MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG8/12
13 October 1989

Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on MTN
Agreements and Arrangements

MEETING OF 18 AND 20 SEPTEMBER 1989

Note by the Secretariat

1. The Group held its twelfth meeting on 18 and 20 September 1989 under the Chairmanship of Dr. Chulsu Kim (Korea).

2. The agenda proposed in GATT/AIR/2819 was adopted. The Chairman recalled the conclusion of the most recent GNG meeting, mentioning in particular that the Chairman of the GNG had "noted that there was agreement in the Group that in the period from September to December, priority should be given to the definition and presentation of national positions, so as to be in a position to start intensive negotiations in the new year. This did not mean that it would not be possible to submit proposals after the end of the year or to begin negotiations before December" (MTN.GNG/20, paragraph 8).

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

3. The Group continued the discussion of earlier proposals by Hong Kong and Japan (MTN.GNG/NG8/W/46 and 48 (with Corr.1 and 2)). It also had before it Hong Kong's further proposals in MTN.GNG/NG8/W/51.

4. One delegation considered some aspects of Hong Kong's proposals to imply a renegotiation of Article VI itself. Japan's proposals were in its view a more genuine effort towards finding a balance between specificity and open-ended flexibility, thus recognising that investigation authorities should be able to take proper account of the facts of a particular case.

5. In another general observation one delegation stated that proposals aiming at prescribing specific rules, e.g. concerning trade level adjustments, introduced new loopholes enabling exporters to mask transfers between related companies. Other proposals introduced significant departures from traditional Code principles with the accompanying risk of creating new uncertainties or ambiguities, e.g. the idea to provide compensation or indemnity in cases of untenable complaints. Along similar lines, but with reference to particular proposals, one delegation expressed doubt about including the concept of wider public interest into a technical Code because it could open the way for possible inconsistent judgement and

implementation. It also thought that mandatory requirements might not always be practical, e.g. proposed rigid percentages (in Article 4:1 and footnote to Article 5:3) could create anomalities in themselves and could undermine the basic objective of dealing effectively and fairly with injurious dumping, taking both export and import interests into account.

6. A number of other delegations supported, generally, the documents concerned on which also a number of clarifications were sought and explanations given.

7. Introducing MTN.GNG/NG8/W/51 the representative of Hong Kong stated it was intended to make Article VI operational and that the operation of comparative advantage was the very purpose of the GATT. Before addressing the details of the document he stressed that Article VI:2 required action against dumped imports rather than against companies, whole industries or sources that by some methodology had been proven to dump, or against new entrants that under no circumstances could have been dumping. He further stressed the difference between a pricing decision and a price adjustment to market circumstances; the concepts of "cumstomary business practice" (whereby practices generally acceptable in the domestic market should be regarded as customary in a new market); the concept of "commercial considerations", (which required investigating authorities to consider market conditions); fair/unfair trading practices, (which meant that account should be taken of economic situations under which dumping could or could not occur); a preambular reference to anti-dumping as an exception to basic GATT principles (intended as a general guidance for the drafting of national legislation and administrative rules); and the concept of "wider public interest" (which would be particularly important in discussing permissive anti-dumping duties under Article 8:1).

8. The concept of comparative advantage was commented upon by a number of participants. Many of these supported, generally, that this notion be stressed. Other delegations took another view. Some pointed out that it raised particular questions in the anti-dumping context, because home market protection might enable exporters to set export prices lower than free market forces would have permitted; and because in the modern international economy multinational enterprises might sustain dumped sales over an extended period of time by shifting profit centres across stages of production and sales and from one generation or line of related products to another. One delegation doubted that comparative advantage was directly relevant to anti-dumping which was about discriminatory pricing causing injury; however, it agree that anti-dumping should not be misused in the absence of injury, as a means of preventing the operation of the principle of comparative advantage.

9. The concepts of "customary business practice" and "commercial considerations" were also the subject of different opinions. One delegation doubted that their incorporation in the Code would add more precision to it. Another delegation sought clarification about the relationship between these notions (and that of comparative advantage), and the definition of dumping in Article VI. It wondered whether the intention

was to require investigating authorities to fulfil new conditions in addition to those they had to observe already. Noting that procedural requirements retarded the necessary relief, it also wondered whether indemnisation might be accepted also in cases of, for instance, flagrant dumping and injury. Other participants thought the concepts were useful because they related to the fundamental GATT principles and objectives. One delegation added that the modern international economy was characterized in normal competitive circumstances by a great diversification and variability of prices in different markets. On this point this delegation therefore agreed that price adjustment was not an unfair trading practice. A number of other delegations also supported this particular viewpoint.

10. A number of delegations gave their support to the document in general and/or its underlying principles. Some of these delegations expressed interest in particular matters, such as the removal of any protective bias in the application of anti-dumping measures, cumulation, wider public interest, companies not investigated, compilation of normal value, causal linkage, sunset clause, like product, domestic industry, circumventions of findings, unilateral interpretations, and transparency of decisions and procedures.

11. In comments on how to proceed one delegation doubted that the perceived application of anti-dumping measures contrary to the GATT and the Code, was necessarily due to any major deficiencies in these instruments. The Group should therefore concentrate on seeking a more consistent application of the Code and clarifications of provisions as they now stood. Another delegation suggested that work be based on the principles of (i) an appropriate balance of rights and obligations, bearing in mind that the Code limited the unilateral right to take anti-dumping actions to situations of injurious dumping; (ii) a strengthening of the multilateral system by avoiding recourse to unilateral interpretations for dealing with apparent ambiguities; and (iii) supporting efforts elsewhere in the Uruguay Round to further trade liberalization and improved market access. Another delegation suggested that as a first step agreement be sought on three fundamental principles for inclusion in any improved rules: (i) the exceptional role of anti-dumping provisions and actions; (ii) the distinction between normal business pricing practices and predatory price discrimination which could occur only when the exporting firm had a dominant position in its domestic market, when this market was large and effectively protected from important competition; and (iii) a public interest clause.

12. The Group agreed, after informal consultations, with the following proposal by the Chairman:

(i) the Group should have an opportunity to discuss all the main issues before the end of the year. (This was in pursuance of the agreement

reached in the GNG that in the period from September to December priority should be given to the definition and presentation of national positions.);

(ii) the secretariat was requested to circulate, prior to the next meeting, a second revision of the checklist in MTN.GNG/NG8/W/26 which would (i) include additional issues raised and (ii) give relevant references to working documents in which each individual item had been dealt with; and

(iii) in order to facilitate a structured and substantive discussion the Group would go through the revised checklist in a systematic way. At the October meeting it would attempt to deal with items I through V of the checklist on the understanding that delegations would be free to revert to any issue at the November meeting when the remainder of the items in the checklist would be taken up. Delegations would also have the possibility to introduce and discuss any new written submissions on any anti-dumping issue and comment on any of the earlier proposals.

B. The Agreement on Technical Barriers to Trade

(i) "Second Level of Obligations"

13. The representative of the European Economic Community said that in the preliminary discussion of the MTN.GNG/NG8/W/49 with interested delegations, as well as in the Committee on Technical Barriers to Trade, virtually all delegations had supported the approach of a "Code of Good Practice for Non-Governmental Standardizing Bodies". Clarification had been sought on some of the general aspects of this proposal. Concerning the scope of application, the situation of national and local governmental bodies and of regional governmental bodies, such as the UN/Economic Commission for Europe, had to be looked at further. Regarding balance of obligations between the various types of standardizing bodies, it had been noted that the certain obligations under the proposed Code went further than the present provisions of the Agreement for central government bodies, i.e. on the establishment of annual work programmes. He considered that it should be possible to work out rules that would maintain the necessary balance.

14. Among the technical aspects the following matters had to be pursued further: The rôle of ISONET and the rights of members of ISONET non-signatories to the Agreement in having access to flow of information, and the question of additional financial and administrative costs that might result from the implementation of the proposed Code for non-governmental standardization bodies. The following comments on the specific provisions would be looked into in greater detail: the suggestion that request for information be made directly to the standardization body concerned; the proposed time limit of sixty days for public notice which might be indispensable for improving transparency at the international level; co-ordination of the standardizing activities at the national level; the use of languages; and the mechanism that would enable Parties to be informed of the implementation of the Code in other Parties.

15. A number of delegations expressed general support for the proposal as a constructive approach for addressing a long-standing issue related to the Agreement. One delegation expressed a preference for greater co-ordination of the activities of non-governmental bodies at the national level through a mechanism that would function in a market-responsive way. One delegation said that it was not in a position to support the proposal in its present form, especially due to concerns about the monitoring mechanism. This delegation wished to be assured that the Code would not adversely effect the delicate balance of rôles and responsibilities between the government and non-governmental bodies in some countries. In response to this last comment, the representative of the European Economic Community said that it would be difficult for his delegation to renounce the monitoring mechanism as without it the proposal would loose its purpose.

(ii) Testing, inspection and approval procedures

16. The representative of Finland introduced the revised proposal on "Testing and Inspection Procedures" (MTN.GNG/NG8/W/50)[1], which took into account the comments made on the earlier proposals in MTN.GNG/NG8/W/41 and 42 and also included the relevant draft definition prepared by the ISO/CASCO Ad Hoc working Group on Definitions. Discussions of this draft with interested delegations and in the Committee on Technical Barriers to Trade could be briefly reported as follows: The Nordic countries agreed with the comment that any final decision on what definitions should be used would depend on the outcome of the work in ISO/CASCO. They also agreed that the reasons listed for not following international recommendations and guides in paragraph 5.1 should be the same as the wording used in Article 2.2. The point had also been made that provisions of paragraph 5.2 might cause certain difficulties for developing countries. While agreeing that infrastructural problems in this respect should be taken into account, he felt that this concern might be more appropriately addressed in Article 12, as necessary, in order not to weaken obligations in this paragraph for all Parties. Concerning Article 5.4.5 a wish had been expresed that negative testing and inspection results should be conveyed to the trader already in the course of the proceeding. Some had also proposed a further improvement of paragraphs 5.4.7 and 5.5 which the Nordic delegation themselves did not suggest to change, as the paragraphs took over the wording in the relevant provisions of the Agreement. A new revised proposal would be presented in the light of the comments made.

17. The representative of the United States introduced the communication on "Product Approval Procedures" subsequently circulated as MTN.GNG/NG8/W/52. The text was a revision of the earlier proposal submitted in 1988. The following points raised in subsequent discussions in the Code Committee would be the subject of further consideration:

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[1]The Group noted that the reference in the first sentence of this document to TBT/W/118 and TBT/W/119 should be replaced by MTN.GNG/NG8/W/41 and 42.

Article 9.4.6. where some had suggested that decisions be based on "sound and provable" technical evidence; Article 9.7, to include a reference to recognized bodies; and suggestions on alternative definitions of "approval".

(iii) Improved Transparency

18. The representative of Finland on behalf of the Nordic countries introduced the revised proposal on "Improved Transparency", (MTN.GNG/NG8/43/Rev.1). Discussions in the Committee on Technical Barriers to Trade and with interested delegations had shown general approval of the proposal. A number of specific concerns related to Articles 2.5.2 and 7.3.2 where some delegations had proposed the deletion of the words "when a draft with the complete text of a proposed technical regulation is made available domestically", as this phrase might unnecessarily limit the scope of the text; Article 10.1.3 bis and 10.2.3 where some delegations had reserved their positions as to the extension of obligations to give information on bilateral and multilateral arrangements within the scope of the Agreement. Some delegations had pointed out a possible contradiction between the provisions of Article 10.2 and established practices in ISO for exchanging information on national standards.

19. As regards the comment that the reference to "government" should be deleted in paragraph 10.7, he recognised that in some countries the task of notifying had been delegated to a non-governmental body. However, the responsibility for the implementation of the obligations under the Agreement on notifications rested with governments.

20. With reference to MTN.GNG/NG8/11, paragraph 20 the Chairman stated that the secretariat had informed him that because of lack of financial and other resources it might not be possible for the Technical Co-operation Division to undertake the work suggested.

21. The representative of India said that recognising the financial and administrative burden that the implementation of the proposal on "Languages for Exchange of Documents" (MTN.GNG/NG8/W/44) might entail for certain Parties, a revised version of the proposal would suggest that under Article 11 on technical assistance a sub-paragraph be added to the effect that "Parties shall, if so requested by a developing country Party, provide copies of the documents covered by the notifications, in either of the official GATT languages". Translation of documents only upon request would considerably diminish the workload. He also suggested that Article 10.5.2 be amended accordingly.

(iv) Voluntary draft standards and their status

22. The representative of India said that the proposal in document MTN.GNG/NG8/W/45, related specifically to the activities of the central government bodies and therefore could not be taken together with the proposal by the European Economic Community on improving obligations at the second-level, at it had been suggested by some delegations in the past.

C. Agreement on Import Licensing Procedures

23. The representative of the United States introduced document MTN.GNG/NG8/W/53. The key elements were explained and summarized as follows: (i) explicit recognition of Article XI as they applied to licensing; (ii) tightened definition of automatic import licensing implying strengthened definition of non-automatic licensing, as well; (iii) requirement that non-automatic import licensing procedures corresponded in scope and duration to the import restrictive measure they were used to implement; and that they (iv) were no more administratively burdensome than absolutely necessary to administer the measure; (v) requirement to publish in advance circumstances under which exceptions might be made to non-automatic licensing procedures, with a publication requirement, as well, for specific exceptions actually granted; (vi) notification requirement of all licensing procedures, as well as changes to these and their GATT basis; (vii) elaboration of a review process whereby the Code Committee would examine licensing notifications, cross-notifications, licensing questionnaires, as well as the licensing regimes of signatory governments; and (viii) incorporation and strengthening of Committee recommendations regarding transparency, publication, time limits and other procedures.

24. Before describing the document in detail, the delegation added that the proposal did not contain degressivity requirement with regard to import licensing procedures but a requirement that to the extent that the import restrictive measure in question was degressive, the licensing procedure should be as well; neither did it contain separate dispute settlement provisions; nor did it imply that the Code Committee could pass judgment on import restrictive measures implemented through licensing procedures.

25. The representative of Hong Kong added that the area of import licensing had an undeveloped potential, and that by strengthening the Code's disciplines and transparency requirements one would contribute to a better order in international trade. Authorities using import licensing would be encouraged to examine the need and rationale for this or an ongoing basis. Transparency should give sufficient opportunity for interested parties to request information, consult and challenge.

26. A number of delegations stated that they shared the basic objectives of the proposal. One delegation added that considerable further thought might have to be given to the proposed new Article 8.2(b) that the Committee examine licensing regimes to ensure their GATT consistency. One delegation highlighted support for the provision ensuring a truly operative transparency allowing a more effective scrutiny both by countries implementing import licensing requirements and by other signatories. It agreed that the Code should not directly deal with GATT consistency of measures being administered through licensing, and also supported the explicit inclusion of language designed to limit the scope and duration of licensing procedures to the measure they were used to implement. Some delegations added that the text was an improvement upon an earlier submission on the subject. One delegation drew particular attention to the proposal concerning Article 3.5(k); believing that applicants should have the right to make known the reasons why licences had not been fully utilized.

D. Other Business, including arrangements for the next meeting(s) of the Negotiating Group

(i) The Agreement on Implementation and Application of Article VII (Customs Valuation Code)

27. One participant said that it intended to present a concrete proposal in the near future. The Chairman proposed that this Code, therefore, be included in the agenda of the next meeting.

(ii) Date(s) of future meetings

28. The Group will meet again on 16-18 October and 20-22 November 1989. At the October meeting the first day was set aside for the Codes on Technical Barriers to Trade, Import Licensing Procedures and Customs Valuation. The next two days were reserved for the Anti-Dumping Code.