20 August 1990

UNITED STATES - IMPOSITION OF ANTI-DUMPING DUTIES ON IMPORTS OF SEAMLESS STAINLESS STEEL HOLLOW PRODUCTS FROM SWEDEN

Report of the Panel
(ADP/47)

1. INTRODUCTION

1.1 On 14 July 1988 Sweden and the United States held bilateral consultations under Article 15:2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereafter in this Report referred to as "the Agreement") regarding the imposition of anti- dumping duties by the United States on imports of seamless stainless steel hollow products from Sweden. When these consultations failed to lead to a mutually satisfactory solution, Sweden requested on 9 September 1988 that a special meeting of the Committee on Anti-Dumping Practices (hereafter in this Report referred to as "the Committee) be held for the purpose of conciliation under Article 15:3 of the Agreement. This meeting took place on 5 October 1988 (AD/M/23).

1.2 In a communication dated 1 December 1988 Sweden requested that a special meeting of the Committee be convened to establish a panel under Article 15:5 of the Agreement (AD/40). On 16 January 1989, the Committee agreed to establish a panel in the dispute referred to the Committee by Sweden in document AD/40 and authorized the Chairman of the Committee to decide, in consultation with the two parties to the dispute, on the terms of reference of the Panel and to decide, after securing the agreement of the two parties, on the Panel's composition. At the same meeting the delegation of Canada reserved its right to present its views on this dispute to the Panel (AD/M/25).

1.3 On 14 April 1989 the Committee was informed by the Chairman in document AD/43 that the terms of reference and composition of the Panel were as follows:

Terms of Reference:

"To examine, in the light of the relevant provisions of the Agreement on Implementation of Article VI of the General Agreement, the matter referred to the Committee by the delegation of Sweden in document AD/40 concerning the determinations of injury and dumping made by the United States' authorities in an anti-dumping duty investigation of imports of stainless steel pipes and tubes from Sweden and to make such findings as will assist the Committee in making recommendations or in giving rulings."

Composition

Chairman: Mr. Jacques Bourgeois

Members: Mr. Crawford Falcori1h6 1 249.84 200.16 Tm/F8 1 14im/F8 11 Tf(or) Tj1t5 B26.08 Tm

2. FACTUAL ASPECTS

2.1 On 17 November 1986 a notice was published in the United States Federal Register by the United States Department of Commerce of the initiation of an anti-dumping duty investigation of certain stainless steel hollow products from Sweden.[1] The decision to open this investigation followed the receipt by the Department of Commerce on 17 October 1986 of a petition from the Specialty Tubing Group and each of its member companies which produced stainless steel hollow products, allegedly filed on behalf of the domestic industry producing stainless steel hollow products. This petition alleged that imports of certain stainless steel hollow products from Sweden were being, or were likely to be sold in the United States at less than fair value within the meaning of section 731 of the United States Tariff Act of 1930, as

2.5 A notice of a preliminary affirmative determination by the Department of Commerce of sales at less than fair value was published in the Federal Register on 22 May 1987.[1] This determination was based on data on export prices and normal values during the investigation period (1 May 1986-31 October 1986) of two Swedish firms, Sandvik AB and Avesta Sandvik Tube AB, which accounted for virtually all of the exports to the United States during this period of the products in question. As a result of this preliminary determination, the Department of Commerce instructed the United States Customs Service to suspend the liquidation of all entries of stainless steel hollow products from Sweden which were entered, or withdrawn from warehouse, for consumption on or after 22 May 1987 and to require a cash deposit or the posting of a bond equal to the margins of dumping preliminarily determined by the Department of Commerce.

2.6 A final affirmative determination by the Department of Commerce of sales at less than fair value was published in the Federal Register on 9 October 1987.[2] With respect to Sandvik AB, the Swedish exporter of seamless stainless steel hollow products, the Department had determined that there had been sufficient home market sales of hollow bar (also known as mechanical tubing) to form the basis of comparison. However, there had been insufficient sales in the home market of seamless redraw hollows and finished pipes and tubes to be used as a basis for determining foreign market value. For these products, the foreign market value was calculated on the basis of sales by Sandvik AB to the Federal Republic of Germany. On the basis of this final affirmative determination the Department of Commerce instructed the United States Customs Service to continue to suspend the liquidation of all entries of stainless steel hollow products from Sweden which were entered, or withdrawn from warehouse, for consumption on or after 9 October 1987 and to require a cash deposit or the posting of a bond on all such entries equal to the margins of dumping found by the Department in its final determination.

2.7 On 19 November 1987 the USITC made a final determination under section 735(b) of the Tariff Act of 1930, as amended, in its investigation of imports of stainless steel pipes and tubes from Sweden.[3] The USITC determined (1) that an industry in the United States was materially injured by reason of imports from Sweden of seamless stainless steel pipes, tubes, hollow bars, and blanks therefor, all the foregoing of circular cross section, which had been found by the Department of Commerce to be sold in the United States at less than fair value, and (2) that an industry in the United States was not materially injured or threatened with material injury, and the establishment of an industry in the United States was not materially retarded, by reason of imports

2.8 On 3 December 1987, the Department of Commerce published in the Federal Register an anti-dumping duty order and an amendment to its final determination of sales at less than fair value with respect to certain stainless steel hollow products from Sweden.[1] The Department changed the average weighted margin of dumping for Sandvik AB from 26.46 to 20.47 per cent; this change reflected a correction of certain clerical errors which had been brought to the attention of the Department by the petitioners and by Sandvik AB subsequent to the publication of the final affirmative determination. Furthermore, based upon the negative determination by the USITC with respect to welded products, the Department excluded imports of welded stainless steel hollow products from the scope of the anti-dumping duty order. Based on this anti-dumping duty order the Department instructed the United States Customs Service to assess, upon further advice by the Department, anti-dumping duties equal to the amount by which the foreign market value of the product exceeded the export price to the United States for all entries of seamless stainless steel hollow products from Sweden provided for in items 610.5130, 610.5202, 610.5229 and 610.5230 of the Tariff Schedules of the United

3.3 With respect to the determination of injury by the USITC regarding seamless stainless steel pipes and tubes, Sweden considered that this determination was not in conformity with Article 3:4 of the Agreement in that the USITC had failed to show a causal relation between the imports

objections to the determination of injury by the USITC: firstly, a failure to show a significant increase of the volume of the dumped imports and, secondly, a failure to show significant price undercutting by the dumped imports. In the proceedings before the Panel Sweden had raised a number of additional issues which had not been mentioned in the request for the establishment of a Panel and were, therefore, outside the scope of the terms of reference of the Panel: firstly, the analysis of data relating to the condition of certain domestic producers known as "redrawers"; secondly, the consideration by the USITC of data for one integrated domestic producer which had left the industry during the investigation period; thirdly,

in the manner in which they had investigated and obtained data, analyzed these data and reached their respective conclusions concerning dumping and injury. On this basis the Panel should conclude that these determinations had been made in full conformity with the applicable provisions of the Agreement. Absent evidence that an investigating authority deliberately acted in a way which would prejudice the outcome of an investigation in favour of one party or was seriously

> "Neither the Act nor the Commerce Regulations requires a petitioner to establish affirmatively that it has the support of a majority of a particular industry. The Department relies on petitioners representation that it has, in fact, filed on behalf of the domestic industry until it is affirmatively shown that this is not the case. Where domestic industry members opposing an investigation provide a clear indication that there are grounds to doubt a petitioner's standing, the Department will review whether the opposing parties do, in fact, represent a major proportion of the domestic industry. In this case, we have not received any opposition from the domestic industry."[1]

Thus, while the Agreement required that there be an indication of support of a petition by the domestic producers as a whole, or by those of them accounting for a major proportion of the domestic production of the like products, before the opening of an investigation, the Department of Commerce would consider the issue of the representativeness of a complaint only if there was an expression of opposition to the opening of an investigation by (domestic) TjETBT1 0 BT1 0 0 1 271.68 616.020 0 1 282.24 616.08 TmBT1 0 0 1

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the petitioners, the acceptance of the petition by the Department of Commerce was inconsistent with the Agreement. Even if one defined the relevant domestic industry as comprising both the producers of welded and the producers of seamless stainless steel products, there still was an obligation under the Agreement on the Department to verify whether the petitioners were representative of this broadly defined domestic industry.

3.16 The United States considered that the determination by the Department of Commerce that the petition filed by the Specialty Tubing Group had been properly filed on behalf of the domestic industry was consistent with Articles 4 and 5 of the Agreement. In this case, the petition filed by the Specialty Tubing Group on its face supported the initiation by the Department of Commerce of an investigation on behalf of a domestic industry in the United States. The petitioner, Specialty Tubing, included producers of welded as well as seamless products. One seamless petitioner was one of the largest producers in the United States of seamless pipe and tube while a second also occupied a significant position in the United States market. The United States provided, at the Panel's request, aggregate percentages of the domestic producers in favour of, neutral toward and opposed to the petition. The United States was unable - consistent with its obligations to protect confidential information under the Agreement and under its domestic legislation - to provide market share data for the two seamless producers who were members of the Specialty Tubing Group. Such data would disclose individual firm data of a highly proprietary nature. In addition, there was no indication of opposition by any domestic producer. Moreover, the facts obtained by the Department of Commerce and the USITC during their respective investigations supported the Department's initial conclusion that the petition had been properly filed, regardless of whether the relevant industry was defined to include both welded and seamless producers (as the Department of Commerce had initially found for the purpose of the opening of the investigation) or seamless producers only (based on the definition of the domestic industries by the USITC). Thus, on its face, the petition had been properly filed on behalf of the domestic industry(ies) and the decision taken by the United States authority to initiate an

3.17 The United States provided the following description of procedures under its domestic law to evaluate

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> "the carefully drafted wording of the Code … has provided sufficient flexibility to permit initiation where the request has been made by other persons properly speaking on behalf of the affected industry."[1]

USWA represented a preponderance of workers throughout both the seamless and welded pipe and tube industry(ies). Thus, as the principal union representative of the industry(ies), USWA had qualified as a co-petitioner whose joinder had provided further support for Specialty Tubing's petition and had cured any alleged defect in Specialty Tubing's standing to file the anti-dumping duty petition on behalf of the domestic industry(ies).

3.21 The United States pointed out that the Department of Commerce had the authority, throughout an anti-dumping duty investigation, to consider the validity of the investigation. Upon further investigation and in light of new evidence that the Department had not had at the time of the opening of the investigation it could conclude that lack of support now demonstrated that a petitioner was not representative of an industry. Thus, it was hypothetically possible for an initiation to appear defective at some point subsequent to initiation during the course of the investigation, and either for that apparent defect to be cured or, if not, for the investigation to be terminated. After the opening of an investigation members of the domestic industry could voice opposition to the investigation, thereby throwing into question the petitioner's assertion that it spoke for the industry. The appearance of other members of the industry expressing their support for the investigation, would, in such a case, provide the "cure" for the purported defect in initiation unless members of the industry subsequently changed their position regarding the petition and the investigation. By leaving open the possibility to members of the domestic industry to assert their support or opposition throughout an investigation, the United States provided ample opportunity for interested parties to state their positions. If elements of the domestic industry opposed a petition, they would not remain silent. Likewise, if the petitioner's representation of the industry became an issue, proponents of the investigation would speak out in support. In the case of the anti-dumping duty investigation on stainless steel hollow products from Sweden, events subseq

during the investigation or since, had challenged the standing of the petitioner. The evidence before the Department of Commerce and the USITC had indicated that the Specialty Tubing Group was unquestionably comprised of manufacturers of both seamless and welded stainless steel pipes and tubes. Thus, the question before the Panel was not whether there was a defect of standing of the petitioners but whether there was a defect in the initiation of the investigation by the Department of Commerce. This had not been the case because the facts demonstrated that a substantial proportion of the industry had affirmatively supported the petition from the outset. The United States considered that one purpose of the requirement in Article 5:1 of the Agreement that a petition be filed "by or on behalf of" the affected domestic industry was to ensure that only an interested party who produced a product which was like the allegedly dumped imported products and who could legitimately claim to be materially injured by those imports of a product like the product which it produced (or which its members produced) was able to request relief. Before this

> The conditions governing the initiation and acceptance of applications for anti-dumping action determine to a large extent the number of anti-dumping cases which arise and the number which are eventually dismissed because full investigations show that action is not justified. In the view of the United Kingdom, therefore, it is of crucial importance that these conditions should be such as to reduce to the minimum the number of unnecessary anti-dumping investigations, and thereby prevent unjustifiable disruption of trade."[1]

Thus, the drafting history of the Kennedy Round Anti-Dumping Code showed that petitions normally should be filed on behalf of the relevant industry as a whole and that, consequently, the initiation of an investigation upon receipt of a petition from producers accounting for only "a major proportion" of domestic production should take place only in special circumstances. It was evident from this drafting history that the negotiators had been well aware of the importance of the standing issue and that it had been their intention to reduce the number of unnecessary anti-dumping duty investigations to a minimum. Sweden considered in this respect that the current position of the United States was the same as the position adopted by the United States in the negotiating process of the Kennedy Round Anti-Dumping Code. While the Panel Report referred to (a) TjETBT1 0 0 1 38 11 Tf(a) TjETBTBT1 0 0 1 179.28 564.24 Tm

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was affirmatively shown that this was not the case. On the first point, the United States pointed out that under its domestic law, regulations and practice, a petitioner must provide sufficient evidence in the petition of each of the elements of dumping and injury as well as of the fact that the petitioner had filed on behalf of an industry, including a listing of members of the industry, a demonstration of sales at less than fair value, and injury data. The Department of Commerce was also required to scrutinize a petition before an investigation could be opened.[1] Thus, the Department relied on petitioner's representations, but only after examining those representations with great care. On the second point, the United States considered that the practice of the United States provided an opportunity for those opposed to a petition to present a clear indication that there was sufficient reason to doubt a petitioner's standing, which would prompt the Department to review whether the opposing parties represented a major proportion of the domestic industry and terminate an investigation if they did.

3.31 In response to the argument of Sweden that the mere initiation of an investigation could disrupt the market for the product in question, the United States pointed out that Sweden was apparently suggesting that the authorities in the United States should substantially lengthen the time for initiation of an investigation so that the market share of the petitioner and other pertinent information, such as the definition of the like product and domestic industry, could be obtained. However, Article 6:9 of the Agreement anticipated that an investigating authority would proceed expeditiously to initiate an investigation. Stretching out the initiation period until the entire domestic industry could be polled would cause just as much disturbance to trade flows, because the filing of the petition itself was the first event which might cause a disruption to trade. Furthermore, the first actual disruption of trade flows did not occur either at the time of the filing of the petition or the time of initiation of the investigation but at the time of the imposition of provisional measures. The United States denied that, as alleged by Sweden, it was more demanding for a domestic producer to oppose a petition than to remain silent and that the mere refusal to join a petition might be seen as tacit disapproval of that petition. Any domestic producer who opposed a petition could simply so indicate in a letter

because of lack of industry support might occur with some regularity.[1] On the assertion by Sweden that the initiation of an anti-dumping duty investigation could constitute a form of harassment and that a rather high percentage of initiated investigations never led to the imposition of definitive measures, the United States argued that the fact that many investigations did not result in definitive measures was evidence of the thoroughness and impartiality of the United States' authorities in conducting anti-dumping duty investigations, and not evidence of lack of a valid basis for investigating. The comments by Sweden on this point also suggested that Sweden confused the circumstances in which a domestic firm lost on the merits of a case and those in which the firm was not entitled to file a petition on behalf of an

3.34 The United States denied that domestic producers first became aware of the existence of an anti-dumping petition when an investigation was initiated. Domestic producers almos

> "Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability."

During the investigation by the Department of Commerce the Swedish exporter, Sandvik AB, had presented data to the Department which clearly showed that Sandvik's prices increased as order volume declined. Therefore, Sandvik had requested the Department to match export sales and foreign market sales of comparable quantities. The Department had, however, matched individual sales prices in the United States with weighted average sales in Sweden and the Federal Republic of Germany which had resulted in a systematic overstatement of the margin of dumping. In the final determination of comparable sales at less than fair value, the Department had explained its refusal to grant a quantity adjustment as follows:

> "We have reviewed the respondent's pricing practices and determined that no clear correlation between prices and quantities has been demonstrated. While internal price lists (which include quantity related prices) are used in setting prices, it is impossible to measure their final impact on the negotiated prices … Therefore the claim has been denied."[1]

Thus, the Department had argued that it had reviewed Sandvik's pricing practices but that it had been impossible to measure the final impact of Sandvik's internal price list on the negotiated prices. However, the data presented to the Department by Sandvik included actual price data which had made it possible for the Department to make due allowance for the quantity differences. Sandvik had provided full documentation on actual sales prices which had clearly indicated an inverse relationship between prices and quantities. This was normal in markets where prices were negotiated between sellers and buyers and not determined on the mere basis of price lists and published rebates. The Department of Commerce had refused to consider these data, although they had been presented on computer tapes.

3.38 Sweden explained that the overstatement of the margin of dumping had to do with the fact that the Department of Commerce had compared export sales and foreign market sales at different levels

Quantity	Unit price
100 kg.	$3.60 per kg.
500 kg.	$3.40 per kg.
1,000 kg.	$3.20 per kg.

The weighted average unit price of these three sales was $3.29 per kg.[1] and if this weighted average was compared to the price of the sales to the United States, the dumping margin was 9.7 per cent.[2] However, if the sale in the United States had been matched with a sale in Sweden of a comparable quantity there would have been a dumping margin of only 6.7 per cent.[3] A second example given by Sweden was a case in which Sandvik sold 150 kilos of a product in the United States at a price of $3.11 per kilo and made three sales of identical merchandise in Sweden as follows:

Invoice date	Quantity	Unit price
21 October 1986	72 kg.	$4.89 per kg.
8 July 1986	162 kg.	$3.06 per kg.
14 May 1986	57 kg.	$8.86 per kg.

In this example the weighted average unit price was $4.65 per kilo and the margin of dumping 50 per cent.[4] However, if the sale in the United States of 150 kilos had been matched with a sale in Sweden of a comparable quantity (162 kilos) there would have been a "negative" dumping margin. Sandvik's claim for quantity adjustments had never been based solely on price list information. The primary grounds for this claim had been the difference in levels of trade between the export sales and the foreign market sales and the fact that Sandvik's prices generally increased as order volume declined, with the largest increases normally occurring on orders of quantities of less than 100 kilos. On these grounds Sandvik had requested the Department to match sales of comparable quantities. To facilitate the work of the Department of

groups of Sandvik's sales in Sweden. This analysis had also revealed a price break at 100 kgs. Sweden also provided to the Panel a document containing an analysis for five quantity groups of the effect of quantity on price with respect to sales by Sandvik in

Thus, a comparison of Article VI of the General Agreement and Article 2:6 of the Agreement revealed that the drafters of the Agreement had added the explanatory phrase "on its merits" to Article 2:6 in order to make clear the exporter's obligation to provide sufficient evidence of differences affecting price comparability. It was apparent that the drafters of the Agreement had been aware of the difficulties of obtaining information completely within the control of a foreign party and responded by providing that, absent sufficient evidence, due allowance for purported differences affecting price comparability need not be made. Article 6:8 of the Agreement supported the conclusion that an

it must be demonstrated that the quantity discounts are warranted on the basis of cost savings attributable to the production of different quantities, Sweden considered that this requirement was virtually impossible for any company to meet, as a company normally acted on the basis of what was rational in broad economic terms, rather than merely on the basis of cost savings in its production. Finally, with respect to the argument of the United States that the rules on quantity adjustments laid down in the regulations of the Department of Commerce were consistent with the views expressed in the draft text of

for comparison to individual sales in the United States.[1] Where sales in

> "due allowance shall be made in each case, on the merits, … for the other differences affecting price comparability."

Thus, to demonstrate that the export price to the United States had to be compared with the foreign market value at the same commercial level of trade, a fact neither alleged nor proven by Sandvik in the investigation by the Department, bore no relationship to the question of an adjustment for difference in quantities. The argument of Sweden that orders of the product in question in excess of 100 kilos in Sweden and the Federal Republic of Germany had constituted more than 20 per cent of the total sales of the pipes and tubes bore no relationship to the relevant rule in the Regulations of the Department of Commerce that discounts be granted on 20 per cent or more of sales, not that 20 per cent or more of all sales be large sales. In fact, the sales of over 100 kilos had been nearly as likely to be sold at high prices as at low prices. The United States further noted

based on the facts in the record

costs had been provided by Sandvik in local currencies and that it was, in the view of Sandvik, the responsibility of the authorities of the United States to determine the appropriate exchange rates and to consider the impact of exchange rates on local prices.

3.53 The United States explained that the exchange rates used by the Department of Commerce when making currency conversions were those published by the United States Customs Service and in effect on the date of sale of the product subject to investigation. These exchange rates were certified by the United States Federal Reserve Board. The rates were set quarterly, unless the daily exchange rate fluctuated by more than 5 per cent from the quarterly rate. The Department made special allowances when an exporter could demonstrate that it had made a real effort to follow exchange rates in its pricing. Sandvik had made no such effort. Sweden misstated the standard in the Agreement for anti-dumping investigations by trying to place a burden on the investigating authority to scout out the proper adjustments and allowances and grant them regardless of whether a respondent requested that such adjustments and allowances be made. The correct

Department of Commerce had decided to include Sandvik's sales to the third-country company among its sales to the United States for the purpose of price comparison because, by the terms of Sandvik's contract with the third country party, Sandvik knew and, in fact, expressly provided that the products were to be sold only in the United States. Under section 772(b) of the United States Tariff Act of 1930, as amended, the "United States purchase price" was defined as

> "the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from the manufacturer or producer of the merchandise for exportation to the United States."

The legislative history accompanying this provision indicated that, when a producer knew that a product was intended for sale to an unrelated purchaser in the United States under terms of sale fixed on or before the date of importation, the producer's sale price to an unrelated

in suggesting that the Department of Commerce had not adjusted for differences in circumstances of sale; the Department had made adjustments for such differences for all of the sales to the United States where such adjustments had been claimed and proven.

Issues Relating to the determination of injury by the USITC (Article 3)

3.58 Sweden contested the consistency with the Agreement of the injury determination of the USITC principally on the ground that the USITC had not demonstrated a causal relationship between the allegedly dumped imports from Sweden and the material injury to a domestic industry. This failure to demonstrate a causal relationship was the result of (1) the USITC's failure to meet the requirements of the Agreement with respect to the analysis of the volume of the dumped imports, (2) the USITC's failure to demonstrate significant price undercutting, (3) the absence in the USITC determination of factors related to the imports from Sweden other than volume and price undercutting which explained how the imports had caused material injury and (4) an inadequate analysis of the impact of the imports upon the domestic industry.

3.59 The United States considered that the USITC had demonstrated a clear causal relationship between the dumped imports and material injury suffered by the domestic industry and that the evidence in the record strongly supported the agency's determination. Therefore, that determination was fully consistent with Article 3 of the Agreement. In specific, the existence of a causal relationship was supported by evidence of (i) the volume of Sandvik's imports throughout the period of investigation, particularly from 1985 to 1987, (ii) significant price undercutting by the imports and (iii) other factors enunciated in Article 3, including significant price suppression or depression. In addition, the USITC's determination contained a thorough analysis of the impact of the imports on the domestic industry.

(1) Volume of the imports

3.60 Sweden drew the attention of the Panel to the following statement in the determination of the USITC:

> "… the significant volume of seamless pipe and tube from Sweden and the high import penetration throughout the period of investigation, combined with the pattern of underselling of these imports and the revenue lost to the domestic industry, demonstrate that these LTFV imports have caused injury to the domestic industry."[1]

Sweden contested the consistency with the Agreement of the analysis by the USITC of the volume of the imports on the following grounds. Firstly, Article 3:2 provided that, as regards the volume of imports, consideration should

In the first six months of 1987 this share had been 43 per cent compared to 48 per cent in the first half of 1986. Sweden considered in light of these data that the relevant imports had showed a decreasing trend in absolute terms as well as

TABLE 2

Imports of Seamless Stainless Steel Pipes and Tubes
as Percentage of Domestic Shipments and Production

Integrated Producers and Redrawers

	Shipments	Production
1984	51.06%	52.07%
1985	40.41%	42.45%
1986	48.07%	46.88%
Int/1986	43.00%	42.26%
Int/1987	33.99%	32.87%

Integrated Producers Only

	Shipments	Production
1984	71.49%	73.79%
1985	57.51%	62.27%
1986	72.77%	70.52%
Int/1986	63.37%	63.40%
Int/1987	49.65%	48.44%

Several conclusions could be drawn from these figures. Firstly, Sandvik's import penetration relative to domestic producers' shipments and production had been high throughout the period of investigation, growing sharply in the last full year of the investigation period and dropping off, as the USITC had found, only after provisional duty deposits began to be collected by the United States authorities. Secondly, the pattern of import penetration relative to domestic producers' shipments and production reflected the pattern of import penetration

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other economic indicators. For example, domestic consumption of seamless stainless steel pipes and tubes in the United States had been low in 1983, compared to the level of consumption in 1984. Thus, the absolute increase of the volume of imports from 1983 to 1984 had to a large extent been the result of increased domestic consumption. There had been no reason for Sandvik to deviate from the investigation period as defined by the USITC. All questions to which the company had been requested to answer had related only to the period 1984-June 1987. In order for a respondent to have adequate opportunities to defend its interests, it was important that investigating authorities base their findings only on data relating to the investigation period defined by such authorities. In addition, the determination of dumping of the United Sates Department of Commerce had been based on an investigation covering the period May-October 1986. If data for 1983, i.e. three years before the alleged dumping had taken place, were to be considered relevant, this would certainly be

(2) Price Undercutting (Article 3:2)

3.69 Sweden drew the Panel's attention to the following statement in the determination of the USITC:[1]

> "As the record reveals, there were eleven orders of seamless pipe and tube placed from 1985 to 1987, that were reported by purchasers during this investigation and the final cvd investigation and that involved competition between the domestic product and the imports from Sweden. Of these, seven were awarded to Sandvik. In these seven orders, the price of the Swedish imports were 8 to 15 per cent below the quoted domestic prices."

Given that

competition between many of the imported and domestic products. The USITC had ignored this lack of competition, despite Sandvik's claim that it did not compete with domestic producers in the United States over a large range of products. Sweden made a number of observations in support of its view that the evidence on the basis of which the USITC had arrived at its finding of

to buy it.[1] In addition, the investigation had revealed that the Swedish product had also undersold the domestic product in eight out of the eleven instances reported relating to orders of redraw hollows. However, the USITC had not relied on this information in reaching its determination.[2]

3.74 Regarding the number of price comparisons made by the USITC, the United States argued that Sweden was factually incorrect in suggesting that the USITC had in fact investigated a larger number of comparisons than described in the Report. Table 26 of the Report and the accompanying text described all of the reported bid price comparisons obtained by the staff of the USITC from purchasers and the Report described fully and precisely the data sought and obtained by the USITC from purchasers.[3] The USITC had sought from large purchasers in the United States bid price information from which to make price comparisons.[4] It had requested bid price data for the two largest volume purchases made during 1986 and 1987 of two different kinds of seamless pipes and tubes - mechanical tubes and redraw hollows - which involved competition between the imported and domestically produced products. These two products had been selected in order to obtain data for transactions on the basis of which accurate and reliable price comparisons could most likely be made which would permit compilation of the largest and most reliable data base. Specifically, data on these products had been sought because they represented more than one third of the production of either domestic producers, the Swedish exporters or both. Six large purchasers had responded to the USITC's questionnaire, collectively reporting twenty-two orders (eleven for mechanical tubing and eleven for redraw hollows) for which delivered price quotation comparisons were possible and each of which involved a purchaser's two largest purchases of the products.[5] Not all of the purchasers had reported price data for all products or all (quarterly) time periods during the investigation and some of the reported information had not been complete. Therefore, to ensure that the price comparisons reported were reliable, not all information obtained could be used. The USITC had, however, sought pricing data on a range of products and from purchasers accounting for a relatively large share of both domestic and imported product shipments. It would have been impossible for the USITC to obtain information on all of the orders placed by purchasers or filled by domestic producers or importers. Thus, the USITC collected information on as many orders as possible; these orders were selected so as to be representative of a larger number of transactions in the market place. Although, in this case the number of orders had been small relative to the total, the volume represented by the orders relied upon had been much larger relative to the total volumes shipped by Sandvik and the domestic firms. Moreover, the key to developing a reliable sample was not only size but the representativeness of the sample.

3.75 The United States explained that the USITC had requested Sandvik and the domestic producers to provide a list of their ten largest selling products.[6] The products on which various pricing data had been requested had been drawn directly from these lists. The USITC could not and did not promise any producer that it would obtain purchaser bid data on any particular product. However, it could and did maximize the chance that data were representative by preparing its questionnaires in consultation with counsel for the parties and with purchasers. Since the information reported to the USITC on the precise percentage of Sandvik's and domestic firms' sales with respect to

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precision the amount of sales accounted for by each of the products on which data had been obtained. It was clear, however, that the USITC had sought the relevant information in an objective manner and through consultation with the parties.

3.76 With respect to the argument of Sweden that it had been improper for the USITC to rely on the bid price comparisons because purchasers had not indicated that price was the only factor in their decisions to purchase the product, the United

3.79 The United States also pointed out that in its investigation the USITC had properly found that the imports subject to investigation (stainless steel pipes and tubes) corresponded to two like products

that

Sweden relied on the label "proprietary alloy" to argue that the Commission should have drawn the inference that such alloys did not compete. The record of the investigation did not support that inference.

3.81 Regarding the argument of Sweden that the number of price comparisons made by the USITC demonstrated that Sandvik's imports rarely competed with domestic products, the United States pointed out that, by using this argument, Sweden was suggesting that if a price comparison could not be reported for two products, they did not compete. The United States contested the implication of Sweden's argument that a sufficient number of price comparisons had not been presented by the USITC. The pricing data sought and obtained by the USITC were ample. Moreover, a price comparison had been reported only when the two products for which the comparison was made were as nearly identical as possible or were in fact identical. In contrast, competition between products could and did occur if the products were both "like products", i.e., if they were similar in characteristics and uses, but not identical. Thus, the two concepts were very different and should not be equated. Price comparison data were reported only if a precise product-to-product match could be made. Otherwise the comparison would be meaningless. Competition between products in the market place was a much broader concept. In effect, Sweden's criticism on this point created a no-win situation for the USITC. If the USITC was careful in reporting comparisons, Sweden would argue that there was no competition. If the USITC reported comparisons on products which were not precisely the same, Sweden would argue that the price comparisons were meaningless.

3.82 With respect to the explanation by the United States of the analysis of bid price information by the USITC, Sweden argued that, while United States used the term "seamless pipes and tubes", in fact the product for which this information had been obtained (mechanical tubing) had never accounted for more than 10 per cent of Sandvik's shipments in the United States market and was clearly distinguishable from the other products covered by the investigation. In its description of this bid price information the United States had argued that the imported Swedish product had undersold the domestically produced product in nine of the eleven cases by 8 to 15 per cent. It was interesting that Sandvik had won the order in only seven of these cases and had lost the order in two cases although in those cases the prices of the domestic product had been 10 and 14 per cent higher than the prices of the Swedish product. This raised the question of whether undercutting margins of 8 to 15 per cent were significant or were normal margins of undercutting for imported stainless steel pipes and tubes. In the Report accompanying the final determination of the USITC numerous examples had been given which showed that there were factors other than price which determined the choice by purchasers of their suppliers of seamless stainless steel pipes and

Year	Percentage
1984	13%
1985	17%
1986	15%
1987	9%

If the USITC had wanted to select data which were representative, it

in that Article should be accorded greater or less weight in an individual case. Article 3 provided that, in examining a causal link, the investigating authorities should examine a number of factors and that "no one or several of these factors can necessarily give decisive guidance." In conducting its analysis in the investigation at issue, the USITC had followed the framework established by Article 3. It had not only examined the volume of imports and evidence pertaining to the existence of price undercutting, but also declining prices, lost revenues and the impact of the imports on the domestic industry. In this case, evidence relating to all of these factors strongly supported the final determination of the USITC. For example, the USITC had examined the net weighted-average f.o.b. selling prices (unit value price series data) from producers and importers in order to evaluate price trends in the domestic market during the period of investigation, information probative on the issue of whether the subject imports had caused significant price depression or prevention of price increases.[1] The USITC had found on the basis of these data that:

> "during the period of investigation, prices of domestic seamless pipe and tube generally declined for both hot-finished and cold-rolled products".[2]

Thus, regardless of whether the evidence obtained by the USITC on price undercutting was sufficiently representative, the evaluation by the USITC of the volume and price effects of the imports under Article 3:2 was supported by the reported declining prices, evidence probative on the question of price depression and prevention of price increases caused by the imports.

3.87 Sweden pointed out that, on the basis of Table 24 in the Report of the USITC and the comments by the staff of the USITC on that Table, it could be concluded that domestic prices had been fairly stable. However, irrespective of whether the price trends for domestic products had been declining or had been stable, the determination of the USITC had not involved any analysis of the question of whether the subject imports had caused significant price depression. As demonstrated by the description in the Report of importer price trends[3] and the data on the basis of which Table 24 had been compiled, Sandvik's prices of finished pipes and tubes and redraw hollows had increased while prices of mechanical tubing had either increased or fluctuated. Even if it might be true that there had been a stagnation of prices of United States producers during the period of investigation, Sandvik's prices had increased for the majority of its products.[4] Consequently, Sandvik could not be found to have caused price suppression or price depression.

(4) Other factors related to the imports of Sweden

3.88 Sweden considered that, in the absence of evidence of a significant increase

3.92 The United States argued that Article 3:2 of the Agreement directed that the impact of the imports subject to investigation be assessed "on domestic producers of such products". In its examination of the impact of the imports, the USITC had explicitly considered economic indicators of the condition of the domestic industry mentioned in Article 3:3 in relation to both redrawers and integrated firms. The following economic indicators of the condition of the domestic redrawers had been explicitly described by the USITC in its determination: production[1], capacity and capacity utilization[2], shipments[3], year-end inventories[4] and employment.[5] Thus, the USITC had examined for the redrawers each of the indicators with respect to which it had also examined data obtained from integrated producers. In addition, the USITC had considered data on two other indicators which included data for both redrawers and integrated producers: (1) domestic shipment data by value[6] and (2) net sales and profit-and-loss data.[7] The record demonstrated that the USITC had considered redrawer data and integrated producer data seriatim rather than in aggregate in order to avoid a potential problem of double counting shipments by integrated firms to redrawers and by redrawers to end-users (see infra, paragraph 3.93). During the investigation, the Swedish producer, Sandvik itself had explicitly urged the USITC to avoid this same double-counting problem as to shipments by Sandvik's U.S. subsidiary. Thus, it was apparent from the determination that the USITC had not excluded redrawer data. The "market share" of United States producers and the decline in that share had not been misdescribed. The USITC had discussed the market share of the domestic industry at only one point.[8] In that discussion, it had explicitly considered the market share of domestic producers to include redrawers.

3.93 The United States considered that the decision taken by the USITC to examine data for redrawers and integrated producers seriatim was reasonable and consistent with the way in which it had discussed data in other investigations involving finished as well as semi-finished products. The

value added by redrawers.[1] Indeed, the USITC had noted that redrawer value added was substantial.[2] Thus, neither the staff nor the USITC had ignored data for redrawers; in fact, such data were explicitly considered. In order to be consistent, the USITC staff had chosen to present data for other economic indicators of the domestic industry (e.g. employment, production, capacity and capacity utilization) in the same manner as the unit shipment data, i.e., data for redrawers had been presented back to back with data for integrated producers.[3] On its face, such an approach was logical because it permitted the USITC to compare different economic indicators such as employment or the level of capacity utilization for the two groups of producers from a common data base. If these data had been presented seriatim for unit shipments and in aggregate for other economic indicators such as production and employment, the USITC would have had to factor out redrawer unit shipment data in order to make a meaningful comparison among the various indicators.

3.94 In response to Sweden's challenge to the USITC's consideration of domestic industry data, the United States discussed the way in which the USITC considered information on three key economic indicators: (1) shipments; (2) production, and; (3) profitability. The USITC had examined unit shipment data for integrated producers, unit shipment data for redrawers and shipments by value of both integrated producers and redrawers (including redrawer value added). The data had shown that unit shipments by integrated firms had declined during each year of the period of investigation, that redrawer unit shipments had risen by approximately 7 per cent from 1984 to 1986, had fallen by almost 10 per cent from interim 1986 to interim 1987,

which, as the USITC had noted, was the year in which Babcock had ceased its production. In view of these figures, the statement by the USITC that the industry's profitability had been "generally low" was reasonable and fully supported by the record of the investigation. Finally, the USITC had noted that profits had dropped precipitously, in interim 1987, falling more than 50 per cent.

3.95 Sweden considered that the problem of double-counting, which had led the USITC to present certain data for integrated producers and redrawers seriatim could not be considered a sufficient ground for the USITC not to include redrawer data in its analysis of the impact of the imports on the domestic industry as defined by the USITC. The mere existence of data on redrawers in the footnotes to the text of the determination did not prove that these data had been included in the analysis by the USITC. In this respect it was significant that each time the USITC had discussed the Swedish market share, it had done so on the basis of market share defined in terms of quantities. This

pointed to available data on the evolution of the production capacity of integrated producers. This capacity had decreased from 21,3000 ST in 1984 to 18,300 ST in 1985 and 15,300 ST in 1986. At least 3,000 ST of this decline was accounted for by the cessation of production by Babcock and Wilcox. In addition, the USITC itself had stated in its determination that:

> "… the increase in profitability in 1986 is partially attributable to the departure from the industry of Babcock and Wilcox".[1]

3.97 The United States considered that Sweden's argument that Babcock's data should have been excluded from the analysis by the USITC suffered from three principal weaknesses. Firstly, the Agreement authorized a national administering authority such as the USITC to exclude from its material injury analysis data from a member of the domestic industry in only one circumstance, namely where a domestic producer was a related party within the meaning of Article 4:1(i). Sweden had not argued, and the record would not support, exclusion of Babcock's data under the related parties provision of Article 4. Moreover, the Agreement directed a national investigating authority to examine injury to a domestic industry "as a whole", rather than, as Sweden would have it, by conducting a firm-by-firm analysis. As both the 1959 Report by a group of Experts[2] and the Panel Report in a dispute between Finland and New Zealand[3] had found, an injury determination under the Agreement must be made on the

3.98 Moreover, the United States explained that the USITC had noted that Babcock and Wilcox had discontinued production of the seamless like product in August 1985 and that the data from that firm were large enough to have had a noticeable effect on domestic industry data.[1] However, the USITC had further found that despite a modest improvement in the industry's financial performance in the immediate wake of Babcock's exit from the industry, those gains had not been sustained. The industry had not recaptured most of the earlier declines in production, shipments, capacity and other factors and, in fact, most of those indicators had continued to decline following Babcock's exit particularly toward the end of the period.

3.99 Sweden explained that Babcock and Wilcox's decision to discontinue its seamless pipe and tube production could largely be attributed to the decline in its captive demand. Historically, Babcock and Wilcox provided seamless pipe and tube as part of its construction operations (project sales) for the power and petroleum industries. Because Babcock and Wilcox's pipe and tube facilities were largely dedicated to the provision of construction materials for its own project sales, it appeared as if Babcock and Wilcox never played a substantial rôle as a

to base their determination on an "objective examination" and to be consistent with the requirement of Article 3:4 that "injures caused by other factors must not be attributed to the dumped imports."

3.101 Sweden considered that the decline of the financial condition of the domestic industry in the United States in the first six months of 1987 had been a reflection of the decline in domestic consumption by 25,5 per cent from interim 1986 to interim 1987. Imports from Sweden had not increased during this period and could, therefore, not be considered as a cause of this deterioration of the

(6) Causal Relationship

Agreement and requested the Panel to find that the imposition of anti-dumping duties on seamless stainless steel hollow products from Sweden was consistent with its obligations under the Agreement.

5.2 The Panel noted that the United States had raised preliminary objections regarding some of the issues raised by Sweden with respect to the injury determination by the USITC which it considered went beyond the scope of the terms of reference of the Panel (paragraph 3.9). The Panel considered these objections and at its meeting on 25-26 May 1989 informed the parties of its views on these objections. In view of the conclusion reached in paragraphs 5.23-24, the Panel did not find it necessary to include in its Report its ruling on the preliminary objections raised by the United States.

5.3 The Panel noted that both parties had submitted a number of general arguments as to the appropriate standard

5.6 The Panel observed that under the Agreement the initiation of an anti-dumping investigation is subject to the following requirements, laid down in Article 5:1:

> "An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry[9] affected. The request shall include sufficient evidence of (a) dumping; (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Code; and (c) a causal link between the dumped imports and the alleged injury. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request they shall proceed only if they have sufficient evidence on all points under (a) to (c) above."

The last sentence of this paragraph was irrelevant to the case under consideration because there clearly had been "a written request" for the initiation of an investigation. This written request had been filed not "by" but "on behalf of" a domestic industry in the United States. This was, for instance, reflected in the text of the notice of the preliminary affirmative determination by the Department of Commerce. Furthermore, in the course of the proceedings before the Panel, the United States had never argued that the written request had been filed "by", rather than "on behalf of" a domestic industry in the United States.

5.7 The Panel further noted that footnote 9 to Article 5:1 of the Agreement referred to the definition of industry in Article 4. Paragraph 1 of this Article defines the term "domestic industry" as "… the domestic producers as a whole of the like products or (…) those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products …". Iproducts

5.10 The Panel then turned to the question of whether Article 5:1 must be interpreted to require investigating authorities to satisfy themselves before initiating an investigation, in a case where a written request for the initiation of an investigation has been made allegedly on behalf of a domestic industry, that the request in question has indeed been made on behalf of that industry. The

5.14 Regarding the argument of the United States that the request for the opening of an investigation "on its face" supported the initiation of an investigation on behalf of a domestic industry, the Panel first considered the points made by the United States that were relevant to the significance of the market shares of the members of the Specialty Tubing Group who produced products like the imported product identified in the complaint. The Panel noted that the Specialty Tubing Group included six domestic producers of stainless steel hollow products; four of these producers produced weld

5.18 The Panel noted the statistical information provided by the United States regarding the degree of support for the investigation expressed by the domestic producers of stainless steel hollow

the Panel was of the view that in the case before it there was no need to make findings on the determinations of dumping and injury by the relevant authorities of the United States in order for the Panel to be able to make a finding on the consistency with the Agreement of the imposition of the definitive anti-dumping duties. In this respect, the Panel also took into account that, should the United States initiate a new investigation on the same products imported from Sweden, the determinations of whether dumping and injury existed in respect of such imports would necessarily be based on facts relating to a period different from the period covered by the determinations of dumping and injury contested by Sweden in the proceedings before the Panel. Accordingly, while the Panel had examined in detail the issues raised by Sweden with respect to these determinations of dumping and injury made in the investigation under consideration, it decided not to make findings on these issues.

Conclusions

5.23 The Panel concluded that the initiation, announced on 17 November 1986, by the United States of an anti-dumping investigation of imports of stainless steel hollow products from Sweden was inconsistent with the obligations of the United States under the first sentence of Article 5:1 of the Agreement. As a consequence, the imposition of anti-dumping duties by the United States