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UNITED STATES - ANTI-DUMPING DUTIES ON STAINLESS STEEL PLATE FROM SWEDEN

Request for Conciliation under Article 15:3 of the Agreement

The following communication, dated 10 October 1991, has been received from the Permanent Delegation of Sweden.

Background

In 1973, the United States imposed anti-dumping duties on imports of stainless steel plate from Sweden. Eighteen years later these imports are still subject to an anti-dumping duty, currently at 4.46 per cent.

The company affected, Avesta AB, has twice tried to get the dumping finding revoked on the basis that the injury determination is not valid. A first request to the International Trade Commission (ITC) was rejected in 1985. Avesta AB challenged the decision in the Court of International Trade without positive result. In 1987 Avesta AB made another request for review of the finding to the ITC but it was also rejected. This second request was appealed first to the Court of International Trade then to the Court of Appeals and finally to the Supreme Court, without positive result.

Sweden considers the continuous imposition of anti-dumping duties on stainless steel plate (both hot- and cold-rolled) contrary to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Agreement). As a result, benefits accruing to Sweden under the Agreement have been nullified or impaired.

Consultation between Sweden and the United States on this matter was held, under Article 15:2 of the Agreement, in Washington D.C. on 9 July 1991. The consultation failed to achieve a mutually agreed solution. Sweden is therefore referring the matter to the Committee for conciliation under Article 15:3 of the Agreement.

The dispute mainly concerns the following:

- the fact that the United States considers the injury determination from 1973 still valid;

- the fact that the United States authority never has taken any initiative to investigate the matter;

- the fact that the information submitted by Avesta AB was not considered to be sufficient to warrant a review;

- the manner in which Avesta AB "inherited" the dumping margin of 4.46 per cent.

Sweden reserves its right to submit more information at a later stage of the process.

I. ARTICLE 9 - DURATION OF ANTI-DUMPING DUTIES

Article 9:1 of the Agreement stipulates that "An anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury".

There is an explicit time element in the wordings "only as long as". In the Swedish opinion, it means that after a reasonable period of time has elapsed since the final determination, the investigating authority must ensure itself that a duty in force is necessary to counteract injurious dumping.

Article 9:2 stipulates that "The investigating authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so request and submits positive information substantiating the need for review".

It is clearly expressed that the investigating authority is obliged, where warranted, to ex officio review the matter. If this was not the case, a measure might be in force for ever.

In the present case it should be quite evident to the United States that it has to satisfy itself, because of the time-span of 18 years, whether the measure is still warranted. However, due to the fact that the duty is still in force, Sweden must draw the conclusion that the United States still considers that injurious dumping is taking place. Sweden can see no basis for this assessment.

The principle that anti-dumping measures shall remain in force only as long as they were genuinely necessary to counteract dumping which was causing or threatening material injury to a domestic industry", was formulated already in a report (L/978), paragraph (23), adopted on 13 May 1959 by the CONTRACTING PARTIES.

These aspects in Article 9 were further recognized by certain delegations in the negotiations, both in the Kennedy Round and in the Tokyo Round. In a paper prepared by the GATT secretariat (COM.AD/W/68) from 1976 some outstanding questions were listed. On page 43, paragraph (12), views regarding the duration of anti-dumping duties were presented. The problem, according to the negotiators, was to set reasonable time-limits for review and revocation.

One delegation stated that "anti-dumping duties may justifiably be imposed during a reasonable minimum period but, thereafter, the authorities concerned should be required to monitor anti-dumping actions to ensure that actions are not maintained..." (COM.AD/W/52, page 2).

Another delegation stated that "the imposition of an anti-dumping duty during an unnecessarily long period to serve preventive and punitive purposes is against the Code (COM.AD/34, paragraphs 50 and 51)".

Conclusions

Both the wording and the drafting history of Article 9 shows that time alone creates an obligation on the investigating authorities to review the measure. When a reasonable period of time has elapsed, the duty shall be revoked unless the investigating authority finds, after a review, that a prolongation is necessary. The time-span in the present case, 18 years, is by far too long to be regarded as reasonable. The United States has not in any respect taken an initiative in order to satisfy itself that the duty is necessary to counteract injurious dumping.

Consequently, the United States has not fulfilled its obligations under Article 9 of the Agreement.

II. POSITIVE INFORMATION ACCORDING TO ARTICLE 9:2

According to Article 9:2, an investigating authority shall also review a matter when an interested party submits positive information substantiating the need for review.

In this case, Avesta AB, an interested party in the meaning of the Agreement, submitted information to the ITC showing the absence of an injurious effect of Avesta AB's exports. The submission showed that the original investigation was outdated. Avesta presented a magnitude of evidence showing that profound changes had occurred since 1971-72. These changes concerned the levels of imports from Sweden, a new marketing strategy from the Avesta Group concerning the participation in the United States market, a new export product-mix to the United States and the state of the United States industry. Thus, by not accepting Avesta AB's request for review, the United States acted contrary to the Agreement.

The concept of injury in Article 9 should be interpreted in the same way as in other parts of the Agreement. Hence, the same standards as in Article 3 should be applied.

Article 3:1 of the Agreement says that "A determination of injury for the purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products". These standards are further specified in Articles 3:2-3:5.

This means that no measure may be applied unless the investigating authorities can establish that the dumped imports are causing injury. It should also mean, without any doubt, that no anti-dumping action can be in force unless the injury determination is still valid.

A. Volume

Concerning volume, Avesta AB's submission showed that imports of stainless steel plate from Sweden were at negligible levels. In 1990, imports of Swedish stainless steel plate represented 0.6 per cent of United States consumption. In 1972 imports from Sweden represented 11.52 per cent of United States consumption.

In addition, Sweden's share of imports to the United States has decreased since the early seventies. In 1972, imports from Sweden represented 58 per cent of total imports while the figure for 1990 was only 6 per cent.

The negligible level stems mainly from the following circumstances:

First, an acquisition of a hot-rolled plate producing mill in the United States in 1976 which meant a change in the Avesta Group's strategy towards the United States market. The mill, Avesta Inc., is today one of the largest producers of hot-rolled stainless steel plate in the country. As a result, imports from Sweden mainly consist of more specialized products.

Second, in sharp contrast to the early 1970's, Western Europe today represents an increasingly strong and natural market for Swedish plate (which enters duty-free and without any quantitative limits). The 1973 dumping finding was principally based on the notion that there was a "decline in demand for stainless steel plate ... in Sweden's largest market, Western Europe ..." and that "Sweden maintained its total export level in 1971 by increasing its exports to the United States market ...". These circumstances have totally changed. Since the beginning of the eighties, Western Europe has represented a strong and consistently growing market for Swedish stainless steel plate. In fact, Swedish exports of stainless steel plate to the EC-12 increased by almost 70 per cent from 1979 to 1990 (net tons).

In its October 1985 determination, the ITC majority stated that "Swedish exports to the EC ... remained below the levels of the early 1970's". This position was upheld by the ITC in the 1987 determination. However, it seems clear from statistics that the statement of the ITC was erroneous.

Third, Sweden's stainless steel plate-producing industry has shrunk from four producers in 1972 to a single producer today - the Avesta Group - with a consistently decreasing capacity to produce stainless steel plate, both actually and relative to all other stainless steel products. The Avesta Group produces stainless steel plate at facilities at three locations, namely in Avesta (Sweden), in Degerfors (Sweden) and at Avesta Inc. (Indiana, United States). The parent company of the "Avesta Group" is Avesta AB, the successor of Avesta Jernverk, which include certain stainless steel units from the former companies Nyby Uddeholm AB and Fagersta AB.

B. Impact on the industry

The United States authorities have not made any separate investigation concerning the state of the domestic stainless steel plate industry since the early seventies. Almost all relevant economic factors and indices have changed since then. These are, inter alia:

First, the market share of the domestic industry inside the United States has constantly increased during the last years. Domestic shipments have increased with almost 200 per cent between 1972 and 1990. Its domestic market share has increased from 80 per cent in 1972 to 90 per cent in 1990.

Second, due to increased levels of imports, an import restraint programme for steel was implemented in the United States in 1984. In order to restore its competitiveness, the industry substantially reduced production costs by closing inefficient mills, reducing employment, renegotiating labour and raw material contracts and increasing productivity. By the end of 1987 imports fell to lower levels.

C. Like Products

Since the early seventies the export product-mix from Sweden has changed substantially. The United States has neither made any investigation whether the new products should be included in the dumping finding as like products, nor if they are dumped and causing injury. The changes are, inter alia:

First, cold-rolled plate in large widths in a continuous process is now exported from Avesta AB. This product is not produced in the United States.

Second, certain types of hot-rolled stainless steel plate which did not exist in the early 1970's are now being imported from Sweden These plates are composed of patented grades of stainless steel which are not manufactured by any United States producer.

These products should be excluded from the dumping finding and if they were, Sweden's share of total United States consumption should be even lower.

Conclusion

Avesta AB has submitted positive information to the ITC showing that almost all circumstances that formed the basis for the injury determination in 1973 have changed. According to Sweden, Avesta AB has fulfilled the requirements in respect of Article 9:2 of th Agreement. The information submitted has not been investigated by the United States and consequently, the United States has not fulfilled its obligation under the Agreement.

III. THE DUMPING MARGIN

The latest administrative review for the period June 1980 to May 1982, published in 1984, resulted in a dumping margin for the then Avesta Jernverk of zero per cent and for Nyby Uddeholm of 4.46 per cent. As earlier stated, a substantial reorganization of the Swedish steel industry has taken place. Avesta Jernverk changed its name to Avesta AB in 1984. The year after, Avesta AB acquired 100 per cent of the shares of Nyby Uddeholm and the latter company was subsequently liquidated.

This restructuring meant that Avesta AB totally reorganized its producing entities. The different facilities changed their product-mixes and do not now produce the same products as they did before. Also, as a result of the restructuring, it is very difficult to make a distinction between the products of the former Avesta Jernverk facilities and Nyby Uddeholm's facilities. As a consequence, Avesta AB could, and probably should, be regarded as a new exporter with a totally new production structure and new export-mix.

If Avesta AB is to be considered as a new exporter, then a new anti-dumping investigation is warranted. The ongoing imposition of duties would in that case be inconsistent with Article VI of GATT and the Agreement.

Article 8:3 of the Agreement says that "The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2".

Were Avesta AB not to be considered as a new exporter and consequently could be considered for a dumping margin, the only logical margin would be that of Avesta Jernverk since that company is Avesta AB's predecessor. It means that the margin of dumping should be zero and consequently the United States imposition of an anti-dumping duty exceeding the margin established, is contrary to Article 8:3 of the Agreement.

Conclusion

It is unclear under what premises Avesta AB became subject to the dumping margin on 4.46 per cent. Either the United States has imposed a duty on a company not investigated which is contrary to Article VI of GATT and the Agreement, or the duty exceeds the established dumping margin which is contrary to Article 8:3 of the Agreement.

IV. CONCLUSIONS

According to Sweden, the United States has not acted in accordance with the Agreement and consequently, the United States has not fulfilled its obligations under the Agreement and the Swedish Government considers that its benefits under the Agreement are being nullified or impaired.