MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

RESTRICTED
MTN.GNG/NG8/7
7 July 1988
Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on MTN Agreements and Arrangements

MEETING OF 6-7 JUNE 1988

Note by the Secretariat

1. The Group held its seventh meeting on 6-7 June 1988 under the Chairmanship of Dr. Chulsu Kim (Korea). The agenda proposed in GATT/AIR/2600 was adopted.

A The Agreement on Implementation of Article VI ("Anti-Dumping Code")

2. The European Economic Community introduced its proposal tabled at the last meeting (MTN.GNG/NG8/W/28), reiterating the main suggestions contained therein.

3. A number of comments of a general nature were made with reference to this contribution and to previous submissions by other participants.

4. Delegations which spoke all shared the general objective of balancing importing and exporting interests. Some added that, in their view, the Code had on the whole proved effective in remedying injurious effects of unfair trade practices, while at the same time safeguarding the legitimate interests of exporting countries: it might not, however, adequately address certain new developments in international trade. Others expressed the view that while the Code was a specific instrument for specific situations, it had not always been applied as such; a truly comprehensive approach had to address the key problems which related to the determination of material injury, in particular the issue of cumulation. Some delegations stressed that Article VI dealt with unfair trade practices and should not become a substitute for provisions such as Article XIX which concerned safeguard measures for fair trade practices; therefore, in any adaptations of the Code, strict and precise rules were needed to limit the scope of anti-dumping measures, to prevent arbitrary interpretation and to ensure against abuse. Some delegations considered that there was an inherent lack of balance of rights between domestic producers and foreign exporters; more attention should therefore be given to achieving stricter disciplines on the application of anti-dumping measures than to imposing stricter disciplines on exporters. Other delegations emphasized that a balanced approach had to take account of the reasons which lay behind anti-dumping measures, i.e. damage to producers. In this connection, the view was expressed that rules and definitions which were too rigid could undermine the authority of importing countries under the GATT to effectively offset injurious dumping. These general points were reiterated or elaborated upon during the discussion of specific suggestions, as indicated later in this note.

5. The view was expressed that there was a need to reconsider the concept of dumping on which the existing rules were based. In this regard it was suggested that the traditional concept of dumping was perhaps no longer relevant to modern commercial realities in that it did not take into consideration that in many cases differentiation of prices in different markets was the result of a necessary adaptation by exporters of their prices to those prevailing in particular markets. One delegation considered that this question should be looked at in the context of determination of injury, bearing in mind that the basic current rule in determining dumping was to compare the export and domestic prices of the exporting country.

6. Another general objective which was mentioned was the need to make access to the Code easier for developing countries, and to ensure that they enjoyed the benefits of Article 13.

7. There was a general wish to incorporate into the Code a number of recommendations adopted by the Code Committee (see paragraph 18 below).

8. Several delegations supported in general the suggestion by the EEC to enforce existing disciplines. Some emphasized that, in their view, this was needed because of divergent enforcement policies and the need to avoid unilateral interpretations with regard to the use of anti-dumping measures. On more specific points, delegations which spoke expressed general support for the suggestions that anti-dumping measures should not go beyond what was necessary for the elimination of injury, and that they should not be in force for a longer period than necessary. A number of delegations also agreed with the suggestion that conditions for the acceptance of undertakings should not be unnecessarily restrictive. One delegation recalled its own proposal to provide for a fair opportunity to choose an undertaking, thereby creating a balance which did not exist in the last sentence of the present Article 7:4. Some other delegations mentioned the need for balance in situations where exporters were under pressure to enter into an undertaking.[1]

9. In addressing the three sets of suggestions on "Adapting the Code to new realities" (Part III of the EEC submission), a number of delegations emphasized the importance of maintaining the equilibrium between importing and exporting interests. Some delegations expressed general support for the view that countermeasures be allowed against genuine circumvention of justified anti-dumping measures. Some stressed that care should be taken to avoid unjustifiably impeding normal trade and investment, and unduly interfering in business practices the purpose of which was to improve the functioning, efficiency and competitiveness of the exporting firm.

---

[1] In MTN.GNG/NG8/W/30, distributed at the meeting, under Section I:6 and I:8, the delegation of Japan referred to price undertakings and a "sunset clause".

10. On the question of circumvention through assembly operations, a number of participants opposed the suggestion that principles underlying the EEC legislation be incorporated into the Code; some pointed out that the consistency of this legislation with the General Agreement and the Code was subject to examination in another forum. One delegation added that any solution to the problem of circumvention through the importation and assembly of components had to take account of the GATT and Code requirement that anti-dumping duties be imposed only upon finding of dumping, injury and causal link, and secondly, that the basis of investigations should be a comparison between like products. Some delegations saw a potential for abuse especially in the approach taken to assembly operations and transformations in third countries. The statement by the delegation of Japan on this matter, dealing also with the treatment of new products, is incorporated in MTN.GNG/NG8/W/30, Section II:1.

11. With respect to the suggestions made in Part III of the EEC proposal concerning the determination of normal value in cases where activities normally undertaken by a sales department had been transferred to a legally separate sales company, one delegation considered that this problem could be resolved if full adjustment were made for differences in levels of trade. One delegation considered that if over strict rules made anti-dumping actions ineffective, other actions had to be taken. Another delegation was concerned that abuse be prevented.

12. Concerning the third suggestion under Part III of the EEC submission on extension of provisional measures/retroactive dumping duties in cases of massive anticipatory imports, one delegation called for measures that could guard against abuse or harassment of the exporter. It was argued that, until a preliminary determination of the dumping margin, exporters should be regarded as innocent. One delegation wondered whether the proposal would meet the problem because frequently mass sales were brought about by existing implementation of anti-dumping legislations in certain countries. Another delegation stated that a massive volume of imports in a short period during the early part of an investigation could lead to massive injury from which it was difficult to recover - in particular, for relatively small industries.

13. The Group went on to discuss outstanding points in the checklist (MTN.GNG/NG8/W/26/Rev.1). Concerning determination of dumping (item I), the delegation of Japan addressed itself to the definition of "introduced into the commerce of another country", the definition of "like product", criteria for the use of constructed value in the determination of normal value/criteria for calculating general expenses and profits in constructed value, and input dumping. It also took up the question of reviews and refunds. (The statements are contained in MTN.GNG/NG8/W/30, Section I:1-3 and 7).

14. One delegation supported the proposals made by Japan in MTN.GNG/NG8/W/11 on the question of the comparison between export price and normal value and on the need to consider anticipated cost declines in

considering whether sales in the domestic market took place at prices which were below the cost of production. The delegation of Japan elaborated further upon its views on the issue of the methodology to be used in the comparison between export price and normal value and addressed in particular the following issues: (i) items deducted in calculating export price and domestic sales price in cases where sales are made through a subsidiary; (ii) definition of "related company" and treatment of sales to related companies; (iii) price comparison in cases where sales prices vary; and (iv) revision of export prices due to sharp exchange rate fluctuations (ref. MTN/GNG/NG8/W/30, section I:4). The question of dumping determinations and cost reductions due to innovations in technology was also elaborated upon in detail (idem, section II:3). One delegation proposed that the Group examine how the impact of inflation should be taken into account in the comparison between export price and normal value and expressed the view that Article 2:6 of the Anti-Dumping Code required that this comparison be made in real terms.

15. With respect to the determination of the existence of material injury (item II on the checklist), the delegation of Korea reiterated the views it had put forward in MTN.GNG/NG8/W/10, sections F and G, concerning problems related to the practice of cumulating imports as well as cumulative injury assessment "across codes", and "follow-down dumping" in order to meet competition. It also recalled that it had proposed examining the possibility of developing a market penetration threshold, below which imports would be exempted from finding of injury. In some of their general remarks, a number of delegations gave support to this approach, and to other suggestions contained in the Korean proposals.

16. During discussions of the questions of repeated dumping and circumvention of anti-dumping duties (items VIII and IX in the checklist), the view was expressed that two increasingly prevalent forms of injurious dumping, which had developed and which the Code did not adequately address, were recidivist dumping, and certain diversionary practices involving deliberate, repeated dumping by a single company. While it might be difficult to arrive at an effective and acceptable solution to these problems, the objective of Article VI had to be fully realized; if the Code were to continue to play a useful rôle these issues had to be addressed. Some delegations stated that they failed to recognize a real problem concerning recidivist dumping because anti-dumping measures often seemed to be in force for so long that recidivist dumping would only rarely be possible. One delegation considered that the initiation of a dumping investigation itself always worked as an harassment to the exporters and caused a financial burden on the part of exporters and importers; more emphasis should be given to minimizing the effects of anti-dumping investigations detrimental to the expansion of trade, rather than reinforcing the system of penalizing a small number of exporters. Another delegation, sharing these views, added that it saw a number of fundamental problems in many of the concepts behind the United States proposal in MTN.GNG/NG8/W/22 suggesting a need to expand the scope of the Code to deal with new issues such as recidivist dumping and diversionary practices. It

added that the Code, did not provide for automatic initiation of an investigation. Some delegations which referred in general terms to MTN.GNG/NG8/W/22, considered that it did not meet the needs for balance between importing and exporting interests.

17. The delegation of Japan addressed the issue of circumvention of anti-dumping duties (MTN.GNG/NG8/W/30, Section II:1).[1]

18. In his summing-up, the Chairman stated that he did not think it appropriate to give any assessment of the work carried out at this meeting. He thought it had become clear, however, that there was a general wish to incorporate into the Code a number of recommendations adopted by the Code Committees. That was one step forward. In addition, he encouraged delegations:

"(i) to reflect on the further elaboration of issues for negotiations which had already been put forward;

(ii) to elaborate additional positions on issues of interest to each of them in the area of Anti-Dumping; and

(iii) to provide revised elaborations of proposals in the light of comments made at this meeting."

Possible "Secretariat Input"

19. The Chairman recalled that a secretariat input had originally been suggested in MTN.GNG/NG8/W/15. Following consultations, the Group had agreed at the last meeting that "delegations be invited to indicate to the secretariat, by 15 May 1988, what additional elements a possible secretariat factual compilation of information should cover. The secretariat would be requested, in the light of such additional elements suggested, to prepare an outline also indicating limitations which any such compilation could contain. The outline would be discussed at the June meeting" (MTN.GNG/NG8/6, paragraph 5).

20. Delegations had received from the secretariat an informal note, listing the issues proposed by some participants for inclusion in the study and pointing out the limitations of the data notified to the secretariat by countries in the semi-annual reports, as well as difficulties involved in collecting information on additional elements that some delegations had suggested should be included in the factual compilation. He added that some of the tasks which could be carried out by the secretariat would be quite time-consuming, bearing in mind that more than 1,100 anti-dumping investigations would have to be analysed and the result of the analysis

---

[1] In addition, the delegation of Japan covered in the document distributed, the question of sufficient evidence necessary to initiate investigations (MTN.GNG/NG8/W/30, Section I:5).

would have to be checked with delegations concerned in order to provide correct data to the Group.

21. A number of statements were made. Following further consultations the Chairman gave the following report to the Group:

"The following are the results of my consultations concerning the question of a possible factual compilation by the secretariat of information on anti-dumping measures:

In relation to Parties to the Anti-Dumping Code, it was agreed that the secretariat would provide information compiled from the semi-annual reports with the request that its accuracy be verified and, where appropriate, supplementary data be provided, by 1 September 1988.

Other participants in the NG8 would be invited to provide by 1 September 1988, information relevant to anti-dumping measures taken since 1 July 1980.

The factual compilation by the secretariat on the basis of this information is expected to be available for consideration at the meeting of the NG8 in October 1988 and is expected to cover countries taking anti-dumping measures, type of anti-dumping measures, countries affected, and product categories involved.

In addition to the above, participants agree to the principle of an extension of the secretariat compilation into a second phase.

The suggestions made by delegations contained in the informal secretariat note would, inter alia, be the basis for consideration of work under the second phase. Participants are invited to present additional suggestions and comments.

It was further agreed that it was recognized that effective co-operation will be needed on the part of all participants in order to ensure a meaningful result."

22. Some delegations expressed varying degrees of reservations as to the scope and precise basis of the second stage.

B. Agreement on Interpretation and Application of Articles VI, XVI and XXIII ("Subsidies Code")

23. The Chairman recalled the submission in MTN.GNG/NG8/W/5 and subsequent observations in the Group. No further statements were made on this item.

C. Agreement on Government Procurement

24. The Chairman recalled communications from India and Korea contained in MTN.GNG/NG8/W/9 and 21 respectively. The delegation of Korea, elaborating on its proposals, noted that in spite of Article III, no substantial improvement had been made in eliminating the real obstacles to accession. The provision of special and differential treatment ought therefore to be suitably expanded and its spirit incorporated into Article IX, the accession clause, by allowing countries with a limited entity offer to accede with a commitment to a gradual expansion of their entity lists thereafter. A growing tendency in many signatory nations to decentralize procurement lowered the real value of their contributions and might make it increasingly difficult for countries with centralized procurement systems to accede. With this in mind, criteria should be considered for entity negotiations, e.g. the share of above-threshold procurement in total contract value. In order to preclude intentional divisions aimed at reducing Code-covered contracts, the tendering procedures should be made more transparent. The Protocol had contributed to ensuring fair competition and to limiting the scope of arbitrary implementation by Parties through the adoption of more detailed provisions with respect to preparation of tender notices, conditions for participation in tendering, and extension of time limits for receipt of tenders. Further efforts should be made towards resolving problems such as requests for special, complicated types of samples, or short response deadlines. Furthermore, lack of accuracy and consistency in the statistics rendered these of little use for assessing the effectiveness of the Agreement and the benefits accruing from it. The introduction of a more unified and specific classification system such as the CCCN four-digit or the Harmonized System, and a uniform application of the definition of country of origin, would provide a basis for improved means of assessment, by both Parties and non-Parties.

25. Two delegations supported the proposals in both submissions on the application of Article III and the need to attract more Parties, in particular developing countries. According to one of these delegations, the Negotiating Group should give priority to this aspect. They supported the suggested criterion for considering entity offers.

26. One delegation stated that it favoured wider membership in all MTN Codes and recognized that the participation of developing countries was particularly limited in this Agreement. While it would welcome specific elaboration of proposals made, it warned against changes in accession procedures that might lead to a situation of incoherence, with harmful effects for the good functioning of the Agreement.

27. The delegation of India explained that its proposals concerning accession referred to procedural requirements which gave individual Parties the power to prevent GATT contracting parties from acceding to this Agreement; no other MTN Code, nor the GATT itself, contained any similar provision, and this raised a question as to the rights and benefits which

accrued to governments under the non-application clause, and to the integrity within the GATT system. The delegation of India expressed the hope that the limited responses to its submission did not mean indifference on the part of Parties to the Agreement and some other members of the NG8.

28. One delegation stated that the 1981 decision by the Committee on Government Procurement on procedures for the accession of GATT contracting parties, was based on the traditional GATT process of consensus, which required a meeting of the Committee to agree on the terms of accession. The 1983 decision provided an alternative procedure for a government to become a Party during an interval between meetings. This alternative procedure was written in terms of needing agreement from all Parties, in order to avoid having to call a special meeting.

29. In a reference to the ongoing Article IX:6(b) negotiations, one delegation noted that in an observer capacity it had expressed the hope that as these negotiations proceeded, it should be possible to broaden the Agreement through broadening its membership. According to information available, no specific proposals had been made in the Article IX:6(b) context to encourage broader participation.

30. A number of suggestions were made concerning further secretariat work. The Chairman stated that the background note (MTN.GNG/NG8/W/18) would be revised to cover (i) the procedures concerning accession referred to above, in more detail; and (ii) information on developments in the Article IX:6(b) negotiations concerning broadening the Agreement in as much detail as possible.

31. Following a suggestion concerning the possibility of compiling and analysing statistics furnished by Parties, the Chairman said that the secretariat had informed him that proposals for more comprehensive analyses of statistics had been tabled by some delegations in the Committee on 16 October 1987 (document GPR/W/83) and had been taken up again on 18 March 1988. The discussions had been inconclusive and would continue at a meeting in October 1988. The secretariat might be in a position to update the background note for the October meeting of the NG8, indicating developments and, if possible, statistical data.

D. Agreement on Implementation of Article VII ("Customs Valuation Code")

32. The delegation of India recalled its suggestions in MTN.GNG/NG8/W/9. It noted that only a few developing countries had become Parties and thought this was largely due to the fact that application of the transaction value had significant revenue implications for countries whose customs duties represented a significant part of government revenue. This was borne out by Technical Committee studies. It was appropriate and necessary to take account of the real commercial situation and the limited resources available to customs administrations, particularly in developing countries. While the Agreement elaborated a detailed procedure to deal with customs valuation in related transactions, it did not take account of

the very widespread, and in some cases rampant practice, of collusion between unrelated parties in under-invoicing/over-invoicing. Article 17 permitted customs to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for valuation purposes. This was a general enabling provision; the burden of proof remained with the customs administration and created enormous difficulties where an otherwise genuine invoice deliberately misrepresented the value of goods on account of an understanding between the buyer and the seller. Therefore, the provisions of Article 17 needed to be elaborated and provide that where customs officials had a factual basis to suspect that the declared value of a transaction was incorrect or had been misrepresented, the burden of proof to establish its validity and correctness be shifted to the importer. Such a provision would apply only to exceptional cases, of which two specific examples had been cited in MTN.GNG/NG8/W/9.

33. One delegation stated that it did not share the view that the burden of proof for establishing the "inaccuracy" of a price declared under Article 1 was placed on customs. The fact that the Agreement sought to have the transaction value used to the greatest extent possible and conferred certain rights on the importer prevented the arbitrariness which characterized certain other valuation systems. These rights were counterbalanced by Article 17 and paragraph 7 of the Protocol. The Agreement in fact presumed that adequate provision regarding the right of customs was made in national legislation. Such provisions might include, inter alia, requirements that the importer present a complete and correct declaration of particulars for valuation purposes and disclose any relevant information in support of that declaration, and might confer powers on the customs to make further enquiries. The results of the application of such provisions should give customs sufficient evidence to justify their decisions in application of the Agreement. Where the customs had reason to doubt the truth or accuracy of particulars declared or of documents produced in support of a declaration, Article 17 supplemented by paragraph 7 of the Protocol, gave customs the power to request further information or documents from the importer. The burden of proof therefore fell on the importer, who must adduce further information to support the declared price. If he was unable to satisfy the Customs and took the case to appeal (Article 11), he would generally be required to convince the Court that the declared value should be accepted. The burden of proof, would, on the other hand, be on the customs if they brought a prosecution for fraud. In respect of transactions between buyers and sellers who were related, the need for a dialogue between the importer and the customs was an explicit part of Article 1.2. The burden of proof was initially on the customs insofar as they must have positive grounds for considering that the price had been influenced by the relationship. However, the burden of proof then passed to the importer, who must be given the opportunity to respond. There was no problem if the importer accepted the point of view of the customs. However, if the importer appealed, the burden of proof remained with him. Apart from paragraph 7 of the Protocol, the two Committees set up under Article 18 and the Customs Co-operation Council had established a number of guidelines dealing with the various aspects of

the concerns expressed. Consequently there was no need to amend the Agreement further. When faced with such concerns, developing countries might consider re-examining their national legislation with particular regard to the power of the customs and obligations on importers. Where appropriate, they could have recourse to the provision of technical assistance under Article 21.3.

34. A number of delegations associated themselves with this statement. One delegation, while not taking issue with fact that customs administrations faced problems with fraud, stated that the Agreement did not encourage fraud, nor was its purpose to deal with it, and left customs with more than adequate means.

35. The delegation of India welcomed the observations made and pointed out that its proposal was not, at this stage, necessarily for amendment but mainly for clarification. It further welcomed information on the experience of other customs administrations. To assert that the Agreement did not induce fraud was not, however, sufficient in dealing with real and frequent problems, which related to a significant portion of its trade.

36. One delegation shared the concerns expressed. Burden of proof, price fixings between related parties, and transfer pricing were real problems which its customs authorities also faced and which constituted the main reasons why many developing countries had not acceded to the Agreement. These concerns should be dealt with in the most suitable manner possible.

37. The observer from the Customs Co-operation Council explained that an advisory opinion on this subject would be before its Council for approval on 20-25 June 1988. This advisory opinion posed two questions, the first being whether Article 17 read with paragraph 7 of the Protocol, gave sufficient powers to customs administrations, to detect and establish valuation offences including fraud. The answer given mentioned specifically the rights of national administrations to expect full co-operation of importers in enquiries concerning the truth and accuracy of any statement, document or declaration, and that no provision in the Agreement restricted those rights. It would be incorrect to suggest that any other rights of customs administrations, not mentioned in Article 17 or paragraph 7 of the Protocol, by implication were excluded. The second question was whether the burden of proof, in the course of determination of customs value, was on the importer. The answer was that the rights and obligations (other than those specifically mentioned in the Agreement) of importers and the customs in determination of customs value, would depend on national rules and regulations. On the subject of valuation fraud, a group of experts had developed a draft recommendation for the above-mentioned meeting of the Council, aimed specifically at promoting mutual administrative assistance. While several instruments already existed in this area, it had been felt important to highlight the issue on particular problems. Secondly, illustrative cases of major valuation fraud had been identified, and countries were being asked to submit examples of valuation fraud for collation into a manual or handbook. A third and

fourth element dealt with national legislation to ensure compliance with valuation laws and legislation; one being a well-defined national law regarding valuation, the other being a proper valuation administration. The work had not been related to any specific valuation system, but was meant to be applicable to all countries, whatever system employed.

38. In response to a request, the observer from the CCC added that it would attempt to provide the GATT secretariat with the results of the CCC Council meeting in respect of the above matters.

E. Further examination and clarification of issues for negotiations

39. One delegation stated that while the various Committees continued their activities in terms of implementation of the respective Codes, attempts to improve, clarify or expand MTN Codes should primarily be the focus of the NG8. It was a matter of concern that some participants nevertheless, wished to pursue substantive discussions in the Committees, on matters that had been initiated in the NG8. This option, which was not provided for in the Punta del Este Declaration, undermined the integrity of the work and was against the principle of transparency. In the Committee on Technical Barriers to Trade, for instance, discussions had taken place as if this Committee was an extension of the NG8, which was not the case. These observations also applied to the Committee on Government Procurement but in a broader sense, since the Article IX:6(b) negotiations had been under way as part of the regular work programme and to this delegation's knowledge, were not the object of particular concerns for the NG8 at this stage.

40. Another delegation stated that negotiations never took place within any specific body and that nothing in the Punta del Este Declaration, nor in the negotiating plan, required that NG8 be the exclusive forum for discussions relating to MTN Codes. The Committees' mandates allowed them to discuss matters relating to the operation of the Codes in the furtherance of their objectives. Thus the Code Committees clearly had the competence to discuss proposals made in NG8. In doing so, its intention was not to attempt to exclude non-Signatories from the discussions, rather, it was to attempt to draw on the experience and expertise of each Committee. This delegation had always supported the discussion of NG8 proposals in all available fora and would continue to do so.

F. Other business, including arrangements for the next meeting(s) of the Negotiating Group

41. The Chairman stated that he had been told that as a result of consultations which the Director-General had held with delegations, it was now generally agreed that, in view of the Ministerial meeting for the mid-term review, it would be necessary to recommence work following the Geneva summer break as from 29 August.

42. One delegation suggested that the next two meetings focus as much as possible on concrete texts; it would itself be ready to put forward texts on some issues and hoped others would do likewise. It also suggested that after the next two meetings, the secretariat be requested to compile positions expressed on the various issues for negotiations.

43. The Group reconfirmed that its next meeting would be held on 14-16 September 1988, when the Codes on Import Licensing and Technical Barriers to Trade would be discussed. It further agreed to meet on 27-28 October 1988 and, if necessary, 31 October, to revert to the Codes on Government Procurement and Customs Valuation (27 October) and to the Anti-Dumping Code (28 October and, if necessary, 31 October).