

GENERAL AGREEMENT ON TARIFFS AND TRADE

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REPORT OF THE WORKING PARTY ON THE UNITED STATES/ZENITH CASE

1. The Working Party was established by the Council at its meeting of 23 May 1977 with the following terms of reference:

"To consider the decision by the United States Customs Court in Zenith Radio Corporation versus the United States and the subsequent United States action in the light of the provisions of paragraph 4 of Article VI of the General Agreement and the note to Article XVI, and to report expeditiously to the Council." (C/M/120)

2. The Working Party met on 2 and 3 June 1977 under the Chairmanship of Ambassador E. Farnon (New Zealand). It had available the texts of a communication dated 12 May 1977 submitted by Japan (L/4500) and of a statement made by the representative of Japan at the meeting of the Council on 23 May 1977 (C/W/288).

3. The Working Party took note of the following facts of the case. Under the Japanese Commodity Tax Law (Law No. 48 of 31 March 1962), a consumption tax is levied on an extensive list of consumer goods, including various electronic products. Upon exportation of these products from Japan the consumption tax is either remitted if previously paid, or the products are exempted from the payment of the tax. On 3 April 1970, the Zenith Radio Corporation, a United States producer of electronic products, petitioned the United States Secretary of the Treasury to impose countervailing duties on certain enumerated consumer electronic products exported from Japan, alleging inter alia that the tax remissions and exemptions amounted to a payment or bestowal of bounties or grants within the purview of Section 303 of the Tariff Act of 1930. On 7 January 1976, a "Final Negative Countervailing Duty Determination" was made by the Secretary of the Treasury. The decision stated that no bounty or grant within the meaning of Section 303 was being paid or bestowed upon the manufacture, production, or exportation of the Japanese electronic products concerned.

4. On 11 March 1976, the Zenith Radio Corporation filed a summons in the United States Customs Court contesting the decision of the Secretary of the Treasury. The action was instituted in accordance with Section 516 of the Tariff Act of 1930, which - since its amendment through the Trade Act of 1974 - enables American companies to obtain a judicial review of negative countervailing duty determinations.

The Court decided on 12 April 1977 that the remission and abatement of consumption taxes by the Japanese Government under Commodity Tax Law No. 48 constitute the payment of a bounty or grant within the meaning of the countervailing duty law. It also directed the Secretary of the Treasury to ascertain, determine or estimate the net amounts of the bounties or grants paid or bestowed and to order all appropriate customs officers to assess countervailing duties in amounts equal to the bounties or grants.

5. The United States appealed the case to the Court of Customs and Patent Appeals. Pending the final outcome of the judicial review, the Secretary of the Treasury directed the customs officers to suspend appraisement and liquidation of the Japanese electronic products and introduced a procedure under which entries and warehouse withdrawals can only be made if bonds in amounts equal to the estimated countervailing duties are submitted.

6. The Working Party then examined the case in the light of its mandate and the provisions of the General Agreement. It heard a statement by the representative of Japan who made the following four points.

7. First, the Japanese practice of exempting exported products from domestic consumption taxes was in full accord with the Articles of the General Agreement, in particular with Article VI:4 and the note to Article XVI.

8. Second, although the Japanese Government was aware of the fact that the United States Government had appealed the case to a higher court, it would like to stress that, if the Customs Court decision were to become final and countervailing duties were imposed on Japanese consumer electronic products by reason of the exemption from commodity taxes or remission of such taxes, the United States would clearly violate the aforementioned provisions of the GATT. Such violation would constitute a prima facie case of nullification or impairment of benefits accruing to Japan under the General Agreement.

9. Third, the court ruling and the subsequent administrative action had serious effects on the Japanese exports of consumer electronic products to the United States which, in 1976, amounted to US\$1.89 billion. The measures were giving rise to uncertainty regarding pricing and future export opportunities. Present exports were hampered by the bonding procedure instituted by the United States Treasury. The amounts of the bonds required were estimated to be in the range of US\$200 to US\$300 million according to 1976 trade figures. The premium cost for bonding insurance of 0.1 to 1 per cent of the actual bonds was estimated to be in the range of US\$200 thousand to US\$3 million. A recent United States Administration decision to allow the filing of letters of credit in lieu of bonds may, according to United States authorities, reduce this cost somewhat. Japanese traders, acting under regulations that fully conform with the General Agreement, had to bear burdens which, under the provisions of GATT, they should not be required to bear. For these reasons, the court ruling and the subsequent administrative actions were, in Japan's view, violative of the GATT.

10. Fourth, the court decision and subsequent administrative action had implications not only for Japanese exports of electronic products but for world trade in general and the MFN. Many contracting parties presently exempted exported products from internal consumption taxes or refunded such taxes. A proliferation of actions in the United States against such tax exemptions or refunds would therefore necessarily have serious repercussions.

11. The representative of the European Community said that he fully supported the views of the Japanese delegation. The Community had doubts whether the Working Party procedure was the most appropriate for cases of this kind and, if their exports had been affected, they would have invoked other procedures available under the General Agreement. In support of the view that the rebates of the commodity taxes were consistent with GATT provisions he quoted excerpts from the United States Administration Brief to the Court of Customs and Patent Appeals to the effect that the United States Treasury had since 1898 followed an interpretation that remission of such taxes was not countervailable and believed that this view was consistent with international rules. If the Court's decision were upheld, the resulting situation would, in his view, underline the disequilibrium existing between the obligations of contracting parties in this area.

12. As regards the present situation following this decision, he emphasized that the adverse effects on trade resulted not so much from the suspension of liquidation - the costs involved in the bonding procedure were not significant - but from the risk of a future supplementary charge on imports of between 5 and 20 per cent which, if applied, would be clearly contrary to GATT. Since the importer had no means of influencing the final decision whether or not he would incur such a charge, he had little choice but to adjust his prices immediately. Because of the general implications of this decision and the dangers of similar decisions in the future, other contracting parties could not take a passive attitude, especially since the Court had ruled that tax remission schemes were subsidies "as a matter of law".

13. Finally, by way of general comment, the present case illustrated the disadvantages of domestic procedures involving judicial review and consequential decisions of a quasi-automatic nature which could too easily lead to uncontrollable situations in the trade policy field. In addition, as mentioned by the Japanese delegation (C/W/288), this situation provided domestic industries with the means to harass importers by excessively invoking multiple complaint procedures relating to the same product.

14. Other members indicated support for the views expressed by the representative of Japan and also expressed concern about the United States action and its implications for world trade and the GATT system. Some of these members added that in the present situation the interests of third countries could also be adversely affected as a result of the United States action.

15. All but one member of the Working Party expressed views on the legal aspects of the matter. They agreed that the Japanese tax practices in question were in full accord with the provisions of GATT, its established interpretation as well as established practice of the GATT. They also agreed that, should the court decision be upheld finally and if countervailing duties were imposed, the imposition of such duties would be in contravention of the provisions of the GATT including Article VI:4 and the note to Article XVI, and would constitute a prima facie case of nullification or impairment of Japan's rights under the General Agreement. They further shared the view that the United States Customs Court decision and the subsequent United States action was already in violation of the GATT and was causing a serious adverse trade impact upon the Japanese exports in question to the United States.

16. The United States representative took note of the views expressed by the other members of the Working Party. He informed the other members that the decision was being appealed expeditiously by his administration and that a decision of the United States Court of Customs and Patent Appeals was expected sometime between mid-summer and early fall. With respect to the view expressed that the export rebate or remission of Japanese commodity taxes was consistent with the GATT, the United States representative noted that the note to Article XVI said "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy." He noted but declined to comment on the view that the suspension of liquidation on entries of Japanese electronic products currently in effect and any eventual assessment of countervailing duties was a nullification or impairment of benefits accruing under the General Agreement. He also noted the view that the suspension of liquidation and any eventual imposition of countervailing duties was a violation of the General Agreement, but stated that it would be inappropriate for him to comment thereon at this time.

17. The Working Party expressed serious concern regarding the implications of the United States Customs Court decision and its consequences for world trade, the MTN and the GATT system itself. In this connexion, similar concern was also expressed about the possible proliferation of action of this kind affecting other products and other contracting parties.

18. The Working Party in the light of its terms of reference and in view of the serious nature of the matter under examination requested that its report be transmitted urgently to the Council for expeditious consideration.