

# GENERAL AGREEMENT ON

RESTRICTED

ADP/M/34

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## TARIFFS AND TRADE

Special Distribution

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### Committee on Anti-Dumping Practices

#### MINUTES OF THE MEETING HELD ON 4 OCTOBER 1991

Chairman: Mr. Didier Chambovey (Switzerland)

1. The Committee on Anti-Dumping Practices ("the Committee") held a special meeting on 4 October 1991 for the purpose of conciliation under Article 15:3 of the Agreement<sup>1</sup> in a dispute between the United States and Korea regarding anti-dumping duties imposed by Korea on polyacetal resins from the United States.
2. The Chairman noted that, while a request for the establishment of a panel had been received from the delegation of Norway (ADP/65), that delegation had informed him that it wished this matter to be taken up at the next regular meeting of the Committee.
3. The Committee took note of the Chairman's statement.

#### Korea - Anti-Dumping duties on imports of polyacetal resins from the United States - Request by the United States for conciliation under Article 15:3 of the Agreement

4. The Chairman drew the Committee's attention to document ADP/64 and Add.1 which contained a request received from the delegation of the United States for conciliation pursuant to Article 15:3 of the Agreement with regard to anti-dumping proceedings in Korea on imports of polyacetal resins from the United States. Definitive anti-dumping duties had been imposed by the Korean authorities on 14 September 1991 and bilateral consultations between the United States and Korea, held both before and subsequent to the entry into force of these duties, had apparently failed to result in a mutually satisfactory resolution of this matter.

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<sup>1</sup>The term "Agreement" hereinafter means Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

5. The representative of the United States explained that his authorities had decided to request conciliation before the Committee regarding the affirmative determination of injury made by the Korean Trade Commission (KTC) in the anti-dumping investigation concerning polyacetal resin imported from the United States and Japan. This determination departed from the standards set forth in the Agreement and was therefore, as a matter of law, inconsistent with Korea's obligations under the Agreement. The relevant standards in the Agreement which had not been observed in this case were the following. First, Article 3:1 required that a determination of material injury "involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products". Second, Article 3:2 provided for a requirement to "consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country" and required that consideration be given to "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product in the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree, or prevent price increases, which otherwise would have occurred, to a significant degree". Third, Article 3:3 required that investigating authorities take into account "all relevant economic factors and indices having a bearing on the state of the industry, such as actual and potential decline in output, sales, market share, profits, productivity, return on investments or utilization of capacity, factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, employment, wages growth, ability to raise capital or investments". He emphasized that his delegation was not seeking to second-guess the factual conclusions drawn by the KTC or to substitute its own judgement, or that of the Committee, for that of the KTC. Rather, his authorities were concerned that the KTC's determination was based on an analysis which included certain presumptions and assumptions and which was contrary to the legal requirements of the Agreement.

6. To explain his delegation's views on the injury determination made by the KTC, the representative of the United States noted as an example that the KTC had stated that it was normal for the products of a new domestic producer to replace those of established importers - in short, for there to be a process of "import substitution". Thus the KTC had ignored the rapid growth in production and market presence enjoyed by the domestic industry. Other questionable aspects of the injury determination of the KTC included the fact that the KTC had relied heavily on a break-even profit level for the domestic industry that was not being met as a major element of its injury determination. However, this break-even level had been calculated on the basis of a materially erroneous production capacity figure. The error in the calculation was manifest from the record of the investigation. Equally puzzling was the KTC's presumption that the Korean domestic industry could not increase its profitability through declining raw material prices, despite the acknowledgement by the KTC that reduced raw material costs had results in higher profits. In addition, the KTC had

attributed injury to the imports despite its apparent recognition that industry losses were attributable to exchange rate losses, a factor which had nothing to do with import competition. In sum, the KTC determination had not properly applied the factors identified in the Agreement for a determination of whether dumped imports are a cause of material injury and had substituted a different standard, not sanctioned by the Agreement. He concluded by saying that his authorities had had, and hoped to continue having, consultations with the Korean authorities regarding the determination of injury made by the KTC in this case.

7. The representative of Korea expressed his country's support for the conciliation process under Article 15:3 of the Agreement as a means to conduct a frank and open exchange of information regarding anti-dumping procedures followed by Parties to the Agreement and to reach an understanding regarding any possible concerns with respect to such procedures. In the matter presently before the Committee his delegation had consulted bilaterally with the United States on 21 July and 30 September 1991. Consultations with Japan had taken place on 2 October 1991 and it had been agreed that further consultations would be held with Japan. He firmly believed that an acceptable understanding could be reached with the United States and Japan with respect to the polyacetal resin case. His delegation had carefully reviewed the questions and concerns raised by the United States and Japan and believed that, once the Committee had had a chance to fully consider his delegation's response to these questions and concerns, it would better understand the basis of the injury determination of the KTC and agree that the KTC had used transparent and fair administrative procedures and had properly considered the factors identified in the Agreement for injury determinations.

8. The representative of Korea pointed out that the determination made by the KTC had been a close one. While reasonable minds could differ regarding the outcome reached, the question for consideration was not whether another outcome was conceivable but whether the determination properly rested upon positive evidence concerning the factors set forth in the Agreement. Viewed from this perspective, there was ample support for the determination made by the KTC in the case under consideration. It also had to be borne in mind that the Agreement did not specify how the different factors relevant to an injury determination should be weighed and did not indicate that any given factors should be considered dispositive. To the contrary, the Agreement specifically provided that "no one or several of these factors can necessarily give decisive guidance". Thus, in each case, the investigating authority had to consider the relevant economic factors in light of the individual circumstances affecting the market and industry in question, provided that the determination itself was not inconsistent with the Agreement.

9. The representative of Korea then pointed to the following principal factors which had been taken into consideration by the KTC. The petitioner, Korea Engineering Plastics (KEP) had only recently begun production in a highly competitive and capital-intensive industry. The

profit realized by this company was not only below the average profit level in that industry but, more importantly, was inadequate to ensure that the company could continue to make the research and development investments necessary for its survival. In fact, KEP had suffered a significant net loss in the first quarter of 1990 (the last quarter of the period of investigation) and throughout its fiscal year 1990. The KTC had found that KEP had been unable to increase prices to levels adequate to assure its long-term viability because imports had caused price depression and price suppression during the period of investigation and were likely to continue to do so. While the volume of imports had declined, the volume was still significant enough to adversely affect the prices which KEP could charge. The KTC had examined evidence showing that imports from the United States and Japan were sold at prices which were sometimes substantially below prices charged by KEP and had found specific evidence of instances in which domestic prices had to be lowered to compete with imports. The KTC had considered a detailed economic analysis of an independent accounting firm in which a calculation had been made of the overall average price level necessary for KEP to reach a break-even point and had examined other data regarding price levels necessary to achieve levels of return equal to average levels of return in the chemical industry. It had found that prevailing prices were well below each of these price levels.

10. The representative of Korea further explained that, in addition to information on profits and prices, the KTC had taken into account the fact that the volume of sales realized by KEP and its rate of return on investment were insufficient to ensure the future viability of the company's operations. Account had also been taken of the overall slowdown of the demand for the product in question in 1990. As had been observed by the United States International Trade Commission (USITC), the impact of dumped imports on a domestic industry was likely to be greater in the context of decline in domestic demand for the product in question. Furthermore, the KTC had found evidence of specific instances in which sales had been lost to unfairly traded imports and had taken into account that the margins of dumping were high, ranging from 20 to 100 per cent. It had clearly been appropriate for the KTC to consider that the domestic industry would have been in a much better condition had import prices not reflected such high margins of dumping. The Agreement did not require that, in order for investigating authorities to be able to make an affirmative determination of injury, there be a negative performance of the industry with respect to each of the factors identified in the Agreement as relevant to an analysis of the impact of dumped imports on the domestic industry. Each case required a weighing of these factors in light of the circumstances of the industry under consideration. The KTC had certainly considered the high rate of capacity utilization and the increase in capacity, production, domestic shipments, employment, wages, and sales revenues. However, based on a detailed financial and economic analysis, the KTC had determined that these factors were less important compared to the fact that the profits, sales volumes and return on investment of KEP were not at a level sufficient to ensure the long-term viability of the company. Without an increase in prices which were being suppressed as a

result of the dumped imports KEP could not improve its performance to achieve long-term viability. The KTC had not applied a standard under which the presence of any competition by import prices would be sufficient to find a causal relationship between dumped imports and material injury to a domestic industry. Rather, the KTC had followed the same causation standard as used by the USITC, under which dumped imports must be "a" cause of material injury, rather than the only cause or a substantial cause of injury. In the case under consideration, there had been more than enough evidence to meet this causation standard, given the evidence on price undercutting by the imports, lost sales and revenues, substantial margins of dumping and price depression and suppression.

11. The representative of Japan noted that at the most recent regular meeting of the Committee his delegation had expressed its concerns regarding certain aspects of the procedures followed and of the injury determination made in the case under consideration which were not consistent with the requirements of the Agreement. Bilateral consultations between Korea and Japan on this matter had taken place on 2 October 1991 but on many points there was a need for further clarification. He hoped that a mutually satisfactory resolution of the matter could be reached.

12. The representative of Canada shared the views of the United States regarding the need to observe the requirements of the Agreement with respect to the examination of the price impact of dumped imports and considered that this aspect needed to be taken into account in the ongoing negotiations on anti-dumping in the Uruguay Round.

13. The representative of Australia reserved his delegation's right to express its views on the matter before the Committee at a later stage.

14. The representative of Mexico observed that the matter presently before the Committee raised an interesting question. Referring to the views expressed by the United States in another context on how issues of fact were to be addressed in dispute settlement proceedings involving determinations made by national authorities, he wondered how, if panels could not review issues of fact, disputes of the type now referred to the Committee by the United States could be resolved.

15. The representative of Finland, on behalf of the Nordic countries, Hong Kong and Singapore considered that the matter referred to the Committee by the United States illustrated the need for clearer rules with respect to the injury provisions of the Agreement.

16. The representative of the United States, responding to the comments of the representative of Mexico, observed that there was a clear distinction between questions requiring a weighing of facts and questions involving the application of legal standards. The matter under consideration in the Committee raised the question of whether legal standards, clearly articulated in the Agreement, such as the requirement to consider whether the volume of imports had increased significantly, had been applied in a proper manner.

17. The Committee took note of the statements made. The Chairman encouraged the delegations of Korea and the United States to make further efforts to arrive at a mutually satisfactory solution of their dispute, consistent with the Agreement.