

# GENERAL AGREEMENT ON

# TARIFFS AND TRADE

RESTRICTED

ADP/M/30

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Committee on Anti-Dumping Practices

MINUTES OF THE MEETING HELD  
ON 19 NOVEMBER 1990

Chairman: Mr. Maamoun Abdel-Fattah (Egypt)

1. The Committee held a special meeting on 19 November 1990. The purpose of this meeting was to continue the Committee's discussion of the Report of the Panel established by the Committee in January 1989 in a dispute between Sweden and the United States on the imposition by the United States of definitive anti-dumping duties on seamless stainless steel hollow products from Sweden (ADP/47).
2. The Chairman recalled that the above-mentioned Panel Report had been discussed by the Committee at a special meeting held on 25 September 1990 (ADP/M/29). At that meeting, the delegation of the United States had indicated that it needed more time to study the Report. While the Report had been inscribed on the agenda of the Committee's regular meeting of 29 October 1990, the Committee had agreed at that meeting, at the request of the delegations of Sweden and the United States, to postpone further discussion of the Report to a later date.
3. The representative of the United States said, that in presenting the views of his authorities on the Panel Report, he would distinguish between the substantive findings of the Panel, which primarily involved the interpretation of Article 5:1 of the Agreement, and the conclusions drawn by the Panel in paragraphs 5.23 and 5.24 of the Report.
4. The representative of the United States then made the following observations on the substantive findings of the Panel regarding Article 5:1 of the Agreement. Firstly, the Panel had found that under this provision a request for the initiation of an anti-dumping investigation could be made either on behalf of the domestic producers as a whole of the like product or on behalf of those domestic producers whose collective output constituted a major proportion of the total domestic production of the like product. The Panel had made it clear that there was no priority or order of preference between the initiation of an investigation upon a written request on behalf of the domestic producers as a whole as compared to the initiation of an investigation on behalf of domestic producers accounting for a major proportion of the total domestic production of the like product. The Panel had rejected the argument advanced by Sweden that there should be a priority in favour of the initiation of an investigation on behalf of domestic producers as a whole of the like product (ADP/47,

paragraph 5.8). Secondly, the Panel had found that the term "on behalf of" in its ordinary meaning involved the notion of agency or representation and that this implied that a written request for the initiation of an investigation must have the approval or authorization of the industry affected before an investigation was initiated (ADP/47, paragraph 5.9). In the view of his delegation, however, the term "on behalf of" by an ordinary dictionary definition meant "in behalf of", "in the interest of", or alternatively, "speaking for or representing." While this second meaning of the term "on behalf of" was similar to the notion of agency or representation referred to by the Panel, the first meaning was different from what the Panel had interpreted to be the ordinary meaning of this term. His delegation, therefore, considered that the ordinary meaning of the term "on behalf" of as used in Article 5:1 of the Agreement did not necessarily correspond to the Panel's finding.

5. Thirdly, the representative of the United States noted that the Panel had found that Article 5:1 of the Agreement implied that, before undertaking an investigation, authorities were required to satisfy themselves that a written request for the initiation of an investigation was made on behalf of the domestic industry (ADP/47, paragraph 5.10). The United States had no objection in principle to this requirement; in fact, as the United States had pointed out during the proceedings before the Panel, the relevant authorities of the United States examined requests for the initiation of investigations when they were filed and sought to ensure that a request made on behalf of an industry was properly filed. However, his delegation did not believe that the text of Article 5:1 indicated that there was a clear affirmative obligation, by the time of initiation, to examine whether a request for the initiation of an investigation had in fact been filed on behalf of the industry. Fourthly, the Panel had found that there were no specific procedural steps which the Agreement required the investigating authorities to undertake to satisfy themselves that a request under Article 5:1 had been made on behalf of the domestic industry:

"The Panel noted that the Agreement did not provide precise guidance in this respect, and considered that the question of how this requirement was to be met depended upon the circumstances of each particular case. Rather than attempting to define any general guidelines, the Panel limited itself to examine whether in the case before it the relevant authorities of the United States had taken such steps as could reasonably be considered sufficient to ensure that the initiation of this investigation was consistent with their obligation to satisfy themselves that the written request for the opening of an investigation had been made on behalf of the relevant domestic industry" (ADP/47, paragraph 5.11).

His delegation considered that the Panel had been correct in not establishing a general rule regarding the particular steps authorities ought to take to satisfy themselves that a request under Article 5:1 had, in fact, been made on behalf of the domestic industry.

6. Fifthly, the representative of the United States noted with respect to the Panel's examination of the case before it that the Panel had found that the request for the initiation of the investigation on its face had not satisfied the requirement that it demonstrated that it had been made on behalf of the domestic industry. The Panel had also found that the relevant authorities of the United States had not taken steps sufficient to satisfy themselves that the request had been made on behalf of the domestic industry. It was important to note carefully what the Panel had found in this regard because the Panel's findings on this issue raised the important question of the appropriate treatment of information of a confidential nature in dispute settlement proceedings under the Agreement, an issue which needed to be examined very carefully by the Committee. With respect to the question of whether the request filed in the case under consideration on its face was sufficient to conclude that it had been made on behalf of the domestic industry, the Panel had concluded in paragraph 5.14:

"There was (...) no statistical evidence provided to the Panel in support of the claim that the request on its face supported the initiation of an investigation had been made on behalf of the domestic industry."

On the question of whether the relevant authorities of the United States could have properly concluded that the request for the initiation of the investigation had been made on behalf of the domestic industry, the Panel had stated in paragraph 5.19:

"...the Panel concluded that the arguments and information provided to it in the course of its proceedings did not permit it to conclude that the Department of Commerce had, prior to the initiation of the investigation, taken steps which could reasonably be considered to be sufficient to ensure that the initiation of this investigation was consistent with the obligation of the Department to satisfy itself that the written request for the initiation of an investigation had been filed on behalf of the domestic industry affected."

Thus, the Panel had not concluded that the information presented to it permitted it to determine that the request had not been properly filed on behalf of a domestic industry; rather, it had found that information presented to it was insufficient for it to conclude that the request had been properly filed on behalf of the domestic industry. This difference was important, because it hinged on the information which the Panel had requested the United States to provide and which the United States had repeatedly attempted to provide. The United States had stretched the limits of its domestic law in order to comply with requests made by the Panel for information of a confidential nature in the records of the investigation under consideration. However, this case had raised new and difficult issues for the United States in complying with these requests in that under the administrative protective order procedures, explicitly referred to in Article 6 of the Agreement, there had been some difficulties in presenting certain kinds of confidential data.

7. To illustrate this last point, the representative of the United States pointed out that in one of the two domestic industries at issue in this case the petitioner had included two domestic firms. To have divulged the precise combined market share of the two firms would have indicated to each of the firms what was the market share of the other firm. Such data were among the most sensitive and confidential business information that businesses maintained. Most importantly, however, was not how the United States had followed its domestic law but how it had followed the provisions of the Agreement in ensuring that confidential data provided to the investigating authorities had not been divulged in a manner inconsistent with what the Agreement dictated and with what reasonableness required. In this respect, he mentioned in particular the provisions regarding the protection of confidential information in Articles 6 and 15 of the Agreement. In the proceedings before the Panel, the presentation of the case of the United States had been restricted and disadvantaged to a significant extent by the limitations on the abilities of the United States to use confidential information.

8. Sixthly, the representative of the United States noted that in paragraph 5.20 of its Report the Panel had concluded that a determination of whether or not a request for the initiation of an investigation had been properly filed must be made by the date of initiation of an investigation. Here the United States once again fully agreed that an examination of a request for the initiation of an investigation and canvassing among the domestic industry were appropriate to ensure that a request was properly filed. However, the requirement established in the Panel Report that this must be accomplished by the date of initiation of an investigation and that authorities could not change their decision thereafter, was nowhere specified in the Agreement and was not supported by the text of Articles 4 and 5 of the Agreement. In fact, this interpretation might be inappropriate in certain cases. The United States was of the view that investigating authorities had every authority all the way through to the last day of an anti-dumping investigation to terminate the investigation if the petitioner lost the support of the domestic industry, or a major proportion thereof, and it was ill-advised to mandate a rule different from that interpretation.

9. The representative of the United States then addressed the conclusions of the Panel in paragraphs 5.23 and 5.24 of the Report and emphasized that the opposition of the United States to the nature of the remedy proposed by the Panel was a matter of principle for his delegation. He expressed concerns about two aspects of the proposed remedy: its specificity and its retroactive character. The expertise of GATT Panels was in the interpretation of provisions of the General Agreement, or of Agreements negotiated under the auspices of GATT, rather than in questions regarding the manner of domestic implementation of these provisions. Accordingly, while it was appropriate for a panel to determine in a particular case whether a country's legislation was applied in a manner consistent with its obligations under the Agreement, it was not appropriate for a panel to mandate precisely what a sovereign country must do to comply with its

international obligations. Thus, the standard and appropriate remedy recommended by GATT Panels was that a country should bring its measures into conformity with its international obligations within a reasonable period of time following the issuance of a panel's decision. Indeed, with the exception of the Panel Report in the dispute between Finland and New Zealand on electrical transformers,<sup>1</sup> there had been no panels which had recommended exclusive remedies similar to the remedy proposed by the Panel in the Report under consideration. With respect to the Panel Report in the dispute between Finland and New Zealand, he believed that this exception proved the rule. He considered that case to have been an aberration among GATT Panel cases and believed that when the Report of the Panel established in that case had been considered by the GATT Council, the United States and other countries were not focused on the specific question of the nature of the remedy proposed by the Panel. A panel might suggest a particular remedy but it should not mandate a particular remedy, as the Panel had done in the Report under consideration. This view appeared to be widely shared, as reflected in the Chairman's text which had been developed in the Uruguay Round Negotiating Group on Dispute Settlement. This text contained a provision which clarified that a remedy recommendation by a panel should never be specific. The United States had been in the forefront of advocating more effective dispute resolution procedures across the board in anti-dumping as well as in other areas and believed that those procedures should apply to all areas of adjudication in GATT. However, the United States also believed that it was important to set the appropriate and correct parameters of such adjudication where necessary and that anti-dumping was an area in which issues relating to standards and scope of adjudication needed to be considered very carefully. In light of the foregoing, he urged that the Committee replace the specific remedy proposed by the Panel with the general remedy traditionally proposed by panels in GATT dispute settlement proceedings.

10. The representative of Sweden said that this was the second time that the Committee considered the Report of the Panel in the dispute between Sweden and the United States on the imposition by the United States of definitive anti-dumping duties on imports of seamless stainless steel hollow products from Sweden. This matter was of utmost importance to his authorities. The findings of the Panel were well reasoned and the Panel had arrived at the correct conclusions. The Panel had concluded that the imposition of the anti-dumping duties by the United States had resulted in prima facie nullification or impairment of benefits accruing to Sweden under the Agreement. Consequently, the Panel had suggested that the Committee request the United States to revoke the anti-dumping duties imposed and to reimburse duties already paid. The Swedish exporter concerned had suffered the adverse effects of the imposition of anti-dumping duties in a manner inconsistent with the Agreement for several years; provisional anti-dumping duties had been imposed in May 1987 and definitive duties in December 1987. The dispute settlement proceedings under the Agreement had been initiated in 1988. Since the imposition of duties, the firm's exports of seamless stainless steel hollow products to

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the United States had been severely affected and more than US\$8 million had been deposited with the United States authorities. Furthermore, large sums of money had been spent in the course of lengthy legal proceedings in the United States and at present the firm was involved in a costly review procedure. All these costs had been incurred by the firm as a result of a measure which was inconsistent with the provisions of the Agreement.

11. The representative of Sweden disagreed with the observations made by the representative of the United States regarding the nature of the remedy proposed by the Panel. An anti-dumping duty was a specific measure, often aimed at the exports of a particular firm. Consequently, the appropriate remedy by definition also had to be specific, and if necessary, retroactive. A careful reading of the Agreement indicated that there was no support for the view of the United States that a panel had to refrain from proposing specific remedies. On the contrary, the provisions of the Agreement implied that a panel had to propose specific remedies, such as revocation and reimbursement of anti-dumping duties, when it found that an anti-dumping duty had been imposed in a manner inconsistent with the Agreement. In this respect he quoted Article 1 of the Agreement which provided inter alia:

"The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the provisions of this Code."

If the requirements of this Article were not met, the obvious remedy was the revocation and reimbursement of the anti-dumping duty in question. Article 1 made it clear that the Agreement was concerned with the application of anti-dumping duties in specific cases, and not with the domestic anti-dumping legislation as such of Parties to the Agreement. The task of the Panel in the case under consideration had therefore not been to examine whether domestic laws and regulations of the United States' were consistent with the Agreement but to examine whether the imposition of anti-dumping duties in the particular case referred to the Panel was in accordance with the obligations of the United States under the Agreement. The Panel had found that this was not the case and it followed logically from this finding that the duties imposed had to be revoked and reimbursed. There was a precedent for the type of remedy proposed by the Panel in the Report of the Panel established in the dispute between Finland and New Zealand on electrical transformers. That Panel had recommended precisely the same remedy as the remedy proposed by the Panel in the Report under consideration. The Report of the Panel in the dispute between Finland and New Zealand had been adopted by the GATT Council; the United States had thus already recognised that it was appropriate for a panel to make recommendations of a specific nature. Moreover, his delegation believed that there was no remedy other than the one recommended by the Panel which could rectify the situation and create the same situation which existed before the anti-dumping duty entered into force. Sweden, the United States and other participants in the Uruguay Round shared the objective of strengthening the multilateral dispute settlement system and he therefore strongly urged the United States to agree to the adoption of the Report and to implement the recommendations contained therein.

12. The representative of the United States noted that the representative of Sweden had argued that no remedy other than the specific remedy recommended by the Panel was available to rectify the situation and that the Report of the Panel in the dispute between Finland and New Zealand constitute a relevant precedent in this regard. The United States did not contest that in that Report a specific remedy had been recommended. However, there were approximately 137 other disputes in the GATT which had been referred to panels and in none of these cases had such a specific remedy been proposed. The explanation of this absence of recommendations concerning specific remedies was obvious: the purpose of dispute settlement in the GATT was not punitive but remedial, to end a continuation of a situation of violation of obligations. He wondered whether those delegations which were tempted to follow the position of Sweden in this case were prepared to accept the broader implications of this position in other disputes, e.g. disputes involving violations of Articles III or XI of the General Agreement. If the principle underlying this position were accepted, the United States would regard this as a radical extension of GATT law into the area of compensatory and retroactive remedies and insist that this principle be applied in each dispute settlement proceeding in which it was the plaintiff. On the argument of the representative of Sweden that no other remedy was available to rectify the situation, he said that, while this might be the case, it was for the United States authorities in their sovereign right to make this determination. The United States was not taking the position that it would not comply with its obligations under the Agreement but it firmly rejected the view that it was necessarily required to do so in the manner recommended by the Panel.

13. The representative of Sweden said that so far the only Panel dealing with a dispute involving the imposition of an anti-dumping duty was the Panel established in the dispute between Finland and New Zealand on electrical transformers. In disputes involving quantitative restrictions there were various possible remedies available, but in a dispute involving the imposition of an anti-dumping duty the only possible remedy in case where the duty was applied in a manner inconsistent with the relevant provisions was the revocation of the duty and the reimbursement of duties already paid. The specific remedy proposed by the Panel was not a recommendation that compensation be granted but merely sought to ensure the restoration of the situation which existed before the imposition of the anti-dumping duties.

14. The representative of the United States noted that the Panel Report in the dispute between Finland and New Zealand on electrical transformers had been before the GATT Council and not before the Committee. Thus, the Report had been considered in the context of the general dispute settlement procedures of Article XXIII of the General Agreement, which served to provide additional support for his delegations's view that, if this Report constituted a valid precedent, there was no reason why its implications should be limited to the anti-dumping area. His delegation would be pleased to see a general acceptance in GATT dispute settlement proceedings of the principle that the objective of dispute settlement was to obtain a

restoration of the status quo ex ante if this principle were also applied to situations involving the imposition of quantitative restrictions, the imposition of customs tariffs in excess of bound rates, the application of internal measures inconsistent with Article III of the General Agreement, or the provision of a subsidy on an industrial or agricultural product in a manner inconsistent with Article XVI of the General Agreement.

15. The representative of the EEC said that his delegation shared the view of Sweden that the Panel report in document ADP/47 was an excellent one. However, his delegation also shared the reservations of the United States regarding the conclusions of the Panel. The Panel had gone into the right direction but it had gone too far. He also observed that a distinction was necessary between legislation on the one hand and its implementation on the other. The application of a law to specific cases could not be a substitute for legislation. This distinction was particularly relevant at this time, in view of the negotiations on anti-dumping the Uruguay Round of Multilateral Trade Negotiating. Negotiators should not try to regulate everything in detail. At the same time, a panel should not try to do the work of the negotiators.

16. The representative of Sweden said that the matter presently before the Committee was solely a question of interpretation of provisions of the existing Agreement and was in no way related to the negotiations on anti-dumping in the Uruguay Round.

17. The representative of Canada expressed some surprise about the discussions in the Committee of the Panel Report. He recalled that a recent meeting of the Committee on Subsidies and Countervailing Measures the representative of the United States had taken the view that it was in the interest of the dispute settlement system to resolve the long-standing problem of unadopted Panel Reports. Yet it appeared from statements made at this meeting by the representatives of the United States and EEC that this Committee ran the risk of opening up a new chapter of unadopted Panel Reports and undermining the credibility of the dispute settlement mechanism in the anti-dumping area in the same manner as in the area of subsidies and countervailing measures. His delegation continued to believe that the Report in document ADP/47 was a good one. He supported the adoption of the Report, as written, and urged its early implementation.

18. The Committee took note of the statements made. The Chairman said that the Committee would hold another meeting to continue its discussion of this matter. Meanwhile, he would hold consultations with interested delegations.