MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG8/13
15 November 1989

Special Distribution

Group of Negotiations on Goods (GATT)
Negotiating Group on MTN Agreements and Arrangements

MEETING OF 16-18 OCTOBER 1989

1. The Group met on 16-18 October 1989 under the Chairmanship of Dr. Chulsu Kim (Korea). The agenda suggested in GATT/AIR/2853 was adopted.

A. The Agreement on Technical Barriers to Trade

2. The Chairman recalled that the most recent documents had been introduced at the previous meeting.

B. The Agreement on Import Licensing Procedures

3. The Group discussed document MTN.GNG/NG8/W/53.

4. A number of delegations welcomed the objective of increasing transparency and strengthening procedures in this field; some added that they appreciated that a number of concerns expressed with regard to MTN.GNG/NG8/W/16 had been taken into account. Many delegations considered the proposal as a good basis for further work but added that it in certain respects went beyond the procedural character of the Code, into areas of substance which appropriately belonged in other GATT fora. These delegations saw in particular the suggested new Article 8:2 as a proposal for giving the Code Committee jurisdiction to pass judgment on measures implemented through licensing procedures. The point was also made that paragraph 2(f) of new Article 5 went beyond the scope of the present Code and the role of this Negotiating Group. It was further noted that one objective was to increase the Code's membership and that this should be borne in mind. Some delegations expressed doubt about the practicability and usefulness of some notification and cross-notification requirements which had been suggested.

5. One delegation remained of the view that the distinction between substance and procedure was not clear, that the Code currently dealt with substance and that, in any event, the mandate of the Group permitted it to look beyond current provisions. With respect to the proposed new Article 5:2(f), an important role of the Committee was to provide transparency and for other parties it might be important to know the GATT basis for another party's implementation of a licensing procedure. Another delegation added that this particular proposal did not invite the Committee to pass judgment on import licensing measures themselves, nor their GATT consistency, and that only through notifications could the Code achieve the level of transparency which was needed for it to work effectively.

GATT SECRETARIAT
UR-89-0368

6. Clarifications were sought and comments made on the proposed additional publication, notification and consultation requirements in Articles 1:4, 3:5(c) and (g), inter alia on problems perceived vis à vis national laws and delays that could be created. It was also stated that the language suggested for a new Article 3:4 about exceptions was not appropriate in cases of emergency situations. One delegation said that this proposed new provision was the one element in the proposal on which it had reservations. One delegation raised a number of additional points, such as the reference to fluctuating quotas in a new Article 3:3; and the right of importers to give explanations in cases referred to in Article 3:5(k).

7. With respect to such comments, one delegation noted, inter alia, that national laws did not guarantee consistency with GATT instruments and that the proposed Article 1:4 was intended to provide an opportunity to discuss concerns parties might have, without necessarily imposing any further obligations. It welcomed other proposals and considered that points raised about time limits in Article 1:4 and 3:5 needed careful reflection. Concerning the proposed new Article 3:3 this delegation noted that cases occurred where quotas were managed on a month-to-month basis, sometimes on a firm-by-firm basis, and with frequent and unpredictable fluctuations. The proposal in new Article 3:4 that exceptions be notified, could in emergency cases mean ex post notifications.

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

8. The representative of India introduced document MTN.GNG/NG8/W/54 stating, inter alia that it was based on the apprehension that the present Code provisions were inadequate to deal with collusion between the importer and the exporter as confirmed by India's experience with implementation of the Code since August 1988. Cases of gross undervaluations had been noticed where in the commercial documents prepared by the supplier, the real transaction value was suppressed and the difference between the actual transaction value and the invoice value was settled in an unauthorised manner. In such cases, there was often no trace of evidence to establish fraud. The Customs authorities had thus to accept values which they knew were manipulated. Customs valuation had previously been based on the notional concept of actual value under Article VII which allowed the uplift of invoice values found to be low compared to other contemporary transactions. This mechanism had acted as a check against deliberate undervaluation whilst the Code, stipulating that the declared value must be accepted, acted as a great incentive to deliberate undervaluation. After its implementation it had been observed that the same importers received goods from the same exporters at much lower prices. Furthermore, undervaluation was noticed in cases where tariff levels were high and imports in substantial quantities. The undervaluation was a problem faced by all developing countries with high rates of tariff.

For countries and goods with low tariff rates, the practice of over-invoicing led to capital flight, which had been noticed in India as well and which was made possible by invoice manipulation through collusion. These effects, i.e. either loss of revenue or flight of capital, were the main reasons why a number of developing countries had not been able to accede to the Code. It was therefore necessary to provide for suitable flexibility to reject the declared transaction values where Customs were satisfied that invoice manipulation took place. A long term solution would have to be found, either by amending the Code or by concluding another Protocol. Alternative solutions could also be considered.

9. A number of delegations supported the proposal and the statement made. A number of other delegations argued that the concerns expressed could be fully addressed under the Code and its Protocol, as presently drafted, and within the framework of national legislations. Some of these delegations also thought that the problems mentioned could be dealt with in the context of technical assistance and in technical discussions within the CCC.

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

(i) Introduction and discussion of MTN.GNG/NG8/W/55; additional comments concerning previous submissions

10. The representative of Singapore stated inter alia, that the discussions in the Group had, in spite of many specific proposals, been without focus; the proposals had been presented and briefly commented upon in a piece-meal fashion. A real dialogue was needed; this required views and inputs from all parties, and agreement on the scope of discussions. In the light of the absence of a negotiating framework to adequately focus and structure the discussion, and the insufficiency of the existing checklist in this regard, her delegation had submitted document MTN.GNG/NG8/W/55 with a view to reaching agreement on the scope of discussion, as a starting point. The paper contained concrete proposals on principles and objectives to govern anti-dumping rules as well as substantive issues for negotiations, thus complementing document MTN.GNG/NG8/W/46 and other proposals before the Group. It attempted to consolidate many issues which had been raised, into a more coherent structure, and sought to ensure a balance between the right of importing countries to deal with problems caused by unfair trade practices and the need to protect the legitimate interests of exporting countries. The proposals were intended to restore the balance i.e. that anti-dumping actions should be taken only in cases of truly injurious dumping and not against normal business pricing practices. They were structured around Article VI of the GATT, aiming at making this provision operational, and at restoring its original intentions, stating more explicitly what was implicit in it and in the Anti-Dumping Code. Objectivity had been attempted but the elements in the proposed framework were of course not exhaustive and gave her delegation's views. It was therefore an open-ended structure, intended to stimulate other parties to present their inputs so that the Group could have a balanced agenda. The delegate of Singapore went on to explain the main points of the document.

11. Many participants expressed general support for this document and the introductory comments. Some delegations stressed particular points of substance which in their view were most important. Some participants welcomed in particular what they saw as a constructive initiative towards establishing a dialogue on anti-dumping in the Group, or in finding a balance between different interests, and agreed that there should be an in-depth discussion of the fundamental issues in relation to dumping and measures against dumping, in the present world economy, before beginning an examination of detailed drafting proposals. The view was also expressed that the Group should consider how a framework, or a set of objectives to direct the discussion, could be combined with the specific proposals and the revised checklist into a more comprehensive document to work on. A number of delegations stated that it was important that further proposals be tabled. Some delegations expected to present further suggestions to the Group.

12. One delegation, while sharing many of the objectives listed in MTN.GNG/NG8/W/55, as well as in other contributions, considered that, in general, the problems mentioned related to the way in which the Code was implemented. Therefore, rather than considering amendments which might introduce rigidities and prevent the particularities of each case from being assessed on their own merits, the NG8 should look at ways in which the implementation of the Code could better reflect its principles and objectives; this could be ensured through agreed interpretations without changing the fundamental nature of the Code. While supporting agreement on basic objectives before moving to specific drafting suggestions, it expressed caution with respect to the ways in which a number of the objectives outlined in MTN.GNG/NG8/W/55 could be made operational; some dealt with problems which related to a minority of cases.

13. Two other delegations expressed similar concerns. They considered that it might be useful for the Group to concentrate later on issues that might form the basis of negotiations and where progress could realistically be expected. One of these delegations added that the question of whether the mandate of the Group permitted possible revision of Article VI itself might also have to be discussed at some point, given new or additional definitions which had been proposed. The other delegation in question added that it would present its own proposals within the framework offered by the existing Code. It remained of the view that a major revision of the Code was both unnecessary and inadvisable. It strongly disagreed with the view that actions taken in accordance with Article VI and the Code were derogations from general GATT obligations, because measures taken consistent with obligations of GATT Articles and of the Code constituted legitimate administrative remedies to unfair trade practices. As such, they tended to bolster the fundamental objectives of the GATT.

14. One delegation said that differences in interpretation could stem from ambiguities in the Code itself. Implementation problems were also due to different perceptions of the fundamental objectives and intent of the Code; on this point some of the original drafters now took positions which differed from those which they had advocated earlier. In addition, there were increasing unilateral interpretations of rights and obligations. All these problems had to be addressed. The rigidity which was seen in some proposals should be seen in the light of the fact that the Code itself was intended to restrain the use of actions which were of a non-m.f.n. nature and implied unbindings of tariffs. What was needed were fair, open and equitable rules.

15. Some delegations stressed that they were not in a position to address all points at this stage, that they did not wish to repeat earlier statements, or that they were awaiting clarifications from other delegations. It was also said that some concerns of a fundamental nature might be easier to address under more specific issues in the checklist. Some specific points made in the general discussion have been incorporated in the summary below.

(ii) Discussion of checklist (MTN.GNG/NG8/W/26/Rev.2)

I. Objectives of Anti-Dumping Measures and Rules for the Determination of the Existence of Dumping

1. Preamble of the Code

16. The following were among the points made:

- pricing decisions in accordance with customary business practice and commercial considerations; and price adjustments to meet prevailing price competition, were not unfair trade practices and were not condemned under Article VI. It could not be considered unfair, if, for instance, a small supplier adapted its price to the normal pricing behaviour of major suppliers because otherwise it would never gain a market share;

- the preambular proposals dealt with a number of notions which were not contained in Article VI. To introduce such notions might mean, for instance, that in spite of a finding of dumping, the exporter could still claim absence of predatory pricing and, even if all the present conditions were fulfilled, he could still claim usual commercial practice, thus making the conditions of Article VI irrelevant. Furthermore, since notions such as "commercial considerations" and "predatory pricing" had no agreed definitions the question arose how the investigating authorities were to make their judgments. The introduction of such notions would reduce the protection offered by anti-dumping against unfair pricing to the extent that one might doubt the efficiency of any such remedy. It was a question

whether such a fundamental change had a realistic chance to be accepted in a system where the principle of free trade was conditioned upon the possibility to act against abuse of this principle;

- anti-dumping measures were not conceived to limit competition based on comparative advantage; this principle was worth being mentioned in the preamble. The concept of "commercial considerations" was intended to differentiate fair price competition from injurious price discrimination. This term was already embodied in Article XVII, including the notion that pricing behaviour was dictated by market conditions. The intention was not to change the basic concepts in Article VI, but principles that directed business in the real world ought to be mentioned;

- Article VI did not apply to situations of comparative advantage but to situations of dumping. It was a question how the principle of comparative advantage could be introduced in a useful way in a Code which dealt with situations in which such advantage did not operate;

- the original intention of Article VI had been compromised in anti-dumping practices, perhaps because some notions were only implicit;

- much which had been proposed was already reflected largely, either in Article VI or in the Code, which very explicitly condemned injurious dumping only and also provided the fundamental principle of anti-dumping not being an unjustifiable impediment to trade. Many concepts might be relevant to consider under specific headings, but in the preamble they might create ambiguities which might further frustrate the objective of clarifying and improving the rules;

- it was a question whether an administering agency would be able to determine who had comparative advantage, and whether the notion of comparative advantage, in the manner addressed, was consistent with dual requirements of injury and dumping in Article VI;

- the distinction between predatory price discrimination and normal business pricing practices normally required, in domestic competition law, that intent be proved. There would be a number of practical difficulties in obtaining evidence of such intent in an international trading context. Where dumping reflected adaptations to price levels in the importing country, price suppression or price depression would not have been caused by dumping and there would be considerable difficulty in establishing that material injury had been caused by dumped goods;

- the introduction of a requirement to take account of public interest could introduce a risk of determinations being made on the basis of political considerations, which would depend on the influence of competing pressure groups;

- a cross-lobbying was normal and assisted the authorities in having access to all relevant viewpoints. This should be favoured over an unconditional right to domestic producers to have an anti-dumping protection as soon as the dumping, injury and causality requirements were fulfilled.

2. Article I of the Code

17. The following were among the points made:

- support was expressed for adding two new sentences to Article I, as proposed in MTN.GNG/NG8/W/51;

- it was noted that export prices often did not reflect comparative advantage because of protection in domestic markets;

- clarification was sought as to what provisions of the Code were conceived to entail a risk that local content requirements, quantitative restrictions or price cartels, be introduced. An anti-dumping duty normally led to a higher price and better sales opportunities for the domestic supplier, but this could not mean a risk of local content requirements being created. Reduced demand for the foreign good could not be considered a q.r., and the investigating authority should not have to make a cartel investigation;

- in practice, anti-dumping has been used as a trade policy or industrial policy tool and had lead to measures like cartels, q.r's, etc. An understanding that this should not happen had to be recorded somewhere;

- anti-dumping proceedings were introduced on the basis of complaints in very precise situations, where also the effect of measures in a wider context had to be considered; if this amounted to industrial policy so did also that proposal to introduce a public interest test;

- when the investigating authority was aware that a cartel existed among domestic producers, anti-dumping measures should be applied with particular care.

3. Price alignment

18. See paragraph 16 above.

4. Interpretation of the expression "introduced into the commerce of another country"

19. The following were among the points made:

- the general rule should be that anti-dumping investigations be initiated at the latest stage possible; but in special circumstances it should be possible to begin earlier, i.e. after conclusion of a contract. The possibility to initiate the investigation at the stage when the potential buyer was only comparing tenders would create an element of price uncertainty that might decisively tilt the choice in favour of domestic producers. It was difficult to see how a product could be considered exported from one country to another before a contract existed;

- signatories had expanded the meaning of "introduced" which went against the narrow interpretation which Article VI:1 (and Article VI:6(a)) required, and which was also the intention in Article 5 of the Code. If a product had not been imported, it could only hypothetically cause material injury;

- a strict interpretation was necessary, as in the case of the term "sales";

- in a competition for an important contract, domestic producers would not fail to launch an anti-dumping complaint in order to get the competitive edge. The responsibility of the investigating authorities then became particularly great, but the less than clear criteria in Article 5 had made it possible to apply a rather low threshold. The importer ran the risk of having to pay an additional bill, and this already constituted a deterrent to importation which should be taken into account when considering the relative importance of various factors.

- the text of the footnote to Article 2:1 and 5:1 suggested in MTN.GNG/NG8/W/48, was acceptable with the elimination of the words "as a general rule";

- it was explained that the reason for using the words "as a general rule", was to clarify that the general rule was the crossing of the border but that exceptional situations could occur;

- it would not be possible to support any proposal which limited initiation of investigations to instances of actual imports. Special circumstances where early initiation was essential included tenders for large capital items. Reference was made to footnote 6 to Article 3:6 of the Code concerning threat of material injury. Furthermore, early initiation forewarned importers; and in terms of transparency it was better that the possible impact of anti-dumping measures be predictable and known well in advance. It was beneficial to both traders and domestic industry that remedial action be available at the time of import rather than by levying retrospective duties;

- where a contract or an irrevocable offer was made, that contract or offer could be just as damaging to the competing industry in the importing country as an actual importation, in particular in the case of "big ticket" or made-to-order items where sales tended to be few and far between. Once a contract or irrevocable offer had been made, the domestic producer might have suffered a decline in prices and, concurrently, lost the opportunity to make a sale, thereby quite possibly suffering material injury as a result. The same applied to sales which were made well before importation;

- as indicated above, injury could be caused by the effect of a tender on the pricing practices of the domestic producer. The Code was clear that in the examination of injury, price suppression was a critical factor;

- it was noted that a proposal similar to that on Article 2:1 and 5:1 also had been made in relation to the fixing of exchange rates (Article 2:7) and that special circumstances were also dealt with under item III:3 in the checklist;

- the problems of proof in establishing the terms of offers made it impossible to determine whether dumping occurred. The proposal in MTN.GNG/NG8/W/40 could therefore be a workable compromise;

- this matter was an example of ambiguity in the Code. A standard interpretation was needed.

5. Interpretation of the term "like product" in Article 2:2

20. The following were among points made:

- the proposal in MTN.GNG/NG8/W/40 was supported, with an addition to indicate that anti-dumping duties should only be applied to a finished product, if the existence of dumping was proven for the finished product itself, if there was material injury or threat thereof to domestic production, and causality between the import of the dumped product, as finished, and the injury;

- existing practices had expanded the definition of "like products" and thus the scope of anti-dumping actions to inputs and components. These were actions on non-like products, contrary to the Code. The problem was thus one of implementation.

6. Legal structure of the exporting company in the context of the determination of the normal value under Article 2, paragraphs 2 and 4

21. The following were among points raised:

- the aim behind this suggestion in MTN.GNG/NG8/W/28 was to avoid manipulations of legal structures with the objective or consequence of dissimulating dumping. Although the present Code justified taking such attempts into consideration, it would be an advantage for the sake of legal certainty that this be expressed explicitly;

- concepts in MTN.GNG/NG8/W/28 were abstract such as "attempted to take advantage", "artificially lowered", "certain corporate structures", "legal structure should have no influence", "artificially low". If such situations were to arise the question was how to tackle them in a fair way. The proposals in MTN.GNG/NG8/W/30 and 48 which related to Article 2:6 (item I:12 and 13 in the checklist) should be taken up in this connection. The Code referred to fair comparison of price at the same level of trade. Nonetheless, some countries deducted certain costs and profits of related companies from the export price, but not so in ascertaining domestic sales price. Also, in certain countries normal value was arrived at by comparing weighted domestic averages with individual export prices. It was

questionable whether such asymmetrical comparisons were justified under present rules but if these were not clear enough, they should be made clear;

- a domestic price had to cover both production and marketing activities and this had to be taken into account in establishing normal value. If legally separate companies worked together to perform functions that had to be considered together, they had to be considered one economic entity. For the sake of clarity the Code should confirm this reasonable interpretation. The concern expressed in MTN.GNG/NG8/W/28 was unrelated to those of the other two submissions. It dealt with the establishment of normal value which was a different matter from the export price and the subsequent comparison.

7. Treatment under Article 2:3 of products imported from a third country

22. No statements were made.

8. Definition of the circumstances in which the normal value cannot be determined on the basis of home market prices in the exporting country (Article 2:4)

23. The following were among the points made:

- in response to a point of clarification it was explained that direct sales were more clearly discernible than resales and that this was the reason for the distinction made in MTN.GNG/NG8/W/48;

- no difficulties had so far been encountered in establishing a price when sales were made via a sales organization of the domestic producer;

- according to the Code, domestic sales were to be used whenever possible. When not possible, the establishment of a ratio might be considered, if it was borne in mind that the actual volume of sales might often be important in making a ratio operationally effective.

9. Order of preference between export sales to third countries and constructed value as alternative methods to determine the normal value under Article 2:4

24. It was stated that:

- the present Code was adequate on this point; a clear hierarchy might lead to a rigidity not adequately taking into account the specific interests of the exporter;

- a hierarchy might also have advantages in providing the exporter with certainty as to which of its prices would be used.

10. Calculation of the amount for administrative, selling and other costs and for profits in constructed value calculations under Article 2:4 (constructed value methodology

25. Among points made were the following:

- support was expressed for the proposals in MTN.GNG/NG8/W/48, with the addition of the criteria suggested in MTN.GNG/NG8/W/40;

- the problem was that investigating authorities arbitrarily determined profit margins and administrative costs instead of considering the normal commercial situations of the country of origin. The Code could be made more explicit in this regard;

- the Code should be reasonably interpreted to require the use of actual expenses; if necessary this had to be made clear. However, the reason for using constructed value could be the absence of profitable sales. Strong reservations were therefore expressed against introducing a minimum percentage value. The Group might consider whether or not some proxy formulation was advisable, which did not have the effect of imposing a profit margin that was unrelated to the nature of the industry involved.

11. Allocation of costs of production in the case of certain high technology products

26. It was argued that when changes of costs of production were so rapid as in these products, it deserved attention.

12. Comparison of normal value and export price under Article 2:6

27. Concerning the question of comparison in general, the following were among points raised:

- support was expressed for the proposal in MTN.GNG/NG8/W/48, which was necessitated by arbitrary implementation of the Code which on this point ought to be clear;

- the Code was drafted so as to allow signatories the flexibility to develop the technical rules necessary to administer their laws, including developing specific rules for identifying and quantifying particular adjustments; this was in recognition of the difficulty in foreseeing the particular circumstances of exporters in the many unique situations that might arise. It was not clear what specific rules were being proposed in this area;

- the proposals in MTN.GNG/NG8/W/48, page 5 and chart 1 of NG8/W/30 were founded on the cardinal rule to compare the export price and the domestic sales price. The seven items suggested reflected the fact that the current Code was too flexible. The chart intended to address situations where a subsidiary was involved both on the domestic and export

side. Under Article 2:5 for purposes of calculating the export price, one should look at the price at which the imported products were first resold to an independent buyer. It was difficult to see why costs relating to sales by subsidiaries to such buyers were not taken into account;

- in practice problems arose from asymmetrical adjustments. Whether or not there should be lists of criteria or factors, the central principle should be that in making comparisons there must be equal price adjustments. The most reasonable and simplest would be to adjust all costs of sales and distribution back to ex factory with reasonable allocation of general costs;

- it was difficult to establish very strict criteria but an attempt should be made to prepare a list as exhaustive as possible that could cover, e.g. sales conditions, discounts according to volume or quality of client, credits, the existence of monopoly or other special situations;

- what was to be compared was a normal domestic price with an export price in the exporting country, not on the importing market. The basic situation was a sale to an independent importer, not the example in the chart in MTN.GNG/NG8/W/30. The price was the ex factory price and costs linked to the export transaction occurring in the exporting country;

- the rationale behind adjustments and comparisons was the profound difference between international trade and conditions in a single market. In the latter access to all segments was equal and prices would be equalized whatever the indirect selling expenses in different regions were. In international trade the crux of the problem was the inegality of market access;

- it was not reasonable to disregard certain selling expenses by subsidiaries in the importing country, whereas the corresponding expenses were including in the normal value. If it was a question of putting the product on the market at the disposition of the consumer, all the expenses required for this should be taken into account;

- Article 2:6 required that due allowances be made for elements which affected price comparability. There was a need for a clear understanding of what affected such comparability, and the extent to which allowances should or should not be made for elements having a less than direct effect. One should also recognize the differences between paragraphs 5 and 6 of Article 2. The former dealt with related parties - situations where the export price had to be derived from the first arms-length sale, from which comparison with normal value was to be made;

- the reason why certain costs were in practice not taken account of with respect to sales subsidiaries in the importing country, was to treat this kind of exporting transaction in exactly the same way as a sale to an independent importer, where the costs of importation were not considered. To discuss this was to discuss deviations from the Code as regards establishment of export price.

28. Concerning the question of how to obtain facts, the following were among points made:

- an exporter that considered itself entitled to an adjustment should demonstrate its claim through the presentation of specific evidence because, with respect to any given sale, it might be entitled to as many as half-a-dozen or more potential adjustments. More importantly, the information needed to demonstrate such entitlement was usually completely within its own control and unless it was required to present it, the administering authority had no way to verify the claim or take it into account in a fair way;

- adjustments should be automatic but the parties might be required to provide necessary additional information;

- the specific facts had to be provided by the parties. However, the authorities should draw their attention to the Code provision about adjustments, lead the investigations and pose the relevant questions, in order to get all relevant specific facts and figures;

- the company had to present its case, but the point was that the authorities should take into account the seven items in MTN.GNG/NG8/W/48; if not, the company's efforts would be of no avail.

13. Use of weighted averages in the comparison of export price and normal value

29. The following were among comments made:

- the problem arose from practices where the normal value, established on a weighted-average basis, was compared to the export price on a transaction-by-transaction basis. Thereby, dumping might be found merely because a company's export price varied in the same way as its own domestic price. Even when domestic profit margin was the same as in the export market, any variations in the export price would, due to the disregard of negative dumping margins, cause dumping to be found, or a dumping margin to be increased;

- if negative margins were included in the calculation, one would not deal with instances in which dumping was targeted to a particular portion of a product line or to a particular region; sales at fair value in one region or in one portion of a product line did not offset injury caused in the other;

- given the definition of like products in Article 2:2, it was difficult to see the relevance of the product line argument. Injury to producers in certain areas presupposed market segmentation which was dealt with in Article 4:1(ii);

- the issue at stake was masked, selective dumping, the effects of which could be considerable;

- an important question was whether non-dumped imports should also have to be included in the examination of injury.

14. Margins of dumping and exchange rate fluctuations

30. Among points made were the following:

- support was expressed for the proposal in MTN.GNG/NG8/W/48;

- margins caused by temporary exchange rate fluctuations should be ignored, and so should margins caused by sustained fluctuations, unless the exporter failed to change its price within a certain time period;

- in circumstances of dramatic exchange rate fluctuations a precise date might not be practicable.

15. Price comparability and inflation

31. It was argued, inter alia, that inflation could seriously undermine the relationship between the value of a product and the monetary unit. Under mechanisms of price realignments variations in a good's price would occur less frequently than exchange rate adjustments. Expressed in a foreign currency the price would depreciate rapidly but when the realignment of domestic prices took place would suffer sharp increases. Normal and export price had therefore to be compared on the basis of average exchanges. Other difficulties which arose were e.g., the treatment to be given to credit sales. The producer, when fixing his price, would incorporate his expectation of inflation which might reflect past experience.

16. Determination of normal values in situations referred to in Article 2:7

32. It was said that, in general, questions left pending in the Ad Hoc Group could usefully be taken up in NG8.

17. Input dumping

33. It was said that this issue had arisen in large measure, because of changes in the nature of global manufacturing methods, in particular the ease with which multinational companies could source products. The aim should be to provide an effective deterrent to practices of this sort without unduly burden international trade.

II. Determination of the existence of material injury

1. Price undercutting and price alignment (Article 3:2); and
2. Comparison of dumping margin and level of price undercutting (Article 3, paragraphs 2 and 4)

34. The following were among points made:

- while being open to a discussion of a possible strengthening of the Code's provisions as to the determination of material injury, it would be difficult to accept price leadership as an overriding defence, particularly where there was not always a dominant supplier. Price suppression and price depression might well be due to factors other than dominant "price leadership";

- to narrow the enquiry to whether imports where "price leaders" or not would require criteria to determine "price leaders". If the determination was in the negative, the questions arose whether enquiry into factors such as price suppression and price depression would become irrelevant and whether an importer who merely matched one "leading price" would have an absolute defence. If proponents of this modification were suggesting automaticity in injury determinations, the fundamental question was whether the Group was prepared to accept one single factor as dispositive of the injury and causation enquiry;

- price behaviour was a major issue in any injury determination but it was difficult to envisage situations with an a priori no-injury finding; this would probably also involve a kind of investigation that would be extremely difficult to carry out.

3. Minimum percentage of market penetration below which no affirmative injury determination could be made (Articles 3:2 and 5:3)

35. Among points made were the following:

- the concept of a penetration threshold would increase certainty and be particularly helpful for small suppliers and new entrants. Information collected by the secretariat showed that actual duties had been imposed in much less than half of the cases investigated. A threshold would go a long way in reducing the burden of having to go through a large number of investigations;

- the proposed threshold of 5 per cent was acceptable;

- it should not be necessary to apply anti-dumping duties to an insignificant volume of imports, even if these were dumped;

- since conditions varied between products and sectors there could be a general guideline with possibilities for deviations, subject to explanations;

- a given volume of imports in one industry might have little or no impact, while the same volume might have an important effect in another industry; a non-rebuttable de minimis level would prejudice an industry producing the latter type of product. Foreign producers might hold a large market share in the importing country for a long period of time without causing material injury whereas a smaller volume of imports might be particularly capable of causing material injury when the demand for the like product was inelastic and there was a high degree of substitutability. Similarly, a small volume of imports might be important in an industry characterized by externalities (e.g., each sale increases the exchange of technical knowledge between domestic producers), indivisibilities, capital intensity or learning efficiencies;

- material injury had in practice occurred even below the proposed threshold;

- depending on the number of suppliers, their size and whether one was dominant, injury might be found below an artificial threshold. On the other hand, no injury might be found for larger market shares;

- the issue of threat of injury had to be borne in mind.

4. Cumulative injury assessment

36. The following were among points made:

- it made sense to cumulate all unfairly-traded goods and examine their effects in unison. A prohibition on cumulation "across Codes" might constitute an invitation to potential dumpers or subsidizers to split their practices. It was not justified to establish a de minimis threshold because a given volume of imports from a number of countries might have a hammering effect equal to the sum of the individual, unfairly-traded, volumes;

- investigating authorities should avoid mechanic approaches and should consider the relative impact from each source. The language of the Codes did not justify cumulation "across" them;

- the Code required that findings be applied only to those imports which could reasonably be expected to contribute to the injury;

- the practice of some signatories contravened the causality requirement; cumulation meant emphasizing the injury aspect alone;

- under the concept of cumulation dumping by one major supplier could lead to penalization of a number of smaller suppliers. Cumulation should be resorted to only in narrowly defined circumstances;

- cumulation increased the likelihood of dumping being found and had the practical effect of involving all suppliers, which could amount to a general restriction on imports;

- cumulation might be particularly harmful for producers in certain countries if differences in the conditions of production were neglected;

- the question was one of injury and not of comparative advantage;

- quantity could be a very important injury factor and the authorities should not be denied the possibility to cumulate imports which were comparable. However, cumulation should not be applied automatically, disregarding individual situations.

5. The concept of "material injury" and the causal relationship between this concept and dumping (Article 3:4)

37. It was said that the causal relationship merited being strengthened and that further proposals might be submitted.

6. Determination of the existence of a threat of material injury (Article 3:6)

38. No comments were made.

7. Definition of the term "domestic industry" in Article 4:1

39. The following were among points made:

- the ideas expressed in MTN.GNG/NG8/W/22 were supported;

- the terminology should not necessarily be the same under this item as under item III:1 below. Making a 50 per cent threshold basis for the determination of "standing" implied that injury could only be assessed on that portion of industry which supported an anti-dumping petition;

- a 50 per cent rule was better than the notion of major proportion. Seen in conjunction with the proposal in MTN.GNG/NG8/W/51 regarding Article 5:1 the criterion for initiating an investigation should be that producers representing at least 50 per cent clearly stood behind the complaint, and that this should be verified;

- the producers of inputs and components should be excluded from the notion of domestic industry;

- the question of input products which had arisen in the field of agricultural subsidies might be worth noting since similar situations might arise for industrial products in the anti-dumping area;

- it should be made clear that the definition of domestic industry included producers of primary as well as processed agricultural products, when the producers concerned shared substantial economic interests, and there was a continuous line of production between the products concerned;

- a rigid requirement would not deal with a situation of dynamic change in relative shares of production.

8. Definition of the term "related" in Article 4:1(i)

40. It was clarified that the Committee understanding referred to had been reached in 1981.

III. Initiation and conduct of anti-dumping duty investigations

1. Definition of the term "domestic industry" in Article 4:1

41. The following were among points made:

- the standard which should apply to the right to petition, might well be different from the standard concerning final assessment of injury, (dealt with under II:7 above);

- the reference to Article 4 in the footnote to Article 5:1 might be taken to mean that what was defined was the same in both provisions.

2. Procedures to verify whether a petition has been filed on behalf of the affected industry

42. The following were among points made:

- Article 5:1 required that the request should be presented by duly authorized representatives of the domestic industry, and that the authorities should verify their standing. However, as this was not always done, the amendment proposed in MTN.GNG/NG8/W/51 was very much to the point;

- of the proposals made, MTN.GNG/NG8/W/51 seemed to be the most complete.

3. Meaning of the expression "special circumstances" in Article 5:1

43. See under paragraph 19 above.

4. Interpretation of the expression "introduced into the commerce of another country" in the context of the initiation of anti-dumping investigations

44. Sympathy was expressed for the proposal in MTN.GNG/NG8/W/48 (item V) that the date for fixing of exchange rate adjustments be the date of the contract of sale.

6. Definition of the term "interested parties" in Article 6:1

45. Some delegations stated that they agreed with the proposal in MTN.GNG/NG8/W/51. It was noted that the proposed illustrative list, (which should include labour unions organized within the affected industry) comprised parties which could present evidence. It did not deal with who were entitled to launch a complaint.

7. Explanation of preliminary and final determinations (Article 6:2)

46. One delegation stated that it supported the proposal in MTN.GNG/NG8/W/51.

8. Explanation of how factors other than dumped imports have been considered in the examination of the causal relationship between material injury and dumped imports (Article 8:5)

47. The following were among points made:

- support in principle suggestions which aim at increasing transparency and improving explanations of reasons why a certain finding has been reached. There were several similarities between the standing of an investigating authority and a court in civil law disputes; the authority should invite the parties, (including the "other interested" parties), to present views and evidence and it should explain its conclusions on this point as well;

- while supporting transparency, it was unclear whether the proposal implied an obligation to examine, in all cases, the factors other than dumping, even factors not raised by the parties or factors which were not relevant;

- it was replied that the intention was to prevent unreasonable decisions.

Items III.5 and 9-12

48. The Chairman recalled proposals but no substantive comments were made.

IV. Price undertakings

1. Criteria and time limits for the acceptance of offers of price undertakings (Article 7)

49. The following were among points made:

- new conditions should not be introduced because undertakings should be accepted more easily;

- improvements would be welcomed if the objective was encouraging solutions that were consistent with the Code. The Code currently required undertakings to be on the basis of price. Quantitative undertakings might be considered, but should not be allowed to become a form of market-sharing;

- one of the developments that had caused concern was the use of quantitative undertakings;

- quantitative undertakings should remain the exception but experience showed that they in certain cases were by far preferred by exporters and could imply much less hardship for these than price undertakings;

- quantitative undertakings might be a good solution except if it were later to be found that there had been no injury, or no dumping;

- in many cases exporters did not have a choice but to accept quantitative undertakings if they wished the investigation to be terminated.

2. Revision and termination of price undertakings (Article 7, paragraphs 5 and 6 and Article 9)

50. It was said that issues which had been discussed in the Ad hoc Group merited further discussion in NG8. No specific views were offered on this particular issue in the checklist.

3. Level of price increase under a price undertaking (Article 7:1)

51. Support was expressed for the proposal in MTN.GNG/NG8/W/51, if its intention was that price increases should not exceed what was necessary in order to eliminate injury or the margin of dumping.

4. Price undertakings in anti-dumping duty investigations involving imports from developing countries (Articles 7 and 13)

52. Some delegations said that if the Code Committee accepted a draft recommendation on this issue, it would be natural to incorporate it in the Code.

E. Other Business, including arrangements for the next meetings

53. Following a statement by the Chairman on how to proceed at the next meeting in the area of anti-dumping, a number of delegations expressed their views on the Group's further work in particular as to how and on which basis to structure the work in this field.

54. The Chairman concluded that at the next meeting, the Group should discuss any new proposals on anti-dumping, continue with the discussion of the checklist, beginning with item V, and come back to earlier papers. The Group would also revert to the question how to further structure the discussions. It was his intention to hold informal consultations on the structure of the negotiations, during that meeting.

55. The Group agreed to meet on 20-22 and 24 November 1989, the first three days set aside for the Anti-Dumping Code.

56. It also agreed to meet on 31 January - 2 February 1990.

57. The Group noted the Chairman's suggestion that further meetings be held on 21-23 March 1990 and 2-4 May 1990.