

**GENERAL AGREEMENT  
ON TARIFFS AND TRADE**

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**Committee on Anti-Dumping Practices**

**MINUTES OF THE MEETING**  
**HELD ON 29 APRIL 1996**

**Chairman: Mr. O. Lundby (Norway)**

1. The Committee on Anti-Dumping Practices ("the Committee") held a special meeting on 29 April 1996, called at the request of Japan in accordance with the Committee's decision ADP/132.
2. The Chairman noted that, as set forth in GATT/AIR/3715 (9 April 1996) Japan requested this special meeting to discuss the Report of the Panel in the dispute between Japan and the European Community regarding the EC's imposition of anti-dumping duties on audio cassettes originating in Japan. Subsequently the delegation of Canada requested that the Committee at the scheduled special meeting undertake conciliation in a dispute between Canada and Mexico involving Mexico's imposition of anti-dumping duties on imports of certain steel from Canada, as set forth in GATT/AIR/3716 (19 April 1996).
3. The delegate of Japan observed that this was the third time that the Panel Report in the audio cassettes dispute had been considered by the Committee. In asking Parties to support the adoption of the Report, he would not repeat the points made at previous meetings. At the meetings in June and October 1995, the EC had objected to the immediate adoption of the Report on the basis that it had not had sufficient time to consider the Report. Japan believed that the Committee had gone far enough in acceding to the EC's request for a delay and should now proceed to a decision. In particular it could no longer be credibly maintained that Parties had not had sufficient time to consider the Report.
4. Regarding the contents of the Report, he reminded Parties of the Panel's most significant conclusion, upholding Japan's criticism of the EC's asymmetrical comparison between the export price and normal value. In particular he pointed to the Panel's findings that (a) the EC by failing to make due allowance on its merits for differences in indirect selling expenses and with respect to profits related to differences in the functions performed by the seller in the domestic and export markets, which differences could affect price comparability, had acted inconsistently with its obligations under Article 2.6 of the Agreement, and (b) Articles 2.9 and 2.10 of the EC's Basic Regulation were mandatory legislation inconsistent with Article 2.6 of the Agreement because they precluded making due allowance on its merits for differences in indirect selling expenses and with respect to profits related to differences in the functions performed by the seller in the domestic and export market which differences could affect price comparability.
5. Because of the close similarity of the Code and the WTO Agreement on the issue of fair comparison between the export price and the normal value, this aspect of the Panel's Report remained significant. This consideration should by itself be sufficient to justify the adoption of the Report by the Committee. Although a number of doubts about the Report were expressed at the last meeting of the Committee, he believed that the most important consideration to be borne in mind by the Committee was one of principle. It was almost inevitable that few, if any, Reports would satisfy all parties on all particulars. Consequently, if dissatisfaction with particular points were a sufficient basis for rejecting them, few if any Reports would be adopted. Reports should be adopted whenever possible.

The notion that countries could agree to have disputes examined by Panels but then chose to adopt only those Reports which supported their own views, had fortunately been swept away by the Uruguay Round Agreement. If the Committee failed to adopt the audio cassettes Report, it would be an unfortunate reversion to outdated obstructionist practices. Therefore, Japan called on the Committee to adopt the Report.

6. The representative of the EC noted that the EC had considered the position to be taken in regard to the Report very seriously. A decision was not easy to make for two reasons. First, the Report was in part favourable to the Community, and in part not favourable. Second was the principle of effective dispute settlement, a principle for which the Community had expressed support for years. The EC was committed to this principle, even in cases like the present one which were not covered by the new system.

7. In the EC's view the Report was not satisfactory and not a fully appropriate way to deal with the point of asymmetry. This question was one of the central points in relation to the establishment and the calculation of dumping. Asymmetry had been contentious over the years, was discussed in considerable detail in the Uruguay Round negotiations, and it had not been possible to reach agreement. As a result, the text of the new Agreement was in substance identical to the Tokyo Round Code. In the EC's view, this negotiating history played a role in the interpretation of the question of asymmetry.

8. The Report found against the Community on the point of asymmetry in two respects. It concluded that the Community failed to consider making due allowance on its merits for differences in cost and profits between the two markets concerned, i.e., the market of the exporting country and the Community market. Second, the Panel found that the Community's anti-dumping legislation was inconsistent with Article 2.6 of the Code in that it contained an exhaustive list of factors for which an allowance could be made.

9. The EC had difficulties with these findings because of the underlying reasoning of part of the Report. In particular, in paragraph 371, the Panel appeared to justify its stand on the treatment of indirect costs for fair comparison purposes based on how they are treated when calculating a constructed value. This seemed to the EC based on doubtful logic. The fact that certain costs were included in the calculation of constructed normal value did not, in the EC's view, automatically mean that the same costs were to be excluded in making a fair comparison. It would simply not make sense to include them under one paragraph of the Article, and then immediately exclude them. Of course, paragraph 371 did not go as far as to say that indirect expenses must be the subject of an allowance. In fact the wording of that paragraph suggested that there were circumstances in which allowances should be refused. But there was no guidance in the Report on this matter. In paragraph 372 the Panel appeared to complicate the matter further by advocating a case by case decision on treatment of indirect expenses, suggesting that Members could not develop a consistent and transparent policy in this area. This would not be a welcome step either for anti-dumping administrations or for exporters, who would find themselves with no advance knowledge of how these expenses would be treated.

10. Paragraph 374 raised another issue of concern, because it could be read to suggest that a mere difference in cost could lead to an allowance. This would mean that there was no requirement to show that the difference affected price comparability, which, in the EC's view, was one of the basic criteria for fair comparison. The EC believed that such an interpretation would be at odds with the existing practice of all Members, and certainly would be in contradiction with the negotiating history referred to earlier. The Community would be very grateful to have some guidance from other Parties regarding how they see this issue.

11. The most controversial aspect of the Report was the assertion in paragraph 376 that certain profits should be the subject of an allowance. The Community had examined the negotiating history

of Article 2:6 and found no reference to suggest that a difference in profits was ever intended to be considered the subject of an allowance. Some delegations supported such a view during the Uruguay Round negotiations, but the suggestion was dropped early in the negotiations, which the EC believed was relevant.

12. This discussion was unfortunately a bit technical, but it was necessary to be technical to evaluate the consequences which would flow from adoption of the Report. In conclusion, given the ambiguity of some parts of the Report and the potential for conflicting interpretation by Parties, the EC did not think it would be appropriate to adopt the Report. Indeed, the EC saw a great risk that adoption of the Report would lead to more contradiction and confusion in the handling of these very difficult and very delicate matters.

13. However, the EC did accept one part of the Report, the conclusion that Article 2.6 of the Code did not provide an exhaustive list of factors for which an allowance could be made. Such an exhaustive list was in the EC's legislation, which led the Panel to conclude that it was tantamount to a *per se* exclusion of certain types of adjustments. The EC agreed that this was a problem, and as a consequence would review its legislation in this respect. In addition, the EC would take appropriate steps with regard to the measures underlying the dispute in question, the anti-dumping duties imposed by the Community on audio cassettes originating in Japan.

14. By these steps review of the legislation and appropriate steps with regard to concrete anti-dumping duties in question, the EC believed it had taken account of an important element of the Report, and believed it would eliminate the cause of the conflict through these two measures. The EC had adopted a constructive position with regard to the Panel findings, part of which gave rise to considerable concern.

15. The delegate of Hong Kong expressed the hope that the Committee could soon come to satisfactory solution on this matter. Hong Kong's views on the Panel's findings had been clearly stated at the last two meetings. Hong Kong wished to highlight a few points in relation to the Uruguay Round Anti-Dumping Agreement currently in force in view of the Tokyo Round Code. The yardstick applicable to the audio cassettes dispute was the Tokyo Round Anti-Dumping Code, which formed the basis of the Panel's findings. The implications of the Report to GATT/WTO jurisprudence could be looked at against the changes brought to the multilateral rules by the Uruguay Round Anti-Dumping Agreement. In some cases the Uruguay Round Anti-Dumping Agreement set new standards and rendered the Panel's findings overtaken by events. As regards the methodology for comparing normal value and export price, the Tokyo Round Code in Article 2 was silent. The Panel set the benchmark against the transaction by transaction comparison methodology and did not find the EC's comparison methodology objectionable *per se*. The Uruguay Round Agreement included explicit language on comparison methodology in Article 2.4.2 which provides a legal preference for average to average comparison and transaction to transaction comparison between normal value and export price during the investigation phase. This was an improvement.

16. The issue of cumulation was similar. The Tokyo Round Code contained no reference to the concept, and the Panel found cumulation by the EC not inconsistent with the Tokyo Round Code by reason of the fact that imports of the like product from two countries operated in distinct markets. On this point the Uruguay Round Agreement provided explicit rules. Whether the effects of dumped imports from different countries can be cumulated depends on, among other things, "the conditions of competition between the imported products".

17. With respect to another issue, the Uruguay Round Agreement clarified and reinforced the Tokyo Round Code, and adds weight to the Panel's findings. In considering the issue of price comparability, while the Panel did not determine whether there was an independent obligation to make a fair comparison, it nevertheless recognized that one of the objectives of the comparison rules in Article 2.6 of the Tokyo

Round Code was to ensure a fair comparison between the export price and the normal value. The Panel took this objective into account in interpreting the term "other differences affecting price comparability". The Panel found the exclusion of indirect expenses and profits related to differences in the functions performed in different markets inconsistent with Article 2.6 of the Tokyo Round Agreement. In the Uruguay Round Agreement, the first sentence of Article 2.4, the successor to Article 2.6 of the Tokyo Round Agreement, provides that "a fair comparison shall be made between the export price and the normal value". An independent obligation to conduct a fair comparison is unequivocally clear.

18. Thus the Panel's findings on this point and the Uruguay Round Agreement compliment each other in developing GATT/WTO jurisprudence. The Committee's recognition of the Panel's findings would be tantamount to an affirmation of a principle enshrined in the Uruguay Round Agreement.

19. Concerning the procedural aspects of this obligation, Article 2.4 of the Uruguay Round Agreement further provides that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. This new language clarified the burden of proof between the importing authorities and the responding parties. In Hong Kong's view Members should take seriously this obligation in implementing the Uruguay Round Agreement. As Hong Kong had made clear in the two previous meetings, it looked forward to an early adoption of the Report. Not only did the Report contain findings helpful to the development of GATT/WTO jurisprudence, although some parts might not be to Hong Kong's liking, but adoption would show confidence in the multilateral dispute settlement mechanism of all parties in this dispute. It would be a testament to Parties' commitment to the multilateral system.

20. The delegate of the United States stated the United States' concern with the Panel's recommendation of a specific and retroactive remedy, and apparent imposition of some obligations on Members which were not found in the Code.

21. The delegate of Korea urged immediate adoption of the report. He called on the EC and other Parties to reconcile their legislation and administrative practice with the finding of the Report. This was the minimum necessary action to maintain the credibility of the dumping margin calculation method. Time was running short to deal with Tokyo Round disputes. In tackling cases from the previous Round all Members should respect the principle and the spirit of the new dispute settlement system to whose establishment they had brought sincere effort, rather than allow a continuation of the deficiencies of the old dispute settlement systems. The adoption and implementation of this Report should not be further delayed.

22. The delegate of Mexico noted that the Committee had been kept alive precisely to resolve dispute settlement issues. In keeping with the transitional arrangements, Parties must do all within their power to resolve disputes while the transition decision remained in effect. He urged adoption of the report.

23. The representative of Norway noted his delegation's consistent position in favour of adoption of the Report on audio cassettes. In Norway's view, the Report provided clarification regarding asymmetrical comparisons. Although some conclusions of the Report had been overtaken by the new WTO Anti-Dumping Agreement, it was advisable that the Report be adopted in order to provide guidance where relevant to future Panels. Finally, he expressed appreciation that steps were being taken by the EC to bring this dispute to an end.

24. The delegate of Brazil expressed his delegation's support in principle for the adoption of the Report.

25. The delegate of Japan thanked Parties expressing support for the adoption of the Report. Japan was happy to note the EC's intention to amend its regulation to bring it into line with at least a part of the Panel's conclusions. After the amendment was finalized Japan would carefully analyze the extent to which the EC had followed the Report. The crucial point was whether the allowance for indirect selling cost and profit was made. Japan would monitor the EC's future practice dealing with indirect selling cost and profit.
26. However, Japan still believed that a mere amendment of the regulation was not enough and that the Report should be adopted. First, adoption of a Panel Report is the normal GATT practice. Secondly, such Reports are of interest and significance not merely to the disputants but also to other WTO Members. Thirdly, the Code procedures were deliberately and exceptionally held open with the express purpose of seeking the adoption of the pending Report. Japan urged the EC to agree to the adoption of the Report.
27. With respect to proposed EC action regarding the anti-dumping measures, he understood the EC delegate to have indicated that there was a possibility that those measures would be revoked. However, the mere fact that the anti-dumping duties might be revoked did not deprive the Report of its status. The EC had been imposing anti-dumping duties based on a calculation which the Panel had condemned. Therefore Japan still requested the adoption of the Report.
28. Regarding the question of asymmetry, Japan's impression was that the EC's reading of the Report was too strict and in some instances too alarmist. Contrary to the concerns of the EC, the Panel did not impose any excessive burdens on the administering authorities. The language of the Report itself did not explicitly require the authorities to make adjustments in all circumstances. To the contrary, the Panel was careful to note, in paragraph 369, that "the construction of an export price does not *per se* require adjustment, but the need for such adjustment would depend on the fact situation of the particular comparison". Paragraph 383 also confirmed that point and there was a similar statement in paragraph 374. The only obligation the Panel imposed was that authorities evaluate such claims on their merit and not reject them based on *per se* rules that precluded entire categories of claims.
29. The new WTO Anti-Dumping Agreement recognised this structure of burdens in the last sentence of Article 2.4 and the Report did not change this approach. The difficulty of calculating the adjustments would arise only if the exporter discharged its burden of establishing that relevant differences existed. There seemed to be only one set of circumstances where this burden would be discharged with any frequency - the situation of asymmetry. It was regarding these circumstances that Japan had brought the Audio Cassette case against the EC, and the issue of asymmetry was, as far as Japan was concerned, the principle relevance of the Panel's Report.
30. Regarding the interpretation of paragraphs 371 and 374, Japan's reading was different from that of the EC. Japan did not believe that, in paragraph 374, the Panel said that an allowance should be made in circumstances where factors were not affecting price comparability. Regarding the comments on profit, Japan supported the Panel's view that, in the case of a seller who performed additional functions and made additional investment and costs, a difference in profit affecting price comparability could exist for which due allowance might be required. The Panel did not require a deduction of all profits but concluded that due allowance should be made for profits affecting price comparability. It would be a more serious problem for the functioning of the whole system if the Report were not adopted, than the mere fact of possible ambiguity in the wording of the Report.
31. The delegate of the EC noted that he certainly did not want to be alarmist. To avoid this if possible, he proposed that other delegations give their interpretations of the portions of the Report that the EC found problematic. His understanding of the interpretation stated by the delegate of Hong Kong was that the principle of fair comparison would require that differences for indirect costs should

be equalized as soon as proof that different costs are incurred had been provided. If this was in fact the interpretation, it was this very point that created a problem for the EC. The EC of course adhered to the principle of fair comparison between normal value and export price. But in the EC's view, this objective was achieved when the detailed rules on how the comparison was to be carried out, contained in the Code and now in the new Agreement, were respected. The EC did not interpret the principle as an obligation which added to or superseded those detailed rules. If this were the case, there would be an unqualified obligation to equalize all differences in cost. This would be a serious problem with the concept of dumping as contained in Article 6, which remained unchanged.

32. The Report was open to interpretations like this, which would create a difficulty, and would in the EC's view change the whole concept of dumping. It was this which made it impossible for the EC to adopt the Report. As he had noted, the EC would be interested in hearing the opinions of other Members on this difficult question, which in the EC's view was fundamental to the interpretation of Article 2. Perhaps the delegation of Japan could give some guidance as to how Japan treated this question. Did Japan grant allowances for indirect expenses and for profit? While the case may not have arisen, presumably there was legislation which provided Japan some basis for a reply. Perhaps it would be difficult to reply in this meeting, but a reply would be helpful at a later stage.

33. The EC remained very committed to the principle of an effective dispute settlement. However, when considering the adoption of a Report, it was necessary to consider the findings and the consequences of the interpretation of the legal requirements in question.

34. The delegate of Japan noted that the Panel report was very carefully written, and thus the EC's concern with possible ambiguities was perhaps unnecessary. In Japan's view, it did not put too much burden on the investigating authorities. Regarding Japanese methodology, Japan was developing its practice in the dumping field. Japan stood willing to discuss methodologies with the EC. In general, in Japan, the actions necessary for the purpose of achieving fair comparison between the export price and normal value would depend on the circumstances of the case. It was not possible to say in the abstract whether this would involve an equal deduction from each price.

35. The delegate of Hong Kong responded to the EC's questions by noting that the Committee's task was deciding whether to adopt the Report. In Hong Kong's view, the Report was very clear that allowance should be made for all differences affecting price comparability.

36. The Chairman observed that the Committee was not in a position to adopt the Report.

37. The Committee took note of the statements made.

38. The delegate of Canada referred to the matter of Mexico's imposition of anti-dumping duties on imports of steel from Canada. Canada sought conciliation in the Committee due to inconsistencies between the Mexican decision and the GATT Code and the GATT itself. Canada wanted to provide interested Members with an opportunity to comment on the case. By way of background, the Mexican Ministry of Trade and Industrial Development made final determinations of dumping with regard to imports of steel from Canada on 28 December 1995 for plate and coil and on 30 December 1995 for hot rolled steel. In addition, final determinations were made that such imports caused injury to the Mexican domestic industry. As a result, definitive anti-dumping duties were imposed at rates for hot rolled steel of 15.37 per cent for one Canadian company, Dofasco, and 45.86 per cent for all others. For plate and coil the rate was 31.08 per cent. The rate for hot rolled steel was subsequently eliminated in February of this year with respect to exports by the one Canadian company, Dofasco, that was actually investigated by the Mexican Investigating Authority.

39. Canada believed that certain aspects of the dumping and injury determinations were flawed and violated provisions of several Articles of the Tokyo Round Anti-Dumping Code and of Article 6 of the GATT. In brief, Canada believed that the margins of dumping were incorrectly calculated and that the findings of injury were unwarranted in view of the facts presented. With a view to reaching a mutually satisfactory resolution of the matter, Canada held consultations with Mexico under Article 15.2 of the Code in Mexico City on 19 March 1996 with regard to the imposition of anti-dumping duties on imports of both hot rolled steel and steel plate and coil from Canada. In Canada's view while these consultations allowed for an exchange of views, no evidence or arguments were put forward by Mexico to address, to Canada's satisfaction, the concerns raised.
40. Canada's principle concerns with Mexico's determinations concerning hot rolled steel and steel plate and coil were the following. In both cases, the overall investigation exceeded the timelimits outlined in Article 5.5 of the Code, which stipulates that except in special circumstances, investigations shall be concluded within one calendar year. The investigations were initiated on 27 October 1993 in the case of hot rolled steel and on 28 October 1993 for plate and coil. These investigations were concluded on 30 December 1995 for hot rolled steel and on 31 December 1995 for plate and coil, and thus lasted for more than two years.
41. In both investigations, Titan Industrial Corporation, the US distributor of Canadian steel, completed a questionnaire as requested by the Mexican investigating authority, yet this information was not used to establish a separate rate for this company. The Mexican investigating authority argued that it was not necessary to calculate a dumping margin for a marketer since this would be equivalent of determining a dumping margin for a sales department. Canada did not agree with this argument and believed that Titan had the right to a separate rate, as supported by Articles 2.3, 2.4 and 2.5 of the Code. It was also Canada's view that, consistent with these Articles, the investigating authority should have considered acquisition costs and third country prices or should have asked the distributor to provide costs of production, before rejecting the distributor's questionnaire and not assessing a separate rate. In this case the Mexican investigating authority did not follow any of these procedures.
42. On 26 February 1996, Mexico issued a clarification of its final anti-dumping determinations for imports of hot rolled steel, lowering one Canadian producer's, Dofasco, rate from 15.37 per cent to 0 per cent. This correction was due to an exchange rate error made during the investigation in comparing Dofasco's home and export market prices. Canada did not understand the basis for the calculation of an "all other" rate for imports of hot rolled steel from Canada that was higher than the rate assessed for the sole exporter originally investigated, Dofasco. In Canada's view the calculation of the "all other" rate was inconsistent with Article 2 of the Code and Articles 6.1 and 6.2 of the GATT. During the consultations held with Mexico, Mexico informed the Canadian delegation that as standard practice it derived its "all other" rate based on the higher of either the highest rate determined for any one exporter investigated or the petitioner's allegations against any one exporter. In justifying the hot rolled steel decision, Mexico stated that its "all other" rate was based solely on the petitioner's unverified allegations against a specific exporter, apparently a US distributor of Canadian hot rolled steel. No investigation was ever conducted against any of the US distributors alleged to have been dumping hot rolled steel from Canada. In Canada's view Mexico did not provide these interested parties in the exporting country with the opportunity to provide evidence as required by Article 6.1 of the Code. By not doing so Mexico was, in Canada's view, in violation of Article 8.3 of the Code and GATT Article 6.2 in assessing the dumping duty for "all other" exporters above the actual margin of dumping assessed against the only Canadian company that was individually investigated.
43. Furthermore, in the plate and coil case, as Titan's questionnaire response was rejected by the Mexican investigating authority and no Canadian producers were shipping directly to Mexico, the investigating authority assessed the rate for imports of Canadian plate and coil based solely on the petitioner's allegations, again against a specific exporter. There was no verification or attempt to verify

these allegations, nor was any effort made to examine information that could have been made available and in fact was made available by Titan, the US distributor exporting Canadian plate. In Canada's view, Mexico again did not provide interested parties in the exporting country with the opportunity to provide evidence as required by Article 6.1 of the Code and by not doing so, Mexico was in violation of Article 8.3 of the Code and GATT Article 6.2 in unilaterally assessing a single dumping duty rate for all exporters.

44. In addition, Canada questioned the basis for the assessment of an "all other" rate on hot rolled steel in Canada's case that was higher than the highest individual company rate assessed. Imports of all other countries investigated without exception were assessed an "all other" rate equal to but not greater than the highest individual company rate assessed. This apparently unequal treatment by Mexico of imports from Canada appeared to be in violation of the most-favoured-nation obligation of GATT Article 1.1.

45. Canada also did not understand Mexico's differing treatment of imports being imported by the petitioners versus imports being imported by the petitioners' customers in Mexico. In the consultations, Mexico stated that imports of a competing product by the petitioners themselves did not constitute potentially injurious competition but the same product imported by the petitioner's customers in Mexico did. Canada believed Mexico's methodology was inconsistent with Article 3.4 of the Code and Article 6.6 of the GATT, requiring a causal link between allegedly dumped imports and injury to the domestic industry, since it differentiated between one kind of allegedly dumped import and another. In Canada's view the establishment of a new re-rolling mill which produced flat steel including hot rolled sheets during the period of allegedly injurious dumping by Canadian producers was a strong indication that the domestic market was not being adversely affected by Canadian imports. Investors would be unlikely, in Canada's view, to establish a new production facility in a market being injured by allegedly dumped imports.

46. In respect of the plate and coil case, the final determination stated that Mexican producers were running at 90 per cent of capacity, a very high capacity utilization rate for any steel producer, Mexican or international. This cast serious doubt over the domestic producers' ability to supply increased domestic demand. In the consultations, however, Mexico stated that it was required only to show one factor to show injury. In both decisions price suppression was cited as supporting an affirmative final injury determination. Given that international steel prices were depressed throughout the period of investigation, Canada seriously questioned Mexico's adherence to Article 3.4 of the Code and Article 6.6 of the GATT, requiring a causal link between allegedly dumped imports and injury to the domestic industry.

47. It was for these reasons that Canada had decided to refer to this Committee for conciliation the matter of these Mexican anti-dumping measures on imports of steel from Canada. After this background to the case, Canada looked forward to hearing from delegations, including that of Mexico and any other delegation that may wish to comment.

48. The delegate of Mexico thanked Canada for the information supplied in relation to the anti-dumping investigations carried out in Mexico with regard to certain steel products from Canada. He understood that in Canada's opinion the investigations contained a number of elements which Canada believed inconsistent with the provisions of the Tokyo Round Anti-Dumping Code. He deplored the fact that at this juncture his delegation did not have full information in order to clarify this very complex situation and in order to dispel Canada's impressions with regard to the way in which the investigations were carried out.

49. Canada had requested at this meeting of the Committee that the issue be submitted to the conciliation process provided for under the Anti-Dumping Code. Mexico recognized that any Member of the Committee had the right to apply for conciliation under Article 15 of the Anti-Dumping Code.



under the transitional provisions as set out in ADP/132. However, before doing so, the consultations provided for in Article 15.2 of the Code should be completed. Since Canada had not formally requested the consultations provided for under 15.2 of the Anti-Dumping Code, Mexico was not in a position to accept that this issue should be submitted to the conciliation process. Accepting it at this session of the Committee would go against Mexico's rights under the Anti-Dumping Code and the transitional provisions. It would also take the matter to conciliation without the parties having had a chance to clarify the situation and possibly to resolve the matter.

50. While he was sorry to contradict the delegate of Canada, the consultations which Canada claimed took place on 19 March 1996 were no such thing. In fact it was a mere courtesy contact between officials of the two Governments, and the Mexican representatives simply listened to concerns expressed by the Canadian representatives. In order for such contact to be considered formal consultations under the Anti-Dumping Code, the Canadian authorities should have previously notified Mexico in writing and informed Mexico that this was a formal consultation under the Anti-Dumping Code. This point was of the utmost importance, not only because it was provided for in Article 15.2 of the Anti-Dumping Code but also because without such a prior notice the Mexican representatives were not fully aware of the intentions of the Canadian officials and so were less prepared to answer their concerns appropriately. As a consequence, Mexico could not accept the submission of this matter to the conciliation procedure as long as the formal consultations provided for in Article 15.2 of the Anti-Dumping Code had not taken place and been finalized.

51. The delegate of Canada regretted the position taken by the Mexican delegation concerning Canada's request for conciliation. In considering whether or not to make this request, Canada had considered the provisions of Article 15 very carefully. Canada was of the opinion that formal consultations had taken place with Mexico on the subject because a date had been set and representatives from Ottawa travelled several thousand miles to Mexico City to attend consultations expressly on the points made at this meeting, as well as additional ones. His understanding was that it was made clear at the outset of those discussions that they were taking place under Article 15. Canada realized of course that before conciliation there was an obligation to consult, but in Canada's view travelling that distance for consultations expressly on this subject was a formal consultation that met the requirements of the Agreement. Therefore, Canada believed itself fully justified in referring this matter to the Committee for conciliation. It was evident from Canada's background statement that there were areas in the determinations by Mexico which concerned Canada. Canada welcomed an opportunity to review these matters again with the Mexican authorities. Perhaps Canadian and Mexican representatives could have discussions in an effort to establish further bilateral dialogue.

52. The delegate of Japan noted that a Party had the right to seek conciliation if consultations had been held, but in this case the core question was whether the consultations had been appropriately held. The two Parties needed to discuss the question, and he suggested that the Chairman might offer his assistance.

53. The delegate of Mexico observed that, as Canada and Mexico were both NAFTA members, representatives of their respective governments met constantly. Officials of the three NAFTA members meet periodically and on many occasions meetings were scheduled to cover a number of different topics. However, the informal contact on 19 March 1996 was handled through telephone communications between officials who were well known to each other because of their NAFTA linkages. Canada wanted to call it formal consultations, he called it contact to avoid any confusion. Mexico had listened to the Canadian concerns, but there had been no written presentation spelling out under which provisions Canada wished to hold the contact in advance of the meeting. This was not just a procedural matter, it had practical connotations, because if it was not known what perspective a topic was being discussed from, i.e., under what instrument, then the relevant context was unknown, and it was not possible to prepare properly to carry out consultations, as provided for under Article 15 of the Code. Thus,

while the contact was cordial, and some informal responses were forthcoming, this did not mean that this informal contact was under Article 15. Mexico could not now accept that those consultations were formal. Contacts between governments do not necessarily turn into a formal process. This is why Mexico felt that, in light of a precise reading of Article 15.2, sufficient elements were not present to declare that the contacts were formal consultations. Mexico remained willing to engage in any further discussions Canada might wish to hold. In order to avoid future misunderstanding, he requested that Canada inform Mexico in writing of the nature of the meeting requested, which of the many available legal instruments between their governments was in question, and what the intentions of the meeting were. Failing such specification, Mexico could not accept *ex post* statements qualifying a meeting as formal Article 15.2 consultations.

54. The delegate of Canada agreed that, as NAFTA members, Canada and Mexico had very cordial dealings. While he regretted unduly prolonging the debate, he wished to reiterate the position of the Canadian authorities that Canadian representatives travelled from Canada to Mexico City for the purpose of discussing these determinations, and it was clear to them at least that it was under the Code. All of the points made in those consultations made references to the obligations of Mexico under the Code, so it seemed there was little room for doubt as to what obligations were under consideration or what Canada had in mind when looking at the determinations themselves. The consultations were held in March. Once Canada had decided to raise the issue at this meeting, every effort had been made here in Geneva to alert the Mexican delegation and to provide them with the background material in English and in Spanish, in the hope that they would have had sufficient time to perhaps offer some responses to the points raised at this meeting. He took note that the Mexican Ambassador had accepted the suggestion that Canadian and Mexican representatives should meet again soon to continue discussions.

55. The delegate of Mexico noted that WTO dispute settlement procedures did not apply to cases such as this because of Article 18.3 of the WTO Anti-Dumping Agreement. But it is established in those procedures that when formal consultations are held, the Chairman of the Dispute Settlement Body is sent a written communication with copies to the respective organ. In this case, the procedures that were in force immediately before the coming into force of the WTO applied, and he believed those procedures also called for written communication to the chair. Nothing had been received, and Mexican authorities had not received a written request, although Article 15.2 does refer to a written request. Finally, merely travelling from one country to another does not determine the formal nature of a contact.

56. The Chairman observed that it was clear that there had been discussions, they had been courteous and cordial, but it was not clear whether they had been consultations. In this situation he encouraged the two parties to make further efforts to find a mutually satisfactory solution to the dispute consistent with Article 15 of the Code. In this regard he noted that the Code only refers to a request in writing for consultations, it does not require that a copy go to the Committee.

57. The Committee took note of all the statements made.

58. The meeting was adjourned.