

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

MTN/GNG/NG8/11  
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Group of Negotiations on Goods (GATT)

Negotiating Group on MTN  
Agreements and Arrangements

MEETING OF 17 AND 19 JULY 1989

Note by the secretariat

1. The Group held its eleventh meeting on 17 and 19 July 1989 under the Chairmanship of Dr. Chulsu Kim (Korea).
2. The agenda proposed in GATT/AIR/2803 was adopted.
- A. The Agreement on Implementation of Article VI (Anti-Dumping Code)
3. The Chairman recalled that since the Group had begun its work, it had received communications concerning this Code from the European Communities, Hong Kong, India, Japan, the Republic of Korea, the Nordic countries, and the United States. The only new written submission was the communication from Hong Kong in MTN.GNG/NG8/W/46.
4. In introducing its contribution the delegation of Hong Kong recalled that the Code implemented Article VI and offered the basic guidance to anti-dumping systems. Since it was the actual implementation of these systems that mattered, the paper addressed their origins, purpose and nature as a background to current anti-dumping problems, which alone covered more than eighty pages in the recent GATT document "Developments in the Trading System". In the context of the Anti-Dumping Committee intensive activities had for a long time been related to national legislations; the fact that these were still under examination also spoke for the problems. In developing working rules of a technical nature the Ad-hoc Group of Experts was faced with difficulties caused by fundamental differences on interpretation. The NG8 was therefore charged with the particular responsibility to ensure that the Code still met its original purpose as well as current challenges. Problems arose in three basic categories: the different perception of rules, sometimes with respect to the original purpose and spirit of the Code; a unilateral creation of rights in national legislations in spite of the negotiated balance of rights and obligations agreed upon; and a tendency to use anti-dumping beyond its intended purpose, by way of technical rules. The delegation went on to introduce in more detail the content of the document itself, adding that further proposals would be presented in the light of the discussion in the Group.

5. A number of delegations expressed full support, or said that they agreed generally, or with most of the content of Hong Kong's paper. Some delegations stressed the importance of particular points therein. Thus, some delegations put particular emphasis on what they saw as transformations in the trading system since the conceptual basis of the current rules had been laid. Holding that, at least in theory, anti-dumping rules and anti-trust legislation both were intended to restrict predatory price-cutting, one delegation made the general observation that anti-trust laws in some countries promoted fair competition domestically, whilst their anti-dumping rules served to defeat the same objective in international trade. Some delegations stated that the fundamental purpose of anti-dumping had been lost from sight in developing technical rules. In this connection it was said that the implementation and application of the Code disregarded the necessary distinction between unfair price discrimination and justified price differentiation, expressed by the adaptation of price to the different characteristics of different business transactions and the particular conditions of each market. Some of these participants recalled in this connection proposals made in document MTN.GNG/NG8/W/15, and added that the word "condemned" in Article VI:1 of the GATT might indicate that the drafters of the General Agreement had wanted to emphasize the aspect of moral disapproval; it was thus a central question under what conditions price differentiation in export trade in today's international business environment could be considered unfair and ought to be condemned. One delegation added that a widespread use of unjustified measures would halt efforts in the Uruguay Round to achieve greater global trade liberalization, and that price adaptation should be addressed in this light rather than being equated with price under-cutting. Some delegations expressed, on this point, particular agreement with Section (viii)(e) of Hong Kong's paper.

6. A number of delegations stated the view that ambiguities in the Code had led to arbitrary implementation and lack of certainty regarding trading conditions; anti-dumping was used as a trade policy measure to defend inefficient industries, to harm exporters, to circumvent safeguards and compensation requirements, instead of being limited to incidences of unfair trade. Some of these delegations stressed in particular that Article VI and the Code had to be very narrowly interpreted, not only because they permitted actions of a non-m.f.n. nature, but also because they could be invoked as an exception to Article II concerning bound tariffs. In this connection it was held that the divergences between Signatories' perceptions of fundamental objectives of the Code were at the source of present problems, with a resulting trend of increasing unilateral interpretation of rights and obligations.

7. Some delegations added that even a launching of an investigation could discourage and harass exporters, in particular small exporters, and create difficulties in investment. In this connection, some participants attached particular importance to the sections of Hong Kong's paper which dealt with protectionist bias, action on companies not investigated, and injury determination. One delegation also drew attention to the parts dealing with competition effects of anti-dumping, recognition of public interest,

improved transparency and greater predictability in procedures. The particular responsibility of NG8 was also mentioned. One delegation added that it attached particular importance to Article 13 of the Code; some noted a relationship between this Group and the Negotiating Groups on Subsidies and Safeguards. In the discussion the proposals in document MTN.GNG/NG8/W/40 were also referred to by some delegations.

8. A number of delegations stated that the Code represented a delicate balance between the interests of exporters and importing countries which should be retained. In this regard, one participant believed the discussion of principles in Hong Kong's paper was designed to preserve this equilibrium. One delegation considered that its particular value was the analysis of past performance as a guide to improving the Code. While some participants considered the paper a timely contribution which provided a good basis for subsequent proposals on specific issues, other delegations expressed various degrees of doubt as to whether practical results would be facilitated by a general discussion of certain underlying notions relating to dumping practices and anti-dumping measures. Some participants considered that the basic economic principles identified by Hong Kong had been broadly recognized by the drafters of Article VI and the Code, who had sought to limit the application of anti-dumping measures to situations of material injury caused by dumped imports. They noted, however, that while the application of anti-dumping measures could, if abused, undermine the principle of comparative advantage, it should also be acknowledged that in today's international economy dumping practices could also have adverse effects on trade and the efficient use of resources. One delegation stated that it continued to believe that a major revision of the Code was both unnecessary and unadvisable.

9. Although different delegations emphasized different aspects of how to address the question of balance, it appeared to be a generally shared view that a balanced approach was necessary and that this required recognition of the interests of both exporters and importing countries.

10. One participant pointed out that some issues had been discussed as far back as 70 years ago. Thus, in 1916 one anti-dumping legislation had restricted anti-dumping action to cases of predatory pricing but this requirement had been deleted in 1921 when it had turned out to be impossible to prove predatory intent. The concept of market isolation remained valid due to unequal market access conditions. Thus, the fact that the penetration ratio in the market he represented was about ten times higher than in some other countries, could not be ignored should questions like the relationship between anti-dumping and competition law be discussed in the Group. However, under Article VI anti-dumping actions were not conditional upon a finding of market isolation, and the question could arise whether the mandate the Group covered a discussion of Article VI.

11. A number of delegations said that it was necessary to strengthen the Code to ensure its efficiency in dealing with the problem of circumvention. It was argued that the objective of preventing anti-dumping provisions from being frustrated was a principle enshrined in many tax and customs legislations and it was necessary that the same principle be explicitly

included in the Code. Two areas were mentioned particularly in this regard, viz. circumvention by assembly operations and the dissimulation of dumping practices through manipulations concerning the corporate structure of exporting companies. As examples of Code provisions which made it very difficult to give effective protection against cases of particularly injurious dumping practices, one delegation also mentioned the requirements concerning the introduction of a complaint and the quasi-impossibility of taking efficient action against massive imports at dumped prices taking place in anticipation of anti-dumping actions. This point had been covered in MTN.GNG/NG8/W/28 which it had itself tabled, reflecting the fact that it represented the world's largest import market as well as the world's biggest exporter, and therefore had an interest in both aspects. One delegation stated that it also saw a need for improving the Code in relation to circumvention, because unilateral actions to overcome what certain participants saw as circumvention posed the danger of inconsistency with Article VI and other GATT Articles, which potentially compromised the integrity of GATT rules. Another participant noted that certain producers continued to enjoy protection in their home markets, whether through tariffs or non-tariff barriers. In addition, the conditions enabling injurious price discrimination were not exclusively those where a producer enjoyed such a protected, dominant, domestic position. In a commercial environment characterised by multinational corporations and globalized production, there might even be greater, not fewer, opportunities for price leveraging. Such corporations could sustain dumped sales over an extended period of time in order to gain or maintain market share. By shifting its profit centres across stages of production and sales, and among related product lines, it could assert the necessary market power to dump without necessarily having to satisfy the traditional tests of dumping theory. Remedies for recidivist and diversionary practices in the dumping arena were therefore all the more urgently required in this delegation's view.

12. In response to the argument that national laws were biased against exporters, one participant noted that Article 8:1 of the Code already aimed to limit the remedy to what is necessary to eliminate injury; he thought he represented the only participant with an active anti-dumping legislation which applied these rules, and if all partners did the same, the practical results would be considerable. He also thought that an easier and more frequent use of undertakings would lead to better proportionality of anti-dumping measures, and that anti-dumping legislations could benefit from a higher degree of transparency and predictability; although this objective had largely to be taken care of in the law-making processes it should be kept in mind as a guideline and as an obligation for all Signatories. A number of other proposals were already covered by the Code and could perhaps therefore be put aside. This applied, for instance, to proposals regarding the need for the submission of "sufficient evidence" before initiation of an anti-dumping proceeding, or the exclusion of "frivolous petitions". In response to the view that Article VI constituted an exception to the basic GATT rules, this delegation noted that this Article was part of the General Agreement and that the principle of free trade necessarily implied the condemnation of an abuse of the opportunities of free trade; therefore, each contracting party must be free to use its

rights under Article VI to the same extent as its rights under other GATT provisions. By its very nature however, anti-dumping actions would only apply to specific situations. In the case of the market he represented less than 1 per cent of its total imports from third countries were affected by such measures. Another participant, referring to proposals in MTN.GNG/NG8/W/40, submitted that too little discretion for an importing country's investigating authorities would lead to rigidity and inflexibility to the detriment of both exporters and injured domestic industries. It also believed that such proposals ignored the considerable legal and regulatory safeguards which already existed in many countries to protect the rights of all parties. The proposed limitation of the concept of "introduced into commerce" to instances where an importation had occurred or a contract had been made, would leave many industries without effective recourse against injurious dumping. In this connection it mentioned the markets for, e.g. airplanes, large power transformers and off-shore oil drilling platforms, which were characterised by high-value, project-based sales over an extended period of time; one would have little meaningful access to anti-dumping relief if cases could not be brought until after the infrequent sale had been lost due to dumping. Concerning the proposed definition of "like-product" this delegation wondered what meaningful difference there was between a product imported in its entirety and one imported in parts to be assembled after entry. Other areas of the proposal also raised questions, such as the apparently arbitrary limitations placed on injury assessments and reviews of anti-dumping findings. Another participant stated that certain of the concerns expressed were already taken care of in the administration of its anti-dumping system, e.g. specific provisions regarding possible public-interest enquiry, as a result of which duties might be reduced or eliminated; transparency in decisions and procedures and the timely review of decisions. This delegation suggested that the Group address the question of methods used to determine the incidence of dumping for certain cyclical and perishable products.

13. One delegation made a number of additional points following these interventions. It maintained that anti-dumping measures not always met the criterion of market isolation; its own exporters, for instance, enjoyed no protection but were nevertheless subject to such actions. Concerning import penetration the main question was whether it reflected the operation of comparative advantage or unfair trading practices; if it was the former, any protection had to be sought through invocation of Article XIX or through Article XXVIII renegotiations. Concerning the right to use Article VI a panel report had brought out that such use should be restrained. The main point in respect of undertakings was that these followed the Code and not became disguised voluntary restrictions, undertakings on quantitative restrictions or undertakings on local content. With regard to corporate structures, new rules might be needed but in the meantime existing rules had to be followed. Some delegations also added that even if a small share of imports were subject to anti-dumping actions this could still affect small exporters; moreover, investigations as such had effects, not only measures actually taken.

14. The representative of Japan circulated proposals subsequently issued as MTN.GNG/NG8/W/48 and noted that further proposals were underway. In response to questions raised he added that the definition of "introduced into the commerce of another country" was, according to a number of delegations, already covered by the Code; nevertheless, actions by certain contracting parties did not seem to reflect this. The proposal on ways of determining domestic sales price in the exporting country was explained by the fact that in practice constructed value had been determined, in some cases arbitrarily. The proposal on exchange rate fluctuations tried to cover cases where long-term contracts or exchange-contracts were entered into. He was also prepared to include a recommendation adopted by the Anti-Dumping Committee, concerning time-limits.

15. The Chairman recalled the statement by Ministers in which they had urged the Group to pursue negotiations vigorously and encouraged early submissions of specific texts to expedite the process of negotiation (MTN/TNC/11). He welcomed the papers received and expressed the wish that new specific texts, or parts thereof, be circulated well in advance of the next meeting. He suggested that the next meeting should further discuss, as necessary, various concepts and problem areas, and that the Group also endeavour to focus on specific texts with the aim of further clarifying specific ideas or negotiating positions, in preparation of a structured detailed discussion of the numerous individual issues raised, later in the year.

B. The Agreement on Technical Barriers to Trade

16. The delegation of the United States highlighted changes it intended to make in its proposal on procedures for issuing product approval (MTN.GNG/NG8/W/23), in the light of comments made. A revised text was expected to be ready by mid-September.

17. The representative of the United States introduced the revised text of the proposal on improved transparency in bilateral standards-related agreements (MTN.GNG/NG8/W/34/Rev.1), which was to be read together with the introduction in the original proposal. The new text attempted to take into account comments made by other participants. One delegation stated that it supported the proposals in the document.

18. One delegation expressed preference for the language of the current provisions concerning transparency.

19. The Chairman recalled that proposals in MTN.GNG/NG8/W/36, 37, 43 and 44 were also before the Group. With reference to the latter, one delegation stated that the question of languages for exchange of documents was of vital concern to developing countries, which had shortage of resources, especially when they had to make comments on the notified texts by a specified time. The proposal should be seen in the light of the transparency objective, keeping in view that only a few languages created problems. It hoped it would be possible to meet the needs, e.g. through burden sharing between Parties, summaries from enquiry points, or GATT technical co-operation.

20. The Chairman said that he understood the secretariat would look into the feasibility of involving GATT technical co-operation and respond in the NG8 at its next meeting.

21. The representative of the European Community introduced a proposed "Code of Good Practice for Non-Governmental Standardizing Bodies" subsequently issued as MTN.GNG/NG8/W/49, which he hoped would be discussed at the next meeting.

22. A number of delegations welcomed the proposal. Some of these said they looked forward to a further communication on other "second level" obligation issues which had been announced. One delegation pointed out that Article 14:24 of the Code dealt with disputes in terms of "second level" for non-governmental bodies.

23. One delegation stated that it continued to be interested in extending the Code obligations under the Agreement to PPMs and welcomed further discussion of this issue.

24. The Chairman invited delegations to present texts under preparation as soon as possible in order to speed up the process of work.

C. Agreement on Import Licensing Procedures

25. One participant informed the Group that it would submit a text prior to the next meeting. This would be done at the urging of many other delegations. He expressed appreciation for comments and suggestions received from other delegations.

D. Other Business

(i) Agreement on Government Procurement

26. The representative of the European Economic Community introduced document MTN.GNG/NG8/W/47 entitled "Guidelines for a Transitional Mechanism" which had been tabled, for information, without prejudice to the final position that might be adopted and any amendments to the Agreement that might be required.

27. Some delegations welcomed the suggestions as an attempt to increase participation in this Code, in particular of developing countries. It was stated that widened membership of the MTN Agreements would contribute to improving further the unity and consistency of the GATT system; attention was also drawn to the provisions for special and differential treatment embodied in Article III of the Code. The EEC replied that the communication had been conceived as a means of attracting new members, without necessarily having any particular category of potential new Parties in mind.

28. One participant noted that the ideas set out in the document had been discussed in the Informal Working Group under the Committee on Government Procurement. He presumed that "transitional" implied time-bound

arrangements, because permanent or semi-permanent arrangements could result in different classes of membership or different sets of disciplines under the Code. He also wondered how reciprocal rights and obligations for members in transition might affect institutional aspects, concerning Committee membership and dispute settlement. Also, if very liberal entry provisions entailed very minimal rights, it was a question whether such membership conditions would be sufficiently attractive. Concerning the reference to different entity groupings, this was a reference to a structure which was currently being discussed elsewhere and which could not yet be addressed in concrete terms.

(ii) Arrangements for the next meetings of the Negotiating Group

29. The Chairman recalled agreement reached on certain points at the previous meeting (MTN.GNG/NG8/10, paragraph 32).

30. The Group agreed that the next meeting be held on 18 and 20 September 1989; with discussions on the Anti-Dumping Code to begin on 18 September, and with discussions of the TBT Code, followed by the Code on Import Licensing and Other Business, on 20 September.

31. The Chairman suggested that on 19 September when the TBT Committee was to meet expert delegates to the NG8 would have an opportunity to discuss anti-dumping informally, and experts on licensing could also discuss this subject. He would be available for informal discussions as would the secretariat if felt useful. In response to a point of clarification he added that it was for the Group to decide whether informal consultations would be necessary and in what manner. Delegations might discuss the question of informal consultations with the secretariat closer to the meeting.

32. The Chairman said that in the light of the heavy schedule of Uruguay Round meetings and the need to prepare in capital between meetings, it seemed advisable to hold not more than three NG8 meetings in the autumn. He proposed, and the Group agreed, that further meetings would be held on 16-18 October 1989, and 20-22 November 1989.