MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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Negotiating Group on MTN
Agreements and Arrangements

MEETINGS OF 31 JANUARY-2 FEBRUARY AND 19-20 FEBRUARY 1990

The Group met on 31 January-2 February 1990 under the Chairmanship of Dr. Chulsu Kim (Korea) with GATT/AIR/2905 and Add.1 as the agenda. It met again on 19-20 February 1990 under the Chairmanship of Ambassador J. Weekes (Canada), with GATT/AIR/2926 as the agenda. The present note combines these two meetings.

A. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE[1]

(i) Transparency

The representative of the United States stated that her delegation would attempt to incorporate comments received concerning the proposal on Bilateral Standards-Related Agreements, which might include bilateral and multilateral agreements and revisions in the area of notifications. With reference to India's proposal on Languages for Exchange of Documents, one delegation said that while it agreed with the general objective of increasing transparency, there were cases in which it would be reasonable to provide translations of summaries. The representative of India stated that this suggestion was acceptable to his delegation.

(ii) Conformity assessment

The representative of the European Economic Community stated that a new submission on conformity assessment would be tabled for the March meeting.

The representative of Canada introduced MTN.GNG/NG8/W/69 dealing with certification systems in the Agreement.

(iii) Second level of obligations

The representative of the European Economic Community introduced the revised proposal entitled "Code of Good Practice for the Preparation, Adoption and Application of Standards in the Agreement on Technical Barriers to Trade" (subsequently circulated as MTN.GNG/NG8/W/71).

(iv) Processes and production methods

The representative of New Zealand informed the Group of discussions which had been held on document MTN.GNG/NG8/W/58.

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[1] Discussed at the meeting of 31 January-2 February 1990

(v) Dispute settlement procedures

The representative of Finland, on behalf of the Nordic countries, introduced document MTN.GNG/NG8/W/58. One delegation stated that the suggestions would need to be studied carefully.

B. THE AGREEMENT ON IMPORT LICENSING PROCEDURES[1]

The Group agreed to establish an Informal Group, open to all interested countries, to clarify and exchange views on the proposals under consideration. It would report to the Chairman at the March meeting so that the Group could take a view as to how to proceed further.

C. THE AGREEMENT ON IMPLEMENTATION AND APPLICATION OF ARTICLE VII (CUSTOMS VALUATION CODE)[1]

Two delegations reiterated the importance they attached to the issues before the Group concerning burden of proof.

The Group agreed that an informal meeting at the level of customs experts should be arranged in Geneva, preferably after the meeting of the Technical Committee of the Customs Cooperation Council. The Chairman urged delegations to see that they be represented at this meeting at an expert level as this might enable further progress at the March meeting of the Group.

D. THE AGREEMENT ON GOVERNMENT PROCUREMENT[1]

The representative of Korea introduced document MTN.GNG/NG8/W/70. In reply to questions he said that the minimum requirement formula was intended to be applied only to developing countries and that the levelling up of concessions during the transitional period was aimed at facilitating these countries' accession by way of a gradual, negotiated increase of concessions during that period. No specific fixed level of concessions was being suggested for the final stage, only that it should be up to the level of existing Parties. It believed that it should be possible to make calculations along the lines of the proposal. If there were problems in this regard, the Agreement ought to be amended.

A number of delegations welcomed the submission. One delegation noted, however, that from a first reading it would seem that to offer concessions up to the full average of procurement of existing Parties, most of whom were major economies, would be a major commitment for smaller and lesser developed countries. One delegation recalled its own proposal on the facilitation of larger participation in the Agreement. Noting that an objective economic criterion for determining membership was now being suggested, it questioned the feasibility of the data collection and calculations that would be involved; it also wondered what kind of concessions during a "phasing in period" countries were to undertake. Some

[1]Discussed at the meeting of 31 January-2 February 1990

delegations agreed with the proposal that all government entities should be taken into account when determining the value of potential members' offers. The provisions suggested for a period during which the conditions of membership should be negotiated were also interesting and merited further study. They believed that the new proposal and that in MTN.GNG/NG8/W/47 could be treated in parallel. One delegation stated that it welcomed a discussion of a broadened membership and that the Korean proposal was interesting and would be studied in detail.

The Chairman noted that certain proposals which would facilitate accession of non-signatory countries had been made. The Group agreed to request the secretariat to arrange for informal consultations among interested delegations for clarification and exchange of views on these proposals.

E. THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI (THE ANTI-DUMPING CODE)

(i) Introductions of new submissions[1]

The following brief summary attempts not to repeat detailed comments which were also made in the subsequent issue-oriented discussion.

The representative of Hong Kong introduced document MTN.GNG/NG8/W/51/Add.1, noting that this was the third submission from his delegation, following a consistent pattern, beginning with document MTN.GNG/NG8/W/46. These papers had to be seen as parts of a coherent whole. He explained the main problem areas as he saw them, grouping these under the headings of "determination of dumping", "determination of injury", "initiation of anti-dumping proceedings" and "anti-dumping duties on companies not investigated". He reiterated that the main purpose was to restore balance and reason to a situation in which, by increments over a period of time, anti-dumping investigations had become tilted in favour of the domestic industries of importing countries. Hong Kong was convinced that many provisions in the Code had to be strengthened and clarified to minimize the risk of arbitrary interpretation, but it had also to be emphasized that Hong Kong did not condone injurious dumping. He supported the right of any signatory to seek remedy against injurious dumping in strict accordance with the Code's provisions and did not propose to circumscribe anti-dumping action so much that it became an ineffective defence against genuinely predatory behaviour. While thus being prepared to discuss the concerns with regard to such matters as "circumvention", he added, however, that anti-dumping investigations had become both broader in scope and more frequent and some domestic industries in importing countries now regarded anti-dumping as a form of selective safeguard. In this situation it was in the interests of importers as well as exporters, to turn back the anti-dumping tide. Otherwise there was a real danger that

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[1]Discussed at the meeting of 31 January-2 February 1990

some of those who had been the target of investigations and felt that they had been unfairly treated might themselves seek to imitate the worst features of existing systems. The threat of a downward spiral into increased protectionism through the proliferation of anti-dumping action was obvious.

The representative of the European Economic Community introduced document MTN.GNG/NG8/W/63, stating that the proposals therein supplemented those presented in March 1988 in MTN.GNG/NG8/W/28, following considerable progress in the Group in the meantime. The general orientation of the two EEC proposals was to try to maintain the delicate balance between the objectives of efficiency and effectiveness of the procedures for combating unfair trading practices, and those of the avoidance of an unjustifiable impediment to international trade, which underlay the system of the Anti-Dumping Code and was set out in its preamble. Accordingly, the new proposal aimed at establishing a certain number of minimum standards with regard to the interventions of investigating authorities and to more workable sets of procedures where existing rules had proved impracticable. The EEC representative went on to explain in more detail the considerations behind the various elements of the supplementary proposal, grouped under the broad headings of "minimum standards in anti-dumping procedures", "more workable procedures" and "developing countries". He summed up by stating that the EEC was in favour of improving the fairness of the rules of the Code, of improving the predictability of the results of anti-dumping investigations, of improving legal certainty, while at the same time maintaining the delicate balance he had referred to above.

The representative of Finland, on behalf of the Nordic countries, introduced document MTN.GNG/NG8/W/64; adding to the introductory remarks contained therein that anti-dumping measures to some extent had deviated from their original purpose, i.e. to counter situations where a dominant position on a protected home market was used to generate profits which were used for price discrimination on export markets. This development gave reason for serious concern. Nevertheless, the Nordic countries believed that it was much more common to see price differentiation on various markets due to market oriented, profit maximizing business strategies where price competition was a normal and perfectly permissible component. The Code should take due account of this fact. The following items were, in the view of the Nordic countries, of particular importance: (i) the method for calculating normal value and export price, i.e. the hierarchical order of calculation methods and the way constructed value was calculated; (ii) assessment of injury, causality and cumulation; (iii) dispute settlement; and (iv) the obligation of the investigating authority to strive for fairness and objectivity, inter alia, by advising the parties what information would be required to enable the investigating authority to make a decision based on all relevant information.

The representative of Canada introduced document MTN.GNG/NG8/W/65 noting at the outset that the scope and quality of the proposals before the Group reflected the increasing shared sense of the importance of anti-dumping issues in the MTN, auguring well for moving forward to a successful result, provided the Group set achievable objectives. The

Canadian proposal had been developed against the following considerations: (i) the drafters of Article VI and the Code had sought to craft a delicate but appropriate balance of rights and obligations which should be preserved; (ii) the experiences of the past decade revealed that the Code had worked well for the most part, but certain ambiguities/arbitrariness in interpretation had led to inconsistent application of Code provisions and of anti-dumping measures; and (iii) one should also try to anticipate the next decade and establish appropriate rules for and parameters of anti-dumping measures in the future. The Canadian proposals were consistent with and reinforced Canada's overall MTN efforts to improve GATT trade remedy rules and to strengthen the multilateral trading system, including by avoiding excessive recourse to unilateral interpretation. The improvements proposed would serve to put the operation of anti-dumping practices on a more transparent, uniform and consistent basis, conducive to a more open and stable trade environment. The specific changes which Canada was advancing in respect of standing of the petitioner, prima facie evidence of injurious dumping, a minimum time period before provisional measures were imposed, and the incorporation of recommendations of the Code Committee, recognized that the trade impact could be felt well before the actual imposition of duties, and that proceedings should be initiated and continued only when required thresholds were met. The Code already gave guidance in this direction; the proposals served to clarify or make the guidance more explicit. He referred to additional proposals which dealt with the improvement of uniformity, consistency, as well as effectiveness of anti-dumping procedures; clarification of the term "domestic industry" (to account for certain situations in agriculture); the use of actual expenses and profit when constructed values were used; and clarification that any undertakings entered into should be restricted to price undertakings and be subject to greater transparency, review and sunset. With regard to the imposition and collection of anti-dumping duties, his delegation was strongly of the view that when the export price equalled or exceeded normal value, no anti-dumping duty should be imposed.

Concerning improved standards for the application of anti-dumping measures, some of the proposed elements were unique to dumping, such as the treatment of sales below cost. Others were more generic to trade remedy instruments and reflected views his delegation had already put forward in the context of subsidy/countervail reform. In a particular reference to normal value he noted that the proposals on this point sought to balance the legitimate practical and administrative interests of the investigating authority against the equally legitimate Code direction to determine "normal value" in the context of ordinary course of trade. This question ought to be examined in the context of particular product/market/industry conditions. With regard to the requirement that injury should not be attributed to dumping when, in fact, it was due to other factors, the proposals should go some distance toward achieving the tests which he believed the original drafters of Article VI and the Code had had in mind. His delegation was also of the view that there should be a de minimis level of dumping and a provision to encourage the exclusion of a country from a cumulative investigation and finding when imports from that country were negligible and not contributing to injury. These proposals would be of

particular benefit to the many small suppliers in developing countries. Another concern was that, too often, anti-dumping measures remained in place for a period well beyond that necessary to remedy the injury originally suffered. He added that the rapidly changing nature of the world economy, the growing intercorporate linkages across borders, the mobility of production factors and other evolutions in the patterns of world production and trade, made it increasingly possible for the effectiveness of legitimate anti-dumping remedies to be undermined by practices which sought to circumvent or escape legitimate GATT remedy. On the other hand, a number of measures were being developed unilaterally in the absence of explicit provisions under the GATT or the Code. The opportunity of the Round should be used to develop appropriate rules and guidelines governing the use of anti-circumvention measures, to strike a balance between the legitimate concerns of the investigating authority to preserve the integrity of its anti-dumping findings and the concern that such capacity not become a general tool for protection. Similarly, the increased interdependence of economies, and the ever-changing relationships in the private sector suggested that anti-dumping measures could no longer be looked at in isolation from their broader economic impact. His delegation proposed that provisions be established for the consideration of public interest subsequent to the final anti-dumping determination.

The representative of Australia introduced document MTN.GNG/NG8/W/66 stressing the underlying objectives set out therein and going on to point out that the proposals focused on abuse of anti-dumping procedures, circumvention and other items for negotiation, such as sunset clause, cumulation and dispute settlement. She added that the framework her delegation was using for an outcome of the negotiations, was a general strengthening of standards and definitions which should go a long way towards providing a more effective Code. Her delegation's proposals attempted to address the concerns about balance by recognizing a number of complaints about the current Code and by suggesting that it be amended to ensure that anti-dumping procedures be transparent and consistent with the content and spirit of the Code, whilst also recognizing the importance of having new provisions to address circumvention issues. Her delegation hoped that this spirit of balance and interests was adopted by all participants, and looked forward to working towards a realistic and practical outcome.

The representative of Japan introduced document MTN.GNG/NG8/W/48/Add.1, stating that it complemented the previous proposal of July 1989. The two proposals reflected the view that although anti-dumping measures were permitted to counter injurious dumping, international trade should not be impeded by abusive measures. Therefore, greater uniformity and transparency in the implementation of Article VI was needed. His delegation reserved its right to submit further proposals on issues such as various types of anti-circumvention measures upon having taken into account the result of the examination currently undertaken by an Article XXIII panel. The delegate of Japan went on to reiterate the reasons for the proposed amendments set out in the document itself grouped under eight separate headings.

The Chairman informed the Group that the delegation of Romania had informed him that for practical reasons it would have to reserve its right to introduce documents MTN.GNG/NG8/W/61 and 62 at a later stage.

(ii) Introduction of Chairman's paper dated 19 January 1990

At the meeting of 31 January-2 February 1990 the Chairman stated that this paper, circulated on his own responsibility, had been intended as a framework which could provide a structured agenda for future work. As he had stated in the covering letter and in the introductory paragraph of the text, the framework had been developed on the basis of the proposals made in the Group; it did not anticipate or prejudge the detailed negotiating position of any country; it was flexible and further issues might be added to it in the course of the negotiations; and the order in which the subjects appeared in the text did not reflect any order of priority. He added that in order to ensure that anti-dumping practices did not constitute an unjustifiable impediment to trade, the Anti-dumping Code, which interpreted Article VI, provided that anti-dumping actions should be taken only when dumped imports caused material injury. The proposals made for improving, clarifying or expanding the Code reflected different perspectives of the nature of the problems and issues that had arisen in regard to its implementation. A number of proposals had raised issues relating to the notion of dumping, and the existence and potential for the use of anti-dumping measures for purposes other than to counter dumping; other proposals had referred to the effectiveness with which governments could deal with dumping practices, taking into account the changes which had taken place as a result of modern commercial realities. He had tried to reflect these basic issues of principle in the section called "objectives and principles of rules on anti-dumping practices". In his view these objectives and principles provided the parameters for the negotiations and would have to be constantly kept in mind during all phases of the negotiations on the specific issues listed in the latter part of the paper. Since the text had been prepared entirely on his own responsibility and its purpose was only to provide a structured agenda, which nevertheless permitted flexibility, he suggested that the Group spend no time in discussing at this stage its form and content. Instead he suggested that the Group start discussing the basic items on the agenda, bearing in mind that a number of new ideas and new issues had been introduced since the last meeting.

(iii) General statements following the Chairman's introductory remarks

It was stated, inter alia, that attention ought to be given to whether an exporting firm could generate more than ordinary profits in its home market and use these for subsidizing exports. If there was considerable import penetration in the exporting country of like products, or if price competition in that country otherwise was strong, or if the exporting firm did not have a dominant position permitting more than ordinary profits, there should be a presumption that the original preconditions for a dumping situation did not exist. Dumping and price undercutting in the importing country implied risks which also had to be taken into account, such as the

reactions of competitors to price decreases, and the risk of anti-dumping measures. There might often exist alternative, less risky and more profitable ways of increasing sales or market shares. The exporting firm could, for example, acquire an existing company or a production plant in the importing country, it could establish a subsidiary company or a new factory there, or it could establish a joint venture. Therefore, it would be incorrect to assume that export sales below normal value a priori fulfilled the criteria for dumping, as the concept had been originally crafted.

A number of delegations emphasized that under Article VI only injurious dumping was to be condemned. Some of these delegations held that it was therefore incorrect to assume that dumping was an unfair trade practice; the negotiations should ensure that the original criteria foreseen in Article VI did exist when anti-dumping measures were taken.

One delegation stated that there appeared to be a view that dumping was acceptable if it was a normal business practice. This was a shortsighted view, in particular from the point of view of smaller countries or companies without the necessary financial resources, because the consequence could be that a producer with large financial resources could price aggressively for market share and effectively put smaller producers out of business. High technology with very high start-up costs was a case in point. It might also appear to be a business practice to price aggressively where the home market was protected. Again, the larger producers might be at an advantage. This delegation saw the trading system benefiting in the long run from encouraged competition and from pricing rules which would not allow what some appeared to consider normal commercial practices. The principle that the requirement of injury or threat thereof was essential to any anti-dumping determination could be reaffirm without drawing conclusions with regard to the items listed under the title "Notion of Dumping".

One delegation stated that the foregoing statements showed how different the phenomena of dumping and anti-dumping were perceived. It took it that the word "parameter" used by the Chairman did not mean that there was agreement on a concept of anti-dumping which went beyond Article VI and the underlying philosophy of the Code. A number of the points listed under "Objectives and Principles" in the Chairman's paper were rather questions to be asked than established principles; one should not try to solve these at the beginning of the substantive discussion.

One delegation shared the two previous views, adding that some of the concepts listed under "Objectives and Principles" were not necessarily concepts which it would like to see reflected in amendments to the Code. The key objective and principle which in its view should guide the discussion was that dumping was to be condemned if it caused or threatened material injury. For this reason it reserved itself against attempts to reflect in the Code notions such as comparative advantage and normal commercial considerations. While it agreed with these concepts, as such, the concern was that the Code should allow for consideration of dumping cases purely on the basis of the facts of each case.

A number of delegations stressed the importance of arriving at a balanced result. It was noted, inter alia, that if the MTNs did not succeed in achieving fair and equitable results, and if anti-dumping measures continued to be used as instruments of protection and trade harassment, there was a risk that anti-dumping systems be designed to protect domestic industries which, in turn, could lead to trade retaliatory measures.

(iv) Detailed discussion of the Chairman's paper[1]

DETERMINATION OF THE EXISTENCE OF DUMPING

One delegation made the general remarks that in addressing all the issues related to the determination of dumping, one had to keep in mind the fundamental principle that anti-dumping actions were intended only to counter truly injurious dumping. The current broad interpretation of "dumping" by some countries and the growing perception among many countries that anti-dumping measures were also being used to combat normal and accepted commercial pricing practices was a basic problem that had to be addressed. A clear distinction should be made between genuine dumping and normal commercial practices. Anti-dumping rules should explicitly recognize and accommodate normal competitive business pricing practices which could not be described as dumping.

A. Normal value

1. Establishment of the normal value on the basis of domestic prices

2. Circumstances in which there are no home market sales of the like product in the ordinary course of trade or in which such sales do not permit a proper comparison

The Chairman recalled that a number of proposals dealt with the circumstances in which the normal value was established on the basis of domestic prices in the home market of the exporter. In this regard reference had been made to the treatment of home market sales made through related parties and to the possible use of home market prices of a parent company in cases where exports took place from a subsidiary of this company in a third country. He further recalled that a second category of proposals addressed the situation in which, as provided for in Article 2:4 of the Code, the normal value could not be established on the basis of sales prices of the exporter in his home market. Important issues dealt with in these proposals were the meaning of the term "in the ordinary course of trade", the question of when sales in the home market at prices below costs of production could be considered to be not "in the ordinary course of trade" and the volume of domestic sales which could be considered to be sufficient to permit a proper comparison.

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[1]The discussion of the first three main categories took place at the meeting of 31 January-2 February 1990. The discussion of the following main categories, beginning with "Anti-Dumping Measures", took place on 19-20 February 1990.

The discussion of these two items tended to overlap when the Group first focused on the proposal made in MTN.GNG/NG8/W/63 concerning corporations operating in more than one country.

A number of delegations reserved themselves against the proposal that the price of the parent company in its home market could be used to calculate normal value, in cases where the products had been produced and exported by a subsidiary in a third country in which no (or insufficient) sales had taken place. The view was expressed that the proposal seemed based on the belief that there was a sort of master plan on the part of multinational concerns. The view was also expressed that it seemed to be based on the presumption that all subsidiaries with little or no domestic sales were highly subsidized by the parent, and that the latter had a highly protected domestic market. It was argued that a number of factors lay behind decisions to invest and produce abroad and that a normal commercial strategy for large companies was to have offshore manufacturing and commercial plants in order to be cost-effective; the proposal might not be adequate in situations where affiliated companies were independent profit units; moreover, it was not always possible to determine who the parent company was. It was also held that the proposal would inevitably lead to determination of dumping margins because the cost elements of the parent would not reflect the actual cost incurred by the subsidiary. One delegation added that the proposal was likely to largely negate comparative cost advantages and might therefore prejudice global investment policies, in particular investment in developing countries, and might lead to a reallocation of investment, and as such becoming a concealed local content requirement. It was also noted that current rules provided that in the absence of sales in the ordinary course of trade in a domestic market of the exporter, the normal value should be the comparable price of the product concerned when sold to a third country or the cost of production in the country of origin plus a reasonable addition for selling costs and profits in the country of origin.

One delegation, while agreeing that the establishment of normal value should preferably be on the basis of domestic prices in the country of production, recognized the practical difficulties involved. However, the proposal did not seem to take account of the fact that significant differences existed in the mix of production factors that might exist between a parent and a subsidiary, and with respect to the actual absorption of costs thereof.

In reply it was stated that the proposal was intended to take account of a real problem that arose when an exporting company had insufficient sales in the home market and it was impossible to construct a normal value on the basis of the cost of that company because it would not reflect the real cost of the product. Situations did occur in which neither of the methods presently provided for in the Code for the establishment of normal value could lead to a realistic result. While it was true that the Code provided the option to use sales to third countries as an alternative, this method might have the same defaults as those of constructed prices because certain cost elements, R&D costs by way of example, could not be included

if they were not incurred by the exporting company. The proposal was not based on any presumptions about subsidization or master plan or any interference on the part of investigating authorities with investment policies of the companies concerned. The attempt was to deal with a loophole in the Code, in the face of which importing countries should have the possibility to arrive at a normal value, if all other methods lead to unrealistic results. The idea was not to reject cost elements of the exporting subsidiary; to the contrary, these should be taken fully into account as far as their reality was apparent. Thus, lower wages, costs of materials, the mix of cost-factors, etc., would have to be taken into account. However, what had to be dealt with were the situations in which whole types of incurred costs which had to be covered, had not been incurred in the country of export. There might be other solutions than the one presented; proposals from other delegations would be welcomed.

One delegation wondered whether adjustment to reflect true costs might not better be dealt with when considering an adjustment to a constructed cost. Another delegation suggested that the concern could be resolved by incorporating into the Code the relevant draft recommendation from the Code Committee on input dumping (ref. MTN.GNG/NG8/W/48/Add.1, item (vi)).

- meaning of the term "...not in the ordinary course of trade"; conditions under which home market sales at prices below cost of production can be considered to be not in the ordinary course of trade.

A number of delegations addressed their comments to the proposals contained in MTN.GNG/NG8/W/51/Add.1, MTN.GNG/NG8/W/64 and MTN.GNG/NG8/W/65. One delegation stated that these contributions, as well as some of the views expressed orally, went roughly in the same direction but with differences of emphasis. Another delegation stated that the introduction of changes would have immediate effects on the systems of many countries and that it would probably be necessary to clarify more issues than those which had been brought up in the proposals. The practices or alleged practices of different governments were not always clear and the proposals tabled might in some cases reverse current practices completely. This might be the case if, for instance, substantial quantities of sales at a loss over extended time periods were to be considered as being within "the ordinary course of trade".

Many speakers regarded the proposals in MTN.GNG/NG8/W/51/Add.1 and MTN.GNG/NG8/W/65 on "treatment of sales below cost" as useful suggestions, which would require further elaboration. One delegation said that a number of countries interpreted Article 2.4 as providing a legal basis for considering "sales below (fully allocated) cost" of production as not having been made in the "ordinary course" and therefore disregarded them in the calculation of normal value. This was not justifiable, because pricing below fully allocated production costs was a normal business behaviour for any firm. It supported the proposal in MTN.GNG/NG8/W/51/Add.1 that sales below fully allocated cost of production, which permitted the recovery of

the average variable cost within a reasonable period of time, should be considered as having been made in the ordinary course of trade, provided that they were not made over an extended period of time, nor in substantial quantity. It considered it necessary to clearly define sales "in substantial quantity"; "over an extended period of time"; "at prices which do not permit recovery of average variable cost"; and the concept "within a reasonable period of time". Related to these issues were also the problems regarding the manner in which cost of production was being calculated. In examining these problems, one would also need to look at the following issues: (a) what types of costs should be included in calculating the cost of production? (b) how should R&D and investment costs be amortized? (c) within what time-frame should a company be expected to cover its cost of production, including the allocation over time of start-up costs incurred during the investigations period?

Another delegation argued that the idea of not having to cover fully allocated costs required an attempt to define what the notion of fixed and variable costs meant; this could vary from country to country and from one company to another. One would also have to discuss the question why certain items like, for example, financial costs, amortization of fixed assets, etc., should not be reflected in the price and be covered within a certain time through the revenues of a company since, after all, if companies treated such costs according to their normal accounting practices, this strongly indicated that it was a normal commercial practice. Normal accounting practices might already provide guidance, given that most investigating authorities followed the practices which the companies applied in this field. The point was also made that perhaps not many countries had production of and experience in dealing with imports of high-tech products to the extent this delegation had. According to its own experience there were situations in which, in an introductory period, exporters acquired market shares which made it nearly impossible to do anything which could protect domestic industry against future dumping. It was a necessity to be able to intervene in a timely fashion when, through low-priced imports, the existence of whole industries were being endangered.

One delegation stressed the difficulties it saw in defining precisely the concepts discussed. This delegation's authorities considered sales at a loss as sales below full costs, not sales being merely below variable costs. "Extended period" was normally not less than one year but "certain circumstances" had been recognized in this country, in which less than one year might be appropriate. The notions of "substantial quantities" and "reasonable period" were not yet precisely defined.

In other comments on time periods some delegations considered a one year minimum time limit for investigating periods to be too short. For bulk products with long lifetimes, the examination period should be at least one business cycle. For products with a high novelty value the period should equal their expected (limited) lifetime, because only in such a perspective would it be possible to assess whether the exporter could be reasonably capable of recuperating losses; be it in economic down-turns or at the initial product-development stage.

It was explained that document MTN.GNG/NG8/W/65 attempted to add greater precision to the terms "in substantial quantities" and "over an extended period of time", to give the investigating authorities greater guidance in respect of conditions and criteria they had to assess. Equally important was the proposal that these authorities provide reasons for any exclusion of sales from the normal value base; this would add further guidance and transparency. The Group would have to recognize, however, that any administrative authority had, ultimately, to apply judgement as to whether conditions and criteria were met. A number of delegations supported the idea that when sales below cost were disregarded the investigating authorities should provide reasons for their decisions and for the use of an alternative method for establishing normal value. Some delegations also stressed, or recognized, that the final judgement and decision lay with the investigating authorities. One delegation considered that too much precision might create problems which could prove non-resolvable in the Group. Nonetheless, it shared the generally held view that the area under discussion was one in which the Code suffered from vagueness and gave room for arbitrary approaches.

With regard to MTN.GNG/NG8/W/64 it was explained that the criteria which it proposed in regard to sales below cost, reflected the difficulties which arose in trying to find clear interpretations. The proposed alternative approach was to establish a list of sales that might be outside "the ordinary course of trade". Some other delegations characterized as a good starting point in particular the suggestions that "a price shall be deemed to be established in the ordinary course of trade if that price concerns sales falling within the normal business activities and commercial strategy of the relevant company"; and that "sales at a loss, even over extended periods of time, shall be deemed to be in the ordinary course of trade, if such sales result from reasonable market assessments and strategies". However, some delegations considered that the three examples in the proposal of situations which should not be considered as being in the ordinary course of trade were normal business practices as well. In a reply it was stated that while it was true that liquidation of end of stocks and introductory price offers could be qualified as falling within a normal commercial strategy, the "ordinary course" problem seemed best approached by listing the kinds of sales which would fall outside this concept.

One delegation believed that a precise definition of "ordinary course" was almost impossible and in some way also inappropriate. It thought, however, that some guidelines should be given and that a non-exhaustive list could be envisaged annexed to the Code. One delegation suggested that the problem with the said three examples in MTN.GNG/NG8/W/64 might possibly - as suggested in MTN.GNG/NG8/W/65 - depend on the nature and type of industry, the time period for investigations and on the amortization of various fixed and variable costs. It was therefore not certain that a detailed examination would lead to a list, be it an exhaustive or illustrative one. One delegation said that the proposal to give a positive definition of cases which were and were not in "the ordinary course" was certain to lead to controversy in the Group. This delegation doubted, for instance, that all the cases listed in MTN.GNG/NG8/W/64 as being within "the ordinary course" could indeed be regarded as such.

In a general comment without reference to any particular proposal, one delegation explained experiences it had had with sales which in its view could not be considered a normal commercial practice in the "ordinary course". One example referred to was a bid on a multi-million dollar telecom project when a price of less than one dollar had been quoted. In such a case it would be extremely difficult to prove some standard of intent. In the computer and supercomputer area companies had lost sales and suffered injury as a result of pricing quotes as low as 20 per cent of normal list prices. Again, this showed the difficulties one faced in trying to determine what was or was not "in the ordinary course". In particular for smaller companies and countries, any rule that would broaden the notion of what was a sale "in ordinary course" would create considerable problems, affecting the world trading system at large. Another delegation considered these examples as extreme cases which in its view fell in the category of "sales below cost". It recalled that document MTN.GNG/NG8/W/48 had proposed that sales below cost should only be excluded from the calculation of normal value when made in substantial quantities and over a significant period of time, and at prices not capable of recovering costs within a reasonable period.

- Volume of home market sales which can be considered to be sufficient to permit a proper comparison

One delegation said that the most important point under this sub-heading was to provide certainty, predictability, transparency and uniform practice, because Article 2.4 of the Code did not set down a guideline. It referred to the proposal in MTN.GNG/NG8/W/51/Add.1 that the sales of the like product in the domestic market of the exporting country should only be deemed insufficient when they constituted less than a certain percentage on a quantity basis of the export sales of the like product of the producers under investigation to the market of the importing country.

Two delegations supported this proposal. One of them explained that it had good experience with a fixed threshold of 5 per cent. The best solution was probably to relate a threshold to the imports into the country doing the investigation. The other delegation noted that document MTN.GNG/NG8/W/64 also addressed this issue, but with a different formula. A third delegation stated its readiness to consider a fixed threshold.

3. Alternative methods for establishing the normal value

The Chairman recalled that a third group of proposals dealt with the use of export prices to a third country and constructed value as methods for determining the normal value in cases where domestic prices could not be used for this purpose. In this category of proposals there were suggestions relating to the establishment of an order of preference between third country export prices and constructed values; furthermore, many suggestions had been made with a view to clarifying the provisions of the Code with respect to the calculation of a constructed value.

- Order of preference between export sales to third countries and use of a constructed value

A number of delegations supported the idea that an order of preference be established. One delegation noted that the proposal was for a preference which would create transparency but not a prohibition of the other method. Some investigating authorities already had their own hierarchy and it was very unusual for some of these to use any method other than the constructed value in cases where domestic sales were insufficient. Another delegation, supporting this view, added it could be detrimental to the interests of exporting countries when the cost and profit margins used by the investigating authorities in computing constructed value were in excess of those incurred and realized by the exporter in its domestic market. Also, dumping was normally related to the pricing practices of a company in a foreign market and if there were inadequate home market sales to permit proper comparison it would be reasonable to take the prices of like products to third countries as the basis. One delegation stated that it did not believe an order of preference called for an amendment to GATT Article VI which gave alternatives but stated no obligations. Some other delegations welcomed this argument.

One delegation recalled that the question had been raised already in the Kennedy Round when it had been agreed to continue to leave it open to each government to decide. This delegation wondered whether the preference suggested would be in line with the basic philosophy of Article VI, since the underlying economic theory was that dumping presupposed a certain isolation of the market of the dumper, normally affecting all producers and all price levels of a given product in that country, whereas isolation did not exist in export markets. It was therefore more logical to base oneself on the cost of production in the exporting country. It agreed that if constructed value was used the data for overheads and profits should correspond to reality and they should be taken from actual sales on the domestic market of the exporter concerned. However, it was not possible in important dumping cases, where the exporter and importer were related, to establish the export price to certain third countries, which themselves were not involved in dumping.

One delegation stated that in the choice between third country and constructed value, conceptually one would appear to have a preference for the former, but in the actual administration such a preference would not always be less burdensome for the parties involved. The questions of reliability and verification would still remain. This delegation approached the issue from the perspective that at best the Code could offer a preference but a broad obligation to use third country sales over constructed value would be unwise, impractical and potentially to the disadvantage of all interested parties.

Some delegations considered the comment above concerning related companies relevant when the parent or the affiliated companies were not independent profit units and the parent could determine the pricing policy. This was not always the situation. With respect to reliability, control and verification of export prices to third countries, they believed similar problems arose regarding the home market price.

One delegation stated that a preference for third country prices over constructed value, had been found to involve practical, burdensome problems. One delegation suggested that if the problems perceived related to how constructed values were calculated they might be discussed under "methodology" below.

- criteria for the selection of sales to a third country

One delegation stated that it agreed with the proposal in MTN.GNG/NG8/W/51/Add.1 to specify objective criteria for the selection of a representative third country price. One delegation explained that before accepting a third country sale, its legislation required that such sales be shown to be in the ordinary course of trade.

- methodology for calculating a constructed value

One delegation recalled the proposal in MTN.GNG/NG8/W/40 that "the addition for profit should be based on, and shall not exceed, the actual profit earned by the exporter on sales in the exporting country of products of the same general category as the product under consideration". One delegation stated that if normal value had to be constructed, the authorities should reflect as closely as possible real commercial conditions, actual production costs and the commercially accepted profit margins in the exporting country. Cost allocation should follow generally acceptable accounting practices in the country of export. Current practice in some countries, e.g. on profit margins, was arbitrary. It was a central issue for the Group to find a formula for the addition of profit. Other delegations also held that the addition of profits should be predictable and reflect the practice of the producer himself, on sales in the country of origin. In this connection reference was made to the proposal in MTN.GNG/NG8/W/51/Add.1. One delegation referred to its proposal in MTN.GNG/NG8/W/48 (item III), that when the normal value was based on the cost of production in the country of origin, it should include "a reasonable amount for administrative, selling, and any other costs, and for profits". Actual data should be used and the proposal therefore contained the same idea as the proposal in MTN.GNG/NG8/W/51/Add.1, paragraph 13.

One delegation recalled that in MTN.GNG/NG8/W/65 it had proposed the use of actual data for certain elements of the value, particularly the selling and administrative expenses and the amount of profit where this could be reasonably established on the basis of facts. Another delegation supported this view.

One delegation noted that an exporter could produce very different products with widely different degrees of market protection and thereby of profit margins. It was sometimes closer to market reality to refer to costs and profits derived from the like products of other producers than, for instance, to compare profit margins on completely different products, which the exporter under investigation marketed. This was not a perfect solution, but no surrogate for the domestic prices could be perfect.

4. Determination of the normal value in cases referred to in the Second Supplementary Provision to Article VI:1 in Annex I to the General Agreement

The Chairman recalled that a fourth major issue concerned the methodology for determining the normal value in cases covered by Article 2:7 of the Agreement; in this respect the Group had before it a suggestion concerning the establishment of the normal value on the basis of the export price of the like product when exported from a market economy country to third countries.

One delegation stated that if Article VI was preserved in its present form, the Second Supplementary Provision to its paragraph 1 should also have to be preserved. This provision was not obligatory; it merely stated that special difficulties might exist in determining price comparability and that it might be found necessary to take into account the possibility that a strict comparison might not always be necessary. This was an enabling text which did not exclude the possibility for importing countries to act in accordance with the general Code rules.

5. Definition of certain terms

The Chairman recalled that a number of proposals addressed the definition of certain terms used in or relevant to the rules of the Code with respect to the establishment of the normal value, such as the concept of "like product", "introduced into the commerce of another country" and "related parties". A related issue which could also be seen as a question of definition concerned the treatment of customs-unions for the purpose of the determination of the normal value.

- Like product

Some delegations argued that "like product" should be defined and applied in a uniform manner, throughout the Code and during all phases of an investigation, as proposed in MTN.GNG/NG8/W/64. It was argued that with regard to the proposal in MTN.GNG/NG8/W/63, a market substitutability test more easily lent itself to administrative abuse than a physical similarity test. The definition of "like product" had consistently been interpreted in the GATT as requiring physical similarity. Moreover, parts and components should not be considered as alike to the finished product. The broad interpretation of "like product" by governments in their attempts to prevent "circumvention" as well as the "agricultural/industry exception" proposed in MTN.GNG/NG8/W/65 caused concern; acceptance of the principle of the latter might spread to the field of industry.

One delegation, also expressing its clear preference for the physical similarity test, noted that in certain cases such similarity was impossible to determine, without looking at the applications and uses of a product. It was nearly impossible, for instance, to establish whether a certain metal with impurities representing 5 per cent or 10 per cent were like products or not, if uses and applications were disregarded. Uses and applications should therefore be supplementary criteria to the basic physical similarity test.

One delegation agreed that there could be real problems in this area in certain cases but warned against loosening the basic criterion. Terms such as "minor variations" and "quality differences" might be too loose notions.

- Related parties

Reference was made to the comments and proposals in MTN.GNG/NG8/W/48/Add.1, both with respect to the definition of "association" and the definition of "related". One delegation wondered what objective criteria were proposed for determining whether the level of ownership considerably affected sales prices between two parties.

- Customs unions

One delegation recalled its proposal in MTN.GNG/NG8/W/48/Add.1 to add a footnote to Articles 2.1 and 8.2.

B. Export price

The Chairman recalled that the issues raised with respect to the determination of export price all related to the use of reconstructed export prices. The question had been raised as to the nature of the relationship between an exporter and an importer which would warrant the use of a reconstructed export price. Furthermore, proposals had been made regarding the adjustments to be made when export prices were reconstructed. It would appear that in the view of some participants this second issue was related to the question of the adjustments made in the comparison of normal value and export price. Finally, a question related to the use of reconstructed export prices was how existing anti-dumping duties should be treated when such prices were used for the purpose of calculating the amount of anti-dumping duties to be refunded.

C. Comparison of the normal value and the export price

The Chairman recalled that the question of how to effect a fair comparison between the export price and the normal value had attracted much attention. Perhaps the most fundamental question in this area was whether Article 2:6 should define with greater precision the factors for which adjustments should be made in the comparison of the normal value and the export price. Thus, suggestions had been made for the establishment of a list of factors for which adjustments should be made, such as differences in levels of trade, quantities and circumstances of sale. An important concept which had been mentioned in this context was that of "symmetry" of adjustments, i.e. the idea that the same adjustments should be made to the export price and the normal value. It would appear that those participants who had advanced this concept of "symmetry" had in mind, in particular, the situation where the normal value was compared with a reconstructed export price. Another general question relating to adjustments was the division of responsibility between investigating authorities and interested parties to ensure that the necessary adjustments were made. The Group had also before it a proposal to make it clear that in the comparison between the

export price and the normal value account should be taken of the special characteristics of the market in which companies subject to investigation operated. Finally, there were a number of issues concerning the use of weighted averages in the comparison of normal value and export price and the treatment of exchange rate fluctuations and inflation.

The six sub-items in the Chairman's paper were discussed together.

One delegation considered this item to be very important. It was not a fair comparison - e.g. where sales took place through a related company in the importing country - to calculate the export price by deducting from the resale price to third parties, all costs and profits of the related company whereas, on the other hand, the domestic sales price was calculated without deducting the indirect selling costs, general and administrative expenses and profit of the related party.

Some delegations said that it was fair to have the principles of symmetry of price calculation and symmetry of adjustment in normal value and in export price inscribed in Article 2:6. One delegation said that the practice of comparing the average of the normal value with export prices on a transaction-by-transaction basis was duly described and commented upon in Table 1 of MTN.GNG/NG8/W/64, as well as in MTN.GNG/NG8/W/51/Add.1, paragraphs 14-15. This was an obvious area of prejudice against exporters; the Code should be amended to require comparison to be made between the weighted average of the normal value and the weighted average of the export price. Concerning division of responsibilities one spokesman referred to the proposal in MTN.GNG/NG8/W/64 which implied that investigating authorities ought to take a more active role in leading the investigation and in assisting the parties involved - not least small exporters which could often not afford to use lawyers - to safeguard their interests in assisting them in furnishing the evidence and information needed.

One delegation considered that it would be too large a burden upon the investigating authority if it were to investigate possible factors leading to adjustments, without the mentioning of such factors by the exporters. It was normal that even small exporters at least drew attention to the factors that might lead to adjustment, and that they provide evidence, since they alone had it. It did not think that on the basis of Article 2:6 there was a symmetry problem; it required a comparison of prices at the same level of trade and adjustments for factors that affected price comparability. The main reason for the practice of averaging on a transaction-by-transaction basis was to prevent exporters from practising selective dumping. This phenomenon was of great concern and manifested itself by successive attacks of unfair trade practices on different parts of an importing market. Such a strategy should not leave the authorities concerned without the possibility to react. It added, concerning the table in MTN.GNG/NG8/W/64, that it was common to break down the periods in case of significant fluctuations; differences should not be calculated in an artificial manner which for given time periods did not exist. However, it believed current practices took care of this.

One delegation said that the problem remained that the method used against selective dumping was applied to all, by way of which protectionist barriers were raised across the board.

One delegation said that there was a real problem of selective dumping whether on a regional basis or along product-lines within a single "like product" category. However, it also understood the concerns of some other delegations. The Group should try to find solutions to accommodate the legitimate concerns of both sides.

DETERMINATION OF THE EXISTENCE OF MATERIAL INJURY CAUSED BY DUMPED IMPORTS

A. General

The Chairman said that he had tried to reflect some general questions of a conceptual nature which had been raised with regard to the principle that anti-dumping duties might be imposed only where dumped imports cause material injury to a domestic industry. Thus, the question had been raised as to the meaning of the concept of injury and of the adjective "material". A closely related issue concerned the necessary degree of causal relationship which must be shown to exist between dumped imports and material injury, which raised the question of whether the causality requirement in Article 3 needed to be defined more strictly. Finally, suggestions had been made regarding the treatment of cases in which exporters aligned their prices to prices prevailing in the domestic market of the importing country. In particular, it had been proposed that in such cases no affirmative injury determinations should be possible.

- Concept of "material" injury

One delegation said that MTN.GNG/NG8/W/63 (page 6) introduced the concept of "serious injury", which seemed to mean a higher threshold than that envisaged in Article VI. It was explained that the proposal was to increase the standard in the case of regional dumping. One delegation thought that the proposals in MTN.GNG/NG8/W/63 on "threat of material injury" could dilute the proposal on causality in the same paper.

- Degree of causality between dumped imports and material injury to a domestic industry

The proponent of MTN.GNG/NG8/W/63 said that the concepts of causality were very important but difficult and that therefore additional criteria had been suggested. In reply to a question it confirmed that "dumped imports" was meant in the last sentence of (g) of that document. One spokesman appreciated the proposal in MTN.GNG/NG8/W/63 (page 5) in this respect and reiterated the suggestions contained in MTN.GNG/NG8/W/64.

One delegation took up the question of situations where the margin of price undercutting or depression was substantially higher than the dumping margin. Since in those circumstances injury must have been caused by factors far more injurious than the dumped imports, anti-dumping measures

should not be imposed. It was replied that this question might be relevant in some situations but there could be a causal link because a competitive advantage could be increased by dumping. This might need further reflection.

- Treatment of instances in which exporters align their prices to those prevailing in the domestic market of the importing country

Statements were made under this specific sub-item (see general statements above).

B. Criteria for determining the existence of material injury to a domestic industry caused by dumped imports

The Chairman recalled that there were a number of proposals regarding the criteria for determining the existence of material injury caused by dumped imports. These suggested that there was a need to define with greater clarity the factors to be taken into consideration in injury determinations. An important related question was whether the Code should specify the weight to be accorded to certain factors, i.e. whether it would be possible to amend the provisions of the Code to provide that certain factors must be present before an injury determination could be made. Another important question concerned the requirement in Article 3:4 that injury caused by factors other than dumped imports should not be attributed to dumped imports. A number of suggestions had been made as to how this provision could be rendered more effective. The Group should also consider the proposals made regarding the treatment of de minimis import volumes and de minimis margins of dumping. Finally, a question raised in many proposals and which merited thorough consideration was the issue of cumulative injury assessment.

1. Factors to be considered in the determination of the existence of a causal relationship between dumped imports and material injury

2. Weight to be accorded to other factors; and

3. Consideration of factors other than dumped imports as a possible cause of material injury

One delegation stated that this was a central element of the Code but one which was difficult to apply with consistency and precision. Based on experience it thought the Code could be strengthened considerably in respect of the causality test by requiring certain injury factors in the determination of causality. The principal factors should be price suppression or lost sales, and reduced profits. The issue was the impact of an unfair price in the importing market and the determination of injury should focus on the price variables which that injury would be reflected in. It had therefore proposed (in MTN.GNG/NG8/W/65) that these factors be given increased weight; this did not preclude other factors from being examined as well.

One delegation, commenting on MTN.GNG/NG8/W/65, was not certain that the proposals would give results as close to the reality which it believed all were seeking. By way of example, it noted that a requirement that reduced profits be a principal factor underestimated a scenario where profits were not declining but nevertheless were masking an injury. For instance, a profitable high-technology firm might, due to injury, not be making sufficient profits to fund R&D and production capacity for the next generation. There might also be increasing profits in a large-stock situation where a producer was selling off to yield profits, this being an indicator of declining performance due to injury; thirdly, in cyclical industries, profits might go up during the peak of a cycle yielding an insufficient cushion for a downturn which was certain to come, due to injurious imports. There could also be cases where declining profits occurred but yet the industry could be healthy and not being injured; for example, profits often declined in firms which retired obsolete capacity or built new capacity; profits might temporarily rise in the price of critical inputs which had to be absorbed; and profits might decline during a cyclical downturn and yet the firm might be healthy. Thus, absolute rules could yield arbitrary results. Its experience showed that absolute rules as those suggested would yield unjustified affirmatives in some cases and unjustified negatives in others.

In reply it was said that a number of the points raised were addressed in the proposal regarding "injury analysis" as opposed to the proposal on "injury factors", which dealt with dumping alone. Factors other than dumping - where relevant - should be dealt with in the injury review and in the rationale given for decisions regarding injury. This could take into account cyclical downturns, market developments, the nature of high-technology products, etc., which might impact on profits but which were not associated with dumping. The important point was to create strengthened capacities to assess injury against dumped imports.

One delegation said that under the existing Code it was unclear on which basis an affirmative determination of material injury was permitted. Injury determined on a case-by-case basis impaired predictability. For dumping to be the cause of injury, three factors had to be affirmative: increase in the volume of dumped imports; an effect on prices in the domestic market for like products; and the impact on domestic producers of such products. It recalled the amendments it had proposed in MTN.GNG/NG8/W/48/Add.1. One delegation considered the question of determination of existence of material injury as a central element because the rules on this had to be improved, ensuring that anti-dumping action be taken only against injurious dumping. The causal link should be strengthened. Concerning the footnote to Article 3.4 it saw a need for some increased obligation to look at additional factors.

One delegation expressed support for the proposals in MTN.GNG/NG8/W/65 that due account be taken of factors other than dumping and that there should be an obligation to report on the assessment of such other factors, and the similar proposal in MTN.GNG/NG8/W/48/Add.1 that notices of determination of injury should set forth the factors examined and the

reasons for the determination, including information concerning factors other than dumping that had been examined. These proposals were very important because, at present, there was a tendency that if an industry was not performing well and if some dumping could be found, an insufficient examination of other factors would take place.

One delegation explained that in its legislation consideration was given to a range of factors, including those mentioned in MTN.GNG/NG8/W/65. It nevertheless warned against creating absolute rules. Its authorities, for instance, in assessing the extent of injury looked at several factors in conjunction, notably lost sales and reduced profits. While the margin of dumping might be taken into account, it was not necessarily used to determine whether or not to continue the investigation. It supported the proposal to require that account be taken of other factors which might affect injury, both when conducting an investigation and when making an assessment of the extent to which injury was caused by the dumped imports.

One delegation stated that it seemed reasonable to regard R&D as investment - where even foreign capital might be used - rather than say that R&D should, as a general rule, be financed entirely out of accumulated profits. Such a reasoning could lead to a notion where material injury was found when domestic producers did not make quite the profits that they might make in the absence of import competition.

In reply it was stated that one would not necessarily find material injury only because companies' R&D could not be financed for future product generations, but it might be one of many factors that could lead to the finding that material injury took place. The point was that the absence of reduced profits should not stop investigations from reaching such a finding. Concerning MTN.GNG/NG8/W/65, it appeared that it suggested that one could only find causality if one had price suppression or lost sales, or reduced profits, and that in the absence of one of those factors, no finding of causality could be made. It was better to have a system which allowed flexibility to consider a variety of factors.

One delegation agreed that one should not give decisive importance to a certain number of factors, even if these normally had to be present. This might also be true for the factor of increased imports. An example was given where a market had been covered by two foreign exporters who had dropped prices considerably when domestic production had occurred, whereafter the import volume had decreased. Nevertheless, dumping had occurred with enormous financial losses to the domestic company concerned. While this could be an exceptional example, one should not rule out the possibility of a positive injury finding in such situations.

One delegation, in response to that example, recalled that its own proposal related to the determination of material injury caused by dumped imports to an established industry. The example was relevant to Code provisions dealing with injury assessment that would apply to retardation of the establishment of an industry.

4. De minimis import volumes and market penetration and de minimis margins of dumping; and

5. Cumulative injury assessment

One delegation stated that the concept of de minimis market share would be difficult to apply in a uniform manner. The issue of injury depended on the circumstances of the particular industry, market conditions, number of suppliers and exporters, etc., involved in the concrete case. One could not artificially predetermine whether X per cent market share was a threshold above which there was injury and below which there was none. This depended on the number of participants in the market. The propositions in MTN.GNG/NG8/W/65 (items II (b) and (c)) responded to the motivations which gave rise to the request for a de minimis market share. These proposals should have benefits for smaller participants, but the rules should, in its view, be applied to all.

Some delegations supported these proposals. One delegation stated that it would have difficulties accepting de minimis market shares or import volumes unless these were very small. It would have less difficulty accepting a de minimis dumping margin. One delegation said that many smaller exporters would never cause injury if considered separately, were often not aware of the strategies of other companies and were punished without grounds. Another delegation added that the factors underlying the practice of cumulation implied that there was a kind of international conspiracy to injure which was not real and could not be proved. One delegation recalled its proposals in MTN.GNG/NG8/W/40 and urged, more generally, that the undercutting margin be considered.

Some delegations saw merit in or supported the proposal in MTN.GNG/NG8W/64, inter alia, that there should be an obligation to examine the injurious effect of dumped imports from each source, in relation to dumped imports from other sources. One delegation recalled, however, that it had itself gone further in its own proposal (MTN.GNG/NG8/W/51/Add.1).

One delegation was of the view that cumulative injury assessment should be permitted where imports from a number of countries were clearly being dumped. This seemed to be a logical extension from the concept of cumulating dumped imports from exporters in the same country. Another delegation said that imports from, for example, ten sources each representing a 1 per cent market share, had the same impact as a 10 per cent market share of one source.

C. Determination of the existence of threat of material injury

The Chairman recalled that it had been proposed to incorporate into the Code the Recommendation adopted by the Committee on Anti-Dumping Practices regarding this matter. Some of the proposals recently submitted suggested the inclusion in the Code of a number of additional criteria to determine the existence of a threat of material injury.

In commenting on MTN.GNG/NG8/W/63, some delegations reserved themselves against the additions to the Committee recommendation which were proposed. One delegation mentioned in this connection, in particular, the proposed concepts of the "build-up of related selling organizations" and "rôle as traditional supplier". Another delegation wondered whether it was possible to quantify and define in terms of timing "concrete plans to increase capacity" proposed as another criterion, and considered that the notion of "market proximity" was an awkwardly unmodern one. The intention that "no one or several of the criteria can necessarily give decisive guidance" could lead itself to expanding the meaning of "threat".

One delegation noted that there was a difference between threat and actual injury. Criteria for the determination of the former should be strict, but the possibility of adapting the rules to this less serious situation might be looked into. It shared the general view behind the proposal in MTN.GNG/NG8/W/63 but thought that the proposed indicators of "threat" were contrary to the general aim of increasing legal certainty. For instance, "concrete plans to increase capacity" did not indicate probability of an increase in dumped exports. This criterion was above all dangerous for countries with limited domestic markets because nearly all their exporters could be treated as a potential threat. Also, there could be no presumption that the "development of sales on third markets" was of itself a threat of injury. It was normal for all countries to try to export to new markets and in this they could be harmed by a determination of threat of injury. Although it was normal for trade to be greater between countries close to each other, "market proximity" was not an appropriate basis for assuming an automatic existence of threat of injury. As to the "rôle of a traditional supplier" it felt that this criterion was designed to make it more difficult for new exporters to enter a market under the pretext that they could cause a threat to national producers. It favoured the incorporation of the Committee's recommendation into the Code.

One delegation, supporting these views, thought that incorporating the Committee recommendation would be adequate to increase precision. Proposals made would expand the scope for easy imposition of anti-dumping actions and the scope of arbitrariness in implementation. Another delegation, also supporting the inclusion of the recommendation, argued that many of the additional elements proposed, although said to be indicative, seemed not to indicate much in particular, for example "market proximity" and "rôle as a traditional supplier".

In response it was stressed that, inter alia, the objective was not to expand the possibility of the application of this clause; even if the indicators could be affirmed in a concrete case, this did not mean that "threat of injury" would be found. It also agreed that in certain situations these indicators could be indicative of nothing. But, in other situations, they could have a meaning, for instance, a chemical bulk product which was difficult to transport could be a threat of injury depending on the nearness to market. This alone, however, would not allow a conclusion. None of the criteria proposed, even in combination, should necessarily lead to the conclusion that threat of injury existed or was imminent. However, the factors should be considered. The current language of the Code was very vague and open to interpretation.

One delegation supported the inclusion of the Code Committee's recommendation which was a result of a long and considered examination of the many factors that might be considered relevant. The proposals in MTN.GNG/NG8/W/59 and 63 would be assessed against the objectives of having a reasonably clear and strengthened understanding of the threat of material injury determination. It expressed scepticism to some of the proposals made, without specifying.

In specific comments concerning MTN.GNG/NG8/W/59, one delegation saw no justification for expanding the injury concept beyond the like product. One delegation said that the proposal differed from the Committee recommendation. It was also held that the specific language did not provide clarity or certainty, but rather subjectivity, for example, the reference to "likelihood of increased imports" and "actual and potential negative effects".

In response it was stated that the proposal reflected the experience gained after the recommendations had been adopted, and was intended to increase clarity, certainty and effectiveness in implementation. The proposal would not entail any extension of the concept of like product and domestic industry, rather, it elaborated on factors already contained in the Code such as return on investments, negative effects on cash flow, and the ability of domestic firms to raise capital or make investments.

D. Circumstances under which injury can be established on a regional basis

The Chairman recalled that the Group had before it one proposal regarding a possible amendment of the criteria under which injury could be determined to exist to an industry in a particular region.

One delegation stated that regional injury was a particular reality in large territories with regional differences. However, the Code's regional injury clause was unworkable because it required an isolated regional market, that the producers within it sold all or almost all of their production of the product in question in that market, and that the demand in that market was not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. These conditions were impossible to prove.

One delegation noted that the provision in Article 4 was an exception to the general definition of a domestic industry. As a legal principle exceptions should have restrictive interpretations. It remained unclear why the current rule was not operational. Its experience indicated that with new provisions like the one proposed there would be a tendency to use it more and more widely. It did not see how regional injury as described could make sense without the factor of market isolation. If there were not such isolation the regional industry concerned would be able to sell elsewhere within the importing country particularly since the regional industry was to represent "a significant proportion of total production", according to the proposal. Other delegations expressed similar concerns.

One delegation had itself, on occasion, found the provision of the Code difficult to make operational, but said that it should not be made open to a loose or arbitrary implementation. Whether or not there was a question of market isolation there had to be a very high dependency on a well defined region for a regional industry to exist and only if such an industry existed could a regional injury finding be made. Some of the terms proposed, for example the term "concentrated", were very wide. Clarification was sought as to the difference intended between material and serious injury, and the elements that would be additional to the existing test. A question arising in connection with respect to "significant proportion" was how this was to be measured, and whether the denominator should be total production in a particular country or the total production in, for example, a customs union with a single market.

One delegation believed that the existing Code was clear and reasonable. The proposed amendment might lead to abuse; in particular, a "region" might be selected arbitrarily and might increase pressures from industries to invoke investigations. Some delegations thought that the proposal implied that any country in a single market could claim injury. Some delegations said that the central criterion should be the location of regional markets, not the location of production plants.

The drafter of MTN.GNG/NG8/W/63 welcomed observations made, in particular on the need to find a more precise language. It stressed as a real phenomenon that there could be a concentration of exports in a certain region. Situations could occur where producers were not injured because they could sell elsewhere in the area but in such a case there was no serious injury and there would be no regional case. Market isolation was not absent from the proposed new concept; even with a great degree of integration, regional injury could well exist for producers in a particular region or country. The idea was to replace conditions which had never been possible to fulfil, by provisions which took account of real problems and allowed - under exceptional conditions - measures to be taken. The fact that the GATT concept of serious injury was used indicated a desire to strengthen conditions. However, this concept might need further precision.

E. Definition of certain terms

The Chairman recalled that proposals had been made with regard to the clarification of the definition of two concepts which played a key rôle in injury determinations:

1. Like product; and

2. Domestic industry

A number of delegations referred to the proposal in MTN.GNG/NG8/W/59 (item IV.3) concerning investigations involving processed agricultural products. One delegation thought this extended the coverage of the Code to products whose prices reflected different market signals and which could vary so much that it was impossible to make a fair judgement as to whether

or not dumping existed. Another delegation said that it would be potentially undesirable to provide for a major expansion of the provisions on "like product" and "industry", which set the established parameters under which anti-dumping actions could be invoked. It had chosen to concentrate on a particular concern (reference MTN.GNG/NG8/W/65, item I (b)). A number of delegations expressed the view that by referring to injury caused by, for example, partly or minimally processed agricultural products, one might possibly weaken the definition of like product, and this might spread to the industrial sector. The delegation having made the proposal explained that in its view this would not involve an expansion of the definition of like product.

One delegation recalled its proposal in MTN.GNG/NG8/W/51 that the producers of the like product should constitute 50 per cent by value of total domestic production. It had also proposed a footnote to Article 4:1 that domestic industry should not include manufacturers of products used as input products, parts or components, which were not "like products". The intention was to reinforce the link between domestic industry and like product. A number of delegations also favoured the setting of a percentage, and some of them also agreed with the said footnote proposed. Some delegations referred to the proposal for a "more than 50 per cent" provision in Article 4:1 (reference MTN.GNG/NG8/W/64, item IV), or "at least 50 per cent" (MTN.GNG/NG8/W/40). One delegation said that strengthened definitions of both domestic industry and like product would strengthen the causality element. It recalled its proposal in MTN.GNG/NG8/W/55 in this regard. It also said that some of the proposals on circumvention in MTN.GNG/NG8/W/59 seemed to extend the definition of like product.

Concerning MTN.GNG/NG8/W/48/Add.1, it was explained that "related" was connected with the definition of domestic industry whilst "association" dealt with the relations between exporters and importers. It was open to further discussion about the concrete meaning of "control".

PROCEDURES FOR THE INITIATION AND CONDUCT OF ANTI-DUMPING INVESTIGATIONS

A. Initiation of anti-dumping investigations

The Chairman recalled that one issue which had been addressed concerned the evidence required for the opening of anti-dumping investigations. Thus, suggestions had been made regarding the nature and quality of data which must be provided in support of requests for the opening of investigations. A second issue which had been referred to in a number of proposals concerned the establishment of procedures to verify that a petition was filed on behalf of the domestic industry producing the like product. Third, it had been proposed that, before deciding to initiate an investigation, the relevant authorities should evaluate whether this would be in the public interest. Finally, in this context proposals had been made regarding the definition of the terms "domestic industry" and "introduced into the commerce of another country".

One delegation recalled its proposals in MTN.GNG/NG8/W/51 to clarify the circumstances under which investigations could be initiated and to introduce more definitive requirements on "sufficient evidence". It supported the proposals made in MTN.GNG/NG8/W/65 about minimum documentation and information required in a complaint. Useful suggestions had also been made in MTN.GNG/NG8/W/63 about information and supporting evidence to be given in a complaint. One delegation stated that enhanced standards had been proposed in MTN.GNG/NG8/W/65 because initiation could be as critical in anti-dumping procedures as any definitive duty. Having examined proposals in MTN.GNG/NG8/W/51, W/59 and W/63, there seemed to be a very strong convergence on views at least in terms of motivation. One delegation agreed with these statements. Concerning MTN.GNG/NG8/W/63 it basically supported the ideas contained therein, but thought that further information, such as names of exporters and exporting countries, the scope of products allegedly being dumped, and the dumping margins should be added.

One delegation, also welcoming the proposals made, said that it was important to ensure that measures were not used to deter potential market entrance. Investigations should be initiated only if the petition was supported by domestic producers of like products accounting for the majority of total domestic production thereof; it should be incumbent upon investigating authorities to verify that the petitioners did in fact represent the "major proportion", the meaning of which should be clearly defined. Consideration of public interest should always be taken into account, and user industries should have the full standing to participate in the proceedings.

One delegation shared the principles set out in MTN.GNG/NG8/W/55, that investigations be initiated only if complaints were affirmatively supported by a majority of industry, that the procedures should be equitable, consistent and transparent to ensure greater predictability and certainty.

A number of other delegations stated that several proposals corresponded to these concerns and gave a good basis for further work. Some of these stated that MTN.GNG/NG8/W/64 also addressed the question of prima facie evidence as an important issue to be dealt with. One delegation added that improving procedures alone would not be adequate. It was more important to improve the fundamental problems of determination of dumping and injury. It supported the points made about the harassment element involved in initiations, that the standing of petitioners should be verified and that frivolous complaints should be reduced or eliminated. Elements in MTN.GNG/NG8/W/51 and 64 about compensation in frivolous cases was worth further consideration, as well as a number of proposals which suggested greater transparency during the various stages. Finally, public interest should be taken into account before the actual initiation of investigations, and parties should be given opportunity to comment.

B. Conduct of anti-dumping investigations

The Chairman recalled that a number of proposals had been made regarding the scope of anti-dumping investigations. A second important area related to the definition of interested parties and their rights. In this context suggestions had been made for strengthening the Code's provisions on access to information, disclosure of the facts and methodology on the basis of which determinations are made, the use of simplified questionnaires and time-limits to respondents to questionnaires. Many delegations had proposed to incorporate into the Code the recommendations adopted by the Code Committee on, respectively, use of best information available and procedures for on-the-spot investigations. Finally, some proposals suggested the inclusion of a provision for the termination of investigations in case of negligible imports or in case of de minimis margins of dumping.

1. Scope of investigations

- company-specific nature of investigations and possibility of limiting the scope to a representative number of parties, products and transactions

Delegations addressed the proposal in MTN.GNG/NG8/W/63 concerning sampling. One delegation stated that this could be considered if sampling was intended only for exceptional circumstances. It agreed with the proposal in MTN.GNG/NG8/W/48 that if a company insisted on being investigated individually, this should be granted. One delegation believed that the proposed sampling technique gave rise to selectivity and partiality. It was also held that sampling could have the same effect as cumulation. A number of delegations made similar points.

The drafter of MTN.GNG/NG8/W/63 confirmed that only exceptional circumstances could lead to simplified procedures. The problems explained, for example time-consuming investigations, were problems which exporting companies also faced.

One delegation stated that whilst company-specific investigations were desirable, there might be exceptional cases due to the number of companies involved. It had therefore made a proposal contained in MTN.GNG/NG8/W/48 for a footnote to Article 6.1. It believed that MTN.GNG/NG8/W/63 also dealt with exceptional cases. However, the concrete method had to be considered with caution because it might lead to abuse and impede the interests of exporters not investigated. One delegation stressed that any sampling technique should be fair and scientifically designed and should be representative of the actual situation.

Some delegations said that when there were many exporters it was likely that most of them had minor market shares and were not in a position to influence the market price to any appreciable degree. It was therefore a question under what circumstances it could be deemed necessary to subject

such exporters to anti-dumping procedures. Investigations should, in principle, be company-specific. It was a question how this could be taken into account in a sampling procedure. One delegation held that the concept of de minimis share of the import market could be useful in limiting the number of investigations.

One delegation said that the procedure proposed seemed to establish sampling as a rule and also dealt with sampling in terms of products, which was unclear. The fundamental principle was that actions be company-specific and taken only against companies proven to have dumped. One could not presume that a company not investigated had dumped.

One delegation stated that it was important for companies to be able to predict its exports and an increase in subjectivity, which sampling represented, would counter this need for economic and legal certainty. If it was a question of rare or occasional situations, one would have to discuss the parameters within which actions would be exceptional. If "exceptional" was not defined it could only be understood to be something becoming generalized. One delegation said it was aware of cases where the use of sampling had lead to a fifty/fifty probability of the existence of dumping. This was not acceptable.

One delegation stated that it saw some validity in exploring whether or not a sampling technique that was fair, quick and unbiased was relevant to an anti-dumping proceeding.

One delegation said that its practice was to investigate all companies which were prepared to co-operate. It understood many of the concerns expressed but noted that in a number of cases the sampling technique had worked well, with the consent of the exporters concerned. It welcomed further suggestions by other delegations on how to deal with the practical problems involved. Concerning the company-specific nature of investigations it noted that it had in some cases imposed a so-called residual duty. In such cases companies were granted the possibility of a quick review. This method had also worked to the exporters' satisfaction.

- products subject to quantitative import restrictions

One delegation supported the proposals in MTN.GNG/NG8/W/48 and W/51/Add.1, that proceedings not be initiated against products subject to MFA or Article XIX actions.

Referring to its proposal in MTN.GNG/NG8/W/51/Add.1, one delegation said that it could be argued that MFA and Article XIX were designed to deal with fair trade while Article VI and the Code were designed to deal with unfair trade. However, Annex A of the MFA required that determination of a situation of market disruption should be based on the existence of serious damage to domestic producers or actual threat thereof. Two factors generally appearing in combination caused market disruption: a strong and substantial or imminent increase of imports of particular products from particular sources, offered at prices substantially below those prevailing for similar goods of comparable quality in the market of the importing country. Thus, the MFA clearly made no distinction between fair and

unfair pricing. The same applied for Article XIX. Although there might be a different legal basis for taking action under the MFA on the one hand, and the Code on the other, both measures were designed to address the same problem, i.e. injury caused by a significant increase in low-priced imports. The same sets of economic data were relied upon, whether under the Code or the MFA, to determine whether damage had occurred. In its view, once a QR was in place it was implicit that imports up to that level were non-injurious. It was therefore entirely reasonable to clarify in the Code that anti-dumping proceedings should not be initiated with respect to products already subject to QRs under the MFA or Article XIX. If anti-dumping actions could be taken in such cases one would be faced with a situation of multiple jeopardy for exporters. It noted that participants should refrain from taking measures on textiles covered by the MFA before exhausting all relief measures provided in that Arrangement and that consultations were also required.

One delegation stated that it understood the views expressed but noted that in some specific cases injury had been established in spite of the existence of QRs.

2. Definition of "interested party"; and

3. Rights of interested parties

One delegation noted that some of the proposals contained long lists of interested parties. It was important to make the link between the definition and the rights of interested parties because while transparency was important it was also a question whether, by extending the notion of interested parties, one might not make the procedure more cumbersome and difficult. In a comment on MTN.GNG/NG8/W/59 one delegation expressed the concern that it might be difficult to protect confidentiality under a "protective order" system. With regard to the proposal concerning Article 6:7, dealing with "confrontation conferences" or "hearings", it believed that in order to protect confidential information as well as to discuss a case in depth, only the directly interested parties should have the opportunity to confront its opponents. In reply it was stated that the term "directly interested" might be too vague, and that the question would be further considered.

One delegation addressed the link from the perspective of "public interest". It recalled its own proposals in MTN.GNG/NG8/W/55 which, inter alia, suggested examination of the domestic producers petitioning for measures to determine whether these enjoyed market domination, set price cartels, or engaged in restrictive business practices. It added that it had also a reservation against including workers' unions.

One delegation stated that the question of anti-dumping questionnaires should be added under item B. It referred to its proposal in MTN.GNG/NG8/W/51/Add.1

One delegation commented on the proposals on transparency in MTN.GNG/NG8/W/63 noting that it was difficult to make a trade-off between disclosure and confidentiality; the Code dealt with this in a careful manner. One delegation explained that MTN.GNG/NG8/W/65 did not attempt to address the transparency companies should enjoy, against the administrative considerations of timing and effectiveness.

6. Termination of investigations where the volume of imports is negligible or where the margin of dumping is de minimis; de minimis margin of dumping in case of imports from developing countries

One delegation referred to its proposal in MTN.GNG/NG8/W/51, item D (iii). It looked forward to further elaborations of the similar proposals in other documents. One delegation recalled its proposal in MTN.GNG/NG8/W/65 emphasizing that it was prepared to consider the establishment of de minimis margins of dumping. However, its own experience showed that it was very difficult to determine what an effective de minimis market share or import level could be; it did depend on the circumstances of a particular industry and markets. One delegation noted that it had in MTN.GNG/NG8/W/63 proposed to consider de minimis rules with regard to the dumping margin applicable to developing countries. One delegation referred to its proposal in MTN.GNG/NG8/W/55 for a de minimis market penetration as well as a minimum margin of dumping and stated that it saw merits in a footnote to Article 6:1, as suggested in MTN.GNG/NG8/W/51. With respect to the treatment given to developing countries, it recalled that the Punta del Este Declaration only referred to developed, developing and least developed countries.

One delegation supported a definition of the term "negligible"; this did not have to be in terms of a percentage.

One delegation stated that its own practice included a de minimis margin of dumping. De minimis injury was a different question and very difficult to define. Another delegation made the same distinction, adding that it did not consider a figure like 5 per cent from each individual source as reasonable where many sources were involved.

One delegation wondered why it would be simpler to reach an agreement on a de minimis margin of dumping than on a de minimis market share. Negligible volumes of dumped imports were already referred to in Article 5.3 and information on dumped imports would be available even before initiation of an investigation; it should be possible to terminate investigation of companies whose market shares were found to be below the threshold.

One delegation stated that there was no basis for even initiating investigations if the volume of imports was negligible. The negotiations should therefore decide on a de minimis share of import markets. Small exporters found it extremely difficult both economically and in terms of time to defend their cases properly, and even tended to abandon a particular market.

One delegation referred to the proposals on cumulation in MTN.GNG/NG8/W/65 which encouraged the exclusion from any proceeding at the earliest stage possible of any supplier that was found to be unsubstantial and contributing negligibly to the injury. It believed this proposal addressed fundamentally the same concerns that were sought to be addressed by the proposals regarding de minimis market share.

Points 4 and 5 in the Chairman's paper were not discussed.

ANTI-DUMPING MEASURES

A. Provisional measures

The Chairman said that a number of proposals aimed at a strengthening of the substantive and procedural criteria for the application of provisional measures. Thus, it had been proposed to provide explicitly that provisional measures might be taken only if a formal investigation had been opened, if notice had been given of the opening of the investigation, if adequate opportunities had been given to interested parties to make comments, and if at least a preliminary investigation of the facts had been carried out. Another suggestion was that it should be provided explicitly that provisional measures normally not be applied sooner than sixty days following the initiation of an investigation. Another aspect of the rules on provisional measures which had been raised was the question of the period of validity of such measures. In this respect, the Group had before it a proposal that the period of validity of provisional measures should be extended to six months in normal cases and to nine months in complicated cases. He noted that the issues of the timing of the introduction of provisional measures and the duration of such measures were also dealt with in the proposals dealing with what had been defined as "recurrent injurious dumping" and "repeat dumping". He proposed, however, to discuss those specific proposals under those sections of the Chairman's paper.

1. Substantive and procedural requirements for the application of provisional measures

One delegation recalled the proposals on minimum requirements in MTN.GNG/NG8/W/63, to the effect that no provisional measures should be taken unless a number of steps had been made first. It was important that a clear distinction be made with regard to the evidence available at the moment of initiating a procedure, and the evidence available prior to the moment when provisional measures were taken.

A number of delegations shared these views. One of these delegations added that the Code already charged the operators of anti-dumping systems to provide transparency on all points of an investigation, provisional measures representing a particular turning point in an investigation. Another participant added that the proposals corresponded to the practices of its own investigating authorities. It welcomed indications as to how precisely the Code provisions were proposed to be amended, as these already seemed to be adequate.

One delegation, supported by another delegation, said that conditions and procedures merited consideration, because of certain practices whereby provisional measures were imposed immediately upon the opening of an investigation. A reasonable opportunity should be provided for the submission and analysis of complete information on possible dumping and adequate information on injury before an affirmative preliminary determination could be made and provisional measures applied. The authorities should provide interested parties who participated in the investigation a full explanation of the conclusions and the analysis performed in reaching a preliminary determination.

One delegation stated that it endorsed proposals for increased minimum standards relating to the imposition of provisional measures and supported efforts to improve transparency, to provide fuller explanations and disclosure of methodologies. It also favoured an opportunity for review, if appropriate. Another delegation stated, in general, that it was in favour of more transparency and increased standards.

2. Timing of the application of provisional measures

One delegation recalled that it had suggested a sixty-day minimum period during which provisional measures could not be put into effect. It added that in certain exceptional circumstances of massive importation and repeated dumping practices, this general rule might not be suitable. Another delegation related exceptions to circumstances where a product might have been investigated before, or where there was a repeat - or recurrent - dumping problem. A number of delegations saw merit in setting a minimum period. Some of these said, however, that as long as investigations were thoroughly conducted it might be unnecessary to set a time-limit. One participant wondered whether there was not a possible contradiction between the need to complete investigations speedily and the need to set a reasonable minimum time period. One participant found the proposal interesting but defended the preservation of Article 6:9 which made it possible to proceed quickly.

In reply it was noted that a minimum period did not mean that the authorities should not terminate proceedings when the facts clearly demonstrated that they should do so. In that regard, it supported the existing Code.

Some delegations believed that the principle of minimum obstacles to international trade could be fulfilled if the investigating authorities made a rather thorough investigation to arrive at a preliminary finding of dumping and injury, and then had a relatively short period to finalize the investigations and enforce provisional measures. One possibility might be to combine the proposal of sixty-days minimum time after the initiation, before provisional measures could be applied, with the present four month rule.

3. Period of validity of provisional measures

One delegation explained that the reason why it had indicated (in MTN.GNG/NG8/W/63) that it might be more appropriate to have six months rather than four, was to guarantee that a thorough examination of all arguments and issues could be made. However, in complex cases, the validity period might be nine months.

One delegation said that it had no definitive view as to whether or not the Code ought to be modified to allow for provisional measures for a period of six to nine months. It noted that many of its own proposals in the area of anti-dumping were motivated by the view that where the evidence warranted, cases should be brought to a conclusion at the earliest possible point. Another delegation stressed that a major objective was to complete an investigation as expeditiously as possible because of the disruptive effect investigations had on trade. Therefore, the current Code language seemed more appropriate.

One delegation said that while there might be arguments to support the extension of provisional measures, what was important was to address the question of which parties would have the right to request extension. It understood that the practice of some authorities was to automatically consider requests for extensions if these were from the petitioners. Equal opportunity should be given to exporters in this respect. A similar concern was expressed by another participant as well.

A number of delegations expressed reservations against an extension of the period of validity. It was held that this could prolong the period of uncertainty for exporters and might divert trade; it would not be consistent with Article 10:3; provisional measures themselves already created serious trade effects; standards of this kind (notably the proposal for nine months) usually lead to indiscriminate or little transparent use.

In reply it was noted that the fact that exporters had the right to, and indeed requested an extension was the reason behind the proposal, together with the need to provide clarity.

One delegation referred to the proposal in MTN.GNG/NG8/W/59, for an amendment to Article 10:3 to permit an extension of provisional measures where there existed a likelihood of recurrent injurious dumping. Apart from the concept of recurrent dumping, it thought the concept of likelihood was too vague.

B. Undertakings

The Chairman recalled that some of the proposals suggested that there was a need for a clarification of the Code with respect to the nature of undertakings. One important question in this context was whether undertakings in anti-dumping proceedings should relate only to prices or whether such undertakings might also relate to quantities. Other issues raised in the area of undertakings concerned the criteria for and the timing of the acceptance of undertakings, the level of price increases in an undertaking, and the acceptance of undertakings in anti-dumping proceedings involving imports from developing countries.

1. Nature of undertakings; and

2. Criteria for and timing of the acceptance of offers of undertakings

A number of delegations, expressing support for the proposals in MTN.GNG/NG8/W/65, viewed the present Code as limiting undertakings to price measures and had serious reservations about expanding it to offer alternative means. They also supported the idea of a sunset clause. One delegation referred to document MTN.GNG/NG8/W/28 and argued that the acceptance of undertakings should not be linked to unnecessarily restrictive conditions. While it had itself not imposed QRs, it noted that in a number of instances the exporting companies themselves had made proposals for certain quantitative limitations. Another delegation referred to the proposal in MTN.GNG/NG8/W/40 that the price undertaking offered should be accepted unless the authorities determined that it could not be effectively monitored.

Regarding transparency, some participants supported a requirement to publicize the details of price undertakings. One delegation, while being in favour of transparency in regard to undertakings, noted that there might be difficulties with disclosing confidential information proper to the companies involved. In terms of procedures more generally, however, it treated undertakings in the same way as other anti-dumping measures. One delegation explained that its use of a procedure involving protective orders gave parties an opportunity to review some proprietary data. One delegation held that a distinction should be made between the wish of exporting companies and the relationship between governments. The Group was dealing with rights and obligations between the latter. While it generally sympathized with the idea of transparency, it emphasized that proprietary information imposed limits in this regard.

3. Level of price increases in an undertaking

One delegation recalled the proposal in MTN.GNG/NG8/W/51 that Article 7:1 be amended to require that price increases under undertakings not be higher than necessary to remove the injury to the domestic industry or the margin of dumping, whichever was the less.

C. Definitive anti-dumping duties

The Chairman recalled that the Group had before it proposals dealing with the introduction of a "public interest" clause, the establishment of a "lesser duty" rule and procedures for the treatment of imports from companies which had not been investigated or which had not exported during the period of investigation. These three questions had been the subject of some discussion at the November 1989 meeting. Recent proposals also included two issues which had not yet been discussed and which merited a thorough discussion. First, there was the question of a possible amendment of the provisions of the Code in the area of retroactive application of anti-dumping duties. Second, there was the important question of the procedures for the assessment of the amount of anti-dumping duties payable. One proposal suggested that it should be clarified that the amount of anti-dumping duties payable should be determined at the time of entry of the product in question, or as nearly as possible thereafter.

1. Consideration of the public interest in the decision to impose anti-dumping duties

One delegation believed that in the context of the changing nature of trade patterns and corporate relationships, it was important to examine whether the full application of an anti-dumping duty, once determined, should be assessed. It had therefore proposed (in MTN.GNG/NG8/W/65) that signatories be encouraged to provide for public interest considerations within their systems at the end of a proceeding.

A number of delegations supported a requirement that public interest be considered before the decision to impose an anti-dumping duty. Some of these considered that such considerations be taken into account even at earlier stages of the investigations. One delegation noted that it supported the public interest notion also in other Negotiating Groups, notably on Subsidies and Safeguards. Two delegations recalled their own proposals (in MTN.GNG/NG8/W/48/Add.1 and W/51). In their references to public interest, industrial users and consumers were mentioned by a number of speakers. Some participants said that it was widely held that anti-dumping measures had over the years evolved into becoming a trade policy instrument; there was therefore already a strong political element present. Moreover, a general assessment would not preclude the conclusion that anti-dumping duties would be in the best public interest.

One delegation, supported by another participant, noted that the notion of public interest had not been defined in international law and was interpreted in each country in accordance with its specific interests. It was aware of the need to keep in mind, for example, the interests of consumers, but since the question had to do with national sovereignty, the proponents of the notion ought to give it a more detailed explanation, also as to how they thought it would function in practice, for example, with respect to the prolonged investigations which would be needed. Therefore, while not being against the introduction of a general concept of public interest, any concrete and detailed implementation should be very carefully analysed.

One delegation stated that the determination of what was or was not in the public interest was within the discretion of the administrative authority. It should therefore also be discretionary whether or not a contracting party should adopt such a test. Some, which had such a test, had reported that it worked well but for some systems such a test would undermine objectivity and the non-political, juridical nature of the process. Its own process gave no room for political considerations and some contracting parties might consider that the public interest was best served by scrupulous enforcement of the anti-dumping laws. Another delegation also thought that a specific requirement to take account of public interest could work to politicize investigations and could open the door for lobby groups to influence outcomes which should be determined by the objective assessment of the facts. It therefore disagreed with the generalization which implied that all anti-dumping actions were trade policy instruments. It noted also that there were differences in administrative systems; in its country, for instance, the final decision was taken by the Minister concerned, which was assumed to be in the broader public interest.

One delegation agreed that ultimately, any consideration of adjustment of anti-dumping duties for reasons of public interest would be the sovereign determination of the investigating authority. However, the increased complexities in world production, trade and corporate relationships that were now about to be revealed, were reflected in a number of the proposals before the Group. The traditional use of anti-dumping was likely to take on a new appearance over time. All proceedings should be fair in redressing injurious practices as well as in responding to the legitimate concerns of consumers and other producers that might be affected by measures imposed. Public interest might not need to be dealt with in every case, but exceptional cases were also likely to be critical to trade patterns. The Code ought to encourage its signatories to provide for the consideration of public interest at the end of the investigative proceeding.

In response, it was argued that although the practice of anti-dumping law was becoming increasingly complex, a mandatory public interest test would make matters far more complicated and difficult to administer.

2. Amount of anti-dumping duties; timing and methodology for the assessment of anti-dumping duties and reimbursement of excessive anti-dumping duties

One delegation said that when there was an exposure to an anti-dumping duty, an exporter might eliminate an unfair pricing. Nevertheless, upon entry into the market, it might be faced with a continuing liability and uncertainty as to whether or not a duty that ought not be payable would in fact be refunded and if so, when. It therefore proposed that the liability for duty be established at the point of entry and that, where anti-dumping duties were assessed in excess of the duty warranted, these be refunded as soon as possible. This was, however, a second best solution: the liability should be known at the point of entry, and the duty assessed at that point in recognition of what the actual liability was.

A number of delegations held views similar to those expressed in MTN.GNG/NG8/W/65 concerning the imposition and collection of anti-dumping duties. A number of delegations expressed support for a "lesser duty" rule; one of these stated support for MTN.GNG/NG8/W/64 in this regard.

Regarding the amount of duties, some delegations stressed that anti-dumping duties should be assessed only on transactions which were actually dumped; since Article VI only condemned dumping which was injurious, the lesser duty rule should be made mandatory. One delegation added that such a rule should also apply to price undertakings.

Some delegations agreed that an element of judgement was unavoidable in quantifying injury. However, judgement was required in a number of existing Code rules and in national laws. They therefore did not see why an assessment of the level of anti-dumping measures should be a radical departure from present principles. One delegation added that when calculating the offsetting anti-dumping duty, this discretion would remain available. However, by incorporating this in the Code the investigating authorities could be expected over time to use this judgement with caution and responsibility.

Another delegation, while agreeing that the amount of duty be the lesser of that required to remove the injury or the margin of dumping, whichever was less, thought that it would be difficult to introduce truly objective criteria into Article XI:1(ii), and questioned the need for changes. With respect to timing and methodology it noted that the proposals in MTN.GNG/NG8/W/65 were in line with its own practice, whereby exporters were supplied with the normal value so that they could predetermine whether it was likely that any anti-dumping duty would be payable.

Another delegation believed it would be impossible to quantify injury in a fashion that would enable authorities to cap the rate of duty. Such a rule would make the process less transparent and certainly less predictable. Injury by reason of dumping had to occur for a lengthy period of time, in its own case for three years, for it to be manifest and clearly identified as caused by dumped imports. It was the aggregate negative impact of such imports on the performance of the domestic industry which had to be identified. One should not adopt the fiction that a lesser duty rule would remedy that impact.

One delegation said that since an investigation had to show that dumped imports caused injury, one would assume that such injury must be measurable; some practitioners found that they could do so. The full extent of injury might in certain cases not be known for some time, but the Code contained provision for review of the level of duties. If it was found that the degree of injury was higher than originally envisaged, there might be justification for increasing the level of duties. However, for most cases it should be possible to measure the injury during the first investigation and apply the lesser duty rule.

3. Treatment of imports from companies which have not been investigated or which did not export during the investigation period, and from small companies

A number of delegations said that it should be recognized that anti-dumping investigations were company-specific and that anti-dumping duties were levies on dumped imports causing injury. Companies which had

not exported during the reference period could not have dumped and should not be subject to anti-dumping duties; if any duties were levied, these should be the result of subsequent and separate investigations. Small companies could also have genuine difficulties in responding to or participating fully in investigations. One of these delegations believed that it was not the intention of the Code that companies which could not comply with the very technical requirements should be unfairly penalized. There should be reference in the Code to give sympathetic consideration to the situations of small companies as long as they could provide some evidence of their problems and demonstrate their willingness to co-operate within their means. Another of these delegations added that flexibility should be shown in their regard, and that exports from small companies could not, moreover, be expected to cause injury directly.

One delegation agreed that genuine newcomers should not be subject to duties without investigation. However, the situation where the payment of anti-dumping duties was being avoided through the use of a different exporter must also be taken into account.

One delegation noted that not only small exporters but also small complaining companies could have difficulties. While understanding that the former might have problems in completing questionnaires, such would be the case of small complaining companies as well. If flexibility was needed, both sides should be borne in mind.

4. Retroactive application of anti-dumping duties

The drafter of MTN.GNG/NG8/W/63 explained that it sought as precise criteria as possible and the removal of the subjectivity in Article 11.1(ii) which required that the importer knew or should have known the dumping margin. The precise wording of the criteria proposed was not yet developed.

The drafter of MTN.GNG/NG8/W/59 noted that it supported retroactivity in the narrow areas of repeat dumping, recurrent injurious dumping and anti-circumvention.

A number of delegations considered both documents to open the possibility of broadening the concept of retroactivity on the basis of arbitrary factors and therefore expressed concern about their possible implications.

In comments on MTN.GNG/NG8/W/63, a number of participants said that it was necessary to clarify the concepts proposed, such as "massive imports over a short period", "a history of dumping in the same business sector", and "particularly high dumping margins".

One delegation expressed doubts as to the possibility of finding acceptable definitions of these concepts which would satisfy the need for having objective and predictable international rules. In this connection it was noted that the present Code referred to massive dumped imports; that the reference to "the same business sector" raised the question of

whether widening of the scope of anti-dumping action was being proposed, in terms of whether one dealt with like or different products; and that the concept of particularly high dumping margins seemed too vague. One delegation noted that "massive" already figured in Article XI:1(ii). It could not give a precise indication on its interpretation since it had never applied measures with retroactive effect.

Some delegations said that it seemed sufficient to allow retroactivity when imports, after initiation of an investigation, had increased to a considerable extent in relation to a previous representative period, when this took place before retroactive measures could be introduced, and there was reason to suspect anticipation of anti-dumping measures; however, retroactive application should in no case be permitted for the period before the investigation was initiated.

In regard to MTN.GNG/NG8/W/59, particular reference was made to the notion of injury caused by sporadic dumping which, according to the proposal, in the light of timing, volume and other circumstances was "likely to postpone the remedial effect of any order". This seemed, according to one delegation, to be particularly vague. Two delegations added that the history of dumping should not be based on prior findings by authorities of a third country because this would lead to an unfounded extension of retroactivity. One delegation stated that it believed that the proposals in MTN.GNG/NG8/W/59 were very precise and designed to address a very particular type of problem.

D. Duration of anti-dumping measures, administrative review and refund procedures

The Chairman said that the issues raised in this area concerned the possible introduction of a "sunset" clause, the scope, purpose and procedures for the conduct of administrative reviews and the procedures for the refund of anti-dumping duties. While the Group had already had a preliminary discussion of the first issue, he thought here was room for a thorough examination of the other questions raised, in particular those with respect to administrative reviews.

One delegation said that in too many cases measures remained in place for periods well in excess of ten years, sometimes without ever having been reviewed. There should be compulsion to require that definitive duties terminate at a specified time and that they be subject to review before extension. Document MTN.GNG/NG8/W/65 had proposed five years where no review occurred, whereas where review took place, measures might be extended for a period of three years beyond which a new investigation in compliance with the various Code provisions would be required.

One delegation stated that a number of measures had expired because the industry benefiting from the protection had not requested review. Therefore, in its experience, a sunset clause was useful and had worked well. It was in favour of full transparency in the framework of reviews. Whenever they believed that circumstances had changed, parties could make a substantiated request for review.

One delegation recalled the proposals for a five-year sunset clause, review and refund, as set out in MTN.GNG/NG8/W/48 and Add.1, adding that it also supported the basic thrust of the proposal in MTN.GNG/NG8/W/59 concerning transparency in reviews.

One delegation proposed that a sunset clause of three years should be introduced, as proposed in MTN.GNG/NG8/W/40. This document, as well as its Add.2, also dealt with administrative refunds and review procedures. Two delegations supported the proposal in MTN.GNG/NG8/W/66, i.e. a three year sunset and any request for remedy thereafter to be treated as a new complaint. They agreed with MTN.GNG/NG8/W/64, that when warranted, interested parties should be entitled to an annual review of dumping margins and of material injury, provided they submitted a substantiated request. These reviews should be completed expeditiously. In this connection, one of these participants recalled that it had suggested amending Articles 8.3 and 9.2. One delegation added that price undertakings should also be subject to a sunset clause.

One delegation agreed that to set a date might not necessarily be the best approach. However, it also noted that some measures had been in place for many years.

One delegation opposed any arbitrary period for the termination of an anti-dumping order. Instead, there ought to be a regular periodic review of the existence of dumping and an opportunity on a regular basis for review upon request of the existence of continued injury. This was in its view the fairest approach since, if there was no evidence of dumping or injury, the order would be removed at the earliest possible time. In its system there was virtually an annual review and no measures were imposed if no dumping was found to exist.

CIRCUMVENTION OF ANTI-DUMPING MEASURES

The Chairman recalled that two delegations had proposed to include provisions designed to deal with what had been referred to as "circumvention" of anti-dumping measures. Given that this was an area not yet covered by the Code, he considered it appropriate to discuss some general conceptual questions regarding the term "circumvention" before proceeding to a discussion of the specific proposals which had been made to deal with this phenomenon. Regarding the scope of the concept of circumvention, two aspects could be distinguished. First, there was the question of the nature of the situations in which circumvention of anti-dumping measures might occur. In the proposals made, the term "circumvention" seemed to relate to: (i) importation of parts and components in an importing country for assembly or completion in that country into a product like a product subject to anti-dumping duties; (ii) shipment of parts and components to a third country for assembly or completion and subsequent exportation to the country in which imports of the like finished product were subject to anti-dumping duties; and (iii) situations in which producers subject to anti-dumping duties started to export slightly altered or later-developed products. Secondly, a range of factors had been mentioned as being relevant to establish criteria to determine the existence of "circumvention". These included, inter alia:

(i) the value added in the assembly or completion process and the value of the parts and components used in the assembly or completion process; (ii) the existence of a relationship between the party carrying out the assembly operation, the producers of the product subject to anti-dumping duties and the supplier of the parts and components; (iii) the evolution of the imports of parts and components; and (iv) the timing of the assembly operation.

Regarding possible remedies suggested, some would provide for the expansion of the scope of application of existing anti-dumping duties, while others would provide for the application of duties to products assembled in the importing country.

One delegation stated that its proposals were based on real experiences in enforcing its anti-dumping laws. Commercial practices were different from when the Code had been written and it was not uncommon for producers to find ways of evading the effect of an anti-dumping order. Some fairly limited rules had been proposed for addressing the circumvention problem, of which three instances had been identified. The first case involved a product subject to an anti-dumping order where the parts making up the product were subsequently exported to the country having imposed the order. It did not intend to use anti-circumvention measures as local content requirements. Therefore, only the quantity of the parts from the country subject to the order was relevant. This quantity should be particularly large. Only if the parts imported, when taken together, were sufficiently like the whole, would the order be extended to these parts. The second instance would involve shipment of the parts or components that made up the whole to a third country with subsequent reshipment to the country having imposed the order. The third circumstance was when the product subject to the order was altered or was a later developed product sufficiently like products subject to investigation. Guidelines had been proposed in MTN.GNG/NG8/W/59, but their refinement might be further discussed. The intention was not that anti-circumvention provisions should be used to erect new barriers or to create new distortions.

Another delegation also underlined the importance of the problem. It recalled that for the same reason a proposal had been made in MTN.GNG/NG8/W/28.

One delegation stated that circumvention was a legitimate concern of those signatories which sought to apply fair remedies to counter unfair and injurious pricing. As a result of the Code's silence on the specific remedies that might be available to redress circumvention of anti-dumping measures, signatories had begun instituting, unilaterally, provisions to deal with the problems they faced. It was not unnatural that they did so, but it was of particular concern that the rules regarding the extension of anti-dumping measures to new situations were unilaterally set. Therefore, the Group should spend considerable effort to address what was obviously going to be a problem of increasing magnitude. This would involve defining the situations in which circumvention might occur, the criteria which

should be considered as evidence of circumvention, and the nature of the remedy. In terms of substantive standards one might have to look at the concepts of like products and the so-called minimum value added test, the trade pattern to assess whether or not one was truly dealing with a case of circumvention, the relevance of related transactions and whether provisions should be available where there was a separate industry for the parts and components. There should be procedural standards not unlike those existing under the Code, including "standing", initiation thresholds, transparency and rules for when provisional and definitive duties might apply.

One delegation saw it as very important that the Group address the problem of circumvention for the same reasons as those outlined above. It would also rather like to see measures to combat circumvention set out clearly within the Code's framework rather than being the subject of unilateral measures. The guiding principle in the negotiations should be for the possible remedies to remain in line with the basic objectives and procedures of the Code. It therefore had a strong preference that before anti-dumping duties could be imposed, the goods should be determined to be dumped and causing injury. It saw a risk in introducing criteria or remedies which ran counter to the basic assumptions of either the GATT or the Code.

Some delegations also agreed that it would be necessary to deal with this problem. Rules should address genuine cases of circumvention and one should take care not to open gateways to new trade obstacles. It seemed that the more complicated the devices of circumvention, the more carefully the cases should be examined, because more complex methods involved increased costs and risks for those involved. The likelihood of intention to circumvent should be examined in the light of such costs and risks.

One delegation said it was prepared to discuss the issue but looked forward to more evidence to illustrate its importance; this because it was important to make a distinction between genuine circumvention and an assumption that circumvention was taking place. It had to be made clear that it was the like product which was discussed in connection with circumvention; the concept of relatedness was essential and it seemed to go far to include cases where components were shipped for assembly, if this meant involving companies which had been found not to be dumping.

One delegation said that it was difficult to take a position at this stage because it was difficult to foresee possible implications, notably for new joint ventures and capacities which were being established in its country. It therefore looked forward to a balanced result which would take account of the legitimate interests of all.

One delegation stated that one should react to realities including the fact that some signatories dealt with circumvention in their legislations. The aspects of particular concern were potential harassment of exporters and a potential negative impact on investments.

One delegation appreciated the concern and the need for rules. However, the issue should not lead to trade obstacles or result in exports from foreign investments being unnecessarily subject to anti-dumping measures or trade harassment. Article VI was an exception to the non-discriminatory application of trade regulations and required a narrow interpretation also when dealing with the issue of circumvention. It thought that the proposals broadened the concepts of like product and domestic industry and said that no provision for full investigation of dumping and injury seemed to have been proposed. It stressed that anti-circumvention rules should not be administered in such a way as to increase local content or to discourage parts and components from countries that might be covered by dumping findings. This might be contrary to what some participants seemed to be pursuing in the Negotiating Group on TRIMs.

One delegation, while being ready to explore these problems, emphasized that an expansion of the Code to take account of presumed situations of circumvention would imply an increase of harassment to legitimate trade and even impediments to investments. The proposal seemed to focus on the argument that companies were investing globally simply so as to circumvent anti-dumping measures. Such a premise ignored the totality of different factors, among them comparative advantage, which determined investment strategies abroad. The proposal also seemed to ignore the global interdependence of manufacturing operations, and that parts and components had often to be obtained from both local and foreign sources. It was concerned that the suggestions might have negative impacts on countries' efforts in developing their investment and industries. It noted that so-called diversionary practices, such as circumvention, input dumping and repeat dumping, had been described as elements of a single commercial phenomenon. This, as well as the differences between these practices, were difficult to understand. It therefore looked forward to illustrations of the circumvention problems. Another general question which had to be addressed was who had the "standing" to initiate a circumvention complaint, and how injury determination requirements would be met.

Many interventions dealt with the question of "like product" and what was meant by "altered or later developed products". One delegation noted in this connection that products could, through a process of incremental change, alter their nature substantially. One delegation, supported by some other participants, said that the premise seemed to be that a final product assembled from imported components was similar to the product subject to the original measures, apart from a value added test. It also seemed that slightly altered or later developed products, as well as components and parts used for assembly in the importing country or in a third country, would be included within the scope of an existing measures, but without investigating whether dumping of these products or components had occurred. This could mean extending a measure to a wider range of other non-like products. One delegation noted that currently anti-dumping action could only be taken on behalf of the industry affected; i.e. the producers of like goods. In dealing with circumvention whereby parts or components were imported, a new case would need to be initiated by the domestic producers thereof.

In reply it was explained that the approach basically was whether or not a product was changed in a minor way so that its primary function did not change, (for example, calculators being added to electric typewriters). Later developed products had to do with rapid technological changes where, although moving from one successive generation to another, the primary function of the product remained the same, (for example, memory chips with the same basic function but with more memory circuits added). With regard to the two other categories, the intention was in no way to inhibit normal commercial activities as it might relate to global assembly and production. What was in mind was principally focusing on kit-type importations which were simply "screwdrived" together. In those specific circumstances there was clearly a legitimate rôle for anti-circumvention measures. It was prepared to discuss details to make sure that nothing more be covered than the types of behaviour mentioned. With regard to the distinction between "genuine" and "presumed" circumvention, it had proposed very specific tests and criteria and welcomed any other concrete proposals.

One delegation said it was prepared to discuss so-called circumvention but cautioned against amending the existing system to allow for measures in the name of preventing circumvention. One should stay very close to the basic objectives of the GATT and the Code; the concept of like product would be an essential element in this respect. The examples given were not convincing in this delegation's view; it was also not sure that the guide should be the concept of "primary function". The [X] per cent referred to would be of crucial importance in distinguishing between so-called "genuine" and other cases. It was also a question how to calculate the [X] per cent, especially when parts of the finished or semi-finished product originated in one or more third countries. It sought clarification as to the suggestion that investigations would be "inconsistent with the prior determination of injury", and noted that the proposal to consider whether imports of parts and components had increased, had not been reflected in the proposed legal text.

One delegation, sharing the point above about the basic rules of the GATT and the Code, stated that an absolute minimum was that the exports of parts and components and their assembly should be undertaken by related companies. The procedures of the Code should be properly followed to ensure that normal investment, manufacturing and trading activities were not unduly interfered with. It also looked forward to practical examples of circumvention. Another participant made similar points, holding that "consideration" of relationship was not enough but had to exist to begin with.

In reply it was said that either the producers of the "whole" product or the producers of the parts should have "standing", since both might suffer injury. Relationship was a strong indication of a circumvention problem but a new company could easily export kits from a company covered by the order. The relevant issue was whether the parts were sufficiently like the whole. The precise percentage was for further negotiations, but the proposal dealt with a circumstance where a high percentage of the parts were assembled. It also dealt with a circumstance where the same parties in the importing country were affected, and relationship between the first and subsequent exporters was not an absolute requirement in its view.

Concerning the question of consistency with a prior finding, the investigating authority should consider whether or not, in the first instance, they had concluded that the parts would be like the "whole" and therefore included in the original order, or whether a product that had been altered in a minor form was so similar in terms of characteristics and uses that it would also have been within the original order. It it was found that it was a separate product it would not be a case of circumvention. The proposal was not contravening Article VI because everything was dependent on a determination that the parts or altered products were "like" the product originally covered by the order. In its view the language of Article 2.2 already covered the concrete examples given.

RECURRENT INJURIOUS DUMPING

The Chairman suggested to first examine a number of conceptual and definitional issues related to this concept. In the proposal the term covered a number of situations: various types of assembly operations (in the importing country or in a third country), exportation of the product subject to a dumping finding through a third country, and exportation of a product which incorporated as an input a product which was subject to an anti-dumping measure. In discussing "recurrent injurious dumping" it might be helpful also to consider how this term related to what had been defined by some delegations as "circumvention" of anti-dumping measures and how it related to the phenomenon of "input dumping" which had been the subject of past discussions in the Anti-Dumping Committee. With regard to possible remedies he recalled that the proposal contained a number of suggestions, some of which were listed in the Chairman's paper. Other possible remedies which had been proposed were the early introduction of provisional measures and the extension of the period of validity of such measures.

It was explained that this proposal dealt with five cases in which largely the same industry in the importing country, after having proven the existence of dumping and injury, subsequently found itself subject to the same type of injury caused by the same party taking - in one form or another - the product covered outside the scope of the original order. In these circumstances - as distinct from track I - there would be a complete anti-dumping investigation although with special rules and procedures, notably with respect to the authority to withhold appraisal commencing with the initiation of the investigation. In the event that no dumping, injury or causality were determined, no duties would be applied. The intention was to address the need in the Code for deterrence, and give authorities the possibility of taking measures, where necessary, to discourage producers which apparently viewed dumping simply as a cost of doing business.

One delegation said that what had been described as "recurrent injurious dumping" seemed to be regarded by the proponent as a kind of circumvention, because it described a process which "can still result in eviscerating the relief afforded by the original anti-dumping measure". Yet one was not dealing with the like product, as implicitly acknowledged by requiring a new investigation. If it was not a question of the like product, there was no justification for any special measure. If this new

concept was accepted, it would be possible later to propose amendments to the sanctions to be imposed when such type of dumping was found. This could have serious consequences in the long run.

One delegation wondered whether provisions for retroactivity were not more relevant for deterrence than establishing a potentially loose new track which imposed - whether or not the duty level was zero - an impediment to an exporter's market, without prior investigation, transparency in proceedings, or injury review. The proposal essentially evoked two questions: whether it was desirable to allow for the possibility of imposing provisional measures at the time of initiation in certain circumstances; and whether corporate relationships could nullify the effect of an existing remedial action so that a special track was needed. Other delegations also referred to present rules on retroactivity as a possible way of alleviating the problems.

One delegation sought clarification on the third situation mentioned in MTN.GNG/NG8/W/59 referring to products produced by the third country producer or by the producer subject to the original dumping finding; and what was meant by the reference to "major input" in situation four. With respect to situations four and five there was no justification for extending a finding on input to the finished product; it was also not clear how the cost of inputs, notably from third countries, would be calculated. The general concern was that once a producer had been subject to a dumping finding he was presumed to be a "dumper" and action would be taken on that premise. This latter point was also made by another delegation, who added that the proposal would mean a far-reaching departure from the concept of "like product".

In reply it was stated that "like product" issues were not really relevant in this track because a new investigation would take place, according to the rules of the Code, with the exception that the duty would be applied retroactively if dumping and injury were found. "Presumption" was therefore not involved. The proposal dealt with real situations where a producer suffered injury for a period of time long enough to prove it, after which further time had to pass before a remedy was available, shortly after which dumping recurred, and the timely and costly process of obtaining relief would have to be repeated again. Deference was proposed by way of setting forth the prospect of retroactive duties if, in the second instance, the same producer was found to dump again. Industries had been decimated as a result of dumping moving from site to site or taking on different forms as a result of corporate strategy for increasing market shares. Any suggestions as to how to deal with this type of problem would be welcomed. It was conceivable that retroactivity provisions might solve the problem, but not as they were currently drafted. It did not believe that an investigation could be conducted fairly within thirty or sixty days.

One delegation agreed that the problem was a real one, and one example of where the Code created a clear bias against the domestic producers, notably in terms of time and resources involved. It had itself addressed a similar problem in the Group, that of "country hopping". Another participant noted that anti-dumping investigations involved inconvenience for all parties concerned, also exporting firms.

REPEAT CORPORATE DUMPING

The Chairman said that the definition of "repeat corporate dumping" was described in a general manner on page 7 of document MTN.GNG/NG8/W/59 as involving situations in which "a foreign producer (...) repeatedly dumps products within the same general category of merchandise". The document gave a more precise, legal definition of this term in a proposed amendment to Article 11 (page 12). The remedies suggested related to the retroactive application of anti-dumping duties, the amount of anti-dumping duties, the withholding of appraisal and the extension of the period of validity of provisional measures.

The proponent stated that a pattern of dumping by particular firms in particular countries demonstrated that notwithstanding the existence of dumping laws and the international recognition that injurious dumping was to be avoided, some companies continued to engage in this behaviour as a strategy. Again, the problem of filing and refiling complaints put strain on the process. It also affected bilateral relations. It was necessary to deter such behaviour for the sake of the trading system and the Code. Again, the details were for discussion.

One delegation sought clarification as to why it was considered necessary to impose provisional measures at the point of initiation as opposed to some earlier time period, following uncovering of factual evidence. It also wondered how the margin of dumping would be established and provisional duties set, given that one was not talking of a similar or like product.

Some delegations welcomed facts and statistics to explain the problem. One of these stated that if the concept of repeat corporate dumping were introduced and that of accelerated relief were to be accepted, one could imagine circumstances in which more severe penalties would be demanded. Given that the GATT did not forbid dumping, it thought that it went too far to refer to "offenders and recidivists".

One delegation noted that the Code, not making a distinction between a first or second time defendant, required initiation to be begun only if there was sufficient evidence of dumping, injury and causal link, for every case. To extend anti-dumping measures from the original product found to be dumped to products of the same general category amounted, in this delegation's view, to an expansion of anti-dumping actions.

The delegation concerned stated that it would explain in detail to interested delegations its experience in particular categories of goods involving the same particular producer. It emphasized that workers lost their jobs and municipalities were literally bankrupted as a result of the practice of some producers, and noted that even scholars who argued for major changes in the Code had acknowledged that there was an appropriate rôle in the Code for repeat dumping provisions.

One delegation said that the problem was very real. Noting that the existing Code already gave some possibilities in the rules on retroactivity to solve, at least partially, this problem, it added that in all known

cases a large multinational firm had been found to dump many different products, and the importer - invariably the same subsidiary - knew or should have known that such dumping occurred. It recalled its own proposal on retroactivity as a possible way to solve the problem raised.

PUBLICATION AND EXPLANATION OF ANTI-DUMPING DETERMINATIONS

The Chairman recalled that a number of proposals had been made to achieve more transparency in the conduct of anti-dumping proceedings. One, which appeared in many proposals, was that the Recommendation of the Committee on Anti-Dumping Practices concerning transparency of anti-dumping proceedings should be incorporated into the Code. Furthermore, a number of particular elements of anti-dumping proceedings in respect of which a strengthening of the obligation to give public notice and to provide explanations, had been suggested.

One delegation said that it was one of those who had suggested incorporation of recommendations into the Code. It drew the Group's attention to the fact that through such incorporation their legal nature would be changed.

A. Recommendation concerning transparency of anti-dumping proceedings

The Chairman recalled that the relevant Recommendation had been adopted by the Committee on Anti-Dumping Practices (BISD, 30S/24-28). It (i) described the nature of the information about anti-dumping petitions which should be provided to exporters and to the authorities of the exporting country in question; and (ii) provided for public notice of decisions to open investigations, and for public notice and explanation of decisions to apply provisional measures and decisions to terminate or suspend investigations.

One delegation said that, generally, it was disposed to increase transparency at all stages of anti-dumping procedures. It supported publication and notice with due explanation of actual decisions to initiate a proceeding, but had reservations as to the publication of notice of petitions received or decisions to reject a petition, the concern being to insulate an exporting company from potential disruption which signals to the purchasing community might cause. Some delegations shared these concerns: the rationale for public notices in official journals was generally to make known a measure or an official decision to an unspecified number of interested parties which was not known in advance; this general transparency interest did not seem to apply to receipts of petitions or a decision to reject petitions. There might be a case, however, for notifying the GATT of the number of rejected complaints.

One delegation recalled that MTN.GNG/NG8/W/63 proposed that specific information and supporting evidence be available before initiation of a procedure, in respect of standing of the complainant, normal value and export prices, injury and causality. It was not sure that the proposed public notices of receipt of petitions and their rejections would be useful.

One delegation explained that two reasons lay behind the proposed public notice of receipt of petitions: (i) it might be possible to prevent any less than transparent interaction between complainants and authorities; and (ii) those subject to complaints would thereby be enabled to comment at the outset and perhaps be able to influence a decision on whether or not an investigation should be opened.

B. Initiation of investigations

The Chairman recalled one proposal for public notice of the receipt of a petition and for a period within which interested parties could make comments on the evidence provided by the petitioner. A second proposal was for public notice of decisions to reject a petition. Finally, it had been proposed that there should be an obligation to explain the reasons for the opening of the investigation.

C. Preliminary and final determinations

The Chairman recalled that MTN.GNG/NG8/W/59 contained a specific proposal to amend Article 8:5 to require an explanation not only of affirmative preliminary and final determinations but also of negative preliminary and final determinations and to lay down in greater detail a standard for explanations of (negative or affirmative) preliminary and final determinations. Another proposal to amend Article 8:5 provided for an explanation of how factors other than dumped imports had been considered in injury determinations having led to affirmative findings.

Two delegations believed transparency fostered better decisions, gave all parties an opportunity to understand and make appropriate arguments, either during the initial proceeding or during judicial reviews.

D. Undertakings

The Chairman recalled that one proposal suggested that there should be an explanation of reasons for decisions to accept undertakings. Another proposal provided for the publication of copies of undertakings.

Some delegations said that notice of the contents of an undertaking should depend on the consent of the party who had given it. An undertaking would normally be preferable to an anti-dumping duty, and they wondered, therefore, why reasons should be explained. In reply it was said that as much information as could be made public should be made public.

E. Retroactivity; and

F. Administrative reviews

The Chairman recalled that a proposal provided that public notice be given, consistent with Article 8:5, of decisions to apply anti-dumping duties on a retroactive basis. A proposal provided that public notice be given of the initiation of an administrative review and of the results of such review.

ANTI-DUMPING ACTION ON BEHALF OF A THIRD COUNTRY

The Chairman recalled that at the meeting of November 1989, one delegation had orally presented some suggestions on possible amendments to Article 12. These related in particular to the possible removal of the requirement of prior approval by the CONTRACTING PARTIES of anti-dumping action on behalf of a third country.

One delegation said that its ideas had been developed on the background of the fact that Article 12 had never been used. The Group might examine the reasons for this and explore options to make it workable. The main suggestion was to remove the requirement of prior approval by the Contracting Parties before the imposition of an anti-dumping duty designed to protect the industry of another exporting country. It recognized that further discussion was needed.

Some delegations supported these ideas, noting that Article VI seemed to be based on the unrealistic presumption that the importing country, which presumably had no domestic producers to defend, should take action, albeit it had no reason, a priori, to get involved in the disputes of others.

One delegation sought clarification as to whether the complaining party should consult with the dumping company or its government, what the basis of those consultations would be, and what could be the subject of formal dispute. One delegation said that the ideas were tempting but that it was not convinced that the solution proposed was the best given the fact that dumping was not prohibited in the GATT; it only entitled governments to take action against injurious dumping. A second problem was that dispute settlement procedures could only cover behaviour of States and not private actions.

Some delegations wondered who was to finally decide whether or not to take anti-dumping action. One of these said that the existing provisions were likely to be inoperative in dealing with a problem that existed; however, there were technical points which required deviations from the existing anti-dumping procedures.

In reply it was stated that the proposal was to allow a duty to be imposed by the importing country, following consultations with the third, injured, country.

One delegation suggested for consideration a modification of Article 12 authorizing bilateral understandings which would provide for the enforcement of their respective laws when a dumping problem was called to their attention.

JUDICIAL REVIEW OF ANTI-DUMPING DETERMINATIONS

The Chairman recalled that two proposals provided for the introduction of a clause which would allow for judicial review by domestic courts of anti-dumping determinations (one of these closely following the language of

Article X:3(b) of the General Agreement). With respect to what type of determinations should be subject to judicial review, one proposal seemed to suggest that such review be available at least with respect to all final findings of dumping and the results of administrative reviews of findings of dumping. Concerning which parties should have access to judicial review, one proposal referred to "all interested parties who participated in the administrative proceeding"; another proposal provided that "the parties directly concerned by anti-dumping measures" should have such access.

One delegation held that judicial review of final decisions by an independent tribunal was essential to ensure that all the rights of parties were safeguarded; these should include review of the findings and reviews relating to the determination of the existence of dumping, injury and causality. All interested parties should have equal access to this type of independent review which would add an element of fairness to the process. Another delegation noted that it had also proposed judicial control of all final determinations and agreed that these should cover the elements proposed above. Right of appeal should be given to all exporters, importers and domestic producers involved in an investigation, but the notion of "interested parties" was too vague and would overload the process.

Two delegations supported these ideas generally. One of these assumed that the review would be about substance and not only as to whether an administration had followed the legal steps laid down in its national legislation.

DISPUTE SETTLEMENT

The Chairman recalled proposals to the effect that recourse to the dispute settlement procedure should already be possible when an investigation had been initiated, and not only after a provisional measure had been applied; that the conciliation procedure should be optional so as to allow for a more rapid establishment of panels; that a permanent multilateral body give advisory opinions while national anti-dumping investigations were continuing; and that there be a provision for the payment of compensation to exporters in cases where a panel found that an investigation had been opened in a manner contrary to the provisions of the Code. In addition, the time period for completion of the dispute settlement process had been raised and a proposal for "improving domestic procedural right", principally tabled in the Dispute Settlement Group, had also been submitted to NG8.[1] A number of delegations had expressed the view that Article 15 might have to be revised at a later stage in light of the results of the Negotiating Group on Dispute Settlement.

[1]At the meeting of 31 January-2 February 1990

One delegation wondered whether delegations who had suggested that compensation be paid if investigations were to show that a complaint was not justified would also accept compensation to domestic producers for injury shown to have occurred before the imposition of anti-dumping measures. Another participant also expressed concerns about the proposed compensation and instead envisaged initiation standards.

One delegation reiterated that the proposal was that compensation be payable when an investigation had been initiated in the absence of sufficient evidence. Instead of discussing this in terms of Article 15, there might be alternatives, for example, a right to challenge the initiation of an investigation. It was open to interested delegations to make their own proposals with respect to compensation to domestic producers. One delegation recalled a suggestion in the Negotiating Group on TRIPs to the effect that "parties wrongfully enjoined or restrained by any measures taken for the purpose of enforcing IPRs shall be entitled to claim adequate compensation of the injury suffered because of an abuse of enforcement procedures, and to recover the costs reasonably incurred in the proceedings. Signatories may provide for the possibility that these parties may, in appropriate cases, claim compensation from the authorities".

One delegation added that the Code provisions had weaknesses in comparison even to the new agreed general GATT procedures. Dispute settlement procedures should be available at all stages of the anti-dumping proceedings, and procedures should also allow exporting countries to challenge the initiation of a proceeding.

Some delegations agreed with MTN.GNG/NG8/W/64 to remove the three-month moratorium after conciliation, before a panel could be established. Some delegations also agreed with MTN.GNG/NG8/W/48/Add.1 in that the conciliation process be optional. One delegation said that an effective dispute settlement system was particularly important in the area of anti-dumping.

TREATMENT OF LEAST-DEVELOPED COUNTRIES

The Chairman recalled the Group had before it in document MTN.GNG/NG8/W/56 a communication on behalf of the last-developed countries. Reference to the treatment of least-developed countries had also been made in another communication which proposed the introduction of a de minimis rule in Article 13 for cases in which margins of dumping were minimal.

One delegation drew attention to its proposal in MTN.GNG/NG8/W/64. Another delegation was not sure that the concept of de minimis was appropriate.

SUMMING UP

At the meeting of 31 January-2 February 1990 the Group agreed that, in order to carry the work further, it would be necessary to hold informal meetings, chaired by the secretariat. It agreed with the Chairman's call for presentation of concrete drafting proposals as soon as possible, which was again reiterated at the meeting of 19-20 February. At this later meeting the Chairman stated that the detailed discussion over the last two meetings on the basis of the Chairman's structured agenda had allowed a clarification of positions and proposals and had given delegations a greater sense of where there was an emerging convergence and where there remained important divergences of view in terms of what had been suggested. He emphasized that this Negotiating Group like all others was committed by the TNC to the target of having by July 1990 a clear picture of what should be in the final Uruguay Round package. The subject matters of this Group was important for many delegations. With respect to how to organize further work, a kind of two-track approach seemed to be emerging although views differed as to how exactly this would be organized: the Group might identify the issues where views converged before proceeding to negotiations of actual changes to the Code and, in parallel, it would have to spend considerable efforts in other areas in order to reach the stage of convergence of views.

The agenda for the next meeting (21-23 March) would again be the Chairman's "structured agenda", but thought had to be given to how it might be made more focused. For this purpose delegations were invited to be in touch with the Chairman and the secretariat. Concerning the question of documentation, it had been suggested by some that the secretariat prepare a comparative table of legal drafting suggestions, and/or that it should prepare a sort of "integrated checklist" on points made on the various issues. Some delegations had also suggested that after the next meeting, when the Group might have pinpointed to a greater degree areas of convergence, it might be appropriate for the secretariat to begin the drafting of legal texts on such points. The Group was not ready now to decide on these matters but the Chairman requested the secretariat to give consideration internally as to how it would meet these suggestions which have been made for documentation and drafting.

Other business

The Group agreed to meet again on 21-23 March, 30 April - 4 May; 28 May - 1 June and 16-20 July 1990.