

UNITED STATES – ANTI-DUMPING ACT OF 1916

Complaint by Japan

Report of the Panel

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Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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H. VIOLATION OF ARTICLE XVI:4

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 " 84 0 TD 0.1252 6.75 Tf

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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).

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

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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.]