

GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Anti-Dumping Practices

MINUTES OF THE MEETING HELD ON
14 MARCH 1984

Chairman: Mr. R. Lempen (Switzerland)

1. The Committee met on 14 March 1984. The participation in this meeting was limited to the Parties.
2. The purpose of the meeting was to continue discussion relating to the request by the EEC for conciliation under Article 15:3 of the Agreement, initiated at the meeting of 15 November 1983 and concerning an anti-dumping investigation by Canada against certain electric generators from Italy. The Committee had before it two documents relevant to this matter:
 - (a) Request for conciliation under Article 15:3 of the Agreement (ADP/16);
 - (b) Minutes of the last meeting (ADP/M/11, paragraphs 53-59).
3. The representative of the EEC considered it necessary to have another exchange of views since, at the November 1983 meeting, the Parties had not had sufficient time to prepare themselves for the important issues involved. He recalled the essential elements which were underlying this conciliation procedure. The history of the case related to three tendering procedures in Canada for hydro-electric generators. The Italian producer (Ansaldo) had participated in the first call for offers but the contract was awarded to the Canadian producer. In the second of these calls for offers, the Italian producer also participated and again the contract was awarded to the Canadian producer. There was a third project where the Italian producer did not participate. However, an anti-dumping procedure was initiated which was based on a complaint from the Canadian producer who alleged that the Italian offer had been dumped and had caused material injury to the Canadian industry concerned. The Canadian authorities decided that there had been dumping practised by the Italian company, that this had caused material injury to the Canadian industry and that there was a threat of further material injury.
4. The representative of the EEC further said that the finding of dumping in this particular case was not justified because there had been no exports from Italy, nor had there been any imports into Canada of the product concerned. In addition, no contract had been awarded to the Italian producer. He considered that the finding of dumping and the application of anti-dumping measures in this situation was not appropriate because it was contrary to Article 2:1 of the Anti-Dumping Code. The EEC also contested that there had been injury caused to the Canadian industry concerned. First of all, one had to note that all three contracts had been awarded to the Canadian producer and no contract had ever been awarded to the Italian

producer. The fact that allegedly the Canadian producer had offered a price below cost was his autonomous decision and had not been caused by the Italian offers. In addition, there could not be any threat of injury because, as the Anti-Dumping Tribunal had stated, there would be no more projects in Canada of this nature before the end of the 1980s. Consequently, there was no imminent threat of injury; threat of material injury was in fact only very remote if at all. The conditions of the Code were therefore not fulfilled because it limits the concept of threat of injury to cases where injury would be incurred by the domestic industry in the immediate future. For all these reasons he considered that the determination of dumping where there had been no exports, the finding of injury where there had been no imports and the finding of threat of injury where there was hardly even a remote chance that there would be injury in the future were contrary to the rules laid down in the Anti-Dumping Code. As bilateral consultations between the EEC and the Canadian authorities had not led to any concrete result, the EEC had decided to ask for conciliation by the Committee and expected comments from other Parties to the Code.

5. The representative of Canada noted that when this matter was last taken up in the Committee on 15 November 1983, his delegation had agreed to discuss the matter because it considered that the request had considerable relevance for the work of the Ad-Hoc Group on the Implementation of the Anti-Dumping Code and because it wished to co-operate in the work of the Committee. However, it had expressed some concerns about the relevance of Article 15:3 of the Code to the action being brought by the EEC.

6. The facts of the case as seen by his delegation were as follows: the Italian bids for the first and second projects were made at dumped prices. The Federal Court of Canada had ruled on appeal that the Canadian authorities had acted properly in making the preliminary determination of dumping on the basis of irrevocable tenders. It had ruled that such tenders, whether accepted or not, constituted an agreement to sell and thus a sale for the purposes of the Anti-Dumping Act. The language of both Articles VI of the General Agreement and Article 2 of the Code was clear in that dumping is regarded as pertaining to a situation where the product of one country is introduced into the commerce of another country at an export price which is less than the comparable price in the country of export. The effective application of Article VI and of the Code would be frustrated if importing authorities were not able to deal with such contractual arrangements at the time of submission of tender. In the case of the Ansaldo bids both of these elements were satisfied at the time when the irrevocable tenders had been submitted, i.e. when the export price and the terms and conditions of sale were specified and were irrevocable. The continuing presence of such dumped tenders in the Canadian market was forcing the Canadian producer to suppress its prices or risk losing business essential to its continued viability. The cumulative effect of the dumped Italian bids was found by the Canadian Anti-Dumping Tribunal to be injurious. Important factors in the Tribunal's consideration of material injury were the financial concessions made by the Canadian producer to obtain the first contract and the price suppression induced by the expectation of continued dumped Italian bids. The importance of a single contract to the utilization of production facilities and the exceptionally long time horizon in obtaining and processing relatively few contract awards was evidence that price suppression had contributed to reduced profitability and a severe constriction in the size of the domestic market compared to that forecast earlier. In summary, the Tribunal had found

"that the presence of a qualified supplier prepared to bid at dumped prices as Ansaldo has done in the past is a continuing and disruptive factor to such planning, is price-suppressive in the tendering process and is a source of continuing and serious harm."

7. The representative of Canada further said that Article 15:3 of the Code covered final actions taken by importing countries to levy definitive anti-dumping duties, price undertakings and provisional measures having a significant impact. In the case before the Committee, no final action had been taken, no price undertaking had been accepted and no provisional measure had been taken. Consequently, Article 15:3 did not apply. Under the new Special Import Measures Act now before the Canadian Parliament, a material injury finding would cease to be in force after five years because of the "sunset clause" included in that legislation. The matter moreover remains before the Canadian Federal Court on appeal. Finally, the issues involved are being studied by the Ad-Hoc Group which may eventually provide appropriate guidance on this problem and on the more generic problem in the capital goods sector.

8. The representative of the EEC sought some clarification as to the allegation that no final action had been taken and that no provisional measures had been imposed. He asked what the situation would be at the Canadian border if, in the very near future, the Italian producer tried to introduce his electric generators (covered by the preliminary finding of dumping) into Canada i.e. whether they would then be subjected to an anti-dumping duty.

9. The representative of Canada said that there would be no final action, at least as long as the matter was before the Canadian courts. He considered the question raised by the representative of the EEC as a highly hypothetical one. If there were to be a sale of a new product, there would have to be a new investigation.

10. The representative of the EEC further asked whether such a new investigation would be opened without a new complaint or whether the Canadian industry had to lodge a new complaint. The representative of Canada said that as there were no new projects of this kind in the foreseeable future, he preferred not to speculate as to what would happen in such a hypothetical case.

11. The representative of the EEC said that the fact that other Parties did not take part in the discussion was highly regrettable. The EEC has asked for another conciliation meeting because it realized that at the November 1983 meeting Parties had not had enough time to examine the matter and make up their minds. Unfortunately and despite the fact that three months had since elapsed, no delegation was willing to contribute to this conciliation process. The EEC delegation had, therefore, to take note of the fact that the conciliation process had failed to produce any results. It would now be up to the EEC to decide whether it wished to take further steps, e.g. request the establishment of a panel which would examine the matter and give its opinion. The Committee would be informed, in due course, what action the EEC has decided to take.

12. The representative of Canada recalled that he had indicated conditions under which his delegation had agreed to participate in this discussion,

although it had serious doubts whether there were sufficient grounds to invoke Article 15:3 of the Code. He requested the GATT secretariat to give its view on the matter.

13. The representative of Australia said that while the issues were complex it was his delegation's opinion that the action taken by the Canadian Government had at least the effect of being a provisional measure against the importation of electric generators from Italy, and to that extent it might be argued that the complaint brought by the EEC fell under Article 15:3. As to what action the Committee should take in order to resolve the matter was up to the Committee itself to decide. He could not exclude the possibility of establishing a panel. The EEC might consider whether a working party would not be an appropriate solution but if it so wished it had the right to request a panel.

14. The representative of the secretariat, said that he could only give a preliminary response to the Canadian request for an opinion. He noted that at the November 1983 meeting the Canadian representative had questioned the relevance of Article 15:3 because, according to him, none of the conditions required by this Article had been met. There was no final action, no definitive duty had been imposed nor had price undertakings been accepted; there likewise existed no provisional measure. This had been confirmed by the Canadian representative at the present meeting. However, the discussion at the previous meeting, according to the minutes of that meeting (ADP/M/11), had taken place under the heading "Request for conciliation in terms of Article 15:3"; the same was true for this meeting. The question therefore arose whether the fact that the Committee had discussed the substance, although with some reservations, meant that it had formally entered into the conciliation procedure of Article 15:3. This was a further question which the Committee had to decide.

15. The representative of Canada said that the minutes of the last meeting would show that his delegation agreed to discuss this matter because of its relevance to the work of the Ad-Hoc Group. He further said that one should not attach too much importance to the heading under which the matter had been discussed. The EEC delegation had put forward its request under the heading "anti-dumping investigation by Canada against certain electric generators exported by Italy". One could therefore say that in formulating the request the EEC had denied its case.

16. The Chairman said that the matter brought before the Committee by the EEC was very important and complex. The conciliation process had not given any guidance on how to handle this matter. Nevertheless, the Committee would continue its efforts in order to reach a common understanding on the issues raised by the EEC. As to further proceedings the Committee noted the statement by the EEC that it would reflect on what further steps would be adequate in light of the existing situation. Furthermore the Committee might, if and when such a need arises, examine what steps could be taken concerning the legal aspects of the matter. The Chairman also suggested that the Ad-Hoc Group examine, as a matter of urgency, the general issues related to this case. The common understanding of general rules would facilitate any further handling of this and similar cases.