

Committee on Anti-Dumping Practices

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STATEMENT MADE BY THE DELEGATION OF THE UNITED STATES
AT THE SPECIAL MEETING HELD ON 5 OCTOBER 1988

I. ISSUES RAISED BY THE GOVERNMENT OF SWEDEN *

On December 3, 1987, the Government of the United States imposed antidumping duties on imports of seamless stainless steel pipe and tube from Sweden that were found to be dumped and causing material injury to an industry in the United States producing the like product. On July 14, 1988, the Government of Sweden and the Government of the United States held consultations concerning the aforementioned imposition of antidumping duties. Subsequently, by letter dated September 9, 1988, to the Chairman of the Committee on Anti-Dumping Practices, the Government of Sweden requested conciliation under Article 15.3 of the Code. 1/

The Government of Sweden has identified five issues with respect to the Commission's determination: (1) the Commission's handling of confidential business information; (2) the volume of the dumped imports; (3) the price effects--in particular evidence of price undercutting--of the dumped imports; and (4) the impact on the domestic industry of the dumped imports and, in particular, whether the Commission (a) included redrawers in its analysis and (b) took into account the circumstances of a large domestic producer that went out of business during the period of investigation. We respond to each of these issues in turn.

*See document ADP/38

1/ Article 15.3 provides (in relevant part):

3. If any Party considers that the consultation pursuant to paragraph 2 has failed to achieve a mutually agreed solution and final action has been taken by the administering authorities of the importing country to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Committee for conciliation. . . . In cases where matters are referred to the Committee for conciliation, the Committee shall meet within thirty days to review the matter, and, through its good offices, shall encourage the Parties involved to develop a mutually acceptable solution.

II. THE COMMISSION'S DETERMINATION OF MATERIAL INJURY CAUSED BY THE SUBJECT IMPORTS

A. Treatment of Confidential Information

The Commission, in conducting its investigation and making its determination, complied fully with Article 6 of the Code, which governs the submission of evidence. In specific, the actions of the Commission were in accord with paragraph 2 of Article 6, which concerns the provision of opportunities for parties and the government of the exporting country to see all relevant information (except confidential information), 2/ and paragraph 3 of Article 6, which describes procedures for treatment of confidential information. 3/

The Report and Determination of the Commission contain (1) all non-confidential information submitted to the Commission during its investigation and (2) all information derived from confidential information that could be disclosed in aggregate or summary form without the disclosure having "a significantly adverse effect" on a submitter. 4/

2/ Article 6.2 of the Code provides that:

2. 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 3, below, and that is used by the authorities in an antidumping investigation, and to prepare presentations on the basis of this information.

3/ Article 6.3 provides (in pertinent part):

3. Any 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 antidumping investigation shall, upon cause shown, be treated as such by the investigation authorities. Such information shall not be disclosed without specific permission of the party submitting it.

In this investigation, problems relating to release of additional confidential information in aggregate or summary form were particularly acute because of the release of three prior sets of data (in the antidumping preliminary and countervailing duty preliminary and final investigations) over the preceding 18 months. The Commission was unable, without the consent of submitters of the information, to disclose much of that information. Nonetheless, the Commission was aware of the problems with release of data and explicitly encouraged the parties to stipulate under the Commission's rules to release of all confidential information to counsel for the parties. ^{4/} Counsel for the parties, including Sandvik A.B. and Sandvik Steel Company, were unable to agree to such a stipulation and, therefore, the Commission was unable to release the data.

B. Volume and Price Effects of the Dumped Imports

Article 3.2 of the Code provides that "the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country." Article 3.2 also directs the authorities to examine the price effects of the dumped imports and provides that "[n]o one or several of these factors can necessarily give decisive guidance."

1. Volume of the Dumped Imports

The Commission emphasized that the volume of imports from Sandvik reached a record level during 1984, the first year of the period. ^{5/} For example, imports that year were 60 percent higher than during the previous year (5,726 short tons ("ST"), up from 3,551 ST in 1983). ^{6/} In 1985, imports declined temporarily to 4,592 ST, then increased again by almost 20 percent to 4,866 ST in 1986. ^{7/} These import volumes represented a

^{4/} Transcript of Commission Hearing, Inv. No. 731-TA-354 (Final) at 58 (Chairman Liebler). See also 19 C.F.R. § 207.7(a).

^{5/} Determination at 13 & n. 47.

^{6/} Id.

^{7/} Imports "declined slightly in the 1987 interim period over the 1986 interim period. Determination at 13. However, the Commission noted that this decline was not significant "in light of evidence that it resulted, at least in part, from this investigation." Determination at

record penetration level of 20.4 percent in 1984, 15.0 percent in 1985, then increasing substantially again by almost 20 percent to 17.9 percent in 1986. 8/ The Commission also noted that import penetration by value rose from interim 1986 to interim 1987 and that the market share of the subject imports also was higher (as a percentage of domestic shipments, including shipments by redrawers) during the last full year of the period of investigation than it had been during the full three-year period. 9/

It is clear that the volume of the dumped imports throughout the period was significantly higher than it had been and that import levels from 1985 through 1987 increased substantially both in absolute terms, relative to U.S. apparent consumption and relative to U.S. production (by both integrated firms and redrawers). Moreover, import penetration relative to production by U.S. redrawers and integrated firms was higher during 1986, the last full year of the period, than it was, on average, during 1984 to 1986. Thus, there was ample ground for the Commission to conclude that, in view of the high levels of import penetration and increases during the period--examined together with the price undercutting, price declines and lost revenues--the dumped imports "caused material injury to the domestic industry." 10/

The Government of Sweden notes that the dumped imports demonstrated "a decreasing trend in absolute as well as in relative terms" during the period of investigation. As noted, imports relative to U.S. production--a factor that is explicitly discussed at Article 3.2--were increasing over the period. To the extent 1986 levels were lower than 1984 levels, that decline, the Commission noted, may be attributed to the fact that the base year, 1984, was an exceptionally high year, indeed a record year. 11/ In light of these facts and the fact that import penetration increased nearly

14 & n. 50. The Commission has in the past consistently stated that declines in import volume caused by the initiation of an investigation or the imposition of duties "will not affect the Commission's analysis of causation." Determination at 14 n. 50. (Citations omitted.)

8/ Determination at 13-14.

9/ Determination at 14 n.52. In fact, one Commissioner observed that Swedish imports as a percentage of domestic integrated producer shipments averaged 67 percent during 1984-1986 and was 73 percent in 1986. Swedish imports relative to combined integrated producer and redrawer domestic shipments (excluding Sandvik) averaged 46 percent during 1984-1986 and was 48 percent in 1986.

10/ Determination at 15.

11/ Determination at 13. For example, as noted, the Commission noted that import volumes that year were 60 percent higher than they had been in 1983 and were approximately 20 percent higher than they were in 1985. Id.

20 percent from 1985 to 1986, it was entirely reasonable for the Commission to accord the temporary 1984-1985 decline limited weight in its analysis.

2. Price Effects of the Subject Imports

Article 3.2 of the Code states that the effect of the dumped imports on prices shall be examined by considering (1) "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country" or (2) whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."

a. Price Undercutting

The Commission first examined price comparison data to determine whether the Swedish imports had undercut the U.S. product. 12/ The Commission found the following facts: (1) in a substantial majority of instances (7 out of 11 orders) for which accurate and reliable price comparisons could be made, the sale was won by the Swedish imports; (2) in each of those instances, prices for the imports ranged from 8 to 15 percent below the quoted domestic prices; (3) in 2 of the remaining 4 orders, the Swedish product also undercut the price of the U.S. product by 10 to 14 percent (thus, there was undercutting in 9 of the 11 instances examined, or more than 80 percent of the total); and (4) purchasers of the Swedish product identified the lower price of the import as a reason for buying the Swedish product. 13/

The Government of Sweden presents three main criticisms of the Commission's collection and evaluation of price comparison data. First, the Government surmises that the Commission in fact investigated a larger number of instances than it described in the Report and, therefore, that the instances described cannot constitute consistent underselling. That conclusion is contradicted by the Commission's Report and Determination. Table 26 of the Report describes all of the reported bid price comparisons made by Commission staff. 14/ As is evident, only eleven price comparisons were obtained and reported. Moreover, the Commission in its Report explicitly described the number of purchasers contacted to obtain price

12/ Public Report at A-65 - A-76.

13/ Determination at 14-15 & n. 57.

14/ Price comparisons were reported for both mechanical tubing and redraw hollows. Although the price comparisons for redraw hollows indicated price undercutting by the Swedish product in 10 of the 11 instances, the Commission did not explicitly rely on that evidence in making its determination.

comparison data and the type of information reported by those purchasers. 15/

The Report also indicates the specific kind of price comparison data that the Commission requested in order to examine evidence that would be probative on the question of price undercutting. 16/ In specific, the Commission contacted numerous purchasers in order to obtain information on the two largest volume purchases of redraw hollows and mechanical tubing, products selected in order that the Commission might obtain reliable price comparison data. 17/ As the Report states, not all of the purchasers reported price data for all products or all (quarterly) time periods during the investigation and some information reported was incomplete. Therefore, to ensure that the price comparisons reported were reliable, not all information obtained could be used. The Commission sought pricing data on a range of products and from purchasers accounting for a relatively large share of both domestic and imported product shipments. 18/

Indeed, it would be impossible for the Commission to obtain information on all of the orders placed by purchasers or filled by domestic producers or importers. Thus, the Commission collects information on as many actual orders as possible. These orders are selected so as to be representative of a larger number of transactions in the marketplace during the period.

The Commission's actions are consistent with the language and intent of Article 3.2. There is no requirement in the Code that information obtained by the Commission include a perfectly representative sampling of foreign producer or U.S. producer sales. Thus, the Government of Sweden's assertion that the Commission's Determination is invalid because the price comparisons are not sufficiently representative of Sandvik's U.S. sales is unfounded.

b. Declining Prices

The Commission also examined the net weighted-average F.O.B. selling prices (unit value price series data) from producers and importers in order

15/ Report at A-69 n.i.

16/ Report at A-65.

17/ Id.

18/ The Commission has emphasized the importance of obtaining data based on as large a number of transactions as possible with a broad geographic base. See Cold-Rolled Carbon Steel Sheet and Plate from Argentina, Inv. 731-TA-175 (Final)(Remand), USITC Pub. No. 1967 (Views of Commissioner Rohr) (March 1987), affirmed USX v. United States, slip op. 88-125 (Sept. 16, 1988).

to to evaluate price trends in the domestic market during the period of investigation, information probative on the issue of whether the subject imports had caused significant price depression or prevention of price increases. 19/ The Commission found on the basis of this data that "[d]uring the period of investigation, prices of domestic seamless pipe and tube generally declined for both hot-finished and cold-rolled products." 20/

Thus, regardless of whether the evidence obtained by the Commission on price undercutting is sufficiently representative, the Commission's evaluation of the volume and price effects of the imports under Article 3.2 is nonetheless supported by the reported declining prices, evidence probative on the question of price depression and prevention of price increases caused by the imports. The Government of Sweden does not contest the Commission's use of this information and, therefore, we presume that the Government of Sweden accepts the Commission's analysis and conclusion on this point.

C. Impact on the Domestic Industry

Article 3.1 directs that the impact of the imports subject to investigation shall be assessed "on domestic producers of such products." Article 3.3 further provides that, in addition to the price effects of the imports, the following factors shall be considered in examining that impact:

"actual and potential decline in output, sales, market share, profits, productivity, return on investments or utilization of capacity . . . actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

The Commission's examination of the economic indicators of the condition of the domestic industry included consideration of the factors enumerated at Article 3.3 in relation to both major groups of producers in the domestic industry: i.e., redrawers and integrated firms. 21/

1. Redrawers

In its determination, the Commission explicitly described and discussed redrawer data relating to production 22/, capacity and capacity

19/ Public Report at A-61 to A-65.

20/ Determination at 15, n. 59, citing Public Report at A-63-A-64 & Table 24.

21/ Determination at 8 & n. 21.

22/ Determination at 11 n. 32.

utilization 23/ shipments 24/, yearend inventories 25/ and employment 26/: in short, each of the indicators with respect to which the Commission also examined data obtained from integrated producers. In addition, the Commission considered data on two other indicators that included both redrawer and integrated producer data: (1) domestic shipment data by value 27/; and (2) net sales and profit-and-loss data. 28/

Thus, it is apparent from the face of the Commission's determination that the Commission did not "exclude" redrawer data. Similarly, the "market share" of U.S. producers and the decline in market share have not been misdescribed or understated, as alleged by the Government of Sweden. The Commission discussed the market share of the U.S. industry at only one point. 29/ In that discussion, the Commission explicitly considered U.S. producer market share to include redrawers.

Finally, the record demonstrates that the Commission considered redrawer data and integrated producer data seriatim rather than in aggregate in order to avoid a potential problem of double-counting shipments by integrated firms to redrawers and by redrawers to end users. Indeed, during the Commission's investigation, the Swedish producer, Sandvik, itself explicitly urged the Commission to avoid this same double-counting problem as to Sandvik. 30/

2. Babcock & Wilcox

The Government of Sweden also asserts that the Commission's analysis was "biased" because the Commission did not take into account that one domestic producer "left the industry mainly or entirely for reasons not related to competition from the dumped imports." This argument is incorrect for two principal reasons.

23/ Determination at 11 n. 34.

24/ Determination at 12 n. 37.

25/ Determination at 12 ns 40 & 41.

26/ Determination at 12 n. 44.

27/ Determination at 12.

28/ Determination at 13, citing Report at A-32, Table 10.

29/ Determination at 14 n.52.

30/ Letter from R. Brian Burke, Counsel for Sandvik, to Kenneth R. Mason, Secretary, U.S. International Trade Commission (July 17, 1987) at 2.

First, Article 3 of the Code directs that the impact of the subject imports is to be examined on "domestic producers " of the like product. Article 4.1 further defines "the domestic industry" as "the domestic producers as a whole of the like products." The Commission followed the language and intent of those articles, examining in aggregate data submitted by a number of integrated firms as well as redrawers.

The language of Article 4.1 strongly suggests that the impact of imports is to be assessed in terms of the domestic industry rather than in terms of domestic producers individually. Certainly, Article 4 does not direct that the Commission conduct a firm-by-firm analysis of the impact of the dumped imports or that the Commission find that the impact of the imports was the same as to each member of the domestic industry. In short, the Commission's material injury analysis in the subject determination is faithful to the Code's direction to examine injury to domestic producers as a whole.

It was also apparent to the Commission that the deteriorating trends in the domestic industry continued after Babcock's withdrawal. Indeed, despite a modest improvement in the industry's performance--as reflected in financial indicators--in the immediate wake of Babcock's exit from the industry, the industry did not recapture most of the early declines in production, shipments, capacity and other factors. In fact, within one business quarter of Babcock's exit from the industry, Sandvik's imports commenced their second surge during the period, rising 20 percent in 1986 above 1985 levels. In the wake of this surge, indicators of the domestic industry's performance continued to decline.

III. THE U.S. DEPARTMENT OF COMMERCE'S DETERMINATION OF SALES AT LESS THAN FAIR VALUE

A. Quantity Adjustments

Article 2:6 of the Antidumping Code states that "[d]ue allowance shall be made in each case, on its merits, for...differences affecting price comparability" (emphasis added). In this regard, it is U.S. practice to make reasonable allowance for differences in quantities sold, insofar as it can be shown that the amount of any price differential is wholly or partly due to such quantity differences.

In this investigation, the Department of Commerce found that both Swedish exporters' claims of price differences resulting from differences in quantities sold could not be substantiated. In examining the exporters' pricing practices, it was impossible to identify a clear correlation between prices and quantities sold. While the companies maintained internal price lists, including quantity-related prices, their final impact on negotiated prices could not be established. In other words, these price lists were neither consistently nor necessarily adhered to in the final setting of prices. Since there was also no cost justification provided to demonstrate that discounts were warranted on the basis of savings attributable to the production of different quantities, no adjustment for quantity differences could reasonably be allowed. In any event, the Department used actual, negotiated sales prices, which presumably reflected any such quantity considerations.

As for the second point which Sweden raises here, it should be noted that the Department did not compare "the export price to an unrelated third country reseller with the export price to customers in the U.S." However, sales to the U.S. made through a third country reseller were included among the export sales used for price comparison purposes. Although this third country reseller was unrelated to Sandvik, Sandvik did have foreknowledge that these sales were ultimately destined for the United States. Indeed, the promotion, marketing, sale and distribution in the United States of Sandvik hollow bar was the reseller's principal undertaking in its sales agreement with Sandvik. Thus, Sandvik's pricing to the third country reseller was based on the knowledge and objective of ultimately selling the merchandise in the U.S. market. Because it was Sandvik which effectively determined and controlled the prices charged in both the home and U.S. markets, the Department used the prices obtained by Sandvik in all instances for purposes of price-to-price comparisons.

B. Standing of the Petitioner

In this case, the petition was filed by the Specialty Tubing Group as well as by its individual members on behalf of producers of both seamless and welded stainless steel hollow products (SSHP). Because the U.S. International Trade Commission determined that seamless and

welded SSHP were two separate like products, and that the industry producing welded SSHP was not injured by reason of imports of welded SSHP sold at less than fair value, the antidumping duty order was ultimately issued only with respect to seamless SSHP.

Of the original six individual petitioners, two firms were producers of seamless SSHP. One firm, Al Tech Specialty Steel Corp., is "one of the largest integrated producers of seamless stainless steel pipes and tubes" (USITC Report at A-12). The other firm, Carpenter Technology, produces seamless pipes and tubes at two of its own plants, as well as at the facilities of a wholly owned subsidiary (USITC Report at A-14). There were only three other integrated producers of seamless SSHP in the U.S. industry, one of which closed its production facilities in August 1985.

The remainder of the seamless SSHP industry is composed of nine seamless redrawers. According to the USITC report, only two of these redrawers expressed opposition to the petition. In this regard, it bears pointing out that Sandvik's U.S. subsidiary is itself a redrawer and could therefore be disqualified from consideration as a member of the U.S. industry, pursuant to Article 4:1(i) of the Code. Moreover, the United Steelworkers of America later joined as a co-petitioner, acting on behalf of workers employed at four redraw mills accounting for a majority (excluding Sandvik Steel) of both employment and estimated seamless redraw mill production.

Irrespective of whether Sweden may agree or disagree with the particular methods by which the U.S. assesses petitioner's standing, the facts of this case are neither accurately nor adequately reflected by the statement that "only two of 14 producers of seamless pipes and tubes are among the petitioners." All available evidence points to the conclusion that the petition was supported by a major proportion of the domestic industry.

C. Exchange Rates

The Swedish memorandum states that "[s]ubstantial changes in exchange rates took place during the period 1984 through June 1987," and suggests that the dumping margin was artificially inflated because "due regard was not taken" of such changes.

First, the period considered by the Department of Commerce in determining whether dumping was occurring was May through October 1986, not 1984 through June 1987 (see section below concerning

periods of investigation). Thus, any exchange rate changes affecting sales made outside the six-month period of investigation are irrelevant in the context of this proceeding.

Second, at no point in the investigation did Sandvik claim that "due regard" should be taken of relative exchange rate changes between the krona and the dollar on the one hand, and the krona and the deutschmark on the other, as the Swedish memorandum suggests should have been done. If failure to take this into account had any material effect on the amount of the dumping margin, it seems difficult to believe that the adversely affected party would not have requested that an adjustment be made.

This is all the more surprising considering that the other Swedish exporter, Avesta, did not overlook the opportunity to request the Department of Commerce to take account of changes in the krona/dollar exchange rate. Under U.S. practice, when the prices under consideration are affected by temporary exchange rate fluctuations, no difference between the prices compared is taken into account when the difference results solely from the exchange rate fluctuations. However, when exporters have had a reasonable period of time to adjust their prices in response to sustained exchange rate changes, it is expected that they will adjust their prices accordingly. Ultimately, no adjustment was made in this case because, in reviewing the exchange rate changes in conjunction with the pricing data, Avesta was found not to have adjusted its prices to reflect the sustained depreciation of the dollar against the krona.

D. Periods of Investigation

In this case, the Department of Commerce's period of investigation covered sales occurring from May through October 1986. The U.S. International Trade Commission considered the period 1984 through the first half of 1987 in reaching its material injury determination. Thus, it is not a question of why different periods are being considered, but rather whether it is logical and appropriate that the period considered for injury purposes be broader than the one examined for purposes of determining whether there were sales at less than fair value.

It is the U.S. view that this practice is both reasonable and consistent with the intent of Article 3. In selecting a period of investigation, the Department of Commerce seeks to use the most recent representative period of sales on the assumption that most petitions are filed in response to relatively recent developments in the marketplace. If sales at less than fair value are found, such a period of investigation is also likely to yield the best estimate of dumping occurring on entries that would be covered by any eventual antidumping duty order.

By contrast, the purpose of the U.S. International Trade Commission in choosing a period of investigation is to select an appropriate period of time in which to determine whether there is material

injury to a domestic industry. In general, the USITC's investigations have encompassed a three year period. This relatively longer period provides a more reliable data base on which to make a material injury determination than would a six-month period. Specifically, the three year period enables the USITC to discern whether, for example, any price effects observed and any impact on such indicators as production, employment and profitability were, in fact, caused by the subject imports. Similarly, the three-year period will tend to reveal developments that may be related to other forces in the marketplace or that reflect a relatively short term development (such as a particular stage in an industry's business cycle).

Thus, in order to examine "all relevant economic factors and indices," as Article 3:3 mandates, it is necessary for the USITC to evaluate trends with respect to the factors enumerated in that article over the course of several years leading up to the period in which dumping was identified. Any abbreviation of this period would be sure to distort the analysis. By the same token, the Department of Commerce would place an unreasonable burden upon the exporters under investigation if it were to require years worth of data in responses to antidumping questionnaires. Each investigation period is therefore tailored to be both reasonable and in keeping with the factors unique to determining dumping, on the one hand, and injury, on the other.