GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

ADP/91
26 March 1993

Special Distribution

Committee on Anti-Dumping Practices

Original: English

MEXICO - ANTI-DUMPING DUTIES ON ELECTRIC POWER TRANSFORMERS FROM BRAZIL

Request for Conciliation under Article 15:3 of the Agreement

Communication from Brazil

The following communication, dated 18 March 1993, has been received from the Permanent Mission of Brazil.

I. BACKGROUND

1. On 25 September 1991 three Mexican companies requested the Ministry of Trade and Industrial Development of Mexico ("Secretaria de Comercio y Fomento Industrial de los Estados Unidos Mexicanos - SECOFI"), the initiation of an anti-dumping investigation on alleged dumping of electric power transformers made in Brazil by the companies:

- COEMSA ANSALDO SA (formerly Construçoes Eletrônicas S.A. - COEMSA); and

- Trafo Equipamentos Eléctricos S.A.

2. The three petitioners were:

- Industrias IEM, S.A. de C.V.;

- PROLEC, S.A. de C.V.; and

- Ferranti-Packard de Mexico, S.A. de C.V. (formerly Transformadores Parson Peebles de México S.A. de C.V.).

3. The Brazilian firms' tenders had been accepted in international tender proceedings called by the Federal Electricity Commission of Mexico ("Comisión Federal de Electricidad - CFE"), a decentralized state entity. The projects of expansion covered by the proceedings are financed by the World Bank (IBRD) and by the Interamerican Development Bank (IDB).

4. An investigation by SECOFI pursuant to the above mentioned request was initiated on 8 November 1991 according to Mexico's semi-annual report to the Committee under Article 14:4 of the Agreement (Document ADP/70/Add.6, of 11 March 1992, covering the period 1 July 1991 to 31 December 1991). The same report indicates that a "provisional measure" was imposed on 15 November 1991. This is, nevertheless, apparently only inadequate application of the terminology of the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade" (the Agreement, or the Code). Mexican authorities seemed to mean by that reference that an investigation was being opened "without imposition of quota" (pgs. 4 and 5 of document ADP/70/Add.6).

5. Provisional duties ranging from 1 to 23 per cent ad valorem did become effective, in the sense of the Code, on 21 February 1992, after the publication, on 20 February 1992, of a Resolution of SECOFI of 11 February 1992. The Resolution was passed only five working days after replies were lodged by the Brazilian exporters.

6. On 27 April 1992, Brazil raised several questions during the regular meeting of the Committee regarding this action. The representative of Mexico gave preliminary replies to those questions.

7. The representatives of the two Brazilian exporters and the Mexican public importer, CFE, offered from the start full cooperation to the investigating authorities. At the same time, as these authorities were not, in Brazil's view, providing opportunities for the exporters concerned to see all information considered relevant to the presentation of their cases under Article 6:1 of the Agreement, the Brazilian Government formally requested in writing consultations with Mexico on 4 August 1992. A first official meeting was held on 10 August 1992 between the Brazilian Chargé d'Affaires in Mexico City and the Under-secretary for Foreign Trade of SECOFI. There was, on the occasion, from Brazil's point of view, sympathetic consideration by Mexico to Brazil's representation and useful exchange of information. Further contacts were, nevertheless, less productive and Mexican authorities agreed to hold further formal consultations only on 15 October 1992, after repeated reiteration by Brazil of its interest that Mexico fulfil its obligations under Article 15:1 of the Code and after definitive duties had been applied pursuant to the publication of a resolution by SECOFI on 7 September 1993 (ranging from 26 per cent to 29 per cent for units already delivered or in the process of delivery and 35 per cent to COEMSA and 29 per cent to Trafo for any future deliveries of power transformers whether identical or not, purchased by CFE).

8. Legal action has been initiated by both COEMSA and Trafo on several grounds against the administrative decisions of SECOFI, which are, according to those companies, in conflict with constitutional and legal provisions in Mexico.

9. The Committee examined this matter during its regular meeting of 26-27 and 30 October 1992 under a specific item. The representative of Brazil stated on that occasion that Brazil considered the consultations had failed

to achieve a mutually satisfactory solution. While Brazil was open to negotiations, he had limited hope regarding the outcome of further negotiations. Absent unforeseen progress, Brazil would request conciliation under Article 15:3 of the Code (ADP/M/39, paragraphs 147 to 154).

II. MAIN ISSUES

10. The main issues in this case concern the initiation of the investigation and its subsequent development (Article 5); opportunity for presenting evidence and access to information (Article 6); determination of dumping, in particular definitions in anti-dumping investigations pursuant to international public tender procedures ("ordinary course of trade" and "differences in conditions and terms of sale"), product similarity and calculation of costs (id est, idle capacity, financial costs, lack of transparency in regard to criteria for findings on costs of materials and alleged price transfers, et cetera) (Article 2); determination of injury (Article 3); and application of provisional (Article 10) and final duties (Article 8).

1. INITIATION AND SUBSEQUENT INVESTIGATION (ARTICLE 5)

11. In Brazil's view, the initiation of the investigation and measures taken during subsequent phases of this action by Mexico are not in conformity with Mexico's obligations under the Code for the reasons indicated below.

(a) Initiation of the investigation: lack of sufficient evidence

12. The petition was based on a comparison between the prices stated by the Brazilian producers in their tenders and the costs of Mexican industry, adjusted to supposed manufacturing conditions in Brazil. Mexican authorities were not entitled to have accepted this information as sufficient evidence to initiate an investigation under the provisions of Article 5:1 of the Code. The application ought to have been rejected according to the specific provision to that effect contained in Article 5:3. The abnormal procedure followed by the investigating authority was timely denounced by interested parties, including the CFE, in different moments of the domestic proceedings.

(b) Subsequent investigation

13. During investigation, the petitioners participated in further international public tenders in Mexico, offering, through adjustments, prices more competitive than those of the exporters under investigation. SECOFI refused to take into consideration this factor, which should have led to prompt termination as also provided under Article 5:3.

2. EVIDENCE (ARTICLE 6)

14. Exporters were denied ample opportunity to present evidence, as guaranteed by Article 6:1 of the Code. The investigating authorities failed to respond promptly to representations made under Article 15:2 by Brazil,

hampering the process of consultations. The insufficient opportunity to present evidence is also associated to the obstruction, by investigating authorities, to access to non-confidential relevant information, as required under Article 6:2 of the Code. No non-confidential summaries of confidential information (or statement of reasons why summarization was not possible) were provided on different items, as required under Article 6:3. SECOFI was repeatedly informed by Brazilian authorities and by the representatives of the exporters that full opportunity for the defence of their interests, in the sense of Article 6:7, was not being provided. Information was denied on, among other factors, criteria for the findings and values utilized in comparisons. One example is SECOFI's denial to give access to information contained in experts' reports on apparent national consumption, relevant for the determination of injury. Access to such information would have contributed decisively to the presentation of the exporters' views.

3. DETERMINATION OF DUMPING (ARTICLE 2).

15. Three main issues concerning Article 2 are to be underlined: definitions in anti-dumping investigations pursuant to international public tender proceedings ("ordinary course of trade" and "differences in conditions and terms of sale"); product similarity; and calculation of costs and cost comparison.

(a) Definitions in anti-dumping investigations pursuant to international public tender procedures.

16. As recalled previously by Brazil, there has been intensive but inconclusive discussion in the Committee on the application of anti-dumping duties to products imported pursuant to international tender procedures. In the present case, it is not clear whether the concept of "ordinary course of trade" in Article 2:1 or of its exceptions in the remaining provisions of Article 2, are pertinent. The purchase of the transformers by CFE has special characteristics. It is dependent on strict rules imposed by the international financing organizations (with specific advantages to the local bidders). It also implies the manufacturing of the expensive custom-made capital goods according to unique requirements. Significant capacity by the supplier is invested in the production of such goods. The well-known harassment potential of an investigation is particularly damaging to the foreign bidder in cases such as this. Furthermore, the actual imposition of duties distorts the strict criteria followed by all interested parties in the tender procedures, and is apt to jeopardize the implementation of the projects to which the purchase is associated.

17. In Brazil's view it would also be appropriate for the Committee to determine to what extent the "differences in conditions and terms of sale", to which "due allowance shall be made in each case, on its merits", according to Article 2:6, are presumed to be taken into full and definitive consideration in the international tender procedures themselves. It should be taken especially into consideration that those procedures involving funds from

international development financing institutions like the World Bank and the IDB already afford offsetting protection to the local competing industry.

(b) Product similarity.

18. In the present case, the detailed specifications for the production of the capital assets of interest to the importer, coupled with the determinant factor embodied in the technological level that justified the selection of the supplier, make it questionable whether the similarity requirement of Article 2:1 is actually fulfilled.

(c) Calculation of costs.

19. After having accepted what, in Brazil's view, was insufficient information to initiate the investigation, as mentioned above, Mexican authorities did carry out, later, investigations in Brazil under the provisions of Article 6:5. They received full co-operation from the exporters concerned and benefited from ample disclosure of information. The relevant information actually obtained during in situ investigations was, nevertheless, apparently disregarded, for they have led to a finding of dumping where no such dumping exists. The conclusions arrived at by SECOFI on the margin of dumping are unwarranted under the provisions of Article 2, paragraphs 4, 5 or 6. They are based on methods that disregard the generally accepted accounting principles, not only in the exporting country, but also in Mexico. As examples of the unwarranted criteria for calculation and comparison adopted by SECOFI, the following can be mentioned: calculation of idle capacity values, calculation of financial costs, lack of transparency in regard to criteria for findings on costs of materials and alleged price transfers.

20. Idle capacity. In relation to one of the exporters, independent consultants have attested to capacity utilization far different from that of the investigating authorities. SECOFI was aware of the findings in the consultancy reports but chose to disregard them in its final determination.

21. Financial costs. In relation to the same producer, the investigating authority considered relevant to the case some financial costs that were actually temporary, resulting from delay in payments by domestic purchasers of products unlike the products under investigation. They also ignored that according to the contracts resulting from the tender proceedings, there was application of different price conditions for units to be delivered at different deadlines.

22. Lack of transparency in regard to criteria for findings on costs of materials and alleged price transfers. In its final determination, SECOFI also found that the other Brazilian producer had not properly quoted the costs of materials and had incurred in "price transfers" to affiliates. No acceptable explanation was given on the criteria utilized and no information was given to permit the party to prepare a defence against these findings.

4. DETERMINATION OF INJURY (ARTICLE 3)

23. One basic element to be considered in this case is that the actual demand of the products in question was conditioned by international financing to the CFE. There was no normal "significant increase" in imports, in the sense of Article 3:2. Thus, the comparison of the consumption to result from the projects covered by the tender procedures with the ordinary consumption figures for 1989 and 1990, as established by SECOFI, was unwarranted. The finding of injury was not based on positive evidence and the objective examination of such evidence, as required by Article 3:1.

24. Also to be noted is CFE's position during the investigation. A public entity which controls over 80 per cent of the consumption of this type of product in Mexico (as noted by the petitioners), CFE mentioned among the reasons for not selecting the domestically made transformers that they were of insufficient quality, technologically outmoded, and offered at artificially excessive prices. Delays in deliveries were also mentioned. CFE also stated during proceedings that the complainants could not and did not suffer injury resulting from the purchases under investigation. In effect, the petitioners had remained very active in trade, especially international trade, of transformers, during the most recent years and Mexico continues to be a net exporter of these products.

25. Even if injury existed, the investigation failed to demonstrate, as required by Article 3, paragraphs 3 and 4, that it would have been caused by imports from Brazil and not by other factors, such as the ones mentioned in footnote 5 to Article 3:4.

26. It is justified to think that the petitioners lost opportunities opened in the Mexican market simply because they were not prepared for competition and had to yield to more competitive suppliers under fair conditions.

27. It is to be mentioned that Mexican producers of the products concerned lowered considerably their prices during the period 1989/1991, opening markets at home and abroad, including, for example, Brazil, where they began to compete with locally made products.

5. PROVISIONAL AND FINAL DUTIES (ARTICLES 10 AND 8)

28. Brazil argues that the requirements for the imposition of anti-dumping duties under Article 5:1 (a) to (c) and Article 8:1 of the Code were not fulfilled. For the reasons explained above, it is also impossible to verify the adequacy of the margins applied. Brazil has similar reservations to the appropriateness of provisional duties applied from 21 February 1992 under Article 10:1.

III. REQUEST FOR CONCILIATION

29. In view of the above, Brazil submits that the anti-dumping action by Mexico on Brazilian electric power transformers, with imposition of

provisional and final duties, violates several provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, including:

- Article 1 (Principles);
- Article 2 (Determination of Dumping), paragraphs 1, 4, 5, and 6;
- Article 3 (Determination of Injury), paragraphs 1, 2, 3 and 4;
- Article 5 (Initiation and Subsequent Investigation), paragraphs 1 and 3;
- Article 6 (Evidence), paragraphs 1, 2, 3 and 7;
- Article 8 (Imposition and Collection of Anti-Dumping Duties), paragraph 1;
- Article 10 (Provisional Measures), paragraph 1;
- Article 15 (Consultation, Conciliation and Dispute Settlement), paragraphs 1 and 2.

30. As consultations have failed to achieve a mutually satisfactory solution and final action has been taken by the administering authorities, Brazil refers hereby this matter to the Committee for conciliation under Article 15:3 of the Agreement. Brazil is willing to continue its best efforts to reach a mutually satisfactory solution, throughout the period of conciliation.

31. Given the preliminary and explanatory nature of this document, Brazil reserves its right to amend and complement the information hereby transmitted to the Committee, as appropriate.