

Committee on Subsidies and  
Countervailing Measures

Original: English

REQUEST FOR CONCILIATION UNDER ARTICLE 17  
OF THE AGREEMENT

Communication from Brazil

The following communication, dated 13 June 1988, has been received by the Chairman from the Delegation of Brazil.

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This is to confirm that on 31 May 1988 during the discussion of the agenda item 2 (L) of the Committee on Subsidies and Countervailing Measures, the Brazilian Delegation formally requested conciliation under Article 17 of the Subsidies Code, consultations between the United States and Brazil having failed to reach a mutually agreed solution.

In view of the urgency of the matter and considering that the regular session of the Committee will not be held before October 1988, it is hereby requested that a special meeting of the said Committee be convened as soon as possible in order to review the facts involved in the case and take appropriate action.

The Brazilian Government reserves its rights under Article 17:3 of the Code to request, should the matter remain unresolved, that a panel be established by the Committee in accordance with the provisions of Article 18.

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Background Information provided by the Brazilian Delegation concerning the United States' Attempt to Collect Countervailing Duties on Certain Imports of Non-Rubber Footwear from Brazil.

GATT/AIR/2595 Item 2 (L).

The Governments of Brazil and the United States have engaged in consultations to discuss the attempt by the United States Government to collect countervailing duties on Brazilian non-rubber footwear entering the United States from January 1, 1980 to October 28, 1981. This document summarizes the Brazilian position, which is essentially that: 1) the collection of any such duties contravenes the United States' obligation not to impose countervailing duties on imported merchandise which does not cause or threaten material injury to a domestic industry, and 2) the collection of cash deposits on these entries and the attempt by the United States to collect countervailing duties in excess of these deposits violates established procedures governing the application of provisional measures.

## I. BACKGROUND

The United States Government issued a countervailing duty order on imports of non-rubber footwear from Brazil on September 12, 1974. This order was not preceded by a finding of material injury, since the United States Government had taken the position that its accession to the General Agreement on Tariffs and Trade ("GATT") did not require the provision of an injury test in countervailing duty investigations.<sup>1/</sup>

The countervailing duty applicable to Brazilian non-rubber footwear was reduced several times in 1979. The revision in each case reflected the Brazilian Government's phased reduction of the IPI credit premiums. This phased reduction was implemented as early as from January 24, 1979 as part of the terms of the Brazilian Government's accession to the Subsidies Code under Article 14:5. The United States Government announced that the new rates in each case would apply prospectively and that liquidation of U.S. Customs duties would proceed normally.

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<sup>1/</sup> See Protocol of Provisional Application of the General Agreement on Tariffs and Trade, GATT, IV BISD 77 (1969).

On January 4, 1980, liquidation was suspended with respect to products exported on or after December 7, 1979 and imported on or after January 4, 1980, following the Government of Brazil's decision to eliminate the IPI export credit premium. During the period following January 4, 1980, importers of Brazilian non-rubber footwear were required to post cash deposits for estimated countervailing duties in an amount equal to one percent of the dutiable value of the merchandise.

On January 1, 1980, the provisions of the Subsidies' Code became binding on the Governments of Brazil and the United States, both of which were among the original signatories to the Code. The principal obligation undertaken by all signatories as of this date was to implement Article VI of the General Agreement. Article VI:6(a) of the General Agreement provides that:

No contracting party shall levy any ... counter-  
vailing duty on the importation of any product  
of the territory of another contracting party un-  
less it determines that the effect of the ... sub-  
sidization ... is such as to cause or threaten  
material injury to an established domestic ind-  
ustry, or is such as to retard materially the  
establishment of a domestic industry. (Emphasis  
added.)

In addition, Article 4:9 of the Code states that "a counter-vailing duty shall remain in force only as long as, and to the extent necessary to counteract the subsidization which is causing injury."

The United States implemented its obligations under the Code by enacting the Trade Agreement Act of 1979. The most important revision in U.S. law introduced by that Act was the application of the injury test in cases involving merchandise exported to the United States from the territory of another Code signatory. The injury test was applied automatically to each new countervailing duty investigation initiated after January 4, 1980. Imports subject to countervailing duty orders already in effect on January 1, 1980, such as the countervailing duty order on non-rubber footwear from Brazil, did not automatically receive an injury test, and that Act provided procedures under which a signatory could request an injury determination within three years of its enactment. Where a request for an injury determination was timely filed in proper form, the Act required the United States International Trade Commission ("ITC") to decide whether "an industry in the United States would be materially injured, or would be threatened with material injury ... by reasons of imports covered by the countervailing duty order if the order were to be revoked."

The Brazilian Government formally requested that the ITC conduct a review on October 26, 1981, within the three-year time period allowed by U.S. law. The suspension of liquidation first ordered on December 7, 1979 remained in effect during the ITC's investigation.

On May 24, 1983, the ITC notified the U.S. Department of Commerce of its finding that "an industry in the United States would not be materially injured, or threatened with material injury" if the countervailing duty order were revoked. The Commerce Department then revoked the countervailing duty order as to all future entries on June 21, 1983, and issued a directive to the United States Customs Service to refund any estimated countervailing duty deposits collected on imports of Brazilian footwear entering the United States on or after October 29, 1981 - the date the ITC officially notified the Department of Commerce of the Brazilian Government's request for an injury determination - and before the date of the Commerce Department's termination notice. However, the Department of Commerce also indicated that it intended to collect countervailing duties on all Brazilian non-rubber footwear shipped from Brazil on or after December 7, 1979 and entering the United States prior to October 29, 1981, despite the ITC's "no injury" finding and its own revocation of the countervailing duty order. According to Commerce's interpretation of the U.S. law, countervailing duties must be collected on imports which are entered into the United States prior to the date of the ITC's notification to the Commerce Department of a request for an injury determination under Section 104(b)(3) of the Act. Consequently, the United States Government continued its administrative reviews of the subsidy levels regarding the period December 7, 1979 to October 28, 1981.

The Brazilian Government filed formal comments in the administrative reviews conducted by the Department of Commerce, arguing essentially that U.S. law, the General Agreement and the Subsidies Code did not permit the United States Government to continue its administrative reviews or to collect countervailing duties on the shipments under review. This view was also expressed in numerous meetings between United States and Brazilian officials during the course of the reviews. The United States Government specifically acknowledged and rejected the position of the Government of Brazil.

Notwithstanding the objections of the Government of Brazil, the United States Government completed the administrative reviews and found subsidies to the extent of 11.03 percent ad valorem for the period December 7, 1979 to December 31, 1979, 8.84 percent ad valorem for the period January 1, 1980 to December 31, 1980, and 6.04 percent for the period

January 1, 1981 to October 28, 1981. The estimated potential liability, including duties and interest, for the period January 1, 1980 through October 28, 1981 exceeds (U.S.) \$80 million.

## II. ARGUMENT

Article VI:6(a) of the General Agreement and Articles 1 and 4 of the Subsidies Code prevent the collection of any countervailing duty unless national authorities determine that imports of the product in question cause or threaten material injury to a domestic industry. After January 1, 1980, the effective date of the United States' obligations and Brazil's rights under the Code, the United States could not collect countervailing duties on any entries from Brazil without an affirmative injury finding. The United States enacted legislation which implemented the requirements of the General Agreement and the Code, but the Department of Commerce has interpreted the law inconsistently with the United States' international obligations and continues to insist on the payment of countervailing duties on entries from January 1, 1980 through October 28, 1981. Not only has there been no affirmative injury determination with respect to these non-rubber footwear entries, but the United States ITC determined that imports of Brazilian non-rubber footwear do not cause or threaten material injury to the United States industry. The United States must give effect to the determination by the ITC as of January 1, 1980 and revoke the countervailing duty order as of that date.

Article 5 of the Code governs the use of provisional measures by signatories. Article 5 requires, inter alia, that: 1) provisional measures not be applied unless they are necessary to prevent injury during the period of investigation, art. 5:1; 2) provisional measures be reimbursed where the determination of material injury is negative, art. 5:8, and 3) if the definitive countervailing duty is higher than the amount of the cash deposit or bond posted, the difference shall not be collected, art. 5:6.

The United States' use of provisional measures on non-rubber footwear from Brazil, including the suspension of liquidation and the posting of cash deposits for estimated countervailing duties beginning on January 4, 1980, violated these provisions of Article 5. Despite the requirements of Article 5:8, the United States did not refund the cash deposits after the ITC determined on May 24, 1983 that imports of non-rubber footwear from Brazil were not causing injury to an industry in the United States. In addition, the United States is attempting to collect the difference between the deposit rate and the definitive duties determined in the administrative review, in viola-

tion of Article 5:6.

### III. CONCLUSION

The Government of Brazil has requested that the United States Government honor its obligations under the General Agreement and the Subsidies Code by abandoning its efforts to collect any countervailing duties on Brazilian non-rubber footwear entering the United States on or after January 1, 1980. The Government of Brazil has also asked the United States to recognize that its collection of cash deposits and its attempt to collect countervailing duties in excess of those deposits violate the relevant provisions of the Code. The Government of Brazil is requesting that the United States treat these entries as required by its international obligations.