

GENERAL AGREEMENT ON

RESTRICTED

TARIFFS AND TRADE

ADP/M/36

22 July 1992

Special Distribution

Committee on Anti-Dumping Practices

MINUTES OF THE MEETING HELD ON 17 FEBRUARY 1992

Chairman: Mr. Didier Chambovey (Switzerland)

1. The Committee on Anti-Dumping Practices ("the Committee") held a special meeting on 17 February 1992.
2. The Committee discussed the following matters:
 - (i) Korea - Imposition of anti-dumping duties on imports of polyacetal resins from the United States - Request by the United States for the establishment of a panel under Article 15:5 of the Agreement¹ (ADP/72 and Add.1);
 - (ii) Canada - Imposition of anti-dumping duties on imports of beer from the United States - Request by the United States for conciliation under Article 15:3 of the Agreement (ADP/73).
- (i) Korea - Imposition of anti-dumping duties on imports of polyacetal resins from the United States - Request by the United States for the establishment of a panel under Article 15:5 of the Agreement (ADP/72 and Add.1)
3. The Committee had before it in documents ADP/72 and Add.1 a request received from the delegation of the United States for the establishment of a panel under Article 15:5 of the Agreement in a dispute between the United States and Korea regarding anti-dumping duties imposed by Korea on imports of polyacetal resins from the United States. A special meeting on this matter for the purpose of conciliation under Article 15:3 had been held on 4 October 1991 (ADP/M/34).

¹The term "Agreement" hereinafter means Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

4. The representative of the United States noted that, as explained in his delegation's request for the establishment of a panel (ADP/72), consultations under Article 15:2 and conciliation under Article 15:3 of the Agreement had failed to result in a mutually satisfactory resolution of this dispute. His authorities had therefore decided to request the Committee to establish a panel in this matter. Document ADP/72/Add.1 described the precise questions to be examined by this panel. His delegation considered that it was good practice for complaining Parties to outline with precision in their request for the establishment of a panel the matters which they wished to address, as the United States had done in this case.

5. The representative of Korea said that his authorities did not object to the establishment of a panel in the dispute referred to the Committee by the United States. His delegation had expressed its views on the matters in dispute at the special meeting held on 4 October 1991 under Article 15:3 of the Agreement.

6. The representatives of Japan, the EEC and Canada reserved their delegations' rights to intervene as interested third parties in the proceedings before the panel. The representative of Japan indicated that his delegation would seek further bilateral consultations with Korea on this matter.

7. The Committee took note of the statements made and decided to establish a panel under Article 15:5 of the Agreement in the matter referred to the Committee by the United States in documents ADP/72 and Add.1. The Committee authorized the Chairman to decide, in consultation with the two parties to the dispute, on the terms of reference of the Panel and to decide on¹ the Panel's composition after obtaining the agreement of the two parties.

(ii) Canada - Imposition of anti-dumping duties on imports of beer from the United States - Request by the United States for conciliation under Article 15:3 of the Agreement (ADP/73)

8. The Committee had before it in document ADP/73 a request for conciliation under Article 15:3 of the Agreement by the United States with respect to anti-dumping duties imposed by Canada on imports of beer from the United States.

9. The representative of the United States introduced his delegation's request for conciliation in this matter by saying that bilateral consultations under Article 15:2 of the Agreement held on 24 January 1992 had not been successful. The matter referred to the Committee by his delegation pertained to anti-dumping duties imposed by Canada in

¹See document ADP/76.

November 1991 on imports of beer from the United States into British Columbia. His authorities had identified three issues of potential inconsistency with Canada's obligations under the Agreement. First, the "regional industry" analysis applied by the Canadian International Trade Tribunal (CITT) in its injury investigation; second, the refusal to make adjustments for differences in promotional expenses between export sales and domestic sales; and third, the selection of the "like product" sold in the United States for the purpose of making price comparisons.

10. The representative of the United States pointed out that the CITT had determined that producers of beer in British Columbia constituted a separate regional industry because 20-37 per cent of all imports of beer from the United States into Canada went into British Columbia, while British Columbia accounted for only 10 per cent of domestic consumption of beer in Canada. In addition, import penetration into British Columbia was somewhat higher on average than import penetration into other provinces in Canada. His delegation was of the view that this finding was inconsistent as a matter of law with the requirement in Article 4:1(ii) of the Agreement that injury to a regional industry may be found only if there is "a concentration of dumped imports into the region". There was no basis to conclude that a percentage as small as 20-37 constituted "a concentration" as provided for by the Agreement. Equally important, to the extent that imports of beer from the United States into Canada were somewhat more concentrated into British Columbia, this was only because restrictions on imports into other Canadian provinces were higher. It was notable that those restrictions had recently been found to be inconsistent with the General Agreement in a Panel Report which would soon be considered for adoption by the GATT Council. In other words, the Canadian authorities had relied on the more liberal access to one of Canada's provincial markets as the basis for application of a special provision of the Agreement. This was improper as a matter of law. He asked the representative of Canada how the Canadian authorities interpreted the "concentration" requirement of Article 4:1(ii) of the Agreement, and whether there was in their view any minimum import penetration (overall or relative to import penetration in other provinces) which would have to exist in order to meet this requirement.

11. Regarding the determination of dumping made in the case under consideration by the Canadian authorities, the representative of the United States expressed his delegation's concern about the refusal of the Canadian authorities to grant a request made by exporters from the United States for an adjustment to prices to account for significantly heavier promotional expenses connected to sales in the domestic market in the United States. The denial of this adjustment might be inconsistent with the requirements of Article 2:6 of a fair comparison of export price and normal value and of adjustments. Specifically, the Canadian authorities apparently would provide an adjustment only if the same two functions were not performed in the importing country and in the exporting country. In other words, if an exporter from the United States sponsored a speedboat competition in Seattle at a cost of one million dollars and also sponsored a boat race in British Columbia at a cost of

100,000 dollars, no adjustment would be made. This appeared to this authorities to be inequitable and he wondered on what basis Canada would assert that such a methodology was consistent with the Agreement.

12. The representative of the United States then turned to the question of the product selected by the Canadian authorities for purposes of making price comparisons. The Canadian authorities had chosen a brand of beer sold in Washington notwithstanding the fact that, as was not contested by Canada, the beer was sold as a premium beer in Washington but as a discount beer in British Columbia. In addition, the Canadian methodology for making price comparisons had also led to the exclusion of consideration of sales of beer outside the State of Washington (where the beer was not sold as a premium beer) in the calculation of the appropriate home market price. The exclusion of these sales was the result of the "preponderant price" methodology of determining normal value, under which the normal value was considered to be the "preponderant price" in the home market, defined as that price used "more often than any other" and "dominant in the market". In bilateral consultations the Canadian authorities had indicated that the first criterion could be satisfied if one price were found in 20 or even in 10 per cent of the cases, so long as it occurred more often than any other. In a competitive market place like that in the United States this was quite possible. As to the second criterion, the Canadian authorities had conceded that it was not defined. In the case under consideration, the price used by the Canadian authorities had occurred about 60 per cent of the time - all inside the State of Washington. Outside the State, the beer in question sold as a discount beer, just like in British Columbia, and sold for much less. Yet, all of these lower prices had been ignored. His delegation wondered how this methodology could be considered fair or reflective of the market price in the exporting country for the export product. The determination of the Canadian authorities might in this respect be inconsistent with the "like product" and "fair comparison" provisions of Article 2 of the Agreement.

13. The representative of Canada first addressed the points raised by the representative of the United States regarding the determination of injury of the CITT in the case under consideration. On 2 October 1991, the CITT had determined that the dumping of beer, originating in or exported from the United States by or on behalf of Pabst Brewing Company, Heileman Brewing Company and The Shoh Brewery Company for use or consumption in the province of British Columbia, had caused, was causing and was likely to cause material injury to the production in British Columbia of like goods. In reaching this conclusion, the CITT had undertaken a vigorous analysis to ensure that the conditions set out in Article 4:1(ii) of the Agreement were met. Under this Article a determination of injury to an industry in a particular region required that (i) the producers within a market sell all or almost all of their production of the product in question in that market, (ii) the demand in that market not be supplied to any substantial degree by producers of the product in question located elsewhere in the territory of the importing country, (iii) there be a concentration of dumped imports into such an isolated market, and (iv) the dumped imports are causing injury to the producers of all or almost all of the production within such a market. The CITT's determination in the case under consideration was consistent with each of these conditions.

14. Regarding the first of the conditions required by Article 4:1(ii), the representative of Canada said that the evidence before the CITT had indicated that in the period 1 April 1990-31 March 1991 the combined sales of packaged beer by the two largest brewers in British Columbia accounted for 95 per cent of their total domestic sales of packaged beer. The new owner of Pacific Western Brewing had reported that in its first month of operation (March 1991) 100 per cent of its total domestic sales were made in British Columbia. With respect to the second criterion for determining market isolation, the evidence before the CITT had indicated that the penetration into British Columbia of beer produced in other Canadian provinces was minimal. Less than one per cent of packaged beer consumed in British Columbia in the years 1987-1990 had been supplied by producers of beer located in other provinces. In respect of the requirement in Article 4:1(ii), that there be "a concentration" of dumped imports into the regional market, the CITT had interpreted this language to mean that concentration was to be examined by comparing the volume of dumped imports into the regional market to the volume of dumped imports into the rest of the country. The CITT had concluded that the subject dumped imports constituted a concentration of dumped imports into the market of British Columbia. The evidence before the CITT indicated that 41 per cent of all subject dumped imports into Canada in 1990 were consumed in British Columbia. Furthermore, the share of the total subject imports into British Columbia was 2.9 times British Columbia's share of total Canadian consumption of packaged beer in 1990. Finally, after having conducted an extensive analysis of the evidence, the CITT had concluded that the dumped imports were causing material injury to the producers of all or almost all the production within the market in British Columbia. Sales of packaged beer in British Columbia by the three complainants from 1987 to 1990 accounted for 99 per cent of the total sales of like good of producers in British Columbia. Thus, the decision of the CITT was clearly consistent with the conditions set out in Article 4:1(ii) of the Agreement.

15. Turning to the question of differences in promotional expenses between export sales and home market sales, the representative of Canada said that Canadian anti-dumping legislation reflected the requirements of Article 2:6 of the Agreement by requiring normal values to be determined using the exporter's domestic sales of like products to purchasers "who are at the same or substantially the same trade level as the importer". Where there were no sales of like products to purchasers at the same level of trade, the Canadian legislation provided for the substitution of sales to purchasers of like products who were at the level of trade nearest and subsequent to that of the importer. At the same time, Canadian anti-dumping regulations ensured, in keeping with Article 2:6 of the Agreement, that in such cases the price of like products must be adjusted by deducting "the amount of any costs, charges or expenses incurred by the vendor of the like goods in selling to purchasers who are at the trade level nearest and subsequent to that of the importer that result from activities that would not be performed if the like goods were sold to purchasers who are at the same or substantially the same trade level as that of the importer".

16. The representative of Canada said that in the case under consideration the exporters from the United States had contended that the importer, the British Columbia Liquor Distribution Branch (BCLDB) was at a trade level superior to that of domestic consumers. Conversely, the complainants had argued that the BCLDB was at an inferior level of trade. Revenue Canada had determined that the BCLDB did not occupy a typical trade level but rather performed the functions of a regional distributor, wholesaler and retailer of beer in British Columbia. The functions performed on sales by the exporters to the BCLDB and those performed on sales to wholesalers in the United States had then been examined and Revenue Canada had concluded that an adjustment was warranted for the selling activities performed in the domestic market but not performed on sales to the BCLDB. In particular, it had been found that, while several activities were performed in both markets, certain marketing and promotional activities were performed only on sales in the domestic market of the United States. Information had been obtained for each category of expenses incurred on sales in the two markets. The information included specific details of the advertizing campaigns and expenses and a comparison had been made of the activities conducted in both markets. Adjustments had been made for expenses incurred in activities performed exclusively in the United States market. Those adjustments had reduced the normal value, as requested by the exporters and had been made for all media, print and billboard advertizing expenses and for a portion of sponsorship and promotional expenses. The adjustments had been based on actual marketing and advertizing expenses.

17. Regarding the use of the preponderant price methodology, the representative of Canada noted that Article 2:1 contemplated the establishment of the normal value on the basis of "the comparable price ... for the like product when destined for consumption in the exporting country". Consistent with this provision, the Canadian anti-dumping legislation provided that to determine normal value the price of like products was the price at which the preponderance of sales of like products was made by the exporter to the purchasers throughout the period investigated. Absent such a preponderant price, the weighted average domestic price was used to determine the normal value. While Article 2:1 did not define how the "comparable price" was to be determined, the weighted average approach had been considered less desirable and fair in the case under consideration since 60 per cent of all sales of the Rainier brand, in all sizes and package configurations, had occurred in the State of Washington. This was not unexpected as Rainier was a minor brand in the United States, having its greatest appeal in a limited regional market. The data provided for the preliminary and final investigations clearly demonstrated that the predominant market for Rainier brand beer was the State of Washington. In this State prices were posted and must be the same for all purchasers at the same trade levels. Consequently, it had been determined that the prices for Rainier beer to customers in Washington were preponderant prices. The same principle had been applied to other brands and exporters. Where a preponderant price could not be determined, the weighted average selling price had been used.

18. With respect to the choice of the brand of beer sold in the United States for purposes of comparison with prices of export sales to British Columbia, the representative of Canada, referring to the definition of the term 'like product' in Article 2:2 of the Agreement, pointed out that in the case of Rainier beer products identical in all respects to the products exported to British Columbia were sold in the United States. The characteristics of the products were identical in terms of the beer content, packaging and brand name. Therefore, in view of the existence of identical products in the domestic market, Revenue Canada could not accept the exporter's arguments for the use of other brands of beer to determine normal values. However, in acknowledgement of the differences in the marketing of the Rainier brands in Washington and British Columbia, an adjustment had been made for the differences in the marketing activities as part of the trade level adjustment. The same principle had been applied to other brands and exporters.

19. The representative of the United States stated that, in light of the comments made by the representative of Canada, it was unlikely that the parties to this dispute would be in a position to arrive at a mutually satisfactory resolution through the conciliation process. He expressed concerns in particular with respect to the reliance by the CITT on the minimal import penetration in Canadian provinces other than British Columbia and reiterated that this minimal import penetration was due to the existence of provincial trade barriers which recently had been found by a Panel to be inconsistent with the General Agreement. He also observed that the representative of Canada had not responded to his question on whether the Canadian authorities considered that there was a minimum import penetration level which would have to exist in order to satisfy the requirement of Article 4:1(ii) of the Agreement that there be a "concentration" of allegedly dumped imports in an isolated market.

20. The representative of Canada observed that the Panel Report referred to by the representative of the United States had not been before the CITT. Furthermore, the Agreement did not make any distinction between causes of market segmentation for purposes of applying Article 4:1(ii). Regarding the comment of the representative of the United States on a quantification of the import penetration level necessary to meet the requirement that imports be concentrated in a region, he said that it was not appropriate to define such a threshold in abstracto and reiterated that the CITT's comparison between import penetration in British Columbia and import penetration in other Canadian provinces was consistent with Article 4:1(ii) of the Agreement.

21. The representative of the EEC expressed his delegation's interest in two matters of principle raised by the dispute before the Committee. First, Article 4:1(ii) of the Agreement laid down very stringent conditions regarding the circumstances in which injury could be found to exist to an industry in a separate, regional market. In its own practice, the EEC had fully observed these stringent conditions. Of particular importance was the requirement that there be a concentration of allegedly dumped imports in the relevant market. Second, while the use of the "preponderant price"

methodology in the determination of the normal value was perhaps not inconsistent with the Agreement, his authorities considered that this methodology should be used only if other means of establishing the normal value could not be used.

22. The Committee took note of the statements made. The Chairman encouraged the parties to the dispute to continue their efforts to reach a mutually satisfactory resolution of this dispute, consistent with the Agreement.