

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)

Negotiating Group on MTN
Agreements and Arrangements

MEETING OF 20-21 AND 24 NOVEMBER 1989

1. The Group met on 20-21 and 24 November 1989 under the Chairmanship of Dr. Chulsu Kim (Korea). The agenda proposed in GATT/AIR/2873 was adopted.

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

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

2. The Group discussed items V-X of the checklist, as summarized below. Some additional points which were made in general statements are incorporated. In further comments on other items in the list some of the views or concerns summarized in MTN.GNG/NG8/13 were reiterated.

V. Imposition and collection of anti-dumping duties

1. Imposition of anti-dumping duties in an amount less than the full margin of dumping (Article 8:1)

3. A number of participants supported the lesser-duty principle and the proposals to this effect in MTN.GNG/NG8/W/28 and 51. It was argued, inter alia, that:

- anti-dumping measures should not unjustifiably impede international trade and should apply only if dumping caused or threatened to cause material injury;

- if dumping was actionable when it caused injury, it was logical to try to measure the extent to which injury required measures to be taken;

- the current lesser-duty rule had to be strengthened to ensure its application in practice; when dumping was a minor factor of injury anti-dumping action should not be taken at all.

4. Other delegations supported a non-mandatory approach, some of these noting that this was not only what the current Code required but also what conceptual and practical enforcement difficulties called for. The following difficulties were among those mentioned:

- a mandatory rule might necessitate the calculation of a specific margin of injury for each individual exporter; it might also involve regular reviews of that margin;

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- a concept such as margin of underselling would not be acceptable as an equivalent to the notion of margin of injury, because of frequent market price movements, and because market prices might be depressed due to dumping, thereby adding to the difficulty of determining either the margin of underselling or the margin of injury. In addition, material injury could be found in circumstances where no margin of underselling was apparent;

- to make it mandatory to impose duties in amounts adequate to remove injury would be to suggest that there were some measurable levels of injury that were less than the margin of dumping. This stretched the limits of a neutral and objective analysis and amounted to suggesting that the injury was accounted for by the dumped imports alone. Article 3:4, however, recognized "other factors".

5. One participant explained that it operated a "dual" system whereby the dumping and injury determinations were carried out by different bodies, with periodical reviews of margins of dumping. One participant said that it had a system of lesser-duty collection, which was not mandatory but which required the responsible minister to consider the desirability of taking such an action. This limited discretion recognized the difficulties involved, particularly when there were large numbers of models or products were complex. Another participant, operating an automatic system which was designed to be as juridical as possible, believed that a mandatory approach would create a discretionary element which could lead to politization of the process and make it extremely difficult to administer.

6. One participant explained how it established the price which was required to remove injury; it was not necessarily a price equal to that of the dumped imports plus the price undercutting: it could mean a price which allowed domestic producers to realize reasonable benefits, to be able to invest, to undertake R & D activities etc. Some degree of weighing of different elements was needed, but it was possible to arrive at a relatively concrete figure for a kind of "ideal price". While one had to take account of the fact that injury could stem from factors other than dumping experience showed that it was possible to distinguish the impact of important factors, such as, regression in demand.

7. A number of delegations stressed the need for further discussion on the basis of practical experience. Some of these added that domestic procedures should not be an impediment to improving the Code. One participant noted that the problem of price movements had been dealt with by some countries in the framework of reviews and refund operations. A similar system ought to be possible to operate under a system where definitive duties were calculated for each entry. One delegation considered that the question how to arrive at a remedial measure if there were "other factors" than dumping could be discussed further in another context. One delegation maintained that it was not only a question of types of systems; even without operating a "dual" system itself, it considered that conceptual and practical difficulties indicated something short of a mandatory requirement.

2. Extension of the application of anti-dumping duties on imports of finished products to imports of parts and components of such products or to newly developed products

8. The following were among the points made:

- a stand on substance would not be taken before an expected Panel report had been issued and examined;

- at the time the GATT had been drafted such that a given product was manufactured in its entirety in one country and exported to a second country. Today production was globalized, parts being manufactured in two or more countries, assembled in a third and exported yet to a fourth location. New methods had permitted firms to take advantage of the modern commercial system to evade or circumvent anti-dumping measures. If parts and components, taken as a whole, or newly-developed products, were so similar to the product initially investigated so as to be, in essence, the same or like product, and if they were imported from the source subject to the anti-dumping finding, and if also other factors indicated circumvention of the anti-dumping duty, it might be appropriate to apply this duty to such imports. However, measures against circumvention should be consistent with Article VI and the Code, and be taken in a transparent manner with sufficient procedural safeguards;

- this item was related to item IX below and was one of the central issues in the negotiations. Even if a specific aspect of a possible reaction to anti-circumvention was before a panel, the Group had the obligation to look into this matter with all the necessary care and attention it deserved. The suggestion made concerning the treatment of parts was a possible way of reacting to an attempt to circumvent a legitimately imposed anti-dumping duty. It would be interesting to hear whether participants accepting the principle of acting against circumvention would deal with the matter in any other way. Measures had to be consistent with the GATT but had also to be practicable. A full investigation of all parts and components of a product assembled in the country of export would make the possibility to react to circumventing illusory;

- it was not justifiable to impose anti-dumping duties on imports of newly-developed products, without additional investigation, except when a newly-developed product could be regarded as the same as the original product. Thus, it was necessary to establish criteria, such as physical features, purpose and ways of use, to determine whether a new product should be considered the same. Abuse of so-called anti-circumvention measures had occurred, impeding legitimate trade and investment;

- the Group was faced with the important challenge to design multilaterally accepted rules to deal with problems of genuine circumventions;

3. Imposition of anti-dumping duties on exporters who have not been investigated

9. The following points are amongst those made:

- support was expressed for the footnote to Article 6.1 proposed in MTN.GNG/NG8/W/48 without the correction in the corrigendum to this document. The proposed footnote to Article 8:2 was an acceptable basis for further discussion;

- Article VI required that goods that had not been dumped should not be subject to anti-dumping duties. For companies that had not been investigated and companies that had not been exporting during the investigating period, and companies that were unrelated, no facts could exist to indicate that these had been dumped and caused injury, and they should not be subject to any anti-dumping measure;

- this question was perhaps the most difficult in the checklist in so far as the imposition of anti-dumping duties on independent exporters who had not been investigated was a serious infringement on legal rights under the Code. On the other hand, it had been easy to circumvent anti-dumping duties by using dummy companies. Since it seemed difficult for the original dumper to use any company in such a way, it was suggested for consideration that anti-dumping duties could be imposed without investigation, temporarily, when it had been established that the exporter and the original dumper were related;

- practical problems required reasonable application of the principle referred to. Sometimes an investigation had to be restricted to a representative sample of a great number of companies; then necessarily there was an extension of the results to other companies. If this in certain situations was the only way to take efficient measures against dumping, the question remained how to limit excessive application by other means, e.g. through reviews/refunds. As to newcomers and the use of strawman companies, again, a general principle was not enough; in this case one solution was to impose so-called residual duties, combined with the possibility for a newcomer to rapidly establish that it was not related to any of the exporters investigated and that, therefore, there was no risk of circumvention. A relatively recently established practice was to carry out a quick, simplified review, limited to establishing a situation of a newcomer company, unrelated to any of the exporters examined individually;

- as a general rule, anti-dumping duties should only apply to companies investigated, since they were to be applied against companies rather than countries. Where new exporters entered markets they should request to be investigated and supply information voluntarily in order to be excluded from any dumping duties imposed in other exporters;

- while it was preferable to investigate all exporters, it could sometimes be impossible, if a result was to be rendered in a timely fashion. Where the number of investigated firms had to be limited, every effort should be made to allow any company, not selected for investigation, to submit information voluntarily provided that such information was reasonably complete and could otherwise be considered within the timeframe. If such an opportunity was provided it was reasonable to assign to the firms not investigated and which had not effectively requested separate treatment by virtue of submitting a voluntary response, an average rate based on the exporters which had been investigated. If such average rates were not assigned, investigated firms could easily avoid their specific rates by reincorporating themselves under a different name or by setting up dummy corporations. The representativeness of the investigated firms would assure that the results reflected the commercial activity of all firms concerned. Moreover, in systems where anti-dumping duties were assessed retroactively, every exporter had an opportunity to make certain that any duties actually levied were equivalent to the actual margin of dumping;

- the suggestion that new entrants provide voluntary information might not fit small exporters that might not be aware of investigations;

- while a company-specific investigation and company-specific anti-dumping duty was desirable, Article 8:2 made it possible to name the supplying country, as an exception. However, this was not the practice of a certain signatory which also sometimes subjected uninvestigated companies to the highest anti-dumping duty.

4. Consideration of public interest criterion in the decision to apply anti-dumping duties

10. A number of participants gave an outline of their laws and practices making, inter alia the following points:

- in one country there was an administrative, investigatory mechanism that operated according to transparent and objective procedures, taking into account the information and arguments of those alleged to be dumping as well as those alleged to be injured by dumping. It would better serve the public interest to allow such systems to operate in a non-discretionary manner, without introducing potentially subjective tests. No information was entertained which dealt with political, foreign policy or national security matters; only the facts relating to dumping and injury to domestic industry were taken into account. To the extent that so-called public interest determination prevented injured industries from receiving appropriate relief, one risked generating pressures to resort to solutions which would provide less by way of procedural due process, automaticity and objectivity than currently available under a highly judicial anti-dumping procedure. As the determination of what was in the public interest was a matter of governmental discretion anyway, there was no reason to make a public interest clause mandatory;

- one legislation provided for an independent examination as to whether the full imposition of a duty was in the public interest, given possible implications for other industries, consumers, and the economy in general. A trade tribunal had the right, on its own initiative or at the request of any interested party, to conduct an examination of public interest, which was separate from the injury determination and would take place after the injury finding had been issued. Interested parties were invited to present views. The tribunal, if satisfied that the imposition of a lower amount was in the public interest, would make a recommendation to the Minister of Finance. Since the inception of this provision in 1984, one such report had been issued (in 1987) which had led the Government to substantially reduce the duty in question;

- much depended on how such a clause was applied in practice. It was important not to compare the interests of different parties in any automatic or simplified way; the importance of various criteria were extremely difficult to quantify and assess: e.g. the simple fact that prices increased could not, by necessity, be considered to be against the interests of the consumers. However, experience showed that, in general, such a clause did not necessarily obstruct the objective of anti-dumping measures; there could be situations in which it was necessary to have the possibility, in the framework of a legal procedure, to look into interests of possibly negatively affected parties. If defined on the basis of criteria that could be reasonably assessed and could lead to conclusions that were not in themselves subjective, such a clause could be very beneficial;

- following an independent study in 1986 one Government had endorsed the finding that no explicit national interest provision be written into legislation. The reasons had been, essentially, that such a clause would add to the uncertainty of proceedings, lead to administrative complexity, and increase costs to users. In current practice, the relevant authority could take a broader perspective in examining issues such as material injury, and causal link, giving the relevant Minister discretion not to impose duties or to impose lesser duties than those recommended. The legislation also allowed for complaints about dumping to be made by any person on behalf of an industry affected, e.g. a primary producer might lodge a complaint in respect of injury being caused to a processor. In this sense, action was not limited solely to directly affected parties, although any measures would have to be in accordance with the Code;

11. Some participants considered that present laws tended to protect the interests of the sector seeking protection and that the authorities ought to give all concerned parties an opportunity to comment at all stages of an investigation. Some delegations said that while the concept of public interest should be incorporated into the Code, this should not lead to discretionary, subjective, or arbitrary procedures. Some of these participants believed that instead of a mandatory rule, there could be a recommendation or guideline in the matter. It was said, inter alia, that

the only guidance at present was contained in the last sentence of Article 8:1, which could be strengthened, while keeping with the discretion of national authorities. Some delegations said that it was a normal practice of interest groupings to lobby, and that it was difficult to see why this should present particular difficulties in the area of anti-dumping. It was also argued that a public interest clause was feasible as shown by the procedures available in some countries.

12. Some participants noted that anti-dumping remedies themselves served the public interest by providing a means to offset injury without impeding fair trade.

5. Criteria for the reimbursement of excessive anti-dumping duties (Article 8:3)

13. One delegation recalled that a proposal in MTN.GNG/NG8/W/40/Add.2, was relevant to this issue. Another delegation recalled that if the exporter and importer were related, the export prices were to be calculated by deducting the costs and profits of the importer from the resale price. However, one signatory considered the anti-dumping duty to be a cost incurred between importation and resale and therefore, even if the resale price was increased by the amount of the anti-dumping duty, no refund was given. The signatory in question replied that an anti-dumping duty was a cost and that there ought to be no differentiation between a related and unrelated importer. Current regulations required (full or partial) reimbursement of the duty paid by an unrelated importer if the price was increased so that the dumping margin disappeared (fully or partially). It had to be presumed that a related importer passed the amount of the anti-dumping duty on to the first independent buyer.

6. Duration of provisional measures (Article 10)

14. One delegation stated, inter alia, that massive imports over a short period constituted a difficult problem when a thorough investigation was required prior to the imposition of provisional measures and moreover, the period between provisional and definitive measures was short. The solution to the problem could be to extend the duration of provisional measures or to make it more feasible to impose anti-dumping duties retroactively. Exporters normally requested extension of the duration of provisional measures which indicated that they had an interest in making the investigation in the "definitive phase" as complete as possible.

7. Retroactive application of anti-dumping measures (Article 11)

15. One delegation stated that provisional measures were difficult to apply due to the conditions of Article 11:1(ii).

VI. Duration, review and termination of anti-dumping measures

1. "Sunset" clause (Article 9:1)

16. A number of delegations expressed their support for the introduction of a clause establishing a time-limit for the duration of anti-dumping measures. One delegation said that it was still not convinced of its

necessity. Some delegations explained the functioning of their respective systems:

- in one country there was a clause whereby definitive measures ceased three years after they had been first introduced; out of about thirty cases only in one or two there had been applications for measures to be re-imposed;
- in another legislation anti-dumping findings could be reviewed at any time within five years and, if there had been no review, they would lapse at the end of the fifth year;
- current practice in one country was to provide for annual reviews and revocations if for four previous years there had been no requests for reviews. "Sunset" procedures could serve useful purposes for all parties concerned but the mere passage of time was not a basis for the termination of measures unless there was adequate provision for evaluating dumping and injury;
- another participant practiced a system of review upon request and automatic termination of action after five years (unless a new request had been lodged). This was a reasonable sharing of the burden of proof.

17. The point was made by some participants that a "sunset" clause would imply the filing of a new application with new evidence whereas a review clause would put the onus on the exporter. Today's trading environment with quick and marked changes and with a number of factors influencing pricing practices, made it most reasonable to put the onus of proof on the domestic producers that there was a need for continued measures after a certain number of years. One delegation added that in a certain country anti-dumping duties could be applied for excessive periods of time, and although a dumping margin was reviewed annually, injury was not reviewed after the original investigation.

2. Mandatory review of anti-dumping measures after a certain period of time (Article 9:2)

18. Some delegations supported the proposal in MTN.GNG/NG8/W/40, because in practice reviews were often not conducted until after several years. It was also explained that the proposal in MTN.GNG/NG8/W/15 had been made because one signatory had applied measures for excessive periods of time. Some participants added, however, that the need for a mandatory review would depend on a "sunset" clause.

19. One delegation expressed sympathy for the notion of a review based on request; its own current practice reflected this. One delegation said that most systems provided for this possibility. In its own case review would occur after a lapse of one year but earlier reviews were granted for newcomers subject to "residual" anti-dumping duties. It was difficult to see why an exporter who did not request a review, should have the right to burden authorities with a mandatory revision. The burden of proof should represent no problems for the exporters as the information required was at their own disposal.

VII. Anti-dumping action on behalf of a third country (Article 12)

20. One participant noted that Article 12 allowed a signatory to request another to take anti-dumping action on its behalf. However, the decision whether or not to proceed with the case rested solely with the importing country and if it agreed to take action, it had to seek the approval of the CONTRACTING PARTIES as a whole. Article 12 might be amended to state that dumping should not materially injure or threaten material injury to industries of other exporting countries. If this occurred, however, the solution could be along two possible lines: apart from the existing right to request action the injured party should have the right of immediate consultation with the party which was dumping. If such consultations did not ameliorate the problem, the matter should be able to be referred to Article 15. In reply to concerns expressed by another participant it was stressed that the proposal was not to remove sovereign rights to decide but to remove the requirement for prior approval by the Contracting Parties of any decision to take anti-dumping action on behalf of an affected third country. The other solution was to use the Code's dispute settlement procedures.

21. One delegation agreed that the problem was a serious one. It might be necessary to address the constraints contained in Article VI and, in any event, the Group should consider Article 12 of the Code to determine if remedies could be strengthened, within the parameters of Article VI.

VIII. Repeated Dumping

22. One delegation stated that this problem was of particular concern. One of the shortcomings of the Code was lack of adequate provisions to deter injurious dumping from occurring in the first place, as shown by repeated dumping by certain exporters in recent years. The Code did not require or advise authorities to draw any distinction between exporters which had never been subject of an anti-dumping finding and exporters on which there had been multiple findings, particularly when those involved similar products over a relatively short time-span. It was essential to consider whether distinctions in terms of procedures and remedies should be drawn for such cases, because customary procedures and remedies were not sufficient to relieve or deter such unfair trade. Companies which decided to engage in repeated dumping apparently regarded anti-dumping laws and proceedings as simply another cost worth sustaining in the course of enlarging their market shares. This practice had already taken a considerable toll on sectors ranging from basic industry to high technology manufacturing. Remedies might include accelerated investigation procedures and early withholdment of appraisement in order to allow the retroactive assessment of duties beyond the time currently allowed by the Code.

23. One delegation agreed that the problem was serious and well known to those authorities which had to protect an attractive open market. Another delegation stated that any action had to be within the boundaries of the definition of dumping; otherwise retaliation might be caused with restrictive effects on trade.

24. Additional points were made in the course of the introduction and discussion of MTN.GNG/NG8/W/59 and Add.1. (See below).

IX. Circumvention of anti-dumping measures

25. One delegation referred to MTN.GNG/NG8/W/59 (see below), adding that it was beyond question that circumvention practices ran counter to the purpose of Article VI and the Code. Exporters subject to anti-dumping measures should not be permitted to nullify these by way of slight changes in production or shipments methods or by other means. If unchecked, such activities would lead to rapid and serious deterioration of the confidence in Article VI and the Code. Care had to be taken, however, that any procedures be transparent and that measures be implemented only to prevent the circumvention of legitimately imposed measures and not for GATT-inconsistent purposes.

26. One delegation stated that it entertained a certain scepticism with regard to this issue. Another delegation recalled that this matter was about to be dealt with in a GATT panel.

27. One participant responded that the said panel was to decide on the basis of the present Code. The issue was of fundamental importance because there was a risk that anti-dumping remedies would become widely inefficient, which was not in the interest of any party. A further delegation agreed that the Code should provide an effective and practical response to circumvention, to keep its balance of rights and obligations. Absence of rules had led to administrative measures that did not have a clear justification under the GATT or the Code.

X. Indemnization of exporters

28. The following were among points made:

- the proposal in MTN.GNG/NG8/W/51 had been made with the objective in mind that anti-dumping measures should be taken with restraint, and that all measures and procedures should be used with great care and in accordance with the Code; investigating authorities were responsible for ensuring that the petitions received were justified before action was initiated. A multilateral dispute settlement procedure was proposed, either a panel or a body with a surveillance responsibility, which would provide objective and neutral conclusions or recommendations;

- for exporters the mere initiation of an investigation could represent harassment and burden on trade. It was therefore reasonable to consider international compensation if a contracting party did not act in accordance with obligations;

- it would be easier for the investigating authority to resist unfounded complaints if there were some kind of internationally agreed response when investigations were contrary to agreed GATT rules. The

proposal that indemnization could only take place following dispute settlement procedures meant that any request for indemnization would be subject to impartial GATT scrutiny;

- the notion of compensation for failure to comply with obligations was a new concept which was not supported;

- it was a question whether, in order to discourage frivolous complaints, the focus should not be on how Article 5 could be improved;

- it was relevant to consider the frivolous injury caused by the exporter against which presently no action was available. In a great number of anti-dumping cases the complaint had been introduced after companies had reached as much as 80 per cent market share through dumping. If it was felt that it was presently too easy to launch a complaint, the solution lay in the conditions of the complaint itself.

(ii) Introduction and discussion of MTN.GNG/NG8/W/59

29. The representative of the United States introduced MTN.GNG/NG8/W/59. The written statement will be found in addendum 1 thereto.

30. A number of delegations welcomed this contribution to the work of the Group, some stressing the open-mindedness and readiness to discuss which had been mentioned in the introductory remarks. Some participants stated that they shared the objective to strengthen procedural standards and to improve predictability and transparency of anti-dumping proceedings. The proposal on the determination of threat of material injury and those dealing with wider access to information and independent reviews of anti-dumping decisions were highlighted as interesting by some speakers.

31. Some delegations stated that the approach was fundamentally different from that of delegations who would like to see the concept of dumping examined, and who considered that price differentiation in international trade in most cases was not to be condemned as an unfair trade practice. The proposal was based on the "classical" concept of dumping, with no distinction between price differentiation due to normal commercial practices as opposed to aggressive or predatory pricing policy. In the discussion, it was also said, inter alia that the use of the price as a measure in international trade competition should not be excluded, all the more so since competition law strongly encouraged the use of that means of competition in national trade. It was also stated that anti-dumping measures should be used with restraint and not as disguised safeguard measures or as instruments of protection; however there was a growing perception among many countries that through unilateral interpretations of basic objectives, anti-dumping measures were being used to combat not only genuine dumping, but also normal and accepted commercial pricing practices.

32. According to another view the fundamental differences in the Group were the attempts to redefine Article VI as opposed to attempts to make the Code more efficient in a certain number of respects. It would be difficult

to redefine the notion of dumping in a way that did not remove it of all substance. While the Code was a solid basis and had been a useful instrument, a number of improvements and practical applications might be considered. However, it would not be realistic to ignore the experience of the largest importing markets and the statistics which showed no evidence that anti-dumping measures had, in a global sense, so far been a trade-restrictive device. The future negotiations should recognize this.

33. A number of participants agreed that circumvention, input dumping and recidivist dumping, represented serious problems which deserved careful attention. It was important that attention be given to the question of multilateral disciplines within the Code on new methods of international sourcing and supply with the scope this offered for transfer pricing that undermined the remedies provided by Article VI and the applicable provisions of the Code. One delegation said that in its own experience, very commonly, it had been the importer who had instigated the attempt to circumvent the duties, by changing source as soon as measures applied to a country. Some delegations added that strengthened anti-dumping procedures should not give rise to protectionist devices and further arbitrariness.

34. Some delegations said that the fundamental question for the negotiations would be to find ways and means to combine a strengthened discipline in cases of genuine abusive pricing practices with the need to prevent unwarranted anti-dumping actions against pricing practices made necessary by an increased dependence on and a presence in an international market. These delegations expressed doubts that progress could be achieved by a prolonged debate on fundamental principles and thought that a more pragmatic approach might be more fruitful involving an examination and negotiation on specific Code rules.

35. One participant stated that the new document was a contribution to a balanced discussion focusing on very important issues for the negotiations, such as circumventions and the possibility to combat these; transparency and how to better define injury and causality. While sharing many concerns of substance, there might be different perceptions on a number of technical issues.

36. One delegation stated that it approached the negotiations as a user and as an exporter; since the Group had to take a compromise approach, it was encouraging that many delegations had mentioned the need for a dialogue and open mind.

37. One delegation said that the Group should discuss and reach an understanding on the fundamental distinction between genuine dumping and accepted normal commercial pricing practices. Anti-dumping rules should explicitly recognize and accommodate the latter, which comprised (i) prices reflecting the fact that more efficient companies could produce at lower costs; (ii) prices covering a producer's marginal costs only with very low profits for a period until start-up production costs had been amortized or until an adverse economic situation had changed or with very low profits on a more permanent basis. In this connection it was not fair when, presently, importing authorities constructed normal value by using average

profit prevailing in the exporters market or profits of other producers which had no relevance to the investigated company's profits and which had led to determination of dumping margins when none really existed; (iii) sales below costs or without profits, under certain circumstances, for example, during a recession, when it was normal commercial practice to reduce production volume and prices in order to maintain the market position; (iv) situations where the exporters were price takers and adjusted to the prices of the domestic industry in the importing country or to different market demands; it was normal business practice to price a product differentially in markets with differing demand curves, competitive environments or marketing requirements.

38. One delegation stressed that a balanced outcome required recognition of the basic objective of anti-dumping systems. There was a need to reaffirm these basic principles as much as it should be reaffirmed that action could be taken on any injurious dumping and that the Code could be strengthened also along those lines.

(iii) Introduction and discussion of MTN.GNG/NG8/W/40/Add.2

39. The representative of Korea circulated and introduced additional written proposals, subsequently circulated as MTN.GNG/NG8/W/40/Add.2. A number of delegations welcomed this contribution. Some of these made initial comments.

40. With respect to item A, two delegations shared the concerns expressed whilst another delegation wondered what was meant by the phrase appearing in the proposed amendment to Article 2:5 and the footnote "to make the value of the product that is resold to an independent buyer equivalent to the value of the product imported".

41. Some delegations sought clarifications with respect to item B. A concern was expressed that under certain circumstances price provisions could be manipulated and margins artificially eliminated. The question was asked what other evidence might be considered in determining whether price charges had been fictitious. In response it was explained that the new Article 2:8 had been proposed as a result of experience with a provision about fictitious markets which one signatory had in its anti-dumping legislation.

42. Two delegations expressed interest in item C whilst another delegation wondered how to define temporary and sustained exchange rate fluctuations. Concerning the proposed amendment to Article 3:1 (item D) one delegation wondered how consideration of other interests than the domestic economy could play a determining role in whether or not a domestic industry was materially injured.

43. With regard to item E the representative of Korea explained that an advisory opinion was intended as a written interpretation of laws and regulations. For instance, if an investigating authority found that a certain expense could not be considered as an adjustment element in calculating constructed value, it should establish transparent procedures

to make such an interpretation available to the public, in view of the fact that it could be used as a criterion for future investigations. One delegation expressed doubt as to the practicability of the proposal. Another delegation considered this proposal useful.

44. Comments on other items were not of a detailed nature except that one delegation stated on item F that it was difficult to see how investigating authorities could know whether a transaction-specific date was significant or not.

(iv) Summing-up

45. The Chairman stated that he saw it as his responsibility as Chairman to offer suggestions as to how the Group could best organize its discussion, with a view to entering the intensive negotiating stage as early as possible in 1990. It was his intention to present well before the next meeting, a paper containing a proposal to this effect, which would be put forward on his own responsibility without prejudice to the negotiating positions of any delegation. The following considerations would guide him: (i) First, he considered that the basic purpose was to provide the Group with a structured agenda which would allow it to proceed expeditiously with intensive negotiations in 1990; (ii) secondly, the proposed structure would have to be drafted in such a manner as to reflect in a comprehensive and balanced way all issues raised in the Group. Different perceptions existed of problems in the area of anti-dumping which were reflected in differences in priorities of participants. Inevitably, a comprehensive and balanced agenda would have to allow for discussion of both issues of a general conceptual nature and more specific issues.

46. Noting that a number of participants had indicated that they intended to present further proposals to the Group, he urged these delegations to do so at the latest by 20 December 1989 so that these proposals could be taken into account in the preparation of his structure. He referred to the agreement reached in the GNG that proposals be on the table before the end of 1989.

47. The Group agreed with this way of proceeding.

B. The Agreement on Technical Barriers to Trade

(i) Languages for Exchange of Documents

48. The representative of India introduced document MTN.GNG/NG8/W/44/Rev.1, stating that in discussions held with interested delegations most of those who had spoken had considered the changes made to go in the direction of limited workload and financial burden by limiting translations to specific requests from developing country Parties only. Some delegations had also suggested a further limitation, to documents covered by specific notifications only.

49. One participant thought that no substantial problems would exist if all the Parties followed the TBT Committee's recommendations. To impose burdens only on some Parties would create an increased imbalance in

obligations between those using GATT working languages and those which did not. It added that while it was aware of the need to provide technical assistance to developing countries, one should bear in mind that translations were of commercial interest to all Parties.

(ii) Processes and Production Methods (PPMs)

50. The representative of New Zealand introduced document MTN.GNG/NG8/W/58 adding that in preliminary comments in the Committee on Technical Barriers to Trade a number of delegations had expressed general support for its intent and some of the proposed provisions such as the equivalency principle. Comment had been, however, that this principle might be made wider. In response to a question she added that the proposed amendment to Annex 1.1 was not intended to change the current definition of "technical specification" although questions about definitions would have to be reviewed.

51. As a general comment one delegation said that it supported the thrust of earlier proposals and that this new proposal was a carefully constructed and interesting one which merited further study. One delegation, supporting this view, referred also to its own earlier proposal on the subject. Other delegations also expressed general support. One of these stressed that the principle of equivalency was essential given the difficulty for an importing country to test a product; the concept of a hierarchy was also necessary so as to discourage arbitrary use of PPMs. At some stage one would have to discuss the circumstances under which a PPM-standard could be chosen in preference to a product standard.

52. One delegation emphasized that a preference ought to be expressed in terms of performance characteristics of products; this would make it easier for importers to determine conformity and would not prevent manufacturers from considering alternative means of reducing costs, achieving desirable quality levels, etc. As nevertheless there might be instances where it could be more desirable or appropriate to express regulations in terms of PPMs, this delegation agreed that the notion of equivalency would introduce a desired element of flexibility.

(iii) Accreditation Systems

53. The representative of the United States introduced document MTN.GNG/NG8/W/60, noting that it was complementary to previous proposals on testing, inspection and approval procedures. While some proposals paralleled existing Articles on certification systems, some language had its origin in other proposals on the table.

(iv) Other proposals in the negotiations

54. The Group confirmed the Chairman's understanding that the situation was as follows with regard to the topics discussed:

- with regard to the proposals on transparency, a revised version of MTN.GNG/NG8/W/43/Rev.1 was expected before the end of 1989; the other proposals were MTN.GNG/NG8/W/34/Rev.2, 36, 37 and 44/Rev.1.

- on the subject of conformity assessment, a revised version of MTN.GNG/NG8/W/50 was expected before the end of 1989; two further proposals were expected early in 1990; the other proposals were before the Group in MTN.GNG/NG8/W/52 and 60;
- as regards the proposals relating to second level of obligations, an additional proposal about local government bodies and regional bodies was expected early in 1990; the proposals tabled were MTN.GNG/NG8/W/35 and 49;
- also a proposal on voluntary standards and their status had been submitted in MTN.GNG/NG8/W/45.

55. The Chairman recalled the end-of-year target date which had been set by the Chairman of the Trade Negotiations Committee for the submission of proposals. He invited delegations to make every effort to submit any new proposals by the end of the year.

(v) Non-paper by the secretariat

56. The Chairman stated that already some of the proposals had been drafted in the form of precise texts. It had been suggested that the secretariat prepare a non-paper setting out the proposed provisions side by side with the present Articles of the Agreement. Such a paper should give helpful indications as to the scope of the future work. On his suggestion, the Group agreed to request the secretariat to begin preparing such a paper in consultation with interested delegations.

C. The Agreement on Import Licensing Procedures

57. The delegation of Hong Kong introduced document MTN.GNG/NG8/W/53/Rev.1 explaining amendments made after having heard the comments of other delegations. The delegation of the United States reviewed discussion which had taken place in the Committee on Import Licensing the foregoing day. A number of other delegations addressed general and/or more specific issues. Main points made are summarized below.

General points

58. A number of delegations said that they either shared the objectives and several of the elements in the proposal, or that generally the amendments made to the original proposal went in the right direction. Some of these delegations added that they would wish to see further improvements. It was also said that any proposal which impinged upon policy aspects or aimed at imposing obligations on the Parties for justifying the use of import licensing would not be acceptable as it would considerably expand the basic objectives of the Code.

Preamble of the Code

59. One delegation considered that the first new preambular paragraph was inappropriate because it was not the intention of the Code to ensure the consistency of import licensing with the substantive GATT principles and

obligations; the second preambular paragraph seemed to be in replacement of a current preambular paragraph and it was not clear why Article XI had been specifically mentioned; concerning the third preambular paragraph it was unclear whether the reference was to procedures only. Other delegations also expressed preoccupations with the suggested two first preambular paragraphs. In reply it was stated that the thrust of the Code was to a large extent to uphold GATT principles. Article XI had been referred in particular because it was the principle GATT provision that gave rise to licensing procedures. The intention was not to disregard other provision which were also relevant to licensing.

Article 1:4

60. It was explained that the revised language reflected the intention to create a "best-endeavour" obligation, and the idea that the use of earlier opening dates would be exceptional.

61. One delegation said that the political and administrative system in its country did not permit consultations with other governments before making changes in policies or procedures. It was open to affected trading partners to make representations on a post facto basis, either bilaterally or multilaterally. The proposal to give an opportunity to make comments in writing and discuss these upon request would therefore not be acceptable. The quota system was in its country not normally used for administering import restrictions. Certain normative criteria were prescribed for allowing imports of restricted items and when licensing was introduced or changed one was not normally in a position to give advance notice. However, the interests of importers were fully safeguarded by allowing them to make imports in accordance with the earlier import policy if they could show that the contracts had already entered prior to the change in import licensing.

62. One delegation said that it had understood the purpose of Article 1:4 to be to introduce transparency but the procedure proposed would create administrative burden, especially when the authorities had to deal with many products at the same time. Another participant said that prior consultation procedures might be cumbersome in practice; some licensing tended to be introduced in the safeguard framework, which by definition was an emergency situation.

63. In response, it was noted that consultations on matters related to trade was a generally accepted principle. If the problem was only a practical one this delegation would be open to suggestions.

Article 1:6

64. One delegation stated that giving advance notice of closing date for the submission of licensing applications could in its view lead to misuse unwarranted by commercial considerations. The suggestion that there should be a maximum of two bodies to approach did not seem justified as long as the norm of one administrative body had been fixed. Due to administrative complexities import of certain items might need the clearance of more than two bodies.

Article 3:3

65. One delegation considered that the proposal opened the possibility of discretionary licensing which was at present not allowed. Other delegations suggested that this matter be discussed further. It was stated that if the view was shared that discretionary licensing was prohibited under the Code, the provision in its current form might not be needed. It might nevertheless be useful to reflect this understanding. In practice discretionary licensing did take place and could be particularly trade distortive. Proposals for a more operational language would be welcomed.

Article 3:4

66. It was explained that the amendments introduced a requirement that would add greater transparency and discipline. A requirement that licensing requirements be published would become considerably less meaningful if exceptions were granted without transparency. Other participants held that there were practical problems involved e.g. it was difficult to predict exceptional cases when importation could not take place within a prescribed period.

Article 3:5(a)

67. It was argued that introduction of the words "or distortive" might have uncertain implications. In reply, it was argued that the GATT was concerned with discrimination as well as restrictions themselves.

Article 3:5(g)

68. Some delegations said that the proposed language caused them concern. One delegation said that the proposal was not the only option for achieving the objective of reducing waiting time. Annual performance measurements might also be introduced. Developing countries capacity should also be taken into account. In reply reference was made to the Code Committee's recommendation.

Article 5

69. Most comments dealt with the reference to "GATT basis" in paragraph 2(f), on which a number of participants maintained reservations. Some delegations, however, supported the paper on this point as being particularly relevant. The drafters continued to feel strongly that it was necessary to incorporate that reference, having made it clear that only transparency was intended. One delegation said that the notification requirements were useful for transparency reasons but that they should be simple enough not to create a heavy administrative burden. A cross-notification mechanism should first allow a Party to request another Party to notify its own licensing procedure itself. One delegation added that since it was developing countries which had recourse to import licensing on account of balance-of-payments difficulties, the incidence of consequential administrative burden would fall unequally on these. It was replied that Article 5:2(f) dealt with restrictive licensing and a basic

element of transparency was the willingness to state the "GATT basis". If other Parties did not agree on a stated GATT justification, the Licensing Committee was not the proper forum in which to address it, but this did not make the notification itself any less useful.

Article 8

70. It was stated that licensing procedures were not always possible to separate from underlying measures, and that the Code itself did not always make such a clear distinction. Since it had not been the intention that the Committee should have an unlimited right to pass judgment on import licensing policies per se, the reference to the "General Agreement" had been deleted. However, the drafters had not in the revised version attempted to find their own language to other delegations' concerns. The intention behind the proposed new paragraph 2 was only to provide a framework for general review of notifications.

71. One delegation said that the far-reaching proposal in new Article 8:2 had been revised in the right direction but could be made still more specific and clear, possibly by using the reintroduced language of Article 1:1. Another delegation said that the requirements were over ambitious and that "GATT basis" did not belong to the Licensing Committee; the Code should not be extended beyond ensuring that the procedures used did not have more restrictive effects than the restrictive measures themselves.

72. Some delegations said that the suggestions as now drafted did not go beyond the Code's area of responsibility but would serve an important purpose of improving the current notification and review procedures to ensure that the Committee fulfilled its functions within the purpose of the Code and be a good basis on which to make assessments as to whether licensing regimes were administered in a way that was no more trade restrictive than the measures themselves. Another question, however, was the consequences or follow-up to a review.

Other points

73. In final, general remarks by two delegations it was held, inter alia, that licensing was extensively used in developed countries and might have important effects on trade interests of developing countries. On a trade weighted basis new disciplines might be of net benefit to the latter; in the last analysis it might be worth paying for a Code which was more transparent, disciplined and fair and equitable.

74. One delegation stated that it hoped to be in a position to present more precise views on questions concerning export licensing.

75. The Chairman urged delegations who wished to pursue specific ideas with more precise language, to come forward with suggestions as soon as possible, hopefully before the end of the year. He also invited delegations to consider how the Group could most usefully organize its work as from the next meeting onwards.

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

76. The representative of Brazil introduced document MTN.GNG/NG8/W/57, stating that he fully supported the proposal in MTN.GNG/NG8/W/54 which his delegation believed should also encompass cases of over-invoicing. Under-invoicing practices had led to considerable fiscal evasion, and government authorities, bound by the provisions of the Agreement, found themselves in many cases powerless to reject the declared import value. Over-invoicing was a means of sending capital abroad illegally from countries which, by necessity, administered exchange controls. These two problems were very real and resulted in the loss of much needed foreign currency in developing countries. In principle it was true that the Agreement's existing provisions covered these situations and did not barr customs authorities from ascertaining the exactness of the information provided. But, for developing countries in particular, the ability to fully verify the truthfulness of information had been very limited, be it through the reluctance on the part of exporting countries to furnish the necessary information, be it through the lack of technical resources to maintain an efficient customs data base. This was the background for the second part of the proposal, related to technical cooperation. Bearing in mind the wish to expand participation in the Agreement, it was desirable to complement technical cooperation efforts by, for example, periodic reviews in the Committee on Customs Valuation of the programmes undertaken in this field and examining ways in which they could be improved, exchanging information on individual experiences in implementing the Agreement. If, as many delegations had stated, the present text of the Agreement fully covered the concerns expressed it should not be difficult to find a way to reiterate this understanding multilaterally, through an amendment to the existing text or a new protocol. This would have the advantage of establishing a multilateral framework to guide the drafting of national legislation in such a way as to avoid the creation of additional barriers to trade while at the same time assuring a more effective control over illegal invoicing.

77. A number of delegations welcomed the new contribution and gave it general support; as a complement to the proposals on undervaluation in MTN.GNG/NG8/W/54. Some of these delegations noted in particular the absence of appropriate information. One participant added that this had made it necessary for many governments to seek cooperation with independent entities. Another participant added that technical assistance could be improved by access to information sources in developed countries. Two delegations stressed in particular that technical cooperation and informative material were not enough, but that a legal standard was needed.

78. One delegation stated that it fully shared the view expressed in paragraph 10 of MTN.GNG/NG8/W/54 that leaving the solution to national legislation "could lead to distortions in the implementation of the Agreement and divergent practices could consequently become barriers to trade". This delegation was open-minded as to the legal form in which the proposed flexibility would be introduced but, at this stage, was inclined towards an amendment of the Agreement.

79. One delegation, while agreeing that over-invoicing was another serious problem faced in implementation of the Agreement, felt that it was not as serious a problem as undervaluation. Technical assistance or discussions within the CCC as suggested by some delegations would not, however, resolve the difficulties as undervaluation could not be established without adequate documentary evidence, which would not be available in the case of invoice manipulations through prior arrangement between the importer and the exporter. Article 17 of the Agreement and paragraph 7 of its Protocol did give customs power to make inquiries to satisfy themselves of the genuineness of a declared value. However, as these provisions had limited application in cases of invoice manipulation, national legislations based on these provisions would not be of help. In consultations which this delegation had held with other delegations some had reiterated the inadequacy of the existing provisions of the Agreement to deal with situations of invoice manipulation; others, having drawn attention to the relevant Advisory opinion of the Technical Committee, had opined that a suitable provision to shift the burden of proof could be made in national legislations. None had suggested that shifting the burden of proof to the importer to establish the genuineness of the declared value would be inconsistent with the provisions of the Agreement. Some delegations had felt that the two situations pointed out in MTN.GNG/NG8/W/54 overlapped. However, in the view of this delegation the situations were different. The first was the case of imports where comparison was with reference to a series of transactions involving previously accepted customs values of goods imported at or about the same time. The second situation referred to importations from countries other than the country of manufacture, where the comparison was with reference to imports of identical goods from the country of manufacture. In both cases problems would arise when the declared value was appreciably less than the previously accepted customs values. This delegation favoured a provision to be made in the Agreement itself but could consider alternative solutions which had the effect that responsibility to prove the genuineness of a declared price in specified situations be with the importer. If the latter failed to satisfy customs it should be permitted to reject the declared value under Article 1. This would meet the concerns of developing countries on revenue leakage to a large extent and would open the way for many more countries to join the Agreement. The multilateral solution would ensure uniform application of the Agreement and the trade would get the message that invoice manipulation was no longer easy.

80. One delegation stressed in particular that although the Technical Committee in its Advisory opinion had stated that customs administrations were not required to rely on fraudulent documents and had the right to assess the situation, it was not an easy task for administrations of developing countries, lacking up-to-date information and a modern data base. Regarding paragraph 7 of the Protocol, it could hardly be expected that an importer submitting a false declaration would cooperate fully in order to establish the genuine transaction value.

81. One delegation stated that the current Agreement and Protocol in its view were appropriate but that there was a need for appropriate technical assistance and cooperation.

82. One delegation stressed that it had an open mind; the questions discussed dealt with one of the most important areas of financial planning of enterprises and had a direct effect on trade flows.

83. One delegation stated that undervaluation in its country had damaged or could potentially damage national industries. Actions to combat undervaluation within the terms of the current Agreement included adoption of a vigorous anti-fraud campaign, imposition of automatic penalties where omissions or misdescriptions resulted in underpayment of duties and procedures for the rejection of the transaction value where the importer could not satisfy the administrative authority that the transaction price was not designed to obtain a reduction of or avoid a duty.

84. One delegation recalled its position that the Agreement allowed sufficient flexibility and was an adequate framework. It also recalled the statement made in June 1988 by another participant (ref. MTN.GNG/NG8/7, paragraph 33). The idea that technical experts exchange views on how to make most efficient use of technical assistance, was interesting; technical experts met regularly at the CCC which was an appropriate forum in this respect.

85. The observer for the Customs Co-operation Council recalled efforts made within the CCC to deal with fraud in general and the burden of proof in particular mentioning, inter alia, the recommendations transmitted to the Group (MTN.GNG/NG8/W/33). Considering that legal provisions could not, in themselves, resolve the problems of fraudulent valuation, the CCC stressed the improvement of valuation services in the developing countries, and was about to draft a handbook on the control methods used by the main users of the Agreement. This indicated that the Technical Committee and the CCC were sensitive to the problems under discussion. The weak developing country participation in the Agreement had brought the CCC, at its session in July 1989, to examine a proposal designed to encourage developing countries with difficulties in applying the Agreement, to apply the Brussels Definition of Value as an intermediate step. The Council had agreed to promote the GATT Agreement while at the same time inviting its signatories to show understanding for the problems of the developing countries. Noting that MTN.GNG/NG8/W/54 raised the questions of burden of proof, and the means of providing proof, he recalled the Advisory opinions on these two issues. Given the fact that some delegations were not satisfied with these, he hoped the Group would be able to arrive at a satisfactory solution.

86. One delegation stated that the BDV could not be thought of as a transitional mechanism to the GATT Agreement because these two systems were fundamentally different in nature.

87. The Chairman stated that this agenda item would be reverted to at the next meeting.

E. Other Business including arrangements for the next meetings of the Negotiating Group

(i) Proposals on behalf of the Least Developed Countries

88. The Chairman recalled MTN.GNG/NG8/10, paragraphs 29-30 and drew attention to the communication from the delegation of Bangladesh in MTN.GNG/NG8/W/56.

(ii) Further meetings

89. The Chairman recalled that the Group had agreed to meet on 31 January - 2 February 1990.

90. The Group agreed to hold additional meetings on 21 - 23 March 1990, with the possibility of commencing on 20 March; and on 2 - 4 May 1990, with the possibility of commencing on 1 May 1990.