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COMMITTEE ON ANTI-DUMPING PRACTICES

Minutes of the Meeting Held on 29-30 October 1979

Chairman: Mr. M. Lemmel (Sweden)

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A. Examination of reports submitted under Article 16 of the Anti-Dumping Code

(a) European Communities (COM.AD/52)

1. The representative of Japan referred to six anti-dumping actions against Japanese products where the European Communities had taken a final decision and asked for the reasons why Japan had not yet been informed of the results of these actions while the Anti-Dumping Code prescribed that the exporting country was entitled to be informed.

2. The representative of the European Communities said that all decisions on imposition of provisional or definitive anti-dumping duties had been published and duly motivated in the Official Gazette of the European Communities and that, furthermore, information had been provided to the authorities in question through the usual diplomatic channels.

3. The representative of Canada said that one of the cases opened by the European Communities had concerned graphite spheroidal pig iron from Brazil and Canada and that the anti-dumping action against Brazil had been terminated by a price undertaking while the anti-dumping action against Canada was still active. He asked for the status of this last case.

4. The representative of the European Communities replied that the investigation was still continuing with respect to the Canadian product.

(b) United States (COM.AD/52/Add.2)

5. Referring to a case concerning rayon staple fibre from Belgium, France and Italy, the representative of the European Communities stated that the dumping calculation, with respect to the product originating in Belgium, had caused some concern. The United States Treasury Department had first calculated on the basis of domestic prices in Belgium a dumping margin of 6.7 per cent. Afterwards, the question had been raised by the United States producers whether Belgian sales were not sales at a loss. Consequently, the United States has asked the Belgian producer to submit information on his costs of production, which he had refused. While under those circumstances, the United States authorities were free under the Anti-Dumping Code to use the best information available to estimate the dumping margin, it was nevertheless strange that the margin thus established was 57 per cent for Belgium while in the case of France and Italy, the calculation had established margins of 14.6 per cent and 18.6 per cent. As to the injury determination with respect to the product originating in Belgium, he said that the United States International Trade Commission (US ITC) had found injury against Belgium alone despite the fact that the Belgian market share had been 0.5 per cent in 1977 and 1 per cent in 1978. The determination had been based essentially on the fact that the Belgian producer had been producing at 77 per cent of his capacity. An extrapolation had been made that if the utilization of the capacity had been 100 per cent and if the producer would have exported the whole production to the United States, the market share of Belgian products in the United States could have gone up to 4 per cent. He added that this kind of argumentation did not convince his authorities. As to the injury determination with respect to the products originating in France and Italy, the US ITC had found that the market penetration of the French product had been 1 per cent in 1977 and 1.4 per cent in 1978. He was not clear whether the market penetration had been calculated in a cumulative form. With respect to the Italian product, it had been found in the determination of injury that the market share had been 0.2 per cent in 1977 and 0.1 per cent in 1978. He did not consider the determination of injury justified when the impact was de minimis. Referring to another case concerning nylon yarn from France, he pointed out that no duties had been imposed since the US ITC, which had calculated a 1.9 per cent market penetration in 1977 and a 1.7 per cent in the first half of 1978, had not found any injury. He asked why the case had not originally been sent to the US ITC for an injury determination under the thirty-day procedure as provided for in the 1974 United States Trade Act.

6. The representative of the United States said that, in the case of rayon staple fibre from Belgium, the original low margin calculations had been changed as there had been reasonable cause to believe that sales below cost had occurred, and the United States had asked the Belgian producer to supply detailed cost information which he had repeatedly refused to submit. The

petitioners' data had then been taken into consideration. He emphasized that, of the cases involving rayon staple fibre from the European Communities, the Belgian case had been the first one. He pointed out that the ultimate data which had disclosed lower margins in the other cases had not been available to the United States authorities at that time. He added that, even if it had been unfortunate that a margin as high as 57 per cent had to be used, the United States had no other choice than to do so under the circumstances. It had been apparent that the US ITC in trying to determine injury had been influenced by the size of the dumping margins that had been reported to it. A margin of that size tended to indicate a situation in which no sales would have been likely to have been made in the absence of dumping margins. As to cumulative data, he pointed out that the Belgian case had been the first case sent to the US ITC and that it had not been possible to cumulate with other cases which had come later. The injury determination had been reasonable when all the sales had remained below cost, the United States industry had operated at losses in 1977 and in the first quarter of 1978, and the market penetration had risen from 0 per cent to 1.5 per cent in a six months' period. As to the French case, he said that the US ITC had cumulated with other cases. As to the Italian case, he agreed that the import penetration had been small both absolutely and in relation to that found in the other cases. However, the US ITC had been able to document price suppression, sales at a loss and in addition all the other indicators of injury generally attributable to cumulative less than fair value imports. The US ITC had also argued that Italy had the capacity of substituting for the others if Italian exporters had been excluded from any dumping finding. The cumulation principle had been appropriately used. As to nylon yarn from France, he pointed out that the United States Treasury Department might well have referred the case to the US ITC for a thirty-day injury investigation, if the data subsequently developed by the US ITC had been available at the time of the initiation of the investigation.

B. Examination of national legislations

(a) European Communities (L/4781 and L/4822)

7. The representative of Japan asked whether the European Communities had the intention to revise the European Coal and Steel Community regulations along the lines of the revised European Economic Community regulations on anti-dumping.

8. The representative of the European Communities replied that his authorities had the firm intention to revise the European Coal and Steel Community regulations. He recalled that in 1979 two changes had been introduced as far as coal and steel products were concerned on one side, and as far as general anti-dumping regulations on European Economic Community products were concerned on the other side. He pointed out that his authorities would proceed to the new revision of the anti-dumping regulations implementing the results achieved in the Multilateral Trade Negotiations and that the regulation dealing with coal and steel products would be modified by the end of 1979.

9. Referring to the EEC Regulation No. 1681/79, Article 3:2(c), the representative of Czechoslovakia said that in the case of imports from non-market economy countries it provided for several alternative criteria to calculate the margin of dumping, some of which were either contrary to the concept of free trade or not consistent with Article VI of the General Agreement and the Agreement on Implementation of this Article. In particular, he referred to the use of domestic prices of the importing country or of a third country which might lead to the determination of fictitious or arbitrary values, even if such a comparison was to be made as a last resort in the absence of other possibilities. He pointed out that in the Agreement on Implementation of Article VII, the criterion of domestic prices of the importing country had been explicitly prohibited as a standard for the determination of customs value. Furthermore, Article VI:1(b) read in conjunction with paragraph 2 of the Interpretative Note to Article VI:1 provided for a possibility to use the highest comparable price for the like product for export to any third country. This criterion of comparison was not provided for in the EEC regulation concerning non-market economy countries, nor did this regulation allow to compare, where appropriate, export prices with domestic prices of the exporting country. He proposed that the criterion of domestic prices in the importing country be replaced by a more general provision allowing the use of any other reasonable method of comparison.

10. The representative of the European Communities replied that the EEC regulation was based on the relevant provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII which were fully consistent with Article VI of the General Agreement including the relevant Note to it, had resulted from long negotiations with the representatives of countries referred to in the Notes and Supplementary Provisions to the General Agreement (Annex I, Article VI, paragraph 1, point 2) and was carefully worded. The criterion of domestic prices in the importing country was clearly considered as a last resort, when all other possibilities were excluded. In such cases this criterion would be used in a reasonable way and he could cite several cases where it gave more favourable results to the exporters from non-market economies than a comparison with export prices of third countries. He wondered whether in such cases the Czechoslovak authorities would have any objections.

11. The representative of Czechoslovakia said that he had objected to the inclusion into Article 15 of the Agreement on Subsidies and Countervailing Duties of the concept of the domestic price of the importing country. He recalled that his delegation was not a party to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII and objected to the inclusion of the provision referred to by the representative of the European Communities. He proposed that the criterion of domestic prices in the importing country be replaced by a more general provision allowing use of any other reasonable method of comparison.

12. The representative of the United States said that the relevant United States legislation could provide a solution. There should be no general rule but each case should be carefully examined. In some cases it might be possible to compare with internal prices of the exporting non-market economy and this possibility should not be, a priori, excluded. On the other hand, internal prices in the importing country might be used as a last fall-back method, where no other criteria were available.

13. The representative of Hungary reserved his position on the anti-dumping legislation of the European Communities pending the entry into force of the respective MTN Agreement. Referring to the criterion of domestic prices in the importing country, he thought that clarification of methods of calculating such prices would be necessary and proposed that the Committee revert to this question at an appropriate stage.

14. The representative of the United States pointed out that a recent change in United States legislation had introduced a new procedure which attempted to take into account any genuine comparative economic advantages or disadvantages of particular non-market economy countries in dealing with problems arising in investigations of products from such countries.

15. The representative of Japan raised several points with respect to the anti-dumping legislation of the European Communities. He referred to Article 14:2, according to which the termination of anti-dumping procedures by accepting price undertakings shall not preclude the definitive collection of an amount secured by way of provisional duties. He wondered whether this provision was compatible with the relevant provisions of the Anti-Dumping Code for the three following reasons. First, the Anti-Dumping Code clearly stated that an anti-dumping duty could be imposed only when all requirements for the imposition had been fulfilled or, in other words, when the existence of both dumping and injury had been determined. Secondly, the existence of a preliminary decision and a price undertaking would not be sufficient to establish that the authority of the importing country had completed the investigation required and determined the existence of injury. Thirdly, the Anti-Dumping Code had regarded the retroactive application as an exception and explicitly stipulated in Article 11, paragraph 1, the cases where anti-dumping measures could be applied retroactively. Accordingly, he had difficulty in sharing the view of the European Community that definitive collection of provisional duties after the termination of the anti-dumping procedure through a price undertaking could be justified because there was no explicit provision against it. He also considered a ten-day period for representations referred to in Article 10, paragraph 1(c)(cc), as too short in particular for distant countries. With reference to Article 3, paragraph 4, which dealt with due allowance for differences affecting price comparability between export prices and domestic prices, and which stated that interested parties claiming such allowances should satisfactorily prove that their claim was justified, he stressed the importance of ensuring fair and equitable treatment for both exporters and importers.

16. The representative of the European Communities pointed out that Article 14, paragraph 2, of the anti-dumping legislation of the European Communities was in conformity with the relevant provisions of the Anti-Dumping Code. The existence of both dumping and injury would have to be determined and an investigation terminated before a decision was taken on what to do with provisional duties secured prior to the acceptance of a price undertaking. As to the ten-day time-limit, he said that the matter was under consideration and that he had good reasons to hope that a more flexible solution would be found. He also agreed that in the implementation of Article 3, paragraph 4, fair and equitable treatment should be ensured.

(b) United States (L/4625/Add.2, and L/4767)

17. The representative of the United States pointed out that the proposed amendments to United States customs regulations concerning the deposit of estimated dumping duties for merchandise subject to a dumping finding and the use of best information available had been formally withdrawn as a result of passage of a new Trade Act, and would be replaced by new regulations.

C. Examination of anti-dumping questionnaires

18. The representative of Japan expressed the hope that due account would be taken by the United States authorities of the need not to impose undue burdens on exporters when the United States anti-dumping questionnaire would be revised consequent to the implementation of the 1979 Trade Agreements Act.

19. The representative of the United States confirmed that it was expected that the United States anti-dumping questionnaire would be revised in the light of the 1979 Trade Agreements Act. He added that the United States would endeavour not to impose difficult burdens on exporters and importers in responding to questionnaires, but he noted that the ability of the United States to do so would be limited by the shortened time-limits for investigations under the new law.

D. Other business

(a) United States dumping determination with respect to canned pears

20. The representative of Australia referred to the question of the review of a 1973 dumping determination in the United States with respect to canned pears. He stressed that the continuation of the imposition of anti-dumping duties was not justified under Article 9(a) of the Anti-Dumping Code. Moreover, according to the 1973 finding by the US ITC, there was only a likelihood of the imports causing injury to the United States industry. He also pointed out that the United States authorities had not been prepared to proceed with the revocation in the absence of a price undertaking.

21. The representative of the United States replied that when the revocation of the dumping finding had been proposed by the United States Treasury Department, the United States industry had objected vigorously by submitting information concerning the prices of the same goods sold to Canada, which would constitute dumping prices in the United States. The United States authorities were not prepared, in these circumstances, to revoke the dumping finding unless assurances were given that future sales would not be at dumping prices. He added that the US ITC had well established procedures for the review of previous injury determinations, which the exporters could invoke in an attempt to secure a revocation of the finding on grounds of absence of injury or likelihood thereof.

(b) Reporting format of anti-dumping actions: United States proposal

22. A brief discussion took place with regard to a proposal tabled by the United States delegation on the reporting format of anti-dumping actions under Article 16 of the Anti-Dumping Code. The matter would be taken up at the next meeting of the Committee.

(c) United States proposed anti-dumping regulations

23. As to the Trade Agreements Act of 1979, the representative of the United States stated that different sets of proposed regulations would be considered before the end of 1979. One set, published on 16 October 1979, dealt with proposed anti-dumping regulations and the deadline for comments was 30 November 1979. The US ITC had also published proposed regulations and proceedings for conducting injury investigations and the formal deadline for comments was 29 November 1979.

24. The representative of the European Communities welcomed the fact that, according to these draft regulations and the 1979 Trade Agreements Act, the United States would apply new rules on simultaneous investigation of dumping and injury and that every dumping case would be referred to the US ITC right from the beginning. The price undertaking policy had also been liberalized. Greater flexibility had been introduced in the rules of allowances to be made where differences in conditions of sales existed. However, he noted that no flexibility had been introduced with respect to the rates of 8 per cent for profit and 10 per cent for overhead costs and expenses. Greater flexibility was needed in allowances in de minimis cases. He also noted with regret that the US ITC draft regulations concerning injury were silent on causality and other factors to be taken into consideration. Referring to the Agreement on Subsidies and Countervailing Measures, he said that his authorities would have preferred that the Anti-Dumping Code provision on causality which had been balanced and reasonable would have been used in the Agreement and that the fairest solution would have been the inclusion of the Anti-Dumping Code provision in the US ITC injury regulations.

25. The representative of Japan welcomed the fact that the term "material injury" had been introduced into the United States legislation, but, at the same time, he expected that, in relation to the introduction of the new definition (section 771(7)), counter-action would be taken only when the degree of injury had been material, not only according to the legislation but also in actual practice. As to the causal link (section 731(a) (2)), he expected that although the causal link between injury and dumping had been defined by the words "... by reason of ...", which were different from the language of the Agreement on Subsidies and Countervailing Measures, the requirement of causality would be strictly observed within the spirit of the Anti-Dumping Code in actual practice. He said that his authorities had been greatly interested in the rules on the disclosure of confidential information. In this regard, the provisions that confidential information that had been submitted without persuasive reasons for the confidentiality could be disregarded (section 777(b) (2)) and that disclosure of confidential information had been permitted under a protective order (section 777(c)), should be used in accordance with the spirit of the Code. As to the petitioner, there had been a definition of interested parties in the legislation (section 771 (9)); his authorities had expected that the reasonable interpretation would be in accordance with the Code which said "... by or on behalf of an industry". As to constructed value, it was doubtful whether it was appropriate, from the viewpoint of consistency with the Code, to utilize certain fixed ratios such as 10 per cent for general expenses and 8 per cent for profits in calculating the constructed value (section 773(e) (1)).

26. The representative of the United States replied to the representative of the European Communities that, as to allowances, the proposed changes were subject to comment, and that they did not necessarily reflect their final form. As to the rate of 8 per cent for pre-tax profit, he said that even if it arguably represented too high a figure, his authorities could nevertheless not have accepted that there should have been no minimum figure as to pre-tax profit and overhead costs and expenses. As to adjustments, the last sentence of the proposed regulation was clear when it read that "such adjustment shall not be disregarded if such disregard would significantly affect the results of the determination". With respect to the administrative action by the US ITC, he said that his authorities were concerned that the US ITC, which had been bound by the Anti-Dumping Code, might have overlooked some points. The delegations had been encouraged to make known their views to the US ITC. He replied to the representative of Japan that he could assure him that no action would be taken in the absence of material injury and that the causal link would be established before a definitive action could be taken. The United States authorities would take all appropriate action to safeguard the confidentiality of all information. The "protective orders" would be introduced in the future and would represent a new device in United States practice.