

UNITED STATES – ANTI-DUMPING ACT OF 1916

Complaint by Japan

Report of the Panel

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I. INTRODUCTION

1.1 On 10 February 1999, Japan requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the "DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (hereinafter the "GATT 1994") and Article 17.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter the "Anti-Dumping Agreement") regarding Title VIII of the US Revenue Act of 1916, also known as the US Anti-Dumping Act of 1916 (hereinafter the "1916 Act").¹

1.2 Consultations were held on 17 March 1999, but did not lead to a mutually satisfactory resolution of the matter.

1.3 On 3 June 1999, Japan requested the Dispute Settlement Body (hereinafter the "DSB") to establish a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17 of the Anti-Dumping Agreement.² Japan claimed that the 1916 Act was inconsistent with Article III:4 of the GATT 1994; Article VI of the GATT 1994 and the Anti-Dumping Agreement, in particular Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement as well as Articles 1, 2, 3, 4, 5, 9 and 11 of the Anti-Dumping Agreement; Article XI of the GATT 1994; and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter the "WTO Agreement") and Article 18.4 of the Anti-Dumping Agreement.

1.4 On 26 July 1999, the DSB established a panel pursuant to the request made by Japan, in accordance with Article 6 of the DSU. In document WT/DS162/4, the Secretariat reported that the parties had agreed that the panel would have the standard terms of reference. The terms of reference are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Japan in document WT/DS162/3, the matter referred to the DSB by Japan in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 Document WT/DS162/4 also reported that, on 11 August 1999, the Panel was constituted as follows:

Chairman: Mr. Johann Human

Members: Mr. Dimitrij Grcar

Professor Eugeniusz Piontek

1.6 The European Communities and India reserved their rights to participate in the Panel proceedings as third parties. Both of them presented arguments to the Panel.

1.7 The Panel met with the parties on 3 and 4 November 1999 as well as 8 and 9 December 1999. It met with third parties on 4 November 1999. The Panel issued its interim report to the parties on 28 February 1999. The Panel issued its final report to the parties on 31 March 2000.

¹ See WT/DS162/1.

² See WT/DS162/3.

II. FACTUAL ASPECTS

A. DESCRIPTION OF THE 1916 ACT

2.1 The 1916 Act at issue in the present dispute was enacted by the US Congress under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916.³ It provides as follows:

"It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanour, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder."⁴

2.2 Thus, the business activity which the 1916 Act prohibits is a form of international price discrimination, which has two basic components:

- (a) An importer⁵ must have sold a foreign-produced product⁶ within the United States at a price which is "substantially less" than the price at which the same product is sold in the country of the foreign producer.
- (b) The importer must have undertaken this price discrimination "commonly and systematically."

2.3 It is a condition for criminal or civil liability under the 1916 Act that the importer must have undertaken this price discrimination with "an intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."

³ Act of 8 September 1916. The Revenue Act of 1916 can be found at 39 Stat. 756 (1916).

⁴ 15 U.S.C. § 72.

⁵ The importer may be a domestic US company.

⁶ The 1916 Act does not apply to sales of domestic goods.

2.4 Another characteristic of the 1916 Act is that it provides for a private right of action in a federal district court and the remedy of treble damages for a private complainant, based on the injury sustained by that complainant in its business or property, as well as for criminal penalties in an action brought by the US government.

2.5 The 1916 Act is codified in Title 15 of the United States Code, entitled "Commerce and Trade".⁷

B. DESCRIPTION OF OTHER RELEVANT US ACTS

1. Antidumping Act of 1921 and Tariff Act of 1930

2.6 In 1921, the United States enacted the "Antidumping Act of 1921".⁸ It empowered the Secretary of the Treasury to impose duties on dumped goods without regard to the dumper's intent. Whereas the Antidumping Act of 1921 was later repealed, it is on this Act that the United States' Tariff Act of 1930, as amended (hereinafter the "Tariff Act of 1930"), is built.⁹ The Tariff Act of 1930 is implemented through proceedings governed by regulations promulgated by the US Department of Commerce and the US International Trade Commission¹⁰.

2.7 The 1921 Antidumping Act was, and the 1930 Tariff Act, as amended, is, codified in Title 19 of the United States Code, entitled "Customs Duties".

2.8 The United States has notified Title VII of the Tariff Act of 1930, as amended, and its implementing regulations to the WTO Committee on Anti-Dumping Practices in accordance with Articles 18.4 and 18.5 of the Anti-Dumping Agreement.

2. Robinson-Patman Act

2.9 Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act in 1936, provides in pertinent part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States [...] and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them."¹¹

2.10 Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, applies the same principles to the conduct of a buyer, by making it unlawful for a buyer "knowingly to induce or receive discrimination in price" prohibited by other parts of the Act.¹²

⁷ See 15 U.S.C. §§ 71-74.

⁸ The Antidumping Act of 1921 was codified at 19 U.S.C. §§ 160-71 (repealed).

⁹ The Tariff Act of 1930 is codified at 19 U.S.C. §§ 1671 et seq.

¹⁰ See 19 C.F.R. Part 200.

¹¹ 15 U.S.C. 13(a).

¹² See 15 U.S.C. 13(f).

2.11 A violation of either of these provisions is subject to criminal penalties and also is actionable in a private right of action, where treble damages and injunctive relief are available, and in administrative or federal court actions initiated by the Federal Trade Commission.

2.12 To establish price discrimination in an action under the Robinson-Patman Act, there first must be evidence of two actual sales at different prices, with each sale occurring in interstate commerce.¹³ Thus, the Robinson-Patman Act does not apply to cross-border price discrimination.¹⁴ In addition, a successful price discrimination claim requires a showing of an anti-competitive effect. Case law has established that, if the claim is directed at so-called "primary line injury", meaning injury to the price discriminator's rivals, which corresponds to the situation addressed by the 1916 Act, the requisite anti-competitive effect can be demonstrated through a showing of (i) pricing below an appropriate measure of cost and (ii) the likelihood that the predator will recoup its losses in the future.¹⁵ If the claim is directed at "secondary line injury", meaning injury to disfavoured buyers from the price discriminator, the requisite anti-competitive effect can be inferred, subject to rebuttal, from substantial price differences between competing purchasers over time.¹⁶

2.13 The Robinson-Patman Act is codified in Title 15 of the United States Code, entitled "Commerce and Trade".¹⁷

C. INSTANCES OF APPLICATION OF THE 1916 ACT

2.14 The 1916 Act has been invoked infrequently. Accordingly, there is a limited number of judicial interpretations of its specific provisions.¹⁸ In this regard, it should be noted that, under the

¹³ See *International Telephone & Telegraph Corp. et al.*, 104 F.T.C. 280, 417, citing E. Kinter, *Robinson-Patman Primer*, 3rd ed. (1979), p. 35.

¹⁴ However, imported goods that have become a part of domestic commerce may be subject to the Robinson-Patman Act. Accordingly, the Robinson-Patman Act applies in a situation where a foreign producer makes two sales of the same imported product within the United States at a different price, assuming that all other requirements under the Act are met.

¹⁵ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-23 (1993) (hereinafter "*Brooke Group*").

¹⁶ See, e.g., *Falls City Industries v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983); *FTC v. Morton Salt*, 334 U.S. 37, 50-51 (1948); *Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653, 657 (1997).

¹⁷ Also located in Title 15 are the Sherman Act (15 U.S.C. §§ 1-7, to be found at 26 Stat. 209 (1890)), the Clayton Act (15 U.S.C. §§ 12-27, to be found at 38 Stat. 730 (1914)) and the Federal Trade Commission Act (15 U.S.C. §§ 41-58, to be found at 38 Stat. 717 (1914)).

¹⁸ Most of those interpretations can be found in the following - final or interlocutory - court decisions referenced by the parties: *In re Japanese Electronic Products Antitrust Litigation*, 388 F.Supp. 565 (Judicial Panel on Multidistrict Litigation, 1975) (hereinafter "*In re Japanese Electronic Products I*"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F.Supp. 244 (E.D. Pa. 1975) (hereinafter "*Zenith I*"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F.Supp. 251 (E.D. Pa. 1975) (hereinafter "*Zenith II*"); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978); *Schwimmer v. Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979); *Schwimmer v. Sony Corp. of America*, 637 F.2d 41 (2nd Cir. 1980); *Jewel Foliage Co. v. Uniflora Overseas Florida*, 497 F. Supp. 513 (M.D. Fla. 1980); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 494 F.Supp. 1190 (E.D. Pa. 1980) (hereinafter "*Zenith III*"), affirmed in part and reversed in part, 723 F.2d 319 (3d Cir. 1983), reversed and remanded, 475 U.S. 574, 106 S. Ct. 1348 (1986), District Court decision affirmed on remand, 807 F. 2d 44 (3d Cir. 1986); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 723 F.2d 319 (3d Cir. 1983) (hereinafter "*In re Japanese Electronic Products II*"); *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013 (9th Cir. 1985); *Isra Fruit Ltd. v. Agrexco Agr. Export Co.*, 631 F. Supp. 984 (S.D.N.Y. 1986); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 807 F.2d 44 (3d Cir. 1986) (hereinafter "*In re Japanese Electronic Products III*"); *Helmac Products Corp. v. Roth (Plastics) Corp.*, 814 F. Supp. 560 (E.D. Mich. 1992) (hereinafter "*Helmac I*"); *Helmac Products Corp. v. Roth (Plastics) Corp.*, 814 F.Supp. 581 (E.D. Mich. 1993) (hereinafter "*Helmac II*"); *Geneva Steel Company v. Ranger Steel Supply Corp.*, 980 F.Supp. 1209 (D. Utah 1997) (hereinafter "*Geneva Steel*");

US legal system, the judicial branch of the government is the final authority regarding the meaning of federal laws, such as statutes passed by the legislative branch, i.e. the US Congress. It should also be noted, however, that no claims under the 1916 Act have ever been reviewed by the US Supreme Court, which is the highest federal court in the United States.¹⁹ All court decisions so far have been rendered by US circuit courts of appeals or US district courts.²⁰

2.15 All of the court decisions addressing the meaning of the 1916 Act and its various provisions to date also have involved private civil complaints rather than criminal prosecutions. No complainant in a civil suit has yet recovered treble damages and the cost of the suit. However, in one recent civil case involving a 1916 Act claim, *Wheeling-Pittsburgh*, some defendants have elected to settle rather than proceed to trial.²¹

2.16 The US Department of Justice, the agency responsible for prosecuting criminal violations of the 1916 Act, has never successfully prosecuted a criminal case under the 1916 Act.²² Accordingly, no criminal sanctions have ever been imposed pursuant to the 1916 Act.

Wheeling-Pittsburgh Steel Corporation v. Mitsui Co., 35 F.Supp.2d. 597 (S.D. Ohio 1999) (hereinafter "*Wheeling-Pittsburgh*").

¹⁹ The only reported case in which the US Supreme Court has considered the 1916 Act was *United States v. Cooper Corp.*, 312 U.S. 600 (1941), although the issue in that case was whether the United States is a "person" within the meaning of Section 7 of the US Sherman Act entitled to sue for treble damages thereunder.

²⁰ In the United States, the judicial branch is established on three levels. Generally, the lowest level is the trial court level, consisting of the various US district courts. At least one district court can be found in each of the 50 States. The next level consists of the US circuit courts of appeals, which are intermediate appellate courts responsible for reviewing district court decisions. There are 12 federal court circuits. At the highest level of the federal court system is the US Supreme Court, which, at its discretion, hears appeals from decisions of the circuit courts.

²¹ Up until the Panel's second substantive meeting with the parties, the case was still pending while the remaining litigants conducted discovery. Since the Panel's second substantive meeting with the parties there have, according to the United States, been further developments in the *Wheeling-Pittsburgh* case. According to the United States, the plaintiff in that case, Wheeling-Pittsburgh Steel Corporation, has voluntarily dismissed its claims against the remaining defendants at the trial court level so that all that remains is an appeal of an interlocutory opinion regarding injunctive relief currently pending before the US Court of Appeals for the Sixth Circuit.

²² The United States notes that, to its knowledge, the US Department of Justice has never prosecuted a criminal case under the 1916 Act. In *Zenith III*, Op. Cit., p. 1212, the following is stated regarding enforcement of the 1916 Act's criminal provisions until the early 1970s:

"Apparently there have been four attempts to enforce the criminal provisions of the Act, but none of them has been successful and none has given rise to a reported judicial decision. Marks, *United States Antidumping Laws – A Government Overview* 43 Antitrust L.J. 580, 581 (1974)."

III. CLAIMS AND MAIN ARGUMENTS

[The text of this section will be circulated to Members at a later stage. In order to be consistent with the complete text of this report, footnotes are numbered accordingly and references in the findings to paragraphs of this section have been left unchanged.]

IV. THIRD PARTY SUBMISSIONS

[The text of this section will be circulated to Members at a later stage. In order to be consistent with the complete text of this report, footnotes are numbered accordingly and references in the findings to paragraphs of this section have been left unchanged.]