SUMMARY OF POINTS MADE IN RELATION TO PRESHIPPING INSPECTION

Note by the Secretariat

Revision

As requested by the Negotiating Group at its meeting on 30 November 1989 (MTN.GNG/NG2/14, paragraph 7), this revision updates the secretariat's note MTN.GNG/NG2/W/45/Rev.1 of 20 November 1989, taking into account recent discussions in the Negotiating Group and submissions by participants (MTN.GNG/NG2/14, and MTN.GNG/NG2/W/50 and 53).

This paper outlines the issues raised and summarizes possible solutions that have been put forward by some individual participants in the context of the Uruguay Round. Where specific drafting proposals have been made, it quotes them in full (MTN.GNG/NG2/W/50 and 53).

Summaries of the discussions to date in the Negotiating Group on the subject of preshipment inspection (PSI) can be found in the following notes on its meetings: MTN.GNG/NG2/6, paragraphs 11-12; NG2/7, paragraphs 4-7; NG2/8/Add.1, paragraph 7; NG2/9, paragraphs 8-9; NG2/10, paragraphs 3-6; NG2/11/Add.1, paragraphs 5-6; NG2/13, paragraphs 2-4; NG2/14, paragraphs 4-7. Six submissions have been made to the Negotiating Group on PSI (MTN.GNG/NG2/W/17, 30, 39, 46, 50 and 53), and PSI has been included in four indicative lists (MTN.GNG/NG2/W/14, 16, 22 and 32). A background paper by the secretariat is to be found in MTN.GNG/NG2/W/11 and Add.1.
Specific drafting proposals

I. GENERAL

PREAMBLE

The Contracting Parties (hereinafter referred to as "Parties"),

NOTING that Ministers on 20 September 1986 agreed that the Uruguay Round of Multilateral Trade Negotiations shall aim to bring about further liberalization and expansion of world trade, strengthen the role of GATT and increase the responsiveness of the GATT system to the evolving international economic environment,

RECOGNIZING that governments of developing countries employ the services of preshipment inspection companies in the pursuit of legitimate objectives, and that governments should not interfere with the pursuit of these legitimate objectives,

RECOGNIZING also that certain activities of preshipment inspection companies may have the effect of distorting trade, and that governments employing preshipment inspection companies should ensure that the trade-distorting aspects of their activities are prevented or eliminated,

RECOGNIZING that the principles and obligations of the General Agreement apply to those activities of preshipment inspection companies that are mandated by governments that are Parties to the General Agreement,

DESIRING to provide for the speedy, effective and equitable resolution of disputes arising under this Agreement,

"RECOGNIZING that preshipment inspection programmes which provide for verification of quality, quantity, price, customs classification and value, particularly on behalf of developing countries, do not constitute a non-tariff barrier and can facilitate international trade by deterring over-invoicing and under-invoicing and thereby minimizing opportunities for capital flight, fraud, discriminatory pricing and tax and customs duty evasion;

MINDFUL that such programmes must be carried out without giving rise to unnecessary delays, unequal treatment, or procedures implemented in a non-transparent manner;

CONSIDERING therefore that preshipment inspection programmes should be facilitated, provided that such programmes remain in conformity with GATT rules, that there is no discrimination between suppliers and that the confidential information of exporters is protected;

RECOGNIZING that contracting parties using such programmes must ensure that their preshipment inspection requirements are made public and that the activities of preshipment inspection are conducted in an orderly and transparent manner which is no more intrusive than is necessary;

RECOGNIZING also that governments of the exporting countries might be required to provide technical assistance as requested by countries using preshipment inspection programmes and that they should refrain from impairing the effectiveness of preshipment inspection;
DESIRING to enhance the effectiveness of this Agreement through oversight and periodic review of its operation, and of the activities governed by it,

Have agreed as follows:

Issues raised

Representatives of PSI user governments state that PSI is necessary to deal with specific problems of developing countries: (a) financial difficulties requiring the prevention of capital flight and of illicit practices relating to commercial fraud, evasion of customs duties and export of capital: (b) insufficiencies in the importing country's own administrative infrastructure, necessitating resort to specialized private agencies. They state that practices in exporting countries also contribute to the need for PSI, that PSI is a legitimate means of meeting these problems and will only be used as long as necessary, and that the right of developing countries to resort to the services of PSI companies should be safeguarded. They have therefore advocated a multilateral response to this multilateral issue. Representatives of PSI user governments feel, however, that discussion in the Negotiating Group has not enabled it to establish that PSI causes import restrictions. Furthermore, it would not be desirable, in a multilateral instrument, to limit PSI programmes in time. Only the user governments are in a position to determine their needs.

While others acknowledge the legitimate needs of developing countries and that their PSI programmes are not per se non-tariff measures, they state that implementation has created difficulties for exporters which should be minimized. Also some state that resort to PSI should be on a temporary basis. Representatives of exporting countries have also supported a multilateral approach which effectively addresses the trade-distorting aspects of PSI.

II. OBLIGATIONS OF PSI USER GOVERNMENTS

Specific drafting proposals

"ARTICLE I

Obligations of Parties Employing Preshipment Inspection Companies

1. Contracting parties that employ or mandate directly or indirectly the employment of preshipment inspection companies (hereinafter referred to as user governments) shall ensure that these companies undertake the following obligations when conducting activities on their behalf."

"The user countries shall ensure that the preshipment inspection companies, acting through their trade association, establish a Code of Practice for preshipment inspection which will incorporate the following principles:"
II.1. NON-DISCRIMINATION AND NATIONAL TREATMENT

Specific drafting proposals

"Non-Discrimination/National Treatment"

(a) Preshipment inspection companies shall conduct physical inspection, price verification and other relevant activities in a non-discriminatory manner. The procedures and criteria employed by preshipment inspection companies in conducting these activities shall be objective and shall be applied on an equal basis to exporters of all contracting parties. Preshipment inspection companies shall apply no less favourable technical criteria and procedural requirements when conducting quality inspections of foreign goods than would be applied by the user government to identical or similar domestic goods."

Issues raised

Representatives of exporting countries state that inspection procedures and price comparison criteria are not always applied equally to all exporters and exporting countries. Representatives of PSI user governments point out that in adhering to the IFIA Code of Practice, PSI companies would observe, in all exporting countries, the same procedures for physical inspection of goods and the same principles for the comparison of prices.

II.2. STANDARDS

Specific drafting proposals

"Standards"

(b) Preshipment inspection companies should normally perform quantity and quality inspections based on international standards and guides. In exceptional cases where this is not possible, they may use national standards."
II.3. TRANSPARENCY

Specific drafting proposals

"Transparency"

(c) Preshipment inspection companies shall conduct their physical inspection, price verification and other relevant activities in a transparent manner.

(d) When initially contacting an exporter to arrange for an inspection, preshipment inspection companies shall send to the exporter all of the information, including procedures and criteria employed by preshipment inspection companies for inspection and price verification purposes and the exporter's rights vis-à-vis the preshipment inspection company, necessary for exporters to comply with inspection requirements. Additional procedural requirements or changes in existing procedures shall be sent to those exporters that have engaged in business with the preshipment inspection company during the previous twelve months, at least thirty days before they become operative.

(e) Preshipment inspection companies shall designate information points in each port or city in which they maintain administrative offices where the information described in (d) above shall be made available, and shall designate personnel in each port or city to answer questions from exporters during normal business hours. Additional procedural requirements or changes in existing procedures shall be placed in designated information points at least thirty days before they become operative.

"preshipment inspection companies will furnish guidelines to enable suppliers to comply with the preshipment inspection regulations of the importing countries;"

Issues raised

Representatives of exporting countries point to lack of information on the requirements of PSI programmes and the procedures that must be followed. Non-transparent price verification procedures result in uncertainty for exporters, thus forcing them, in some cases, to lower legitimate prices.
Representatives of governments using PSI state that they make available to the public the decrees or other circulars establishing their PSI programmes. Furthermore, the IFIA Code of Practice requires PSI companies to "provide information and guidelines necessary to enable exporters to comply with the preshipment inspection regulations of the importing country", and to comply with a set of "price comparison principles".

II.4. PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION

Specific drafting proposals

"Protection of Confidential Business Information"

(f) Preshipment inspection companies shall ensure that confidential business information provided by exporters is adequately safeguarded.

(g) Preshipment inspection companies shall develop and maintain procedures to adequately safeguard confidential business information provided by exporters or otherwise obtained by preshipment inspection companies. These procedures shall be available through the information points in accordance with the obligations specified in (e) above.

(h) Confidential business information shall include information so designated by the exporter, and shall not include information which is generally available.

(i) Confidential business information shall only be shared by preshipment inspection companies, as necessary, with the relevant government entity mandating the inspection and shall only be used for purposes directly related to the inspection. User governments shall ensure that confidential business information received from preshipment inspection companies, as defined above, is adequately safeguarded. User governments shall require confidential business information from preshipment inspection companies in their employ only to the extent that such information is customarily required for letters of credit or other forms of payment or for customs, import licensing or exchange control purposes.

"Preshipment inspection companies will not require exporters to provide information related to patented, licensed or undisclosed processes, nor will they divulge confidential information imparted to them by an exporter to any third party, other than the government which mandated them;"
Preshipment inspection companies shall not request from exporters information regarding:

(i) manufacturing data related to patented, licensed or undisclosed processes, or processes for which a patent is pending;

(ii) technical data other than testing data necessary to demonstrate compliance with technical standards;

(iii) manufacturing costs;

(iv) profit levels; or

(v) the terms of contracts between exporters and their suppliers."

Issues raised

Representatives of exporting countries state that there are inadequate safeguards for the protection of pricing and other business confidential information required to be furnished by exporters to PSI companies.

Representatives of governments using PSI note that PSI companies generally only request information routinely available to customs services and other parties to the transaction. Also, the IFIA Code of Practice and Price Comparison Principles prohibit PSI companies from sharing confidential business information with any third party other than the appropriate government authority for which the inspection is being performed and limit the type of information that may properly be requested by PSI companies. However, the guidelines adopted by IFIA are not considered by some participants to provide adequate disciplines.

II.5. AVOIDANCE OF CONFLICTS OF INTEREST

Specific drafting proposals

"Avoidance of Conflicts of Interest

(k) Preshipment inspection companies shall avoid conflicts of interest. To this end, they shall adopt and maintain procedures to ensure avoidance of conflicts of interest, including disclosure of confidential business information:"
(i) among divisions of preshipment inspection companies engaged in activities other than those required to carry out the inspection process;

(ii) between preshipment inspection companies and any related entities of preshipment inspection companies, including entities in which preshipment inspection companies have a financial interest or entities which have a financial interest in preshipment inspection companies; or

(iii) between preshipment inspection companies and any other companies or entities, with the exception of those government entities identified in Article I:1(i) above."

II.6. AVOIDANCE OF DELAYS

Specific drafting proposals

"Avoidance of Delays"

(1) Preshipment inspection companies shall avoid unreasonable delays in inspection of shipments. In this regard, once a preshipment inspection company and an exporter agree on an inspection date, the preshipment inspection company shall conduct the inspection on that date unless it is rescheduled on a mutually-agreed basis between the exporter and the preshipment inspection company.

"Preshipment inspection companies will act without undue delay and ensure that any measures to verify prices are taken as early as possible in the inspection process;"

(m) In order to avoid delays in shipment, a preshipment inspection company shall, whenever so requested by the exporter, undertake a preliminary price verification of an agreed contract between an exporter and an importer prior to the date of inspection. Once this preliminary verification has been made, it shall not be withdrawn, providing the goods conform to the import documentation and/or import licence. In instances where a preliminary price verification has taken place, the preshipment
inspection company shall, within three working days of the date of inspection, (1) issue a conditional Clean Report of Findings; or (2) provide a detailed written explanation specifying the reasons for non-issuance and, if requested, arrange to reinspect the shipment at the earliest possible mutually-convenient time so as not to unreasonably delay the shipment. Once a conditional Clean Report of Findings is granted, it shall not be withdrawn provided that the actual goods inspected conform with respect to quantity and quality to the final on-board bill of lading and other import documentation.

(n) In cases where a preliminary price verification is not requested, the preshipment inspection company shall conduct the inspection and price verification in accordance with the obligations of this Agreement. In all cases, the preshipment inspection company shall, within three working days of issuance of the final on-board bill of lading, (1) issue a final Clean Report of Findings; or (2) provide a detailed written explanation specifying the reasons for non-issuance and arrange for a reinspection at the earliest possible mutually-convenient date.

(o) In order to avoid delays in payment, the preshipment inspection company shall send to the exporter or to a designated representative of the exporter a final Clean Report of Findings as expeditiously as possible.

(p) In the event of a clerical error in the conditional or final Clean Report of Findings, the preshipment inspection company shall correct the error and forward the corrected information to the appropriate parties as expeditiously as possible.
Issues raised

Representatives of exporting countries state that, in a significant proportion of cases, PSI causes undue delays in shipment. This constitutes an obstacle to trade and leads to increased costs. The effects are detrimental to both exporters and importers.

Representatives of PSI user governments note that physical inspection takes place upon notification from the exporter that the goods are available and that price comparison may precede this, once the import licence has been issued.

II.7. PRICE VERIFICATION AND CUSTOMS VALUATION

Specific drafting proposals

*Price Verification and Customs Valuation

(q) Preshipment inspection companies shall conduct price verification inspections according to the following guidelines:

(i) the contract price between the exporter and the importer shall be accepted as valid unless there is clear evidence of circumvention of the laws or regulations of the user government;

(ii) in order to verify prices, preshipment inspection companies may compare the C.I.F. or F.O.B. price of a good to the C.I.F. or F.O.B. prices of identical or similar goods sold for export from the same country of exportation to the same country of importation and exported at or about the same time as the goods being valued. Appropriate adjustments shall be made for minor differences in the goods being compared, the time of exportation and/or the conditions of delivery;
(iii) when conducting price verification, preshipment inspection companies shall make appropriate allowances for the commercial considerations of each sale, including but not limited to the commercial level and quantity of the sale, delivery periods and conditions, price escalation clauses, quality specifications, special design features, special shipping or packing specifications, order size, spot sales, seasonal influences, licence or other intellectual property fees, and services rendered as part of the contract;

(iv) preshipment inspection companies shall not use the following for purposes of price verification or customs valuation:

A. the selling price in the country of importation of goods produced in such country;

B. the price of goods on the domestic market of the country of exportation;

C. the cost of production;

D. the price of goods for export to a country other than the country of importation;

E. reference prices or minimum values; and

F. arbitrary or fictitious prices or values.

(r) Preshipment inspection companies shall follow the guidelines in (q) above and the principles of Article VII of the General Agreement when valuing goods for purposes of customs duties and other charges, or for the application of restrictions on importation or exportation based upon or regulated by value."
Issues raised

Representatives of exporting countries state that, in a significant proportion of cases, price comparison procedures appear to lead to arbitrary price determinations, which can result in forcing a valid contract price to be lowered.

Representatives of PSI user governments note that the IFIA Price Comparison Principles set out clear criteria for the conduct of price comparisons by PSI companies.

However, representatives of exporting countries consider that the IFIA principles and guidelines constitute a useful first step, but many of their provisions are vague and do not provide adequate disciplines.

II.8. APPEALS PROCEDURES

"(s) Preshipment inspection companies and exporters should attempt to mutually resolve their disputes. In this regard, preshipment inspection companies shall establish procedures to receive, consider and render decisions concerning grievances raised by exporters. These procedures shall be made available to exporters through the information points specified in (e) above and shall be developed and maintained in accordance with the following guidelines:

(i) preshipment inspection companies shall designate officials who will be available during normal business hours in each city or port in which they maintain an administrative office to receive, consider and render decisions on exporters' grievances;

(ii) exporters shall provide in writing to the preshipment inspection company facts concerning the specific transaction in dispute, the nature of the grievance and a suggested resolution;

(iii) preshipment inspection companies shall afford sympathetic consideration to exporters' grievances and shall render a decision within three working days of receipt of the grievance."

"The countries using preshipment programmes shall also ensure that there is established through the trade association of the preshipment inspection companies, in consultation with exporters' representatives, an appropriate independent review body whose function it will be to review the decisions of preshipment inspection companies in case of complaint by exporters. The findings of such a body shall not limit or abridge the sovereign rights of the countries using preshipment inspection programmes."
Issues raised

Representatives of exporting countries note a frequent lack of adequate and impartial appeals and dispute settlement procedures. A framework needs to be defined, and implemented in the national legislations of PSI user countries, for the settlement of disputes arising between exporters and PSI companies in the day-to-day operation of PSI.

Representatives of PSI user countries propose an Independent Review Body which would provide a forum for exporters' specific grievances. It should be composed of one exporter representative, one IFIA representative and a neutral third person selected by the other two. Its findings should not be binding as they should not interfere with the sovereign rights of governments using PSI.

II.9. SMALL SHIPMENTS

Specific drafting proposals

"Small Shipments

(t) Preshipment inspection companies should not normally inspect shipments valued at US$ 10,000 or less. In exceptional circumstances, preshipment inspection companies may inspect such shipments provided that the preshipment inspection company explains these circumstances to the exporter in writing."
III. OBLIGATION OF PARTIES AFFECTED BY PRESHIPMENT INSPECTION ACTIVITIES

Specific drafting proposals

"ARTICLE II

Obligations of Parties Affected by Preshipment Inspection Activities"

"The exporting countries undertake:"

III.1. TECHNICAL ASSISTANCE

Specific drafting proposals

"Technical Assistance

1. Contracting parties affected by preshipment inspection activities (hereinafter referred to as exporter governments) shall offer to provide technical assistance, as requested, to user governments on customs matters on mutually agreed terms. Technical assistance could be provided on a bilateral basis and/or under the auspices of an international organization, such as the Customs Cooperation Council."

Issues raised

Some representatives of exporting countries state that the final objective of PSI user countries should be to develop their public administrations to take over the services performed by PSI companies. This should go hand-in-hand with accession to the Customs Valuation and Licensing Codes. In this context, they have expressed readiness to provide technical assistance to PSI user countries. Other exporting countries have expressed an unconditional willingness to offer technical assistance to PSI user countries.

Representatives of PSI user countries state that technical assistance should not put into question the right of user countries to resort to PSI as long as unethical practices in world trade made it necessary.
III.2. DISPUTE RESOLUTION

Specific drafting proposals

"National Dispute Resolution

2. Exporter governments may establish national systems to resolve disputes between exporters and preshipment inspection companies. Exporter governments shall reserve their rights to ensure compliance with findings in dispute resolution cases. In cases involving disputes over prices where expeditious shipment is required, parties may agree to ship the goods on a conditional basis. In such cases, a bond covering the disputed portion of the total payment for the shipment could be posted to reimburse the appropriate party once the dispute has been resolved."

Issues raised

Representatives of exporting countries note a frequent lack of adequate and impartial appeals and dispute settlement procedures.

III.3. FACILITATION OF PRESHIPMENT INSPECTION

Specific drafting proposals

"- to ensure that any relevant domestic laws and regulations with respect to preshipment inspection or preshipment inspection companies will facilitate preshipment inspection programmes and will not in any way change, limit or inhibit the operation of these programmes as adopted by the user countries."

Issues raised

Representatives of governments using PSI state that unilateral actions of exporting countries in regulating the activities of PSI companies on their territories should not be allowed to frustrate the legitimate objectives of importing governments.
IV. NOTIFICATION

Specific drafting proposals

"ARTICLE III

Notification

1. Contracting parties shall submit to the GATT Secretariat copies of the laws, regulations and administrative practices they have in place relating to preshipment inspection within ninety days of the date that this Agreement enters into force.

2. Contracting parties shall notify the GATT Secretariat of any proposed administrative, regulatory or legislative change to the laws, regulations and administrative practices relating to preshipment inspection at least sixty days before the change is to be adopted. The notice shall include a description of the proposed change, the products and/or countries affected, and an indication of its likely trade effects. Copies of new or revised laws, regulations or administrative practices shall be submitted to the GATT Secretariat within thirty days of the date on which the change is adopted."

V. REVIEW

Specific drafting proposals

"ARTICLE IV

Review

1. A periodic review of the laws, regulations and administrative practices relating to preshipment inspection which are maintained by contracting parties, and the procedures administered by preshipment inspection companies in the employ of contracting parties, shall be undertaken taking into account the provisions of this Agreement, as well as with the obligations of the General Agreement.

"The user countries undertake that all applicable laws, regulations, and directives relating to preshipment inspection, shall be published or otherwise made available to the public."
2. The provisions of this Agreement shall also be reviewed periodically to ensure their effectiveness in achieving the objectives of this Agreement.

VI. CONSULTATION

Specific drafting proposals

"ARTICLE V

Consultation

1. Prior to the adoption of a proposed change in a law, regulation or administrative practice relating to preshipment inspection, the contracting party proposing the change shall consult with other contracting parties upon request. Such a request for consultations should be made no less than thirty days prior to the proposed date of adoption of the change.

2. Contracting parties shall consult with other contracting parties upon request with respect to any matter affecting the operation of this Agreement, including matters relating to specific preshipment inspection and/or exporting companies. In such cases, the provisions of Article XXII of the General Agreement, as improved and elaborated upon by the Negotiating Group on Dispute Settlement, are applicable.

"If any contracting party should consider that the preshipment inspection programme or the domestic laws and regulations of another contracting party do not conform to the principles of the GATT or of this Agreement, it may invoke Articles XXII and XXIII of the General Agreement."
VII. DISPUTE SETTLEMENT

Specific drafting proposals

"ARTICLE VI

Dispute Settlement

1. Any dispute among contracting parties regarding the operation of this Agreement, including disputes relating to specific preshipment inspection and/or exporting companies may be resolved under the provisions of Article XXIII of the General Agreement, as improved and elaborated upon by the Negotiating Group on Dispute Settlement."

Issues raised

Representatives of some exporting countries see a need for the GATT dispute settlement procedure to apply to disputes between contracting parties relating to the implementation and administration of a GATT agreement on PSI.

VIII. INCREASED ADMINISTRATIVE PROCEDURES AND COSTS

Issues raised

Representatives of exporting countries state that exporters face further increases in costs due to the additional administrative procedures and documentation entailed by PSI.

Representatives of PSI user governments note that, in general, PSI has introduced only one additional document in the export process.
IX. GATT RELEVANCE

Issues raised

Some participants note that regulating the activities of private companies, even though mandated to carry out trade-related services on behalf of governments, might break new ground since GATT rules only apply to governments.

Others note that the services rendered by PSI companies are performed in other countries by the customs authorities of these countries in a way which is subject to multilateral disciplines.

Others believe that the principles and obligations of the General Agreement apply to those activities of preshipment inspection companies that are mandated by governments that are Parties to the General Agreement.

X. NATIONAL LEGISLATION

Issues raised

Some participants state that national regulations should simply constitute the transposition of the results of the negotiations and not contain more restrictive elements than the negotiated multilateral instrument. They believe that it would be advisable to define the framework of such regulations in the multilateral instrument.