

SWEDISH ANTI-DUMPING DUTIES

*Report adopted on 26 February
L/328 - 3S/81*

INTRODUCTION

1. The Panel on Complaints examined with the representatives of Italy and Sweden the complaint of the Italian Government that the Swedish anti-dumping regulations were not consistent with the obligations of Sweden under the General Agreement and that the administration of these regulations impaired the benefits which should accrue to Italy under that Agreement¹. The Panel heard statements from the two parties and obtained from them additional information to clarify a number of points. On the basis of that documentation, the Panel considered if and to what extent the Swedish Royal Decree of 15 October 1954 regarding the levying of anti-dumping duties with respect to the importation of ladies stockings of nylon or similar synthetic fibres was consistent with the provisions of the General Agreement. It considered further whether and to what extent the administration of that decree had actually impaired the benefits accruing directly or indirectly to the Government of Italy under General Agreement. Finally, the panel agreed on the text of a recommendation which, in its opinion, would best assist the Italian and Swedish Governments in arriving at a satisfactory adjustment of the question submitted by Italy to the CONTRACTING PARTIES.

FACTS OF THE CASE

2. On 29 May 1954, the Swedish Government introduced anti-dumping duties on the importation of nylon stockings. In accordance with this Decree, an anti-dumping duty was levied whenever the invoice price was lower than the relevant minimum price fixed by the Swedish Government, the importer being entitled to obtain a refund of that duty if the case of dumping was not established. The Italian complaint was related to that Decree. However, a new decree was issued on 15 October 1954, i.e. before the Italian complaint was considered by the CONTRACTING PARTIES. The main difference between the new decree and the preceding one was that the basic prices were no longer a determining factor for the assessment of the anti-dumping duty but were retained as an administrative device enabling the Swedish Customs Authorities to exempt from anti-dumping enquiries any consignment the price of which was higher than the basic price; the actual determination of dumping policies and the levying of anti-dumping duty were related to the concept of normal value which was defined in terms similar to those of Article VI of the General Agreement. The anti-dumping duty is assessed in relation to the basic price only when that price is lower than the normal value of the imported product.

3. In spite of the changes introduced in the Swedish regulations, the Italian Government maintained its complaint on the ground that, even though the basic prices had become an administrative device, the maintenance of that system was inconsistent with Article VI and other provisions of the Agreement and the administration of that system had in effect impaired benefits which should accrue to Italy under the General Agreement.

¹L/215.

ALLEGED INCONSISTENCY OF THE SWEDISH DECREE WITH THE PROVISIONS
OF PARAGRAPH 1 OF ARTICLE I AND OF ARTICLE VI

4. The Italian delegation contended that the system of basic prices, as an anti-dumping procedure, represented by itself an infringement of the provisions of the General Agreement for the following reasons:

- (a) it discriminated against low-cost producers and deprived them of the competitive advantages to which they were entitled under the general most-favoured-nation clause;
- (b) that system did not take into account the differences existing in the various exporting countries or the actual price differences between the various qualities of goods on the exporting market; the fixing of uniform prices irrespective of the country of supply and the averaging of different prices of products could not be reconciled with the provisions of Article VI of the General Agreement;
- (c) the official character of these basic prices would tend to influence unduly the decisions by the Customs Authorities and render ineffective the formal protection which the decree appeared to afford to exporters by providing that the levying and assessment of anti-dumping duties would be related to normal prices as defined in Article VI of the General Agreement;
- (d) in those circumstances, the basic price system would tend to become a system by which minimum prices are imposed for the admission of imported goods whether there is dumping or not; this type of protection against efficient producers would deprive low-cost exporters of the price advantage which they enjoy when the protection is administered through a most-favoured-nation tariff, and change fundamentally the conditions of competition which Italy could reasonably have expected to be protected by the General Agreement.

5. In this connection, two further arguments were advanced by the Italian representative, namely that the Decree reverses the onus of the proof since the customs authorities are authorized to prevent the import of goods without establishing even a *prima facie* case of dumping. The importer is in effect prevented from clearing the goods without delay or added costs and is placed at a legal disadvantage by that administrative technique. Finally, the Swedish Decree does not provide for the exemption or refund of duties or taxes in the importing country as is required in paragraph 4 of Article VI of the General Agreement.

6. The Panel considered these various contentions in detail and came to the conclusions which are summarized in the following paragraphs.

7. Regarding the alleged discrimination against low-cost producers, the Italian argument was as follows: it is agreed that the cost of production of nylon stockings is different in the various supplying countries. In the absence of anti-dumping duties, the low-cost producer has a substantial price advantage as compared with the high-cost producer. If the high-cost producer subsidizes its exports to the extent necessary to bring down its export price to the level of the Swedish price, he would not be affected by the Swedish anti-dumping regulations. On the other hand, the low-cost producer, if his normal price was equal to or lower than the Swedish basic price, would have lost his price advantage if he were to sell without dumping. If, in order to meet the changed conditions of the competition, he were to resort to dumping practices, he would have to pay in full the anti-dumping duty, even if the amount of dumping in his case were much lower than in the case of the high-cost producer. The Italian Government considered that this would amount to a discrimination against the low-cost producer.

8. The Panel considered that this argument was not entirely convincing. If the low-cost producer is actually resorting to dumping practices, he foregoes the protection embodied in the most-favoured-nation clause. On the other hand, Article VI does not oblige an importing country to levy an anti-dumping duty whenever there is a case of dumping, or to treat in the same manner all suppliers who resort to such practices. The wording of paragraph 6 supports that view. The importing country is only entitled to levy an anti-dumping duty when there is material injury to a domestic industry or at least a threat of such an injury. If, therefore, the importing country considers that the imports above a certain price are not prejudicial to its domestic industry, the text of paragraph 6 does not oblige it to levy an anti-dumping duty on imports coming from high-cost suppliers, but, on the contrary, prevents it from doing so. On the other hand, if the price at which the imports of the low-cost producers are sold is prejudicial to the domestic industry, the levying of an anti-dumping duty is perfectly permissible, provided, of course, that the case of dumping is clearly established.

9. The Panel recognized however that the basic price system would have a serious discriminatory effect if consignments of the goods exported by the low-cost producers had been delayed and subjected to uncertainties by the application of that system and the case for dumping were not established in the course of the enquiry. The fact that the low-cost producer would thus have been at a disadvantage whereas the high-cost producer would have been able to enter his goods freely even at dumping prices would clearly discriminate against the low-cost producer.

10. As regards the second argument relating to the fact that the basic price system is unrelated to the actual prices on the domestic markets of the various exporting countries, the Panel was of the opinion that this feature of the scheme would not necessarily be inconsistent with the provisions of Article VI so long as the basic price is equal to or lower than the actual price on the market of the lowest cost producer. If that condition is fulfilled, no anti-dumping duty will be levied contrary to the provision of Article VI. The Swedish representative stressed that the basic prices were fixed in accordance with that principle. (See also paragraph 22 below.)

11. The second part of the Italian argument is the effect that the basic price system groups the various types of stockings into categories and that the average price for each category differs from the actual price for the various products included in the same category. As an example, the Italian representative indicated that the Swedish Decree provides for the price of 46 Sw. crowns for the 60 gauge stockings and for 40 crowns for the 51-54 gauges, a differential of 6 crowns which is substantially different from the actual price differential on the Italian market which does not exceed 2 Sw. crowns. In those circumstances, the administration of the system cannot guarantee that only consignments of dumped goods would be subjected to an enquiry. If the price of 40 crowns is correct for the 51-54 gauges, the price of 46 crowns for the 60 gauge would be too high, and the consignments of 60 gauge stockings would be delayed or subject to uncertainties for an indefinite period although the goods would have been exported at a normal price.

12. As regards the contention that the official character of the basic prices would unduly influence the actual decisions on alleged anti-dumping practices, the Panel was not in a position to come to any definite conclusion since no evidence was submitted by either party regarding the way in which individual cases have been settled. In view of the fact, however, that, before October, the basic price was actually used as a determining factor and of the statement by the Swedish representative that the basic prices have been fixed by the Swedish authorities as a result of an official enquiry, it would be reasonable to suppose that the customs authorities would be guided to a large extent by those basic prices. Since, however, the determining factor would be in any case the domestic price in the exporting country, if it is lower than the basic price, the Decree would not be inconsistent with the General Agreement if it were applied correctly.

13. The further contention that the basic prices would in effect prevent any import of the product except at a price which would be fixed arbitrarily by the Swedish authorities and might, therefore, nullify any price advantage which low-cost exporters should enjoy did not appear to the Panel to be conclusive if it is assumed that the system would apply to cases of dumping. Of course, if the system were to be applied when the case of dumping is not established, that particular technique might be more prejudicial to the interests of low-cost producers than other anti-dumping techniques.

14. In this connection, the Swedish representative pointed out that the ordinary customs duties for nylon stockings were comparatively low, and that the Swedish Government did not make use of its right to raise the rate to the level of 25 per cent at which it had been bound. The Italian representative pointed out that, if the Swedish industry were suffering from competition from low-cost producers, such as Italian producers, the Swedish Government would be entitled, under the General Agreement, to raise its customs duties. The Italian Government would raise no objection to such a measure, as it would not deprive Italy of its competitive advantage over other suppliers.

15. The Panel then considered the argument developed by the Italian representative to the effect that the Swedish Decree reversed the onus of the proof since the customs authorities can act without being required to prove the existence of dumping practices or even to establish a *prima facie* case of dumping. The Panel considered that it was not competent to deal with the legal rules which may exist in Sweden regarding procedures before customs authorities or the courts. On the other hand, it was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts had been established. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged.

16. Finally, the Panel noted that there was no disagreement between the parties concerned regarding the obligation to take account of legitimate refund of duties or taxes. The Swedish representative indicated, on behalf of his Government, that the Decree would be applied in a manner fully consistent with the provisions of paragraph 4 of Article VI of the General Agreement. As soon as the Swedish Authorities come to a final conclusion regarding the application of paragraph 4 to the Italian refund of taxes and duties – and it is expected that this examination will be completed by the middle of March – the Swedish Government would be prepared to adjust its procedures to take into account such exemptions or refunds which were consistent with Article VI, for such case as may be outstanding and for any future case, provided that the Italian exporters indicate clearly the amount of these refunds on their invoices.

17. The general conclusion of the Panel regarding the consistency of the Swedish Decree with the obligations of the Swedish Government under the General Agreement was:

- (a) that the basic price system was not inconsistent with the most-favoured-nation clause or with the provisions of Article VI,
- (b) but that, in practice, the administration of that system might easily run into conflict with those obligations.

Unless the customs authorities were prepared to decide on the alleged case of dumping in a matter of days after arrival of the consignment, and unless the basic prices were constantly kept under review to make sure that they did not exceed the actual prices prevailing for all the varieties of stockings on the domestic markets of the most efficient producer, there was a certain danger of discrimination against low-cost producers in individual cases. Constant supervision of the operation of the scheme would also be necessary in order to avoid that it might be turned into a general protection against low-cost producers, even in the absence of dumping practices.

ALLEGED NULLIFICATION OR IMPAIRMENT OF BENEFITS ACCRUING
TO ITALY UNDER THE GENERAL AGREEMENT

18. The Panel next considered whether the administration of the Decree had actually caused a serious injury to Italian commercial interests, and whether such an injury represented an impairment of the benefits accruing to Italy under the General Agreement.

19. On the basis of the data submitted by the Italian representative, exports of Italian nylon stockings to Sweden decreased to an appreciable extent after the introduction of anti-dumping duties; the reduction affected more particularly the types of stockings which had been submitted to anti-dumping enquiries. Moreover, the amounts of stockings submitted to those enquiries represented about one half of the total export of Italian stockings to Sweden. The Italian representative indicated that the existence of the basic price system has had the effect, not only of causing delays in the clearing of consignments, but also of making Swedish importers reluctant to pass any orders in view of the delays and the uncertainties involved in the procedure.

20. The Italian representative stressed that it took a long time (up to 6 to 7 months) for the Swedish authorities to take a decision and assess the anti-dumping duty. Such delays of course made the operation of the system particularly damaging for exporting countries. The Swedish representative stated that those delays were due to the fact that the customs procedure was quite new and that the customs authorities as well as the importers had no previous experience in dealing with such cases, that some delay had also been occasioned by the changes made in the earlier Decree and the entry into force of a new Decree on 15 October 1954, but that most of the cases outstanding had now been settled.

21. The Panel recommended that the Swedish customs authorities should endeavour to settle these cases within 20 days, on the understanding that such time limit would not cover the appeal proceedings before an ordinary court. The Swedish representative was prepared on behalf of his Government, to accept that recommendation.

22. Apart from the damage caused by those delays, the Italian delegation contended that the main injury suffered by exporters was due to the fact that the Swedish Government was levying an anti-dumping duty on Italian stockings although it had not established that the export prices of the Italian exporters were less than the normal value of those products as required in Article VI of the GATT. The Panel agreed that if the Swedish Decree was being applied in such a manner as to impose an anti-dumping levy in the absence of dumping practices, the Italian Government would be deprived of the protection it would reasonably expect from the terms of Article VI of the Agreement and that it could claim an impairment of benefits.

23. The Swedish representative stated that it appeared doubtful to his delegation that the CONTRACTING PARTIES could consider that question and that it was the right of the national authorities to decide whether dumping had really taken place. The Panel agreed that no provision of the General Agreement could limit in any way the rights of national authorities in that respect. But, for the reasons set forth in paragraph 15 above, it would be reasonable to expect from the contracting party which resorts to the provisions of Article VI, if such action is challenged, to show to the satisfaction of the CONTRACTING PARTIES that it had exercised its rights consistently with those provisions. The Panel felt therefore that, in order to decide whether Italy had suffered an impairment of benefits, it would be appropriate and necessary to examine whether a case had been made out that Italian stocking exporters had resorted to dumping practices.

24. The Swedish representative indicated that, on the basis of extensive investigations, "the Swedish authorities had established that the normal value of the stockings in question considerably exceeded the invoice prices charged for stockings exported to Sweden". As, however, no definite evidence had

been brought forward to support that conclusion, the Panel tried to consider this question in detail on the basis of the factual data obtained from both parties.

25. The Italian representative submitted to the Panel the export prices charged for the "types" of stockings exported to Sweden as well as the official price lists for the sale of those types on the Italian market. These data showed that, if the comparison were limited to the same types, the export prices to Sweden, even without allowing for any refund of duties or taxes, were not lower than the prices charged on the Italian market, but that both sets of prices were substantially lower than the Swedish basic prices.

26. The Swedish representative considered, however, that such a comparison was not justified for the following reasons: although the stockings exported to Sweden were of the so-called "unmarked" variety and stockings of the same variety were sold on the Italian market, the structure of the Italian market was such that those stockings, when they were sold with a trademark, fetched prices substantially higher than if they were "unmarked". Under those circumstances, the Swedish authorities felt that the Italian producers could afford to sell unmarked stockings on the domestic market at less than the normal price and recoup themselves with the additional profits which they could make on the sale of stockings with a trademark, as the difference in prices was greater than would be justified by cost differences. Accordingly, they decided to calculate the normal price on the basis of a weighted average between the prices of the "unmarked" and "marked" stockings of the same variety.

27. The Italian delegation contended that it would not be consistent with Article VI to compare one product with another type of product, or with a group of like and unlike products. In any case the Swedish argument would not apply to those producers who do not sell stockings with a trade mark in Italy. Since 9 out of the 15 producers who export to Sweden do not sell stockings with trade marks in Italy, those producers would not even have the means of indulging in the financial operation suggested by the Swedish authorities.

28. The Panel was of the opinion that if the Swedish authorities considered that it was not possible to find "a comparable price in the ordinary course of trade for the like product when destined for consumption in the exporting country", no provision in the General Agreement would prevent them from using one of the other two criteria laid down in Article VI.

29. The Swedish representative indicated that his Government could not rely on the second criterion which involved a comparison with the export prices to third countries as the Swedish delegation sent to Milan to enquire into this matter had not been in a position to obtain relevant data from the Italian manufacturers. The Italian representative explained that this lack of success was not surprising, since the Swedish delegation included two Swedish manufacturers and the Italian manufacturers were naturally reluctant to disclose confidential information to competitors.

30. The Panel concluded that, in effect, the Swedish authorities were relying on the third criterion which related to the cost of production. The Panel felt that the use by the Swedish authorities of a weighted average as between the Italian prices could only give a rough estimate of the normal price and that if this approach were retained, it would be reasonable to expect that, if the average included not only the "unmarked" and "marked" first choice stockings of a given type, but also the second and third choices of the same type, the results would be more accurate.

31. In order, however, to see what results the method of calculation adopted by the Swedish authorities would give in a specific instance, the Panel asked the Swedish representative if he could give the actual details of the calculation for one type of stockings. The Panel then compared the data used by the Swedish representative with the official price lists which were used for that calculation and came to the conclusion that, probably through some misunderstandings on a few points, the two sets of figures were difficult

to reconcile and that these misunderstandings might explain to a certain extent the divergence of views between the two governments regarding the alleged existence of dumping practices.

32. The Panel felt, therefore, that before it could come to any definite conclusion regarding the difference, if any, between the Italian export prices and the comparable prices on the Italian market, it would be appropriate for the two delegations to try and clarify the facts on which the determination of dumping was based. In its opinion, the best way to arrive at some understanding on this point would be for the Swedish Government to send to Italy a responsible official who, by his functions, would be under an oath of secrecy, and to whom the Italian Government could guarantee free access to the books of the exporters. If such a procedure were acceptable to both parties, and if the Swedish authorities had arrived at definite conclusions regarding the extent to which allowance should be made for the refund of taxes or duties, when the enquiry suggested would be completed, the Panel believes that it would be comparatively easy for the two parties to agree on what is the correct normal price for stockings in Italy, and to determine whether there are any dumping practices as defined in Article VI of the General Agreement. If, however, disagreement should subsist, the Italian Government would be free to refer the matter again to CONTRACTING PARTIES.

33. In the light of the considerations set out above, the Panel suggests to the CONTRACTING PARTIES that it would be appropriate for them to make a recommendation to Italy and Sweden in accordance with the second sentence of paragraph 2 of Article XXIII. That recommendation should aim at expediting the anti-dumping procedure in Sweden in order to minimize the adverse effects on Italian export trade and at improving the administration of the basic price system, in order to eliminate some of the objections raised by the Italian Government. Accordingly, the Panel submits the following recommendation to the CONTRACTING PARTIES for the consideration and approval:

RECOMMENDATION¹

Having investigated, in accordance with Article XXIII, the complaint of the Italian Government concerning the Swedish Decree regarding the levying of anti-dumping duties on nylon stockings and the manner in which this Decree has been applied with respect to the Italian exports,

The CONTRACTING PARTIES

Approve the Report of the Panel and the suggestion contained therein, and

Recommend:

- (a) that the Swedish Government consider ways and means of improving the administration of the Decree of 15 October 1954 so as to minimize the delays and other impediments to the exports of Italian nylon stockings to Sweden;
- (b) that the Governments of Italy and Sweden make the necessary arrangements to facilitate an enquiry by the Swedish authorities to clarify the various points of fact on which the two governments hold different views, with a view to determining whether Italian nylon stockings are being exported to Sweden at a price less than their normal value and that they take such action as may be necessary in the light of those conclusions, and

¹Adopted together with the Report.

- (c) that the two parties report to the CONTRACTING PARTIES at the Tenth Session or, should it be necessary, to the Intersessional Committee which is hereby authorized to take such action as may be appropriate in the circumstances.