Committee on Anti-Dumping Practices

SYSTEMATIC INVENTORY OF PROBLEMS AND ISSUES
IN THE FIELD OF ANTI-DUMPING

At its last meeting in October 1975, the Committee on Anti-Dumping Practices agreed to draw up an analytical inventory of problems and issues arising under the Anti-Dumping Code and its application by the parties to the Code. To this effect, the secretariat was requested to prepare a systematic inventory, article by article of the Code, of problems and issues that have been raised by adherents to the Code since the inception of the Committee (see paragraph 20 of L/4241).

The secretariat has consequently prepared an inventory of the problems and issues which can be found hereunder.

It should be noted that the paragraphs relating to the discussion held at the last meeting of the Committee in October 1975 are based on draft minutes of the meeting established by the secretariat and might consequently be subject to alterations in the light of comments received on these draft minutes from members of the Committee.

PART I - ANTI-DUMPING CODE

Article 1

The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement. The following provisions govern the application of this Article, in so far as action is taken under anti-dumping legislation or regulations.

Although the question of the consistency of national anti-dumping provisions and procedures with Article VI of the General Agreement could have been taken up here, Article 1 has never been referred to explicitly. The general matter of consistency is thus reported under Article 14, whereas specific questions are dealt with under the relevant articles.

1Document COM.AD/W/50, to be issued in mid-January.
A. Determination of Dumping

Article 2

(a) For the purpose of this Code a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

This paragraph, probably because it contains just the definition of dumping, has only been referred to twice. In the first case, certain national rules regarding sales at a loss were said to go beyond the provisions of Article 2(a) and (d) of the Code. In a second context it was stated that in spite of proposals to amend certain national regulations regarding the method of calculation of fair market value and the possibility of retroactive application of withholding of appraisement, no changes had been made in recent amendments, and it was inferred that these provisions should be revised in order to comply with Article 2(a) of the Code [COM.AD/W/50, paragraph 37].

(b) Throughout this Code the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

This paragraph has never been referred to explicitly. However, two sets of problems regarding the comparability of products have been identified in this context. The first one, which concerned high degree of sophistication or specialization of production, falls exclusively under this sub-paragraph. Parts of the second one, which concerned goods manufactured by different producers of the exporting country, were found to touch equally upon aspects of paragraphs 2(d) and 2(f), and they are reported in these other contexts as well.

1. High degree of sophistication or specialization of production

Concern was voiced that there were cases where the choice of like products for the purpose of determining normal value would be extremely complicated and could therefore give too large a discretion to the authorities (COM.AD/26, paragraphs 38 and 39). Whereas this represented little problem in the case of

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1Cf. comments to Article 2(d) under "3. Sales at a loss".
2Cf. comments to Article 2(d).
3Cf. comments to Article 11.
simple products such as sugar, salt, sulphur, caustic soda, steel ingots, etc.,
difficult problems arose in the case of more sophisticated products such as cars,
TV sets, clothing etc. The point was made that the competent authorities could
meet this concern by maintaining close contact with representatives of the
companies concerned and by discussing with them in detail the various factors
comprising the specific elements in fair value determinations. The danger of
arbitrary and unfair rulings with respect to adjustments for similarity was thereby
intended to be minimized.

A similar problem emerged in the case of products made by measure
(COM.AD/14, paragraphs 32-36; COM.AD/19, paragraph 18; COM.AD/30, paragraphs 34
and 35). According to one opinion, authorities should, before initiating investiga­
tions, proceed with special caution because of the inherent difficulty of price
comparisons. This difficulty was said to stem from the following peculiarities:

- products had been constructed in the exporting country according to
specifications given by clients of the importing country, which meant
a lack of comparability with other products of the exporting country;

- specifications varied to a large extent between different sales;

- importers had based their purchases not on price considerations but on
the technological characteristics of the product.

While it was agreed that it was indeed difficult, under these circumstances,
to determine a basis of fair value comparison, it was claimed that products made
to measure should nevertheless not be allowed to be freely dumped. According to
this opinion, several methods of price comparison could be used, and the
calculation of dumping margins would be made on the basis of information available.
In the concrete cases having been discussed, the price-cost factor was selected
upon suggestion of the exporting firm.

As far as methods of price comparison were concerned, it was mainly one
specific method which caused concern namely, the unadjusted dry-weight method
(COM.AD/26, paragraphs 35 and 36; COM.AD/30, paragraphs 32 and 33). It was
argued, on the one hand, that this method was not sufficiently precise to allow
a meaningful comparison between prices in the exporting countries' domestic
markets and the markets of importing countries. On the other hand, reference was
made to the concrete case under discussion, where the manufacturers of the
importing country used a price list method for determining prices, and it was
understood that manufacturers in other countries generally used an adjusted
dry-weight method for purposes of verifying their computations before making a
bid; the dry-weight method was therefore considered to be fully adequate for
the determination of fair value.
2. Goods manufactured by different producers of the exporting country

The view was expressed that in cases where there was not a sufficient number of sales for home consumption of like products made by the exporter by reason of the fact that the exporter sold goods solely or primarily for export, the comparison should be made with goods manufactured by other producers and sold by other vendors. The main requirement under the Code was, according to this delegation, that the comparison should be made with other sales of a like product (COM.AD/3, paragraphs 18 and 19; COM.AD/9, paragraph 12). According to another view such comparison would be unfair in cases where the exporter was in no way associated with the other vendors and was not in fact deriving any profit from domestic market sales (COM.AD/3, paragraph 20). The delegation which expressed the view set out in the beginning of this paragraph explained that when another vendor was substituted for the exporter, only products manufactured by the same producer - but sold through different channels - were taken into account by his authorities (COM.AD/9, paragraph 13). The opinion was expressed that in cases where the manufacturers concerned had no home sales, sales of similar merchandise by other manufacturers could be used for price comparison and that such a procedure was permitted under the Code (COM.AD/34, paragraphs 32 and 33). Reference was also made in this connexion to quality and productivity differences between production for home and export markets, respectively. It was assured, that adjustment for quality differences was made in the normal practice of the authorities concerned.

(c) In the case where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely trans-shipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

No reference has been made to this paragraph.

(d) When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

Five different issues have been raised under this paragraph, which sets out the alternatives to domestic price when fair value is to be determined.

1 Cf. "non-existent or negligible sales" under Article 2(d)
1. Determination of certain threshold levels of domestic sales

During the discussion on the question whether a predetermined threshold level of domestic sales would serve as a basis for fair value determination, there came up the following issues:

(a) different ways of determining the threshold level and, in connexion with the application of one of the two methods which have been envisaged,

(b) a variety of arguments regarding the relative merits of determining fair value by means of alternative sales other than domestic transactions by the same producer whose exports were allegedly being dumped on another country's markets.

(a) Different ways of determining the threshold level

One way of determining the threshold level was the so-called 25 per cent rule, i.e. the provision that domestic sales must account for at least 25 per cent of the difference between the same exporter's total sales and his exports to the country applying the 25 per cent rule. If domestic sales amounted to less than that, they were disregarded as the basis for fair value determination. Instead, the sales of another manufacturer of the same exporting country were taken for the purpose of price comparison, if the 25 per cent rule was applicable to any one of the remaining manufacturers; if not, the price of sales to third countries was used (COM.AD/9, paragraph 39,2).

Another way of determining the threshold level was defined as follows: since the main requirement under the Code was that the comparison should be made with other sales of the like product, the comparison should rely on goods manufactured by other producers and sold by other vendors only if there was not a sufficient number of sales by the exporter himself in his home market. The fact that the largest producer had supplied up to half the home market with a product which was identical to the one exported to another country, should be considered as fulfilling the "sufficient number of sales" criterion (COM.AD/3, paragraph 19; COM.AD/9, paragraph 41).

(b) Relative merits of using alternative sales

Doubt was raised whether the criteria applied under the 25 per cent rule were reasonable and equitable, in view of a concrete case where the domestic sales prices by the largest producer of the exporting country had been disregarded, and the corresponding prices of the second producer had been used instead. This would mean that the largest producer might in future have to fix his export prices on the basis of domestic prices by his domestic competitors which might lead him into trouble with the Anti-Trust Laws of both his and the importing country (COM.AD/9, paragraph 38,2).
This view, however, was contradicted by the remark that the alternative would then have been to use third country prices in the case of the largest manufacturer, and home market price in the case of many of its competitors. If this approach had been adopted, the result would have been that in the case of the largest manufacturer, there would have been no dumping while for the other competing manufacturers - who were selling both at home and for export at virtually the same prices as the largest manufacturer - there would have been dumping. Such a result would have been impossible to defend from the standpoint of equity (COM.AD/9, paragraph 39,2).

In response to this reasoning in favour of the 25 per cent rule, it was pointed out that measures were taken against exporters, not against countries, and that it was, therefore, illogical to take measures against the largest producer on the basis of sales of another producer (COM.AD/9, paragraph 40).

After the 25 per cent rule had been abolished, there occurred one case where the opposite side of the problem came up. Concern was expressed with the practice of comparing an allegedly dumped price with that prevailing in the domestic market instead of with the price obtained in third country markets, when sales of the exporter in the home market were negligible.

The same country which had previously applied the 25 per cent rule found it difficult to accept the argument of exporting firms subject to anti-dumping procedures that their home market sales, accounting for roughly 10 per cent of their total sales except those directed to the importing country concerned, did not permit a proper comparison. It was pointed out by the representative of the importing country that the use of home market prices as a basis for fair value comparisons was the normal rule under the Code, and that his government had always used home market prices, except where domestic sales in the exporting country were inadequate for comparison purposes (COM.AD/30, paragraphs 29-31).

2. Non-existent or negligible domestic sales

Arguments similar to those reported under 1(b) above were brought forward in circumstances where domestic sales of the product concerned were non-existent or negligible (less than 1 per cent of total sales). In these cases, the export prices had been compared to the domestic prices of similar goods manufactured by other companies of the exporting country, and a substantial dumping margin had been determined to exist. This constituted, according to one view, a contravention of Article 2(d) of the Code which in such cases provided for price comparison with exports to any third country of the products manufactured by the relevant companies. According to another view, this procedure was permitted under the Code (COM.AD/30, paragraph 29; COM.AD/34, paragraphs 32 and 33).
Referring to another case where, for lack of domestic sales in the exporting country, the authorities concerned had requested submission of both production cost information as well as third market export prices, the view was expressed that it was inappropriate to require production cost information when this did not seem necessary, since such a request imposed a heavy burden on private firms. It was pointed out in reply that, in order to comply with the stringent time-limits imposed on the making of anti-dumping decisions, both kinds of information had been asked since the authorities in question had been unable to determine if there had been sufficient third market sales (COM.AD/W/50, paragraphs 10 and 11).

Doubt was expressed whether certain national rules on multinational corporations were consistent with Article 2(d) of the Code (COM.AD/W/50, paragraphs 36 and 37). It was replied that, according to these provisions, the authorities concerned should, if there were no or virtually no domestic sales in the exporting country, look into the prices of the merchandise of the same branch in a different country and make adjustments for the differences in the two economies concerned. It was admitted that Article 2(d) of the Code did not deal with such a comparison (COM.AD/W/50, paragraph 42).

3. Sales at a loss

The question was raised on several occasions whether sales at a loss (sales at prices that did not allow for full cost coverage) were to be regarded as being made in the ordinary course of trade in the sense of Article 2(d); the practical implication was that, unless sales at a loss were in fact considered as being made in the ordinary course of trade, resort would be had to cost of production as a basis of price comparison.

It was stated that in one country the rules regarding "sales at a loss" could be interpreted too extensively and in a way going beyond the provisions of Article 2(a) and (d). In a similar context, it was noted with concern that there were still discrepancies between national legislation and the provisions of the Code in the sense that sales at a loss were not considered as being made in the ordinary course of trade (COM.AD/W/50, paragraph 37). Such an interpretation would imply that low export prices would be considered as falling outside the normal course of trade when the prices quoted on the domestic market were the same. This appeared most unreasonable because it was a common and necessary business practice for producers to sell their products at prices which did not fully cover their overhead costs when demand had failed to come up to past expectations (COM.AD/19, paragraphs 12 and 14; COM.AD/26, paragraph 5).

\(^1\) Cf. comments to Article 2(c)
It was also mentioned that it could be regarded as a common business practice that an old product, which had lost its market because of a competing new product having appeared on the market, was sold at a price which did not cover full costs.

The contrasting view that this issue was not a matter of legislative requirement but of practice and it therefore had to be treated on the basis of a particular set of circumstances (COM.AD/19, paragraphs 13 and 15; COM.AD/26, paragraph 8; COM.AD/30, paragraph 10), was disputed on the ground that the formulation of a general rule was indeed possible. Domestic sales at the best price that the seller could obtain in current market conditions for the products in question should be used as a basis for determining normal value. Sales at a loss could be disregarded, however, where the sales were motivated by considerations other than that of obtaining the best price, for example to promote sales of other lines, or for social reasons. If the export price was not lower than the best price obtainable, there was no dumping. Article 2(d) of the Code supported these conclusions (COM.AD/26, paragraphs 5 and 7).

According to another opinion, the opposite principle, i.e. the view that no comparisons at all could be made between the domestic and export prices in the case of sales at a loss, should at least not be established as a rule. It was not possible always to consider a sale at a loss as an abnormal operation under Article 2(d) of the Code (COM.AD/26, paragraph 6).

On the other hand, it was noted, that some national legislative provisions set strict guidelines as to when sales made in the home market would be disregarded for price comparison purposes and resort would be made to cost of production, in conformity with Article 2(d) of the Code (COM.AD/34, paragraph 20; COM.AD/W/50, paragraph 43).

4. Allowance for costs and profits

All the issues falling under this heading are also dealt with under Article 2(f). In two cases, however, where Article 2(d) had been mentioned explicitly, arguments are reproduced hereunder.

In one case the mark-up of certain components had been calculated in the same way as the mark-up on the final product. It was argued that the normal value was therefore not calculated in accordance with Article 2(d) and (f) of the Code. Since the company in question had indicated that it would appeal the ruling of the mark-ups to the competent body, no comments were made that could prejudge these legal proceedings (COM.AD/W/50, paragraphs 1 and 27).

With regard to another case, the view was expressed that the only instance specified under the Code in which some adjustments for overhead costs could be done was under Article 2(d) of the Code when resort to a constructed value was necessary (COM.AD/26, paragraph 73).
5. Choice of methods for determining fair value

Concern was voiced at the very wide latitude given to authorities who were to decide on the possible implementation of a certain national legislative provision allowing for the use of any method for determining fair value which was deemed appropriate when there was not a clear preponderance of the merchandise sold at the same price and weighted averages of the prices of the merchandise sold were determined to be inappropriate. In response to this concern, it was assured that the government concerned would adhere to the Code rules on the determination of normal value. More specifically, it was said that the first alternative was a comparison with the preponderant domestic price in the exporting country, thereafter with a weighted average price in the exporting country, and in the third place with a weighted average of the preponderant prices, whenever a simple weighted average would produce an unfairly distorted price. Thereafter, the comparison would be made with other prices as established in Article 2(d) of the Code (COM.AD/26, paragraphs 75-77).

(e) In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

When in this Code the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate, senior level.

Whereas the Code does not speak of multinational corporations, Article 2(e) seems to be the only provision applicable to the practices of such corporations.

With regard to a provision in the national legislation of one country relating to transactions by multinational companies, concern was expressed that this provision would create serious problems for exporters. The country concerned explained that the provision was of a discretionary nature. Furthermore, it would apply only in cases where there was no viable home market in the exporting country, which again would severely limit its application (COM.AD/34, paragraphs 16 and 20).

Provisions on multinational corporations were also mentioned in the context of anti-dumping rules of a certain country, when doubts were expressed regarding their conformity with the Code (COM.AD/W/50, paragraphs 36 and 37).
It was replied that the use of these national provisions was very restricted and that the company which was primarily responsible for their inclusion in the anti-dumping legislation had not taken advantage of them yet. According to these provisions, the authorities should, if there were no or virtually no domestic sales in the exporting country, look into the prices of the merchandise of the same branch in a different country and make adjustments for the differences in the two economies concerned. It was admitted that Article 2(d) of the Code did not deal with such a comparison, and it was said that this issue perhaps needed to be dealt with in the future of the Group (COM—D/W/50, paragraph 42).

(f) In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VII:1(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in Article 2(e) allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.

Problems raised under this paragraph, centred around the range of allowances to be made for differences affecting price comparability namely (1) drawback of customs duties, (2) rebate of indirect taxes, (3) commercial practices, (4) bidding practices, (5) export credit terms, (6) mark-up, (7) overhead costs, and (8) quality and productivity differences.

1. Drawback of customs duties

Concern was voiced that drawback of customs duties would be taken into consideration in determining normal value. The view was also expressed that the manner in which exemption or refund of duties and taxes were dealt with in one country, was not in conformity with the drawback provisions of Article VI (COM—D/14, paragraphs 23(b) and 54).

It was also claimed that the provisions of paragraph 4 of Article VI of GATT established that allowance should be made for drawback not only on the product itself but also on component materials, even when the imported components had been replaced by a like component of domestic origin. The country concerned did not accept this interpretation; it stated that allowance did not have to be made for drawback on component parts but only on goods at the same stage of processing, and

1 cf. comments to Article 2(d).
that it considered this practice to be in conformity with the requirements of Article 2(f) of the Code and Article VI:4 of GATT which referred to "duties and taxes borne by the like product" (COM.AD/19, paragraphs 6 and 7; COM.AD/26, paragraph 2).

2. Rebate of indirect taxes

It was stated that rebate of indirect taxes to which exporters were entitled had been repeatedly refused as an element of adjustment in export prices. The view was expressed that this was not in conformity with the specific provisions of Article VI:4. It was indicated in reply by the country concerned that its regulations in this respect were being revised as requested (COM.AD/30, paragraphs 6 and 7).

3. Commercial practices

Concern was expressed that the provisions of the Anti-Dumping Regulations of one country should allow for due regard to all relevant commercial practices of exporting countries. In spite of amendments made to these national provisions, it was held that the problems in this field still remained. In the view of the country to which the concern was addressed, present practices were, however, in full conformity with the Code (COM.AD/14, paragraph 46; COM.AD/19, paragraph 52(d); COM.AD/W/50, paragraph 37).

4. Bidding practices

It was claimed that no allowance could be made for domestic prices being high because of bidding restrictions in favour of domestic companies. Thus, dumping was determined to exist where lower prices were offered abroad (COM.AD/26, paragraph 52).

5. Export credit terms

There was concern that certain new provisions would be used in one country to cope with difference in export credit terms and thus prejudge the outcome of international harmonization efforts in that field. It was indicated that other countries might use similar provisions in the case where the regulations referred to were applied (COM.AD/19, paragraphs 42-45).

6. Mark-up

As already reported under Article 2(d) once concrete case had occurred where the cost of production had been multiplied by the rate of mark-up of the final product, not by that of the components in question. The view was expressed that this practice constituted an undue calculation of fair market value and could not be considered therefore to be in accordance with Article 2(d) and (f) of the Code. Since the importing company in question had indicated that it would
appeal the ruling on the calculation of mark-ups to the competent body, no comments were made on the ground that these could prejudge the legal proceedings (COM.AD/W/50, paragraphs 1 and 2).

7. Overhead costs

In the second of the two cases already reported under Article 2(d), there appeared divergent opinions with respect to overhead costs. It was argued that the main criterion to judge the relevance of certain cost categories for the determination of normal value was the direct relationship between the costs and the specific sale under consideration. Advertising costs, rebates and verified warranties directly related to specific sales would thus be included in the calculations of cost. On the other hand, such items as general advertising costs and bad debts should normally be disregarded in assessing normal value. While some adjustments for overhead costs could be done under Article 2(d) of the Code when resort to a constructed value was necessary, this was the only instance specified in the Code in which such costs should be taken into account. The proponent of this view therefore concluded that non-consideration of overhead costs as a sales adjustment was in conformity with Article 2(f) of the Code, but this conclusion was contested by others (COM.AD/W/51, paragraphs 69-74).

It was noted however, that the disallowance as adjustments of all advertising expenses except those directly related to the sales under consideration had been liberalized by the country concerned to allow for some general advertising expenses to be taken into account (COM.AD/W/50, paragraph 49; COM.AD/W/51, paragraph 17).

8. Quality differences

In connexion with a case already reported under Article 2(b), quality differences between production for home and export markets were mentioned as causing difficulties (COM.AD/W/51, paragraph 32). It was assured, however, that adjustment for quality differences was made in the normal practice of the authorities concerned, but that in the concrete case referred to, it had been impossible to make such adjustments because the manufacturers had been unwilling to supply the necessary information (COM.AD/W/51, paragraph 33).

(g) This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I of the General Agreement.

The provision referred to reads:

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

This question has never been raised during the discussions in the Committee.
B. Determination of material injury, threat of material injury and material retardation

Article 3

(a) A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry. In reaching their decision the authorities shall weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry. The determination shall in all cases be based on positive findings and not on mere allegations or hypothetical possibilities. In the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered.

*When in this Code the term "injury" is used, it shall, unless otherwise specified, be interpreted as covering cause of material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.

Among the subjects discussed under this paragraph, attention focused on the circumstances in which injury could be qualified as "material" and on the question of causality. The considerations were based mostly on concrete cases, but there was also some discussion about national legislative provisions as such.

According to the footnote reproduced above, the Code defines the term "injury" in the sense that it also covers threat of injury and retardation of the establishment of an industry. Since the Code deals with threat of injury specifically under Article 3(e), relevant matters are reported under that paragraph even when explicit reference was made to Article 3(a) either exclusively or in addition to a reference to Article 3(e). The few cases, however, in which retardation of the establishment of an industry has been mentioned, are reported under Article 3(a).

1. "Material" injury

One interpretation of "material injury" was that any injury which was not trivial or negligible was considered material. Concern was expressed with this interpretation on repeated occasions (COM.AD/14, paragraph 55; COM.AD/19, paragraphs 29-32 and 34; COM.AD/26, paragraph 23). The answer given was that, although the language used in national provisions differed from that of the Code, the standards of the Code had been met (COM.AD/14, paragraph 56; COM.AD/19, paragraph 34).
It was stressed at a later meeting that, in spite of a tendency of moving away from the controversial interpretation, there were still several aspects of the administration of national anti-dumping laws and regulations which were not in conformity with the provisions of the Code. In respect of one country there was no indication that its obligations under the Code regarding determinations of material injury were to be followed by the competent national body in its enquiries (COM.AD/34, paragraphs 15 and 23).

Concrete evidence brought forward in this connexion indicated that market penetration was considered a paramount factor in determining whether injury had occurred or not (COM.AD/19, paragraph 31). According to one opinion the material injury criteria had not been applied properly, when determinations of injury had been made although the market penetration had been minimal (COM.AD/26, paragraph 31). The highest penetration ratio ever claimed to be minimal was 4.3 per cent (COM.AD/34, paragraph 27). In some cases where doubt on the appropriateness of injury determinations had been expressed, attention was drawn to market penetration ratios which were even below 1 per cent. (COM.AD/19, paragraph 29; COM.AD/26, paragraph 31.)

According to another opinion, it was not possible to establish a market share level below which there could be no injury. Other factors had also to be considered, particularly import increases (COM.AD/34, paragraph 28), considerable price declines (COM.AD/19, paragraph 34; COM.AD/26, paragraph 32; COM.AD/34, paragraph 28), rapidly decreasing profits for domestic firms (COM.AD/34, paragraph 28), and lost sales (COM.AD/19, paragraph 34).

In the same line of reasoning, it was also noted that nothing in the Code prohibited taking into account an aggregation of sales at less than fair value from a series of countries. In one case, large price declines had been caused by imports from two countries. In another case, it had been concluded that less than fair value imports, whether considered cumulatively or individually, had had a substantial disruptive effect on the domestic market and endangered the continued existence of the national industry (COM.AD/26, paragraph 32).

1 Dumped imports in relation to total domestic sales in the importing country.
2 e.g. 50 per cent in one year
3 Between 10 and 24 per cent in two years or, in another case, amounting to 15 per cent in one year.
4 e.g. 6 per cent in one year.
Reference was made as well to the importance of the **elasticity of demand**. In cases where this aspect was relevant, it had been concluded that, although import volumes may be limited, small margins of dumping were highly significant because even a small price advantage could be decisive (COM.AD/26, paragraph 32). It was confirmed, however, that in any event no dumping duties would be assessed on shipments made at not less than fair value (COM.AD/19, paragraph 34).

This reasoning was opposed by the representatives of those countries whose exports had been subject to such injury determinations. In their view the controversial practices had imposed costly studies on the importers (COM.AD/19, paragraph 35).

In one case doubts were expressed as to how injury could have existed when, at the time, domestic demand could not be satisfied (COM.AD/19, paragraph 29).

2. **Causality**

It was noted that Article 3(a) of the Code stipulated that the dumping had to be **demonstrably the principal cause of the injury**. The very explicit wording of the second sentence of Article 3(a) stipulated that authorities in reaching their decision, had to weigh, on the one hand, the effect of the dumping and, on the other hand, all other factors taken together which might be adversely affecting the industry. It was argued that dumped imports should weigh more than all the other factors taken together (COM.AD/26, paragraphs 23 and 26).

Concern was expressed at several occasions that the decisions made appeared to be inconsistent with this requirement of the Code (COM.AD/19, paragraph 31; COM.AD/26, paragraph 13; COM.AD/W/50 paragraphs 25-28, 30, 32, 34, 35). Specifically, it was pointed out that a national body in a member country had always considered that it was not necessary to show that dumped imports were the sole cause, not even the major cause of injury, as long as the facts showed that the dumped imports caused an injury which was more than **de minimis**. This was in clear disagreement with the Code provision that dumping had to be demonstrably the principal cause of the injury. In one case, the same national body had said that dumped imports contributed substantially to the injury suffered by the national industry. A substantial contribution was not the same thing as the principal cause (COM.AD/26, paragraph 23).

According to another interpretation, however, sales at less than fair value constituted the principal cause of the injury whenever there was no other more important individual cause, even if the dumped sales might not account for 50 per cent of the injury (COM.AD/26, paragraph 24).

An example was given to illustrate how too literal an interpretation of the requirements in Article 3(a) of the Code could lead to anomalies. It might be established that the net return of a particular domestic industry had fallen by
50 per cent, made up of 30 per cent due to general economic factors and 20 per cent due to dumped imports. In this case dumping was not the principal cause of the total injury suffered. It was questionable, however, whether one could consider that a 20 per cent loss of net income caused by dumping was not material (COM.AD/26, paragraph 25).

Although the theory under which it would be sufficient to establish that the dumping constituted "a more than de minimis factor in contributing to an injury" was later abandoned, which was noted with satisfaction by several countries, it was regretted that there was no certainty as to the future attitude as long as the relevant rules of the Code were not brought into the legislation itself (COM.AD/30, paragraph 17; COM.AD/34, paragraphs 36 and 37). This latter remark was countered by recalling that the country in question had made it clear at the time of the drafting of the Code that it would not be feasible to amend national legislation upon acceptance of the Code, but that the present legislation was being applied in a manner consistent with the provisions of the Code (COM.AD/30, paragraph 18).

3. New industries

There were only two instances where reference to the retardation of the establishment of an industry was made. In one case, an explanation of the basis for the retardation finding was asked, which was answered by the assertion that the establishment of retardation had been made on solid grounds, but that recourse could be had to appeal procedures (COM.AD/26, paragraphs 15 and 16). In the other case, it was noted that there had been no national production at all. While admitting that a significant industry did indeed not exist, it was claimed, on the other hand, that there was extensive evidence submitted to the effect that the dumping of the product was materially retarding the establishment of an industry, and that the investigation was therefore in conformity with the Code (COM.AD/34, paragraphs 23 and 24).

(b) The valuation of injury - that is the evaluation of the effects of the dumped imports on the industry in question - shall be based on examination of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country), export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry, and productivity; and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.

Of the factors listed in this paragraph of the Code, reference has been made, inter alia, to developments of turnover, market shares (market penetration), profits and prices. The discussion on these issues is reported under Section 1(a) of the comments on Article 3(a).
(c) In order to establish whether dumped imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined, for example: the volume and prices of undumped imports of the product in question, competition between the domestic producers themselves, contraction in demand due to substitution of other products or to changes in consumer tastes.

This paragraph was explicitly referred to in one instance only [COM.AD/W/50 paragraph 28].

Factors like "elasticity of demand" (COM.AD/26, paragraph 32) to which reference was made in Section 1(a) of the comments on Article 3(a), would also be relevant under Article 3(c).

(d) The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

Because of the affinity of this paragraph to Article 2(b), some of the issues reported there may also be relevant here and vice versa. Article 3(d) was explicitly referred to when it was claimed that in any determination of injury the impact of imports should be measured in relation to the production of like products [COM.AD/W/50, paragraphs 25 and 28].

In one case, it was argued that anti-dumping duties had been imposed upon the whole category of products even though only one range of dimensions had been subject to accusation of dumping (COM.AD/19, paragraph 29). In another case, it was noted that the relevant product was statistically classified together with a different product, for which there was no threat of injury. According to the reply given, the difficulties in separating the two products statistically had made it necessary to make a common finding of dumping (COM.AD/26, paragraphs 15 and 16).

(e) A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause material injury must be clearly foreseen and imminent.1

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1One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices.
Controversies have arisen both about whether determinations of threat of material injury were indeed based on facts, and whether injury was clearly foreseen and imminent. In one case it was clear that the initial controversy was solved by a revision of the original finding. In this case it had been asserted originally that the competent national body had established threat of injury to the domestic industry, although its own opinion clearly indicated that the Code requirements were not met (COM.AD/19, paragraph 3; COM.AD/26, paragraph 9). The records of the relevant meeting of the Anti-Dumping Committee had been handed over to that body, and a member of its staff had attended the meeting (COM.AD/26, paragraphs 10 and 14). Bilateral consultations (COM.AD/19, paragraph 4; COM.AD/26, paragraph 12) were conducted, and the earlier decision was reviewed. No threat of injury was found, and the anti-dumping duties were eliminated. This was noted with satisfaction (COM.AD/30, paragraph 2). It was pointed out, however, that the decision to revoke the original finding of threat of injury was in no way a reflection on the validity of the original finding. The decisions to impose as well as to eliminate the anti-dumping duties had been taken in the light of the particular situation at different points of time in conformity with the provisions of Article VI and the Code (COM.AD/30, paragraph 3).

The discussions referred, in each instance but one, to concrete determinations of threat of injury. In the only case where legislation proper was debated, it was pointed out that certain national regulations referred only to "the likelihood of injury" whereas the Code demanded that any threat of injury should be "clearly foreseen and imminent". It was presumed that the more stringent Code definition of threat would be applied in practice (COM.AD/3, paragraph 58).

With regard to concrete cases, it was asserted on several occasions that determinations of threat of material injury had not been based on facts, but on allegation, imprecise considerations, conjecture or remote possibility (COM.AD/19, paragraphs 2 and 29; COM.AD/30, paragraphs 19 and 21; COM.AD/34, paragraph 25). It was argued, therefore, that the criteria of paragraph 3(e) of the Code had not been met. In other cases, it was argued that the determinations of threat of injury were not in conformity with the Code since they were based merely on offers, future imports or future contracts (COM.AD/19, paragraph 19; COM.AD/30, paragraphs 26 and 27). It was also mentioned that any determination of a threat of injury must be based on "clearly foreseen and imminent" circumstances and not only on a remote threat or possibility thereof (COM.AD/30, paragraph 19; COM.AD/34, paragraph 15).

In one of these cases, it was replied that since the hearings had lasted several weeks, it could not be said that the findings were based on conjecture only (COM.AD/19, paragraph 4). In another case, the answer was that anti-dumping duties would be imposed on imports under contracts signed after the date of the decision, if a margin was established in individual cases. The decision would be
reviewed after eighteen months but could be reviewed earlier on request (COM.AD/19, paragraph 20). In a third case, it was replied that, although no sales at less than fair value had taken place at the time that the investigation had been opened, the complainant had presented very convincing evidence that a dumping bid had been made, which in case of success would have effectively eliminated the sole manufacturer of this product in the importing country. This was due to the fact that the purchaser was the importing country's principal consumer of the product concerned and that he made his purchases only once a year. In such situations, the opening of an investigation on the basis of bids was fully justified (COM.AD/30, paragraph 26). In a fourth case, the answer given was that the duty imposed would be revised annually until 1977. It was stressed that the exporters concerned would need the other country's market as an alternative outlet to a market that had been closed and that with substantial excess capacity in the importing country any substantial sales at less than fair value was likely to result in market disruption (COM.AD/30, paragraph 20). In a fifth case, the allegation that the threat of injury was remote, was rejected on the basis of the figures developed in the investigation; imports had increased by 24 per cent from 1971 to 1972; inventories in the last half of 1972 had increased by 50 per cent as a monthly average; prices in the importing country had fallen by 6½ per cent during the same period. In addition, a fall-off in demand had been projected as a result of environmental factors. These facts clearly showed much more than a remote threat of injury (COM.AD/34, paragraph 26). In a sixth case, it had been claimed that the determination of injury did not comply with the provisions of Article 3(a) and (e) of the Code since the exports concerned had decreased and since the determination on injury depended merely on a hypothetical price. It was pointed out in addition that the national body itself which had to decide on the dumping allegation had recognized that there had been no immediate threat of injury in this case. In reply, it was stated that clear evidence had been presented showing that the foreign companies concerned had offered to customers of the importing countries the product in question in large quantities at dumped prices. Hence, the measures taken were in full compliance with the provisions of the Code (COM.AD/W/50, paragraphs 3 and 4). Moreover, a seventh case had occurred which was peculiar in that provisional duties collected during the period when the injury question had been under review had been returned. This was the consequence of a revised decision determining that there was only future injury (COM.AD/26, paragraph 17).

(f) With respect to cases where material injury is threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care. It was specifically mentioned in only one case that special care should be exerted in cases of threat of injury (COM.AD/26, paragraph 13).

1Cf. also comments to Article 10(d).
Article 4

Definition of industry

(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products (except that...)

The only but twofold issue raised under this paragraph was the question of the representativeness of the complainant for the industry concerned, both as regards the legitimation to request the initiation of an investigation on behalf of the industry affected and as regards the determination of injury. In one case, the investigation had been initiated on the request of only one producer and the injury finding seemed to have been made mainly on the basis of that producer's situation. Moreover, it had been known that the relevant association of producers, which was generally considered to be representative of the industry as a whole, had not supported the complaint (COM.AD/34, paragraph 29).

In another case, it seemed that secondary manufacturers, not representative of the domestic industry, had caused the introduction of proceedings (COM.AD/34, paragraph 30).

It was replied that, even though the complaint might have come from one company, information on injury must pertain to the industry as a whole (COM.AD/34, paragraph 31).

Similar arguments were brought forward in a third case (COM.AD/19, paragraphs 3 and 4).

(1) When producers are importers of the allegedly dumped product the industry may be interpreted as referring to the rest of the producers;

It was noted with great concern that in one case an investigation had been initiated not upon request of the industry affected, but had been requested by a member of a legislative body and the union representing workers of that industry. The reply given was that, as the industry in this case was also a major importer, trade unions or other spokesmen for the workers in the domestic industry concerned could therefore speak "on behalf of" the industry (COM.AD/W/50, paragraphs 25 to 29, and 32).

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1Of comments to Article 5(a), especially "1. Representativeness of the complainant".
(ii) In exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

Concern was expressed about the lack of definition of a regional market by the authorities of an importing country. There was no indication that such a definition would be introduced in its regulations (COM.AD/19, paragraph 31, and COM.AD/34, paragraph 15). With regard to one specific case which had been taken up, it was replied that it might appear that injury had been more significant in some regions than in others, but injury to a portion of the national industry could not generally be isolated from the injury incurred by the entire national industry (COM.AD/34, paragraphs 27 and 28).

(b) Where two or more countries have reached such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the industry referred to in Article 4(a).

(c) The provisions of Article 3(d) shall be applicable to this Article.

These paragraphs have never been referred to in discussions.

C. Investigation and Administration Procedures

Article 5

Initiation and Subsequent Investigation

(a) Investigations shall normally be initiated upon a request on behalf of the industry affected, supported by evidence both of dumping and of injury resulting therefrom for this industry. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have evidence both on dumping and on injury resulting therefrom.

Problems and issues which have arisen under this paragraph refer to the representativeness of the complainant for the industry concerned, the consideration of evidence before initiating an investigation, and investigations in the absence of a complaint.
1. Representativeness of the complainant

Most frequently, the complaint by a single producer has been considered sufficient to initiate proceedings, even though the rest of the industry might not have considered itself affected (COM.AD/19, paragraphs 3, 29, 31; COM.AD/26, paragraph 28; COM.AD/34, paragraph 29). Concern was repeatedly expressed about initiation of investigations upon complaints not representative of a major proportion of the industry (COM.AD/30, paragraph 24; COM.AD/34, paragraph 15). In one particular case, it was pointed out that the complaint had been made by one producer, and that according to most other producers, imports had no adverse effect on the price situation in the importing market (COM.AD/14, paragraph 55). It was also stressed that proceedings had been initiated at the request of secondary manufacturers unrepresentative of the national industry (COM.AD/34, paragraph 30). The countries concerned claimed that their practices were justified by pointing out:

- that the complaint represented two thirds of the national production (COM.AD/30, paragraph 25);
- that injury and threat of injury were always judged with reference to a whole industry (COM.AD/19, paragraph 4);
- that the standards of the Code had been met (COM.AD/14, paragraph 56; COM.AD/19, paragraph 34).

It was also noted with great concern that in the investigation requested by a member of a legislative body and by the union representing workers of a specific industry, none of the relevant conditions of Article 5(a) were fulfilled.

The reply given was that in this case trade unions or other spokesmen for the workers in the domestic industry concerned could speak "on behalf of" the industry because the industry itself was also a major importer2, COM.AD/W/50, paragraphs 25-29, 32-35, 37, 41 and 48.

2. Evidence before initiating an investigation

Other problems and issues brought up under this paragraph were related to complaints which were alleged to be unfounded. It was stressed that cases had been taken up without prima facie evidence of injury though assurances had been given to comply with the Code (COM.AD/26, paragraph 27). To prevent the

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1 This question is dealt with also under Article 4(a).
2 cf. Article 4(a)(1)
controversial practices, it had been suggested that the authorities should request in all cases that complaints be supported by substantial evidence of injury as well as relevant price data (COM.AD/26, paragraph 29). Disagreement was voiced with the statement that a competent national body could initiate investigations without sufficient evidence of injury. In the case of a complaint by a single firm, a preliminary enquiry was made, and the fair value question as well as the content of the complaint about the cause of injury were verified. Moreover, the industry involved as a whole was always taken into consideration when the injury determination was made (COM.AD/26, paragraph 30).

With regard to one concrete case, it was stated that investigations had been initiated though there was no substantiation of the allegation of injury in the complaint, and no "national" industry adversely affected (COM.AD/30, paragraph 24). It was replied that, whereas the determination covered a broader category, investigations had been conducted only on one model, representing 60 per cent of all sales. The coverage of the determination applied to all merchandise of the same class or kind, given the fact that the product on the market was easily substitutable (COM.AD/30, paragraph 25).

With reference to proposals to amend the regulations of one country concern was expressed about the fact that the authorities did not seem to be prepared to undertake any significant scrutiny of the evidence concerning material injury before proceeding with a full investigation (COM.AD/34, paragraph 15). It was also pointed out that a provision requiring that some evidence of injury be present had been introduced into the procedures governing the rulings of one specific national body, but the practical effect of this provision was very unsatisfactory (COM.AD/34, paragraph 23).

In respect of the investigation requested by a member of a legislative body and by the union representing the workers of a specific industry, it was pointed out that:

- the conditions required by Article 5(a) were not fulfilled;
- a governmental body had stated that there was substantial doubt of injury.

The reply given was that, in this case:

- evidence was produced in two petitions;
- the negative formulation of the decision was not contrary to the Code;
- it was only decided whether there was sufficient evidence present to warrant further investigation. (COM.AD/W/50, paragraphs 25-29, 32-35, 37, 41 and 48)
3. **Investigation in the absence of a complaint**

This problem has been brought up only once. The producers concerned had made a complaint but had later changed their mind and did not wish to make their complaint public. While it was agreed that investigations might be initiated in the absence of a complaint, it was stressed that this procedure applied only in special cases, and where there was evidence both of dumping and of injury (COM.AD/34, paragraphs 7 and 8).

(b) Upon initiation of an investigation and thereafter, the evidence of both dumping and injury should be considered simultaneously. In any event the evidence of both dumping and injury shall be considered simultaneously in the decision whether or not to initiate an investigation, and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied, except in the cases provided for in Article 10(d) in which the authorities accept the request of the exporter and the importer.

It was pointed out that this paragraph clearly stipulated that adequate evidence of both dumping and injury was a prerequisite for the initiation of anti-dumping procedures and the introduction of provisional measures. However, problems were raised regarding the requirement of simultaneity of the examinations of dumping and injury. Repeated concern was expressed about the regulations of an important country and their lack of consistency\(^1\) with the provisions of this Article, which was causing unfair and inequitable trade relations (COM.AD/30, paragraph 22; COM.AD/34, paragraph 15).

As an example of improvement of national regulations, it was noted that there had been a revision in one country of the practices concerning consideration of evidence of injury after proceedings had been initiated (COM.AD/30, paragraph 23; COM.AD/34, paragraph 17).

In the context of remarks concerning the investigation on a specific product, it was stressed that the new procedure seemed likely to bring the practices of a certain importing country closer to the requirements of simultaneity of examination of dumping and injury [COM.AD/W/50, paragraph 12].

It was stressed that a thorough examination was needed already in the initial stages of a proceeding in order to verify if the alleged injury really justified the opening of a proceeding. Regarding the interests of the exporters, it was underlined that the Code was designed to prevent anti-dumping proceedings turning into a capricious non-tariff measure with serious effects on trade. According to another view, the Code did not require a full injury investigation before provisional action was taken (COM.AD/34, paragraphs 23 and 24).

\(^1\)This question is dealt with in a wider context under Article 14.
It was questioned whether the preliminary decision taken by a national body with respect to a concrete case, was compatible with Article 5(b). The answer furnished was that the provision did not stipulate simultaneous determination at the initial point of the investigation, but required that the consideration of injury and dumping must be simultaneous from the time at which provisional remedies were applied (COM.AD/W/50, paragraphs 28 and 29).

(c) An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There should be immediate termination in cases where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible.

Three main elements could be discerned from the arguments raised in the discussions: duration of investigation, offsetting versus preventive action, and the question when dumping or injury could be considered to be negligible.

1. Duration of investigations

Concern was expressed by an exporting country about the short time-limits provided by a national legislation for both summary and full-scale investigations. It was questionable whether an adequate summary investigation could be completed within a thirty-day period. The shortness of the time might cause the initiation of a full-scale investigation without an adequate summary investigation (COM.AD/19, paragraph 52(c); COM.AD/26, paragraphs 84 and 85). With regard to the full-scale investigation and the basic six-month period, it would be regrettable if such an investigation could not be properly conducted because of lack of time or if adequate opportunity for expressing views or for submission of appropriate information by respondent firms were not afforded (COM.AD/26, paragraph 86).

The opposite view was that continuing efforts should be made to reduce the length of time needed to settle a case because delays created considerable uncertainty and affected seriously exporters both in terms of costs and loss of market share (COM.AD/30, paragraph 39; COM.AD/W/50, paragraph 377).

In reply to those critical comments, it was pointed out that depending on the case the time-limit would be extended beyond thirty days or beyond six months, or the investigation period would be shortened, and provisions added to allow for termination of discontinued investigations. It was recognized that the process of gathering information for purposes of assessment could be lengthy and that there was an element of uncertainty while a final conclusion on assessment was pending (COM.AD/26, paragraphs 42, 85 and 87; COM.AD/30, paragraphs 40 and 49).

Reference was made to the improvement of the practices of a member country; the time taken to complete investigations had been halved in recent years (COM.AD/34, paragraph 17).
2. Offsetting versus preventive action

In connexion with the question of price undertakings, it was stressed that Article VI and the Code were based on the concept of offsetting injurious dumping effects. Preventive or punitive actions were not permitted by Article 5(c) (COM.AD/34, paragraphs 50, 51, 52 and 53).

3. Negligible dumping margin, volume of dumped imports, or injury

It was pointed out that the injury requirements of Article 5(c) were not always met. In one concrete case, it was asserted that the margin of dumping had been negligible, and the Code had not been observed (COM.AD/11, paragraphs 31 and 33).

It was indicated by one country that investigations would be discontinued only where the margins of dumping were minimal: a minimum margin might be 45 per cent in a situation where there were very many sales and only one of these was made at a dumping price; on the other hand, a 5 per cent margin covering 90 per cent of the sales would probably not be considered to be minimal (COM.AD/26, paragraph 48).

(d) An anti-dumping proceeding shall not hinder the procedures of customs clearance.

With respect to specific national regulations, it was pointed out that certain rules regarding failure to submit evidence relating to the normal value and the export price of goods would give the power to authorities to hinder the procedures of customs clearance in a manner inconsistent with Article 5(d) (COM.AD/3, paragraph 23).

In response, it was stressed that the aim of the rules was to give the parties concerned another possibility to submit information; Article 5(d) was not relevant in this connexion (COM.AD/9, paragraph 10).

Article 6

Evidence

(a) The foreign suppliers and all other interested parties shall be given ample opportunity to present in writing all evidence that they consider useful in respect to the anti-dumping investigation in question. They shall also have the right, on justification, to present evidence orally.

\(^1\)cf. Article 7
It was stressed that it would be regrettable if adequate opportunity for expressing views or for submissions of appropriate documentation by respondent firms were not afforded because of the time limitation (COM.AD/19 paragraphs 16 and 17; COM.AD/26 paragraph 86).

With regard to the implementation of the amendments to a national legislation, the hope was expressed that the presentation of the matter by the parties concerned would not be unreasonably or unfairly restricted. It was replied that it was important to avoid to take up irrelevant issues in the course of investigations, and that for some questions, for example institutional issues, it was preferable that the parties took them to court (COM.AD/26 paragraphs 89 and 90).

(b) The authorities concerned shall provide opportunities for the complainant and the importers and exporters known to be concerned and the governments of the exporting countries, to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph (c) below, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

In one concrete case, it was thought that the exporter should be given a clear definition of the charges to which he would be required to answer. When the exporter did not know the prices by reference to which the alleged dumping was calculated, in the cases of different prices for the same product, he could have difficulties to prepare his defence (COM.AD/14 paragraphs 23c, 24, 25c). It was noted that, as a general rule the foreign exporters were entitled to examine the evidence submitted by the complainant to the extent that there was no violation of confidentiality rules (COM.AD/26 paragraph 50).

It was stated that sufficient information on the reasons and content of a certain complaint had been asked repeatedly in vain.

It was concluded, therefore, that the provisions of Article 6(b) and 10(c) of the Code had not been respected. The answer was that the material in question was confidential but that as much information of a general nature as could reasonably be expected had been supplied to explain the reason for the decision (COM.AD/W/50 paragraphs 7 and 8).

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1This question is reported under Article 5(c).
In respect of this paragraph, improvements had taken place in the regulations of two specific countries with regard to:

- information to foreign governments on anti-dumping actions
  (COM.AD/34 paragraph 17)

- inclusion of more detailed information, as a basis for preliminary determinations of dumping
  (COM.AD/W/50 paragraph 77)

(c) All information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an anti-dumping investigation shall be treated as strictly confidential by the authorities concerned who shall not reveal it, without specific permission of the party submitting such information.

It was stated that the legal representative of an exporting firm appeared to have been refused access to the files. These files had been requested in order to prepare the case for the defence. The problem had been solved through the presentation of a résumé of the confidential information (COM.AD/14 paragraphs 38(b) and 39).

(d) However, if the authorities concerned find that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities would be free to disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

This paragraph has never been referred to in discussions.

(e) In order to verify information provided or to obtain further details the authorities may carry out investigations in other countries as required, provided they obtain the agreement of the firms concerned and provided they notify the representatives of the government of the country in question and unless the latter object to the investigation.

It had been confirmed by one country that its regulations had not excluded such investigations, but that in some cases the availability of information from professional organizations, etc. might make investigations unnecessary (COM.AD/14 paragraphs 28 and 29). In one concrete case, concern had been expressed about the procedures followed in price investigations. It was answered that the national practice was in conformity with the Code, and the administrative lapses that might have occurred were regretted (COM.AD/14, paragraphs 40-42).
(f) Once the competent authorities are satisfied that there is sufficient evidence to justify initiating an anti-dumping investigation pursuant to Article 5 representatives of the exporting country and the exporters and importers known to be concerned shall be notified and a public notice may be published.

Three issues were raised under this paragraph. First, it was stressed that the notification should show prima facie evidence of dumping and injury, and that the exporter should be given a clear definition of the charges to which he would be required to answer (COM.AD/14, paragraph 23c). Secondly, the hope had been expressed that the summary investigation should be carried out to the fullest extent possible before an "anti-dumping proceeding notice" was published. Thirdly, the view had been expressed that this public notice should describe not only the name of the merchandise concerned, but also the name of the manufacturer and the type and model as well as any other relevant features of the merchandise in question (COM.AD/19 paragraph 52).

(g) Throughout the anti-dumping investigation all parties shall have a full opportunity for the defence of their interests. To this end, the authorities concerned shall, on request, provide opportunities for all directly interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

This paragraph has never been referred to in discussions.

(h) The authorities concerned shall notify representatives of the exporting country and the directly interested parties of their decisions regarding imposition or non-imposition of anti-dumping duties, indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public the decisions.

The view was expressed that this paragraph, which stipulated that the exporting country would be notified of reasons for decisions on anti-dumping duties and the criteria applied, had not been observed. In order to establish export prices and to avoid the occurrence of dumping margins, it was necessary that respondents should always be notified of the basis for fair value calculations. In this respect, the provisions of a member country should be more specific so that the exporting country and directly interested parties might be informed more accurately of the reasons and criteria applied for a decision regarding imposition of anti-dumping duties (COM.AD/19 paragraph 52c).

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1The question is reported under Article 6(b) as well.
In reply, it was stated that if there was no violation of confidentiality rules, exporters were entitled to examine the evidence supplied by the complainant. From some time before the withholding of appraisement, the exporters were given full information as to how the calculations were made, and they had the opportunity to make any appropriate price adjustment. It was pointed out that the authorities of the importing countries had more interest in seeing dumping terminated than in collecting anti-dumping duties. It was stressed that as an improvement of the practice in this importing country, estimated duties were made known to importers (COM.AD/26 paragraphs 49 and 50; COM.AD/34 paragraph 17).

(i) The provisions of this Article shall not preclude the authorities from reaching preliminary determinations, affirmative or negative, or from applying provisional measures expeditiously. In cases in which any interested party withholds the necessary information, a final finding, affirmative or negative, may be made on the basis of the facts available.

It was noted that it was necessary to establish a balance between offering reasonable opportunities for the parties concerned to submit additional evidence and preventing abuse (COM.AD/3 paragraphs 23 and 24). However, with regard to a particular case, it was stressed that, although Article 6(i) permitted the expeditious application of provisional measures only when any interested party withheld the necessary information, action had been taken in spite of exporters not having withheld such information (COM.AD/14 paragraph 31).

Article 7
Price Undertakings

(a) Anti-dumping proceedings may be terminated without imposition of anti-dumping duties or provisional measures upon receipt of a voluntary undertaking by the exporters to revise their prices so that the margin of dumping is eliminated or to cease to export to the area in question at dumped prices if the authorities concerned consider this practicable, e.g. if the number of exporters or potential exporters of the product in question is not too great and/or if the trading practices are suitable.

(b) If the exporters concerned undertake during the examination of a case, to revise prices or to cease to export the product in question, and the authorities concerned accept the undertaking, the investigation of injury shall nevertheless be completed if the exporters so desire or the authorities concerned so decide. If a determination of no injury is made, the undertaking given by the exporters shall automatically lapse unless the exporters state that it shall not lapse. The fact that exporters do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case. However, the authorities are of course free to determine that a threat of injury is more likely to be realized if the dumped imports continue.
Concern was expressed on many occasions that possibilities of terminating pending cases by accepting price undertakings had not been admitted by one country.

1. With regard to one concrete case, it was pointed out that in order to terminate the proceedings it would have been reasonable if the importing country had accepted temporarily offers to discuss precise price commitments. It was stressed that the authorities of the importing country were free to accept or refuse price undertakings, but such undertakings could be accepted even after decisions on definitive measures. In the importing country's view, however, the fact that timely price undertakings had not been offered was the reason for the outcome of the case. If the exporter waited until the last minute to offer price undertakings in an effort to avoid what he realized was certain to be an adverse determination, the inadvertency of the dumping became questionable (COM.AD/9 paragraphs 38-42).

2. It was stressed that the new provisions of a certain country provided for the reopening of investigations and immediate withholding of appraisement, based simply on price information, i.e. when "there are reasonable grounds to believe or suspect that there are likely to be sales at less than fair value". It was recalled that provisional measures\(^1\) should be taken when there was sufficient evidence of injury in addition to sales at less than normal value.

According to the country to which these remarks had been addressed, action would only be taken in exceptional cases when a price assurance had been given and subsequently disregarded. Previously a new investigation had to be opened in such cases, but under the proposed provisions the interrupted investigation could be continued, without renewing the injury information. In reply to a question how changing conditions in industry were taken into account, the importing country pointed out that if industry did not feel that there was a threat of injury the reopening of the investigation would not be asked for. (COM.AD/26 paragraphs 80-83).

3. With respect to amendments introduced to the legislation of a member country it was pointed out that previous legislation, by making acceptance of price undertakings almost automatic, actually served to encourage exporters to gain a large share of the market through dumping. The purpose of the new legislation was to stop dumping before damage was done.

Other countries stressed that their practice was different. The acceptance of price undertakings depended only on factors existing at the time that a determination of dumping was made, and not on any previous situation. Moreover, the neutralization of the harmful effects of dumping could be achieved just as effectively by raising export prices as by applying an anti-dumping duty (COM.AD/14 paragraphs 9-21).

\(^1\) cf. Article 10
4. Comments were made on possible amendments to anti-dumping regulations in the field of price undertakings in a member country (COM.AD/19 paragraphs 52b, 53 and 54). Other countries stressed that they did not agree with the contents of a note explaining price undertaking practices (Annex I to COM.AD/14). Investigations should be discontinued as soon as it was found that price undertakings were likely to be implemented in view of the number of foreign exporters involved and of the commercial practices applied in the country of exportation. Moreover, it was pointed out that the price undertaking principle had to be applied more flexibly, the main purpose of the Code being the prevention of dumping. It was recalled by the country reviewing its regulations that, in one concrete case, exporters had refused to give price undertakings and had preferred to test out whether the dumping margins were enough to cause injury. No injury had been determined. Consequently, the exporters could continue selling at less than fair value. It was indicated that investigations would be discontinued only where the margins of dumping were minimal: a minimal margin might be 45 per cent in a situation where there were many sales and only one of these was made at a dumping margin; on the other hand, a 5 per cent margin covering 90 per cent of the sales would probably not be considered to be minimal (COM.AD/26, paragraphs 45-48).

5. Another item which had been raised by an exporting country referred to periodic reports on detailed price information required by a member country during a certain length of time. (COM.AD/26, paragraphs 78 and 79).

6. An importing country reviewing its regulations stressed that improvements in its practice had been introduced as follows: provision had been made for revocation of dumping findings after a set period of time when there were no sales at less than fair value and price undertakings had been given (COM.AD/34, paragraph 17).

It was replied that the present system of dumping finding was unsatisfactory in this country, because it required not only that there were no dumping margins over a considerable period of time, but also that price undertakings be given for future shipments for a non-specified period of time (COM.AD/34, paragraph 36).

7. Disagreement was voiced at the basic assumption contained in a paper on the policy of the importing country reviewing its regulations with respect to "voluntary undertakings". The policy was designed to serve preventive and punitive purposes in violation of the principles of the Code. When exporters, whose offers of price undertakings had been refused, had revised their export prices and thereby eliminated the injurious dumping, they were nevertheless exposed to the inconveniences of anti-dumping procedures. If the provisions of Article 7 made price undertakings optional, this was intended to take account of the fact that price undertakings were not always practicable, but not to permit signatories to the Code to proceed in a punitive fashion against exporters.

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This question is reported under Article 5(c) as well

This question is reported under Article 9 as well
In reply, it was reiterated that it was in each government's power to decide whether or not to terminate proceedings after the acceptance of price undertakings (COM.AD/34, paragraphs 48-53).

Other arguments raised under Article 7 ran as follows:

1. The view was expressed that marginal exporters had to be informed of a price undertaking arranged between the most important supplier and the authorities of the importing country.

The opposite view was that the questionnaire used explained carefully the procedures, that the exporters had to be aware of them, and that the authorities concerned could not make direct contact with overseas manufacturers (COM.AD/14, paragraphs 51-53).

2. The point was made that the purpose of the Code's price undertaking provisions was to exempt exporters from extensive and bothersome procedures. To demand export restraint in addition to price undertakings ran counter to that purpose. The importing country underlined that when the exporter gave assurances which removed the injury, and when his suggestion was accepted, the proceedings were always terminated (COM.AD/34, paragraphs 3-6).

3. It was noted that products under special arrangements of export control should not be subject to anti-dumping action, as these arrangements prevented material injury to the industry of the importing country (COM.AD/26, paragraphs 33 and 34).

D. Anti-dumping duties and provisional measures

Article 8

Imposition and Collection of Anti-Dumping Duties

(a) The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

Problems raised in this area dealt with the significance of the following two concepts:
1. Permissiveness

The point was made that the unclear wording of national legislations seemed to indicate that the imposition of a duty was "obligatory" or "mandatory" upon a final determination of dumping and material injury (COM.AD/9, paragraph 32(i); COM.AD/14, paragraphs 23(a) and 25(a)).

2. Relation between duty and dumping margin

It was asserted that a certain national provision stipulated that the duty should be equal to the dumping margin (COM.AD/9, paragraph 32(ii)).

(b) "When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved."

Problems raised under Article 8(b) regarded the limitation of measures with respect to specific suppliers or supplying countries.

In order to avoid that anti-dumping proceedings be initiated in respect of firms that had not exported or were not exporting the product, an exporting country asked that the determinations of dumping and injury should be made on a company-by-company basis.

According to the importing country, if a particular company could establish that no sales at dumped prices had been made over a period of two years prior to the date of the dumping finding, an order excluding that company from the dumping finding would be issued (COM.AD/19, paragraph 52(g); COM.AD/26, paragraphs 43 and 44). There was disagreement on the period of time to be considered appropriate for verifying whether companies were not engaged in sales at less than fair value. The importing country could not agree to a revocation of a dumping finding within a period as short as six months. Under its new procedure, any company had the opportunity to disclose all of its sales; if it was found before issuance of the dumping finding that the company concerned had not engaged in sales at less than fair value, the company would be excluded from any anti-dumping measures applied (COM.AD/30, paragraphs 37 and 38; COM.AD/34, paragraph 17).

\(^1\) cf. comments to Article 8(c)
(c) The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

Particular importance was attached to the establishment of anti-dumping duties below the full amount of the margin of dumping (COM.AD/9, paragraph 7; COM.AD/19, paragraph 54).

With regard to the procedure followed by an importing country in one concrete case, it was asserted that a duty rate had not been fixed in the final decision but was made subject to further examination; this decision could not be reconciled with the Code. (COM.AD/14, paragraphs 38(a) and 39).

(d) Within a basic price system the following rules shall apply provided that their application is consistent with the other provisions of this Code:

If several suppliers from one or more countries are involved, anti-dumping duties may be imposed on imports of the product in question found to have been dumped and to be causing injury from the country or countries concerned, the duty being equivalent to the amount by which the export price is less than the basic price established for this purpose, not exceeding the lowest normal price in the supplying country or countries where normal conditions of competition are prevailing. It is understood that for products which are sold below this already established basic price a new anti-dumping investigation shall be carried out in each particular case, when so demanded by the interested parties and the demand is supported by relevant evidence. In cases where no dumping is found, anti-dumping duties collected shall be reimbursed as quickly as possible. Furthermore, if it can be found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

This paragraph has never been referred to in discussions.

(e) When the industry has been interpreted as referring to the producers in a certain area, i.e., a market as defined in Article 4(a)(ii), anti-dumping duties shall only be definitively collected on the products in question consumed for final consumption to that area, except in cases where the exporter shall, prior to the imposition of anti-dumping duties, be given an opportunity to cease dumping in the area concerned. In such cases, if an adequate assurance to this effect is promptly given, anti-dumping duties shall not be imposed, provided, however, that if the assurance is not given or is not fulfilled, the duties may be imposed without limitation to an area.

The only problem raised under this paragraph was related to the justification of a concrete determination of injury. The injury in one case had been caused to a regional and not to the national industry as a whole. It was stressed that duties had nevertheless been imposed on all imports.

In reply, it was stressed that injury to a portion of the industry could not generally be isolated from the injury incurred by the entire national industry. (COM.AD/34, paragraphs 27 and 28).

1Cf. Article 4(a)(ii)
Article 9
Duration of Anti-Dumping Duties

(a) An anti-dumping duty shall remain in force only as long as it is necessary in order to counteract dumping which is causing injury.

In response to hopes expressed for material improvement in the practices of a member country, it was pointed out that improvements had taken place as follows:

- provision had been made for revocation of dumping findings after a set period of time when there were no sales at less than fair value and price assurances had been given;
- a procedure had been established for possible reconsideration of injury determinations (COM.AD/34, paragraphs 15 and 17).

Assertions were voiced that the policy of a member country was designed to serve preventive and punitive purposes in violation of Article 5(a) and 9(a) (COM.AD/34, paragraphs 50-53).\(^1\)

In this context reference was made in particular, to those rules according to which dumping findings could not be revoked upon request unless there was proof that no dumping had taken place for at least two years and such findings must be in force for at least four years before they could be revoked at the initiative of the authorities of the importing country (COM.AD/W/50, paragraph 36).

It was replied that, although the findings might remain in force for some time, duties were collected on an entry-by-entry basis and that no duties were assessed for those imports where no dumping margin was found. Moreover, even when no request had been made for revocation, the authorities could on their own initiative revoke a finding after four years, if no sales at less than fair value had occurred. Although its procedures were fully in compliance with Article 9(a), the country concerned expected that a better revocation procedure could be evolved in the future regarding changes in circumstances affecting injury determination (COM.AD/W/50, paragraphs 44 and 48).

(b) The authorities concerned shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if interested suppliers or importers of the product so request and submit information substantiating the need for review.

\(^1\)This question is also reported under Articles 5(c) and 7
The importance of observing the requirements of this paragraph was drawn
to the attention of a member country in connexion with a review of its regulations
relating to injury determinations within a limited period (COM.AD/19, paragraph 3;
COM.AD/26, paragraphs 9-14). Concern was expressed that the authorities of
the importing country had taken an unusually long time to complete the review.
In two other cases, exporting countries asked for a review (COM.AD/14,
paragraphs 31 and 52).

Article 10

Provisional Measures

(a) Provisional measures may be taken only when a preliminary decision has been
taken that there is dumping and when there is sufficient evidence of injury.

Issues raised under this paragraph did not refer to specific cases, but to national
legislation in general. The following matters were discerned from the discussions:

1. Sufficient evidence of injury

It was asked how sufficient evidence of injury was established, when
provisional measures were to be introduced by the authorities as soon as a case
had been referred to the competent body. It was replied that in national
provisions the requirements of evidence of injury for the initiation of an
investigation also applied to preliminary determinations of dumping and the
discretionary decisions that a provisional duty should be paid or a security
posted (COM.AD/3, paragraphs 10 and 11).

The hope was expressed that the anti-dumping legislation of a member country
would be revised along the lines of Article 10(a) to conform to the Code require-
ments concerning preliminary decision: on dumping and sufficient evidence of
injury (COM.AD/19, paragraph 52(c)). It was reiterated in this context that the
withholding of appraisement should be made only when there was sufficient evidence
of injury, and it was underlined that withholding of appraisement on the ground
that authorities of the importing country were not authorized to make an injury
determination in accordance with their national legislation was not consistent
with Article 10(a) (COM.AD/26, paragraph 41).

The point was made that the anti-dumping legislation of a member country
provided for the reopening of an investigation and immediate withholding of
appraisement, based simply upon price information, and not on sufficient evidence
of injury in addition to dumping. In reply, it was stressed that action under
that provision would only be taken in exceptional cases when a price assurance had been given and subsequently disregarded. The investigation could be resumed but it would not be necessary to renew the injury information (COM.AD/26, paragraphs 80 and 81; COM.AD/30, paragraph 49).

2. Preliminary findings and provisional action

In response to a question whether provisional action was always taken once a preliminary determination had been made and the case referred to the competent tribunal, it was stated that in practice action was always taken either through a provisional duty being imposed or by requiring that a security be posted by the exporter, although the decision to take anti-dumping measures was at the discretion of the authorities (COM.AD/14, paragraphs 23(d) and 25(d)).

In a similar context, it was asked whether preliminary findings were a prerequisite for certain measures to be taken by the authorities "even before completion of the investigation". It was replied that the requirements of the Code were met because a decision would have to be taken at the level of Council of Ministers (COM.AD/3, paragraphs 41 and 42).

(b) Provisional measures may take the form of a provisional duty or, preferably, a security - by deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

1. Provisional duty or security

It was asserted that a requirement of a guarantee for customs clearance, when the actual price was 5 per cent or more below the normal value, was not in conformity with the Code (COM.AD/9, paragraph 31).

In one concrete case, concern was expressed at the fact that the provisional duties had been as high as 50 per cent and that the criteria for determining the margin of dumping had not been made clear. It was thought possible that, if the provisional duties could be levied at a higher rate than necessary, the margin of dumping established in the final determination might also be too high. It was replied that anti-dumping action would not be used in a punitive manner, that the margin would be determined in accordance with the Code, and that the determination was subject to appeal (COM.AD/14, paragraphs 35 and 36).
2. Withholding of appraisement

Cases where withholding of appraisement have been used as a provisional measure are also being reported in other contexts. Where the emphasis was laid on the withholding action as such, however, some additional arguments were identified:

In reply to the observation that any provisional measures should be taken with particular care to avoid damage, it was stressed that in almost all the cases where appraisement had been withheld, dumping margins had been ultimately established (COM.AD/30, paragraph 36).

In reply to critical comments on the use of provisional measures in the form of withholding of appraisement, it was pointed out that material improvement in the practices of an importing country had been introduced in connexion with the revision of the relevant regulations (COM.AD/34, paragraphs 15 and 17).

(c) The authorities concerned shall inform representatives of the exporting country and the directly interested parties of their decisions regarding imposition of provisional measures indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public such decisions.

In many cases, conflicts that arose under this paragraph were said to stem, at least in part, from the confidential nature of information.

In two concrete cases affecting the same exporting country, it was pointed to the fact that the authorities of the importing country had neither supplied sufficient information on the reasons for the measures, nor on the way of calculation of normal value.

It was replied that one of the cases had led the authorities to decide that a preliminary determination of dumping should include more detailed information as to the basis for the decision (COM.AD/W/50, paragraphs 5 and 7).

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1Cf. comments to Articles 10(a) and 14 (especially "Cases pending at the entry into force of the Code").

2Cf. Article 6(c) and 6(h).
In another concrete case it was stressed by the importing country that:

- the method of determining prices could not be published without violating confidentiality;

- the authorities of the importing country had been in continuous contact with the exporters and the importers, and the exporters had been given explanations on the manner in which the margins had been computed;

- calculations would be discussed with the exporters and importers;

- a final determination would be made within three months from the issuance of the withholding of appraisal notice (COM.AD/14, paragraphs 47 and 49).

It was stressed that some provisions of a member country should be more specific so that the exporting country and directly interested parties might be informed more accurately (COM.AD/19, paragraph 52(c)).

It was claimed that it was necessary that respondents should always be notified of the basis for fair value calculations. In reply, it was stated that if there was no violation of confidentiality rules, exporters were entitled to examine the evidence submitted by the complainant. For some time before withholding, the exporters were given full information as to how the calculations were made, and they had the opportunity to make any appropriate price adjustment. It was pointed out that the authorities of the importing countries had more interest in seeing dumping terminated than in collecting anti-dumping duties. The fact that estimated duties were made known to importers constituted an improvement of the practice in this particular country (COM.AD/26, paragraphs 49 and 50; COM.AD/34, paragraph 17).

(d) The imposition of provisional measures shall be limited to as short a period as possible. More specifically, provisional measures shall not be imposed for a period longer than three months or, on decision of the authorities concerned upon request by the exporter and the importer, six months.

It was stressed that no limitation of duration appeared in the rules of two national legislations (COM.AD/3, paragraph 23; COM.AD/9, paragraph 31).

Concern was expressed at the fact that, in a concrete case, withholding of appraisement was applied for a longer period than contemplated in the Code. Provisional action should be delayed until the authorities were satisfied that a final decision would be reached within the time-limit prescribed. In reply, it was pointed out that earlier practice had been abandoned and that the six-month period of withholding was normally requested and granted, since it was difficult to fairly consider all issues within three months in complicated cases. It was reiterated that in no event withholding was being maintained in effect for longer than six months (COM.AD/26, paragraphs 40 and 42).
(e) The relevant provisions of Article 8 shall be followed in the application of provisional measures.

This paragraph has never been referred to in discussions.

Article 11

Retroactivity

Anti-dumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under Articles 8(a) and 10(a), respectively, enters into force, except that in cases:

(i) Where a determination of material injury (but not of a threat of material injury, or of a material retardation of the establishment of an industry) is made or where the provisional measures consist of provisional duties and the dumped imports carried out during the period of their application would, in the absence of these provisional measures, have caused material injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

If the anti-dumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

(ii) Where appraisement is suspended for the product in question for reasons which arose before the initiation of the dumping case and which are unrelated to the question of dumping, retroactive assessment of anti-dumping duties may extend back to a period not more than 120 days before the submission of the complaint.

(iii) Where for the dumped product in question the authorities determine

(a) either that there is a history of dumping which caused material injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury, and

(b) that the material injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to assess an anti-dumping duty retroactively on those imports,

the duty may be assessed on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

Problems raised under this Article referred both to specific cases, and to legislation as such. Three sets of issue were identified:
1. **Fixing of an effective date**

There were divergent views on the right to withhold appraisement retroactively. With reference to the national legislation of an importing country, it was stressed by an exporting country that the fixing of an effective date for an application of provisional measures seemed to open up possibilities for a retroactive application of such measures. It was replied that in accordance with Article 11(ii) the duty might be assessed on products which had been entered for consumption not more than ninety days prior to the date of application of provisional measures, and that nearly all entries were appraised very promptly (COM.AD/3, paragraphs 50 and 51).

2. **Duties versus provisional measures**

As a comment on the national legislation of an importing country, it was pointed out by an exporting country that a particular provision would allow the authorities to apply withholding of appraisement retroactively. According to the exporting country, neither this proposed amendment nor the retroactive application in general of provisional measures were allowed under the provisions of Article 11 (COM.AD/19, paragraph 52(a)(ii)).

It was underlined that the Code provided for retroactive application of anti-dumping duties but not of provisional measures, and that the ninety day retroactive application of withholding of appraisement was clearly in conflict with Article 11. It was replied that the right to retroactive withholding of appraisement, which was expressly recognized under the Code, had not been used so far by the importing country. With regard to specific cases the answer given was that these cases clearly came within Article 11 which permitted a ninety day retroactivity (COM.AD/26, paragraphs 41, 42, 43, 80 and 81).

3. **Reappraisal**

With reference to two specific provisions in the legislation of a member country that the value of any goods could in certain circumstances be reappraised within two years, it was stressed that this seemed to open up a possibility for retroactive application of duties contrary to Article 11.

The answer given was that one of these provisions related exclusively to goods which were subject to anti-dumping duties at the time of entry and that the question of retroactivity did not arise. With regard to the second provision it was mentioned that the final determination was subject to re-determination or reappraisal within two years, and that all goods described in the preliminary determination were deemed to be entered provisionally and were normally subject to provisional duties. With reference to other provisions it was concluded that they limited retroactive assessment of duties as provided for in Article 11.
In reply it was noted that, although the aim of the two provisions specifically mentioned was not to create possibilities for a retroactive assessment of duties but to cover situations such as refunds, and to use them, inter alia, in cases where fraud was involved, uncertainty could be caused among traders. It was asserted that the reappraisal could also be used to increase the amounts of duty imposed in a way inconsistent with Article 11. Finally it was pointed out that Article 11(iii) could be violated if an entry subsequent to a specified date would not be deemed to have been perfected until certain conditions were fulfilled.

In view of the assurance given that it was the intention of the authorities to apply the national legislation in consistency with the Code, it was agreed not to pursue the issue further (COM.AD/3, paragraph 21; COM.AD/9, paragraphs 7, 8, 9, 11).

E. Anti-dumping action on behalf of a third country

Article 12

(a) An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

(b) Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

(c) The authorities of the importing country in considering such an application shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry’s exports to the importing country or even on the industry’s total exports.

(d) The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the CONTRACTING PARTIES seeking their approval for such action shall rest with the importing country.

PART II - FINAL PROVISIONS

Article 13

This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to the General Agreement and by the European Economic Community. The Agreement shall enter into force on 1 July 1968 for each party which has accepted it by that date. For each party accepting the Agreement after that date, it shall enter into force upon acceptance.

These Articles have never been referred to in discussions.
Each party to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code.

Issues dealt with under this Article can be classified along four categories:

1. General observations
2. Differences of terminology
3. Precedence of national law
4. Cases pending at the entry into force of the Code

1. General observations

It was stressed that it was of considerable importance for the creation of confidence in international trade that internal anti-dumping legislation of countries parties to the Code did really fulfil the Code requirements and that traders could appeal against administrative decisions which were not in conformity with the Code (COM.AD/9, paragraph 28).

The point was made that the degree to which problems of other non-tariff measures could be solved in future negotiations in a manner similar to that used in the anti-dumping field would, to a significant extent, depend on the success with which the Anti-Dumping Committee would ensure full respect for the provisions of the Code (COM.AD/34, paragraph 21).

On the other hand, it was affirmed that, since the Code was taken seriously and efforts were constantly being made to improve on the various aspects of the application of national law, the idea of codes seemed to be a valid and worthwhile type of solution, both in the field of anti-dumping and in other non-tariff problem areas (COM.AD/34, paragraph 22).

2. Differences of terminology

It was regretted that it had not been possible to follow the wording of the Code more closely in certain national provisions (COM.AD/3, paragraphs 9 and 52).

The answer given was that, although it had been found possible in some cases to use the very words of the Code, it had been necessary in other cases to adjust the wording to correspond to the nationally established legal language (COM.AD/3, paragraphs 11 and 53; COM.AD/9, paragraph 17).
Comments by members of the Committee should be based on concrete actions taken rather than on language differences which existed between the present national legislation and the Code (COM.AD/W/50, paragraph 497).

In this context, reference has very often been made to provisions for the determination of injury. As arguments ran in general terms, this matter was included in the comments to Article 14 rather than under Article 3(a) (COM.AD/3, paragraphs 12-14, 16, 30, 31, 39 and 40; COM.AD/9, paragraphs 31 and 34; COM.AD/19, paragraph 54).

3. Precedence of national law

The bulk of discussions under Article 14 was devoted to the question of whether, given the existence of a certain legal provision establishing a precedence of national law in cases of conflict with the Code, the conformity with the Code would be ensured in the actual application of national law.

It was noted with concern that there might exist, in some cases, a legal obligation to violate the provisions of Article VI of GATT and the Anti-Dumping Code (COM.AD/3, paragraphs 52 and 54).

It was recalled in this connexion that the Code had been signed by all adherents without any reservation (COM.AD/3, paragraph 54; COM.AD/26, paragraph 28; COM.AD/34, paragraph 14). More specifically, although it was recognized that, in respect of one country, it had been made clear at the time of the drafting of the Code that it would not be possible or feasible to change or amend the national Anti-Dumping Act upon acceptance of the Code, attention was drawn to the fact that it had been stated that the present law would be applied in a manner consistent with the provisions of the Code (COM.AD/26, paragraph 28; COM.AD/30, paragraph 18).

It had been assumed that, given the non-existence of any reservation attached to signatures of the Code, all governments would take the necessary steps in order to resolve any conflict between the obligations of the Code and the national Anti-Dumping Law. However, the performance of one country had been disappointing in this respect (COM.AD/34, paragraphs 14 and 21). It was true that the number of cases opened had continued to decline, and the assurances given concerning compliance with the Code were welcomed, but in spite of this progress, there remained still several important aspects of its anti-dumping laws and regulations which were not in conformity with the Code (cf. Articles 2, 3(a) and (e), 4(a)(i), 5(a) and (b), 9, 10(b) and 11), while the Code did require full conformity with its provisions by all participants (COM.AD/34, paragraphs 15 and 21; COM.AD/W/50, paragraphs 25, 32, 36-39, 45, 497). Regret was voiced that the country concerned had not seized the opportunity, as suggested in the Anti-Dumping Committee (COM.AD/26, paragraphs 68-91), to bring its legislation into full conformity with the Code (COM.AD/30, paragraph 48).
In reply, the government concerned stated that it believed that there was
nothing in the legal provisions concerned which impaired its ability to continue
to adhere to the Code. In administering the national Anti-Dumping Act, the two
competent domestic agencies were required by that legislation to take the Code
into account, although the law also made clear that the national law should
take precedence if it were in conflict with the Code (COM.AD/1, paragraph 10).

The government concerned stressed that it had not proved insensitive in the
past to comments made in the Anti-Dumping Committee, and it was taking and would
continue to take a pragmatic approach to any disagreement that existed; this
should be taken into account by members of the Committee (COM.AD/30, paragraph 23).
Specifically, discussion in the Committee had resulted in two important amendments
in the proposed revision of its national legislation (cf. Articles 2(f), 5(c),
and 10; COM.AD/30, paragraph 49). A tendency was found among certain members
of the Committee to underestimate or even ignore the evolution of procedures to
meet concerns expressed in the Committee regarding compliance with the Code.

In addition, the belief was expressed that part of the reason for the
criticism was to be found in the structure and openness of the system of the country concerned, which allowed for a large measure of publicity and dissent in
anti-dumping proceedings. This was a period of transition in the administration
of the national Anti-Dumping Act and further changes and improvements were
envisioned. Nevertheless, national practices, in the view of this country, were
basically in conformity with the spirit and letter of the Code, and the national
system in question was as equitable and objective as that of any other adherent
to the Code (COM.AD/34, paragraph 18; COM.AD/W/50, paragraphs 40 and 48).

Discussions also concerning the application of Article 14 related to other
departies to the Code. In one case it was considered an important aspect that,
given the country's early adherence to the Code and taking into account that this
country was fairly active in the anti-dumping field, the process of harmonization
of national legislation with the provisions of the Code was unreasonably slow
(COM.AD/3, paragraph 53; COM.AD/30, paragraph 51; COM.AD/34, paragraph 41;
COM.AD/W/50, paragraphs 40 and 48). It was replied that the authorities concerned had encountered unforeseen
and exceptional circumstances and run into technical difficulties; thorough
studies of other countries' legislation were required. It was assured, however,
that the task would be completed as soon as possible. Meanwhile, any recourse to
anti-dumping measures would only be taken in the strictest conformity with the
provisions of the Code (COM.AD/30, paragraph 51; COM.AD/34, paragraph 42).
With regard to another adherent to the Code, it was confirmed, in reply to a specific remark, that the provisions of the Code, which had been given the form of national law, would be observed by the authorities concerned, if a practical problem of possible conflict between national law and the Code should arise (COM.AD/30, paragraph 44).

In one case concern was expressed with the possible implications of the statute of a nationally competent body, independent of the government, and only bound to national law and not by the Code. In reply to questions, it was confirmed that the national legislation took full account of the Code. The Code was an international contract; the competent national body operated under the national legislation. Since the one, however, reflected the other, the result was that the body concerned was in fact bound by the Code (COM.AD/19, paragraphs 22 and 23).

4. Cases pending at the entry into force of the Code

With regard to anti-dumping cases, the investigation of which had not been terminated at the entry into force of the Code, it was regretted that one government had considered that such cases should be dealt with under the pre-Code procedure. Injury determinations had been made on the basis of criteria developed nationally before adoption of the Code; the competent national body itself had acknowledged that some of these criteria were in conflict with the Code (COM.AD/3, paragraph 55; COM.AD/34, paragraph 14). The opinion was expressed that it was an internationally accepted principle that account was taken in legal proceedings of new more lenient legislation introduced in the course of the proceedings. With regard to a particular case, it was felt that there were strong reasons for applying the Code rules on time-limits for provisional measures in such a case where the decision had been taken only two weeks before the entry into force of the Code (COM.AD/3, paragraph 55).

In reply it was stated that the government concerned was fully entitled to continue applying the previous rules to investigations initiated before 1 July 1968. In some cases it was in the interest of the parties concerned that the old rules were still applied (COM.AD/3, paragraph 56). After a finding of sales at less than fair market value had been made, the question of whether the case had been conducted in the spirit of the Code was answered in the affirmative. It was stressed that the withholding of appraisement decision had been taken a few weeks before the entry into force of the Code, at a time when there was no obligation to apply the Code rules. It was acknowledged that the investigation had taken a long time. Serious efforts were made, however, to speed up investigation procedures (COM.AD/9, paragraphs 38 and 39).
This reasoning was contested on the ground that it was irregular and not in conformity with international practice that a case which had been initiated two weeks before the entry into force of the Code had been left in suspense for so long (COM.AD/9, paragraph 40).

Article 15

Each party to this Agreement shall inform the CONTRACTING PARTIES to the General Agreement of any changes in its anti-dumping laws and regulations and in the administration of such laws and regulations.

This Article has never been referred to in discussions.

Article 16

Each party to this Agreement shall report to the CONTRACTING PARTIES annually on the administration of its anti-dumping laws and regulations, giving summaries of the cases in which anti-dumping duties have been assessed definitively.

The form of the reports has been discussed and the Committee adopted a standard form for reports under Article 16 (COM.AD/9, paragraphs 51-54).

Article 17

The parties to this Agreement shall request the CONTRACTING PARTIES to establish a Committee on Anti-Dumping Practices composed of representatives of the parties to this Agreement. The Committee shall normally meet once each year for the purpose of affording parties to this Agreement the opportunity of consulting on matters relating to the administration of anti-dumping systems in any participating country or customs territory as it might affect the operation of the Anti-Dumping Code or the furtherance of its objectives. Such consultations shall be without prejudice to Articles XXII and XXIII of the General Agreement.

This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES who shall promptly furnish a certified copy thereof and a notification of each acceptance thereof to each contracting party to the General Agreement and to the European Economic Community.

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Geneva this thirtieth day of June, one thousand nine hundred and sixty-seven, in a single copy, in the English and French languages, both texts being authentic.

This Article has never been referred to in discussions.