f) the domestic price includes certain taxes or duties which the product is exempted from when exported.

For some of these factors, as those under point (e) and (f), adjustments can be based on concrete documentation. Other factors may be used by the exporters as arguments for price differences more or less at their own discretion. Therefore, to prevent abuse, the allowances claimed for such factors must to some extent be subject to the judgment of the investigating authority.

The process of making prices comparable is probably one of the most difficult problems in dumping cases. Therefore, it would be desirable if practical guidelines could be elaborated."

5. Excerpt from submission by Canada circulated in TN.64/NTE/W/12/Add.3 on 29 June 1966 containing views on items that might be included in an anti-dumping code

"The second alternative principle, i.e. comparison of the export price with the cost of production of the product plus a reasonable addition for selling cost and profit, may be unclear because it does not specify that administration costs should be included. Much depends on the technique of cost accounting employed. It seems, however, that if the word profit is used in the sense of gross profit, it would follow that all legitimate costs relating to the production and distribution

of the product including administration expenses should be included. The question arises as to what is a reasonable margin of profit. Some systems of customs law require that the margin of profit realized on sales of similar products in the exporter's domestic market should be applied. This would appear preferable to fixing an arbitrary margin, whether specified in law or set by an official of the importing country."

6. Excerpt from submission by the United States circulated in TN.64/NTB/W/12/Add.5 on 30 June 1966 containing views on items that might be included in an anti-dumping code

"Furthermore, the calculation of cost of production presents more serious difficulties than do price comparisons. Obtaining the necessary facts will be difficult even with the full co-operation of the producer. And, even when all the facts are available, their interpretation for the determination of cost can involve decisions that are necessarily arbitrary, such as the proper allocation of overhead expenses where the firm makes a number of products. Therefore comparisons with cost should be resorted to only where more direct price comparisons are not feasible."

7. Excerpt from submission by Japan circulated in TN.64/NTB/W/12/Add.6 on 1 July 1966 containing views on items that might be included in an anti-dumping code

"The price discrimination should be taken to mean the difference between the export price and the price of the like product in the domestic market of the supplier. To ensure that the two prices are genuinely comparable, due allowance should be made in each case for difference in conditions and terms of sale and other differences affecting price comparability. Provision 9 of the United Kingdom Draft Code provides a useful guideline for relevant elements to be considered in making such adjustment."

8. Excerpt from submission by Denmark circulated in TN.64/NTB/W/12/Add.7 on 4 July 1966 containing views on items that might be included in an anti-dumping code

"The basis for determining the margin of dumping should be the prices actually charged by an exporter for sales to the home market and for sales to the importing country. In normal practice, these prices will not be directly comparable, either because they do not comprise identical cost elements or because they do not comprise certain cost elements to the same degree. The two prices should therefore be adjusted so as to render them comparable. The Danish authorities find Provision 9 of the British Draft Code on this point to be satisfactory and to be in conformity with Article VI of the GATT.

It would be desirable, however, to include in the Code rules about the basis of such comparisons which in principle should be made, wherever possible, between the price ex-works for home-market sales and for export sales, so that price adjustments can be made to ensure comparability in cases where goods are not sold on ex-works terms.

One of the factors to be taken into consideration in comparisons of export prices and an exporter's home-market prices under Provision 9 is the cost of freight. The position of freight costs in such calculations was discussed by the Group on Anti-Dumping Policies in January 1966 - see GATT document TN.64/NTB/W/6, item I(6), according to which the Group appears to have been in agreement about the desirability of taking up the question of freight dumping for more detailed examination.

It has been maintained by United States authorities that goods could be exported to Europe without the possibility of any lawful anti-dumping action being taken as long as the domestic price in the United States was equal to or below the price charged in European ports. In certain cases, a so-called alignment might even be added to the European market prices without triggering off any anti-dumping duty. In the view of the United States authorities, freight subsidies or sub-normal freight rates for certain goods under governmental subsidy arrangements to reduce the cost of transportation of such goods would merely promote competition and are intended to prevent geographical monopolies.

The Danish authorities cannot accept the United States views and find that there is every reason to take up freight dumping or freight subsidies for export of certain goods or consignments for more detailed discussion within the Working Group of GATT. It should be noted, however, that the Danish authorities suggest that only concrete cases of freight subsidies should be discussed - not general problems arising in connexion with subsidies to shipping as GATT is hardly the proper forum for such general discussions.

Freight costs will represent a considerable part of the comparable ex-works price proposed above. The Danish authorities find that it will be in conformity with Article VI of GATT to use normal freight costs, and not artificially reduced freight costs, for the calculation of the ex-works price. If this criterion is applied, the ex-works price calculated will be lower than the normal price referred to in Article VI; this means that one of the conditions for imposing an anti-dumping duty will have been fulfilled."

9. Excerpt from submission by Sweden circulated in TN.64/NTB/W/12/Add.8 on 7 July 1966 containing views on items that might be included in an anti-dumping code

"When comparing prices it is of the utmost importance that all factors affecting the comparability of the prices be taken into account.

In the first place, comparisons must be made between identical products or in the absence of such products between products the physical properties of which are essentially the same. The differences should be so slight as to permit the differences in price caused thereby to be easily established in order to limit the scope for discretionary appraisal as much as possible. Where insignificant differences exist, the resulting differences in price must be fully taken into account when comparing the prices.

The prices under consideration should also in all other respects be fully comparable. Thus the comparison must refer to prices at the same level in the trade, on the same date and locally considered at the same point in the exporting country. In principle, the last-mentioned common point should be the one that requires as few adjustments as possible in relation to the prices used as a starting point thereby limiting the scope for discretionary cost appraisals. As a starting point the most suitable reliable price should be chosen for which satisfactory documentation is available.

When it comes to the adjustment of the prices chosen for comparability, all factors have to be taken into account which may affect the costs, such as differences in duties and purchase tax, in advertising and other sales costs, and in quantities sold (quantity discounts). In this context valuable examples are to be found in the United Kingdom Draft Code.

In the event that one has to resort to a comparison with the highest third country price it should be borne in mind that according to varying commercial conditions a certain price differentiation would seem to be normal. To apply this criterion too rigorously could lead to unsatisfactory results. In the Swedish opinion it is questionable whether, in applying this basis for comparison, the exporter should not in each case be given the opportunity to prove that the export price is not lower than the costs of production.

Finally, as regards the criterion of the costs of production as a basis for comparison, great difficulties no doubt exist in the wording of clear and comprehensive rules to promote correct and uniform results. This is particularly the case as regards the distribution of research and development costs with a reasonable margin for profit."

10. Excerpts from note by the secretariat concerning possible elements to be considered for inclusion in an anti-dumping code circulated in TN.64/MTB/W/13 on 13 August 1966

"1(c) In order to obtain a fair comparison of prices, due allowance shall be made in each case for differences in quantity, in conditions and terms of sale, in taxation and for other differences affecting price comparability. /A more detailed listing of these factors may be included./"

"1(d) In cases where the export price is considered by the authorities concerned to be unreliable because of association between the exporter and importer, /or for any other reason/, the export price may be based on the price of any /the first/ sale of the imported goods between independent buyers or sellers in the importing country /with due allowance being made for duties, taxes, freight rates, etc./ /A provision could be included allowing participating countries to establish specific rules with respect to products not imported for resale./"

11. Excerpts from "Possible elements to be considered for inclusion in an anti-dumping code (revised list)" circulated in TN.64/MTB/W/14 on 9 December 1966

"2(d) When there are no sales in the ordinary course of trade in the domestic market or when such sales do not permit because of the particular market situation a proper comparison, the margin of dumping shall be determined preferably by comparison with a comparable export price which could be the highest export price to any third market but should be a representative price, or with the cost of production in the country of origin plus a reasonable allowance for administrative and selling costs and profits. /The allowance for profit shall not exceed the profit normally realized on sales of similar goods in the domestic market of the country of origin./"

"2.(f) In order to obtain a fair comparison of prices [what is determined to be] due allowance shall be made in each case for [all] differences affecting price comparability. Among the factors to be taken into account are differences in quantity and quality, physical characteristics of the product, level of trade transportation costs, conditions and terms of sale, taxation, credit terms, guarantees, warranties, technical assistance, advertising and other selling costs, commissions, research and development costs, discounts and rebates given in respect of any commercial consideration including quantity, cash payments, continuity of orders etc. In cases referred to in paragraph 2(e) allowance for costs incurred by the importer between importation and resale should also be made."

12. Excerpt from memorandum by Canada circulated in TN.64/NTB/W/15 on 21 February 1967 containing comments to document TN.64/NTB/W/14

"The Canadian authorities believe that the various allowances, deductions, etc. made in the various valuation systems have to be evaluated collectively. It is unrealistic to contemplate reaching agreement in the code (2(f)) on each and every allowance to be considered and how it is to be calculated. Thus the phrase "due allowance" in the present draft should be retained, and the word "all" now in square brackets should be deleted.

The Canadian authorities consider that the code should provide for the use of anti-dumping duties to offset injurious "freight dumping".

13. Excerpts from "Draft Anti-Dumping Code" circulated in TN.64/NTB/W/16 on 3 March 1967

"2(d) When there are no sales of the like product in the ordinary course of trade in the domestic market or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable export price which could be the highest export price to any third market but should be a representative price, or with the cost of production in the country of origin plus a reasonable allowance for administrative, selling and other costs and profits. As a general rule, the allowance for profit shall not exceed the profit normally realized on sales of goods of the same general category in the domestic market of the country of origin."

"2.(f) In order to obtain a fair comparison of prices what the authorities determine to be due allowance shall be made in each case for all appropriate differences affecting price comparability. Among the factors to be taken into account are differences in quantity and quality, physical characteristics of the product, level of trade, transportation costs, conditions and terms of sale, the date it was made, taxation, credit terms, guarantces, warranties, technical assistance, advertising and other selling costs, commissions, research and development costs/ discounts and rebates given in respect of any commercial consideration including quantity, cash payments and continuity of orders. In cases referred to in paragraph 2(e) allowance for costs incurred between importation and resale should also be made."

14. "Draft Anti-Dumping Code. Changes proposed by Canada" (INT(67)99)
15. "Anti-Dumping Code. Revised Draft" (TN.64/NTB/W/17)
16. "Anti-Dumping Code. Second revised draft" (TN.64/NTB/W/18)
17. "Draft Report of the Group of Anti-Dumping Policies"
(TN.64/NTB/W/19)

Essentially the same text as in the final Anti-Dumping Code.

III. Regional protection

A. Provisions of the Anti-Dumping Code

Article 4(a)

"In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that

- (ii) in exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined."

Article 8(e)

"When the industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in Article 4(a)(ii), anti-dumping duties shall only be definitively collected on the products in question consigned for final consumption to that area, except in cases where the exporter shall, prior to the imposition of anti-dumping duties, be given an opportunity to cease dumping in the area concerned. In such cases, if an adequate assurance to this effect is promptly given, anti-dumping duties shall not be imposed, provided, however, that if the assurance is not given or is not fulfilled, the duties may be imposed without limitation to an area."

B. Excerpt from Reports of the Group of Experts on Anti-Dumping and Countervailing Duties in 1959-60

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

C. Kennedy Round

- (1) Excerpt from Draft Code proposed by the United Kingdom and circulated in Spec(65)86 on 7 October 1965

"Provision 12

- (a) Normally the term "domestic industry" used in Article VI shall be interpreted as referring to the domestic producers of the goods in question as a whole, i.e. collectively or to those of them whose collective output of the goods constitutes a major proportion of the total national production of those goods. In short, the industry shall be identified as nation-wide in scope.
- (b) The effect of the dumped imports of a particular article shall not be assessed in relation to the domestic production and sales of the like article considered in isolation unless the article can be separately identified in terms of the production process and the producers' realizations, profits, etc."
- (c) The circumstances in which the Group of the Non-Tariff Barriers Committee may decide that, subject to proper safeguards, the term "domestic industry" may be differently defined.

Rationale

The use of the collective term "industry" clearly indicates that Article VI is not intended to provide for action against dumping which causes or threatens injury to one or a few firms when the dumping is having no materially adverse effects on the national output of the goods in question.

The injury which dumped imports can inflict must consist in the financial loss arising from reduction in the volume of sales and/or from reduction in the realizations resulting from depression of prices (see Provision 8(b)). It would, therefore, be a practical impossibility as well as unreasonable to attempt to assess the effects of dumping on a part of the domestic producers' production which has no separate identity which is meaningful in the context of injurious dumping. The authorities concerned must therefore decide in each case upon the definition of production which can reasonably and practically be accepted as constituting an industry within the meaning of Article VI. It may not be possible for them to arrive at this decision at the outset of the investigation, i.e. before they have obtained detailed information from a number of individual firms. In a case of dumping of teddy bears, for example, it would be necessary to decide whether the effects of the imports could and should be assessed in relation to the domestic production of teddy bears alone or of soft toy animals or of all soft toys."

(2) Excerpts from note on meeting of Group on Anti-Dumping Policies on 20-21 October 1965 (TN.64/NTB/W/2/Rev.1)

"10. Section A (Conditions governing the acceptance and preliminary consideration of applications for imposition of anti-dumping duties.) Members of the Group pointed out that the proportion of the industry, on behalf of which an application for the imposition of an anti-dumping duty should be made, had to be judged against the background of the size of the country. In a large market there could obviously be serious regional problems to take into account, which did not appear in a small market (see paragraph 15 below)."

"15. Section F (Definition of an industry.) Attention was called to the special problems of widespread markets, where the division into virtually independent sub-markets might make an overall application of an anti-dumping duty meaningless (cf. also paragraph 10 above). The United Kingdom representative pointed out that suggestions should be made from countries who considered they had to deal with special circumstances in which the normal definition of an industry would not be applicable, but clearly it would be very difficult to devise special criteria which would provide the necessary safeguards to prevent the unjustifiable acceptance of producers in a certain area being accepted as a domestic industry. It must be remembered that if duties were imposed they would apply to imports over the whole country and the producers in other areas would then obtain unjustifiable protection."

(3) Excerpt from note by the United States circulated in TN.64/NTB/W/3 on 10 January 1966^{1/}

"(a) The geographic definition of "industry"

- (1) Should the phrase be restricted to the national industry regardless of the size or diversity of the geographic market in question? Where dumped imports, for example, are competing with domestic products in a region within a nation in which products from other regions do not or cannot compete should "domestic industry" be defined regionally rather than nationally?
- (2) Should the phrase encompass an industry larger than a national industry, e.g., where dumped imports are competing in a trading region larger than the political boundaries of one nation (such as a customs union or free-trade area)?"

^{1/}The note contains a number of fundamental questions, the exploration of which was in the opinion of the United States essential for a proper evaluation of the United Kingdom Draft Code.

- (4) Excerpt from submission by Japan circulated in TN.64/NTB/W/4 on 27 January 1966 containing comments on the United Kingdom Draft Code

"The domestic industry should be identified as nation-wide in scope. The provisions of Provision 12(c) are not desirable because they may give rise to abuse."

- (5) Excerpt from the note on meeting of Group on Anti-Dumping Policies on 26-27 January 1966 (TN.64/NTB/W/6)

- "(1) The "geographic" definition

(a) It was asked whether "industry" in this context was to be taken to mean all the producers within the national territory regardless of the size and diversity of location of its components. It was argued that regional markets could be the more appropriate units for consideration in certain circumstances.

It was pointed out that this was a question which only affected a very limited number of countries. For most countries a nation-wide application would be the normal solution.

(b) It was felt that there might be a case for extending the concept of industry in a free-trade area or customs union, beyond the national frontiers to cover the whole industry inside the trading zone in question.

It was commented that whatever its relevance might be to industry in a customs union, it did not apply to a free-trade area."

- (6) Excerpt from submission by Norway circulated in TN.64/NTB/W/12/Add.1 on 23 June 1966 containing views on items that might be included in an anti-dumping code

"In the Norwegian view judgment of material injury should normally relate to the total national production of the commodity concerned or a major proportion of the national production.

It must, however, also be recognized that in special circumstances a more narrow definition might be justified. This question will naturally first and foremost arise in case of widespread national markets.

Whether the term industry should be extended in case of an integration area to cover the whole industry in the area will probably to a great extent depend on the agreement between the countries concerned and the degree of integration aimed at."

- (7) Excerpt from submission by the European Economic Community circulated in TN.64/NTB/W/12/Add.2 on 24 June 1966 containing views on items that might be included in an anti-dumping code

"The EEC supports that general guiding principle set forth by the GATT Group of Experts that judgments of material injury should be related to total national output of the like commodity concerned or a significant part thereof. It is the opinion that normally this principle should apply mutatis mutandis to the economic integration areas recognized by the General Agreement."

- (8) Excerpt from submission by Finland circulated in TN.64/NTB/W/12/Add. on 30 June 1966 containing views on items that might be included in an anti-dumping code

"In principle, injury should be related to total national output. It may, however, be necessary to accept material injury in relation to a certain economic region if the country in question can be regarded as consisting of several economic regions. The condition for this should be that the economic region is so important that the injury can be regarded as significant also from the national point of view."

- (9) Excerpt from submission by the United States circulated in TN.64/NTB/W/12/Add.5 on 30 June 1966 containing views on items that might be included in an anti-dumping code

"The term "industry" should be defined to cover all the producers within a given customs territory who sell their products in a market in competition with each other and with the imported product. Where the product can be economically transported from one part of the territory to another the market will normally be co-extensive with the customs territory itself. But where the product is not economically transportable at long distances (examples: cement or some perishables) or where serious geographic barriers to transportation exist, a single customs territory may be divided into two or more "competitive markets". The determination of the extent of the "competitive market" to be considered should be based upon the actual nature of internal competition in the importing customs territory. Members of a customs union are, of course, within the same "competitive market" except where geographic obstacles or other natural factors prevent competition between the producers in different parts of the union."

- (10) Excerpt from submission by Denmark circulated in TN.64/NTB/W/12/Add.7 on 4 July 1966 containing views on items that might be included in an anti-dumping code

"Domestic industry" should normally be understood to comprise all manufacturers within a particular sector of industry in the country concerned. It may be useful, however, as suggested in Provision 12(c) of the Draft Code, to allow definitions of industry on a regional basis in countries which, like the United States, cover a whole continent."

- (11) Excerpt from submission by Sweden circulated in TN.64/NTB/W/12/Add.8 on 7 July 1966 containing views on items that might be included in an anti-dumping code

"Normally, the injuries of dumping should be judged on the merits of the effect on the industry concerned in the country as a whole or in any event the main part thereof. Where the effects of the dumping are limited to a geographically defined market area of a country where similar products from other parts of the country are not competitive due to transportation or other special reasons - a modification of the first-mentioned rule would seem to be justified. As regards integrated areas, such as customs unions with a common external tariff and a free exchange of goods within the area, it may be natural to apply the main rule and to consider the effects on the industry concerned in the area as a whole."

- (12) Excerpt from submission by Australia circulated in TN.64/NTB/W/12/Add.9 on 8 July 1966 containing views on items that might be included in an anti-dumping code

"The United Kingdom Draft Code (Provision 12) appears too restrictive in dealing with the definition of an industry product coverage. There would be practical difficulties in defining an industry in terms only of product coverage. Anti-dumping procedures should be sufficiently flexible to prevent injury to isolated industries which, because of their location, have a small output and supply a small local market, and are therefore vulnerable to injury from shipments of dumped imports in their market area. These circumstances apply particularly in countries such as Australia where there are long distances between population centres."

(13) Excerpt from note by the secretariat concerning possible elements to be considered for inclusion in an anti-dumping code circulated in TN.64/NTB/W/13 on 23 August 1966

"4(a) For determining injury, the term "domestic injury" shall be interpreted as referring to the domestic producers of the goods in question as a whole, i.e. collectively or to those of them whose collective output of the goods constitutes a major proportion of the total national production of those goods.

(b) /The industry shall normally be identified as nation-wide in scope, but where, for the product in question, a national territory - e.g. because of high transport costs - can be divided into two or more competitive markets, the industry within each such market may be considered as a separate entity.]

/In integration areas, where the integration has reached such a level that they have the characteristics of a single, unified market, the industry shall be identified as covering the whole of the area unless the area can be divided into separate competitive markets.]

(c) /An industry shall be taken to include those producers of goods with which the imported product is in sufficiently close competition to open up the possibility that they will suffer material injury as a result of dumping.]"

(14) Excerpts from "Possible elements to be considered for inclusion in an anti-dumping code (revised list)" circulated in TN.64/NTB/W/14 on 9 December 1966

"5(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like or similar goods or to those of them whose collective output of the goods constitutes a substantial proportion of the total production of those goods in a given custom territory, except that:

(i) when producer(s) are importer(s) of the allegedly dumped goods the industry may be interpreted as referring to the rest of the producers;

Alternative I

- (ii) Where, for the production in question, a customs territory can be divided into two or more competitive markets - e.g. because of high transport costs - the industry within each such market may be considered as a separate entity. In this connexion, the term "industry" should be defined to cover all the producers within a given customs territory who sell their products in a market in competition with each other and with the imported product.

Alternative II

- (ii) The industry may be interpreted as referring to the producers in an area or areas within a single customs territory if:
- (1) they sell all or most of their production of the goods in question in that area(s);
 - (2) all or most goods in question produced domestically elsewhere are not sold in the area(s).
- (b) In integration areas, where the integration has reached such a level that they have the characteristics of a single, unified market, the industry shall be identified as covering the whole of the area unless it can be divided into separate competitive markets.
- (c) When production of the like or similar goods cannot be distinguished from the production of a group or range of nearly similar goods in terms of the production process, realizations, profits, etc., the production of the group or range of goods must be considered as the production with which the imports compete, i.e. as the industry."
- "9.(f) When the industry has been interpreted as referring to the producers in a certain area, as referred to in paragraph 5(a)(ii) and (b), anti-dumping duties should only be definitively collected on the goods in question consigned to that area. This provision shall be carried into effect by the authorities concerned to the extent that it is feasible for them to do so within their laws and constitutions."

- (15) Excerpt from memorandum by Canada circulated in TN.64/NTB/W/15 on 21 February 1967 containing comments to document TN.64/NTB/W/14

"The code should provide that injury should be related to industry defined on a national basis, i.e. that the code should preclude the application of anti-dumping duties to protect producers in a region or market area which is only a part of a given customs territory."

- (16) Excerpts from "Draft Anti-Dumping Code" circulated in TN.64/NTB/W/16 on 3 March 1967

"5.(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like goods or to those of them whose collective output of the goods constitutes a substantial major proportion all or almost all of the total production of those goods in a given custom territory, except that:

- (i) when producers are importers of the allegedly dumped goods the industry may be interpreted as referring to the rest of the producers;

- (ii) Alternative I

when for the production in question, a customs territory can be divided into two or more competitive markets - e.g. because of high transport costs - the industry within each such market may be considered as a separate entity. In this connexion the term "industry" should ordinarily be defined to cover all the producers within such a market if they sell all or almost all of their production of the goods in question in that market, provided also that none or almost none of the goods in question produced elsewhere in the customs territory are sold in that market.

- (ii) Alternative II

for the production in question a customs territory may, in exceptional circumstances, be divided into two or more competitive markets - for example, because of high transport costs - and the industry within each market regarded as a separate entity, if all the producers within such a market sell all or almost all of their production of the goods in question in that market, and none, or almost none, of the goods in question produced elsewhere in the customs territory are sold in that market, or if there is an equally economically justifiable basis for identifying a separate industry.

(b) Where two or more countries have reached such a level of integration that they have the characteristics of a single, unified market, the industry shall be identified as covering the whole of the area without prejudice to the provisions of paragraphs 5(a)(i) and (ii)."

"10.(f) When the industry has been interpreted as referring to the producers in a certain area, as referred to in paragraph 5(a)(ii), anti-dumping duties shall only be definitively collected on the goods in question consigned to that area, or the exporter shall, prior to the imposition of anti-dumping duties, be given an opportunity to cease dumping in the area concerned and, if adequate assurance to this effect is promptly given, anti-dumping duties shall not be imposed, provided, however, that if the assurance is not satisfied, this alternative provision shall not be applicable⁷."

(17) Excerpt from "Anti-Dumping Code. Changes proposed by the United States" circulated in INT(67)100 on 20 March 1967

"10.(f) Delete the last clause of this sub-paragraph and substitute in its place the wording here indicated by underlining:

When the industry has been interpreted as referring to the producers in a certain area, as referred to in paragraph 5(a)(ii), anti-dumping duties shall only be definitively collected on the goods in question consigned to that area, except in cases where the exporter shall, prior to the imposition of anti-dumping duties, be given an opportunity to cease dumping in the area concerned. In such cases, if adequate assurance to this effect is promptly given, anti-dumping duties shall not be imposed, provided, however, that if the assurance is not given or is not satisfied, the duties may be imposed without limitation to an area."

(18) "Anti-Dumping Code. Revised Draft" (TN.64/NTE/W/17)

(19) "Anti-Dumping Code. Second Revised Draft" (TN.64/NTE/W/18)

(20) "Draft Report of the Group on Anti-Dumping Policies" (TN.64/NTE/W/19)

Essentially the same text as in the final Anti-Dumping Code.

IV. Price undertakings

A. Provisions of the Anti-Dumping Code

Article 7(a)

Anti-dumping proceedings may be terminated without imposition of anti-dumping duties or provisional measures upon receipt of a voluntary undertaking by the exporters to revise their prices so that the margin of dumping is eliminated or to cease to export to the area in question at dumped prices if the authorities concerned consider this practicable, e.g. if the number of exporters or potential exporters of the product in question is not too great and/or if the trading practices are suitable.

Article 7(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. If a determination of no injury is made, the undertaking given by the exporters shall automatically lapse unless the exporters state that it shall not lapse. The fact that exporters do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case. However, the authorities are of course free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

B. Kennedy Round

(1) Introductory remark

The question of price undertaking was first raised during the Kennedy Round in connexion with the discussions of paragraph 9(f) of document TN.64/NTM/W/14 "Possible elements to be considered for inclusion in an anti-dumping code (revised list)" (see paragraph III.C.14 on page 26 above). One participant stated on that occasion that his authorities could not, for constitutional reasons, guarantee a geographical assessment of anti-dumping duties when the industry had been injured only in a certain area. He mentioned that his authorities could however provide a remedy on a geographical basis by asking for a price undertaking that would be limited to the area concerned.

(2) Excerpt from "Draft Anti-Dumping Code" circulated in TN.64/NTB/W/16 on 3 March 1967

"9. If the exporters concerned undertake during the examination of a case, to revise prices or to cease to export the goods in question, and the authorities concerned accept the undertaking, the investigation of material injury shall nevertheless be completed if the exporter so desires or the authorities concerned so decide. If a determination of no injury or threat of it is made, the undertaking given by the exporter

shall automatically lapse unless the exporter states that it shall not lapse. The fact that exporters do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case."

- (3) Excerpt from "Anti-Dumping Code. Changes proposed by the United States" circulated in INT(67)100 on 20 March 1967

"9. Add the underlined wording to the end of this sub-paragraph so that it will read as follows:

If the exporters concerned undertake during the examination of a case, to revise prices or to cease to export the goods in question, and the authorities concerned accept the undertaking, the investigation of material injury shall nevertheless be completed if the exporter so desires or the authorities concerned so decide. If a determination of no injury or threat of it is made, the undertaking given by the exporter shall automatically lapse unless the exporter states that it shall not lapse. The fact that exporters do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case; however, the authorities are of course free to determine that a threat of injury is more likely to be found when dumped imports will continue than when they will not."

- (4) Excerpt from "Anti-Dumping Code. Revised Draft" circulated in TN.64/NTB/W/17 on 28 March 1967

"8. If the exporters concerned undertake during the examination of a case, to revise prices or to cease to export the goods in question, and the authorities concerned accept the undertaking, the investigation of material injury shall nevertheless be completed if the exporter so desires or the authorities concerned so decide. If a determination of no injury is made, the undertaking given by the exporter shall automatically lapse unless the exporter states that it shall not lapse. The fact that exporters do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case. However, the authorities are of course free to determine that a threat of injury is more likely to be realized if the dumped imports continue."

- (5) "Anti-Dumping Code. Second Revised Draft" (TN.64/NTB/W/18)

The same text as in TN.64/NTB/W/17.

- (6) "Draft Report of the Group on Anti-Dumping Policies" (TN.64/NTB/W/19)

Essentially the same text as in the final Anti-Dumping Code.