

UNITED STATES - DENIAL OF MOST-FAVoured-NATION
TREATMENT AS TO NON-RUBBER FOOTWEAR FROM BRAZIL

Report of the Panel

1. INTRODUCTION

1.1. On 7 August 1990, Brazil requested consultations under Article XXIII:1 with the United States concerning an alleged denial by the United States of most-favoured-nation treatment under Article I in the implementation of its Article VI obligations with respect to a countervailing duty order on non-rubber footwear from Brazil.¹ These consultations were held on 30 October 1990, but no mutually satisfactory solution to the matter was reached. On 28 February 1991 Brazil requested the CONTRACTING PARTIES to establish a panel under Article XXIII:2 to examine the matter.² At its meeting on 24 April 1991 the Council agreed to establish the Panel and authorized the Council Chairman to designate the chairman and members of the Panel in consultation with the parties concerned.³ The Council further agreed that the Panel would have the following terms of reference unless, as provided for in the Decision of 12 April 1989⁴, the parties agreed on other terms of reference within the following twenty days:

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Brazil in document DS18/2 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2".

Chile, Colombia and India reserved their rights to be heard by the Panel and to make written submissions to the Panel.⁵

¹DS18/1

²DS18/2

³C/M/249/25; DS18/3

⁴Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of 12 April 1989, BISD 36S/61, 63-64, para. F(b)(1).

⁵C/M/248/10-18; C/M/249/26-29

1.2 On 3 June 1991, the Council Chairman announced that the Panel would have the following composition:

Chairman: Mr. Peter Lai
Members: Mr. Meinhard Hilf
Mr. János Nyerges

He further announced that, as the parties had not agreed on other terms of reference, the above standard terms of reference would apply.⁶

1.3 The Panel held meetings with the parties to the dispute on 17 and 18 September and 29 October 1991. India made an oral presentation to the Panel on 18 September 1991 and also submitted its views in writing on that date. The Panel submitted its conclusions to the parties to the dispute on 13 December 1991.

2. FACTUAL ASPECTS

Prior Panel under the Subsidies Agreement

2.1 In 1988-89, a related dispute between Brazil and the United States involving the same countervailing duty order on non-rubber footwear from Brazil was submitted to a panel under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the "Subsidies Agreement").⁷ Before that panel Brazil argued that the Subsidies Agreement required that countervailing duties on non-rubber footwear from Brazil could not be levied, without a determination of injury, after the date on which the obligation to provide an injury determination came into force for the United States. Brazil also argued that the United States discriminated against Brazil by implementing its Article VI obligation only from the date of Brazil's request for an injury review, rather than from the date when the Article VI obligation to provide an injury test arose. The United States argued that its action with respect to backdating the effect of its injury determination to the date of Brazil's request was consistent with United States' obligations under the Subsidies Agreement.

2.2 The Subsidies Agreement panel concluded that the Subsidies Agreement did not require that the injury determination become effective prior to the date of request for an injury determination so long as the request could be made as of the date that the Article VI obligation entered into force. The panel found that the procedures under Section 104 of the Trade Agreements Act of 1979 were an acceptable method of implementing United States obligations in this regard. Specifically, the panel stated:

"In general terms, the Panel considered that the obligation regarding injury determination of a Code signatory with respect to pre-existing decisions to impose countervailing duties would be satisfied as long

⁶DS18/3

⁷Panel report on "United States - Countervailing Duties on Non-Rubber Footwear from Brazil", SCM/94. The Report of the Panel was circulated to the Committee on Subsidies and Countervailing Measures on 4 October 1989.

as the signatory subject to such a decision had a right to an injury examination as of entry into force, through the Code, of the Article VI:6(a) obligations."⁸

In reaching its decision, the Subsidies Agreement panel did not specifically address Brazil's allegation that the procedure applied by the United States to non-rubber footwear from Brazil discriminated against Brazil. The report of this panel has been discussed repeatedly in the Committee on Subsidies and Countervailing Measures, but has so far not been adopted.

2.3 During the debate in the Council prior to the establishment of the present Panel, Brazil indicated that it did not intend to relitigate the issues considered by the Subsidies Agreement panel.

Background to This Case

2.4 There are three different countervailing duty laws of the United States of concern in this proceeding: (1) Section 303 of the Tariff Act of 1930; (2) Section 331 of the Trade Act of 1974; and (3) Sections 701 and 104 of the Trade Agreements Act of 1979.

2.5 Section 303 of the Tariff Act of 1930⁹ was enacted to provide for the imposition of countervailing duties on imports of dutiable products found to be subsidized. It does not provide for a determination of injury prior to the levy of countervailing duties on subsidized imports. The law provides, in relevant part:

"Whenever any country . . . shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country . . . and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States . . . there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated." (emphasis added)

2.6 This legislation, in effect at the time the United States acceded to the GATT in 1947, was inconsistent with Article VI:6(a), which proscribes the levy of countervailing duties without a determination of injury. However, Section 303 was covered by the "existing legislation" clause of paragraph 1(b) of the Protocol of Provisional Application of the General Agreement (the "PPA"). Paragraph 1(b) of the PPA states that GATT contracting parties shall apply Part II of the General Agreement (which includes Article VI) "to the fullest extent not inconsistent with existing legislation". Section 303 remains in effect today and applies to dutiable

⁸ SCM/94, para. 4.6

⁹ 19 U.S.C. Section 1303

imports from all countries that are not signatories to the Subsidies Agreement.

2.7 It was under Section 303 that the countervailing duty order on non-rubber footwear from Brazil was imposed in 1974, without the benefit of an injury test.

2.8 In 1974, the United States enacted Section 331 of the Trade Act of 1974¹⁰, amending its countervailing duty law to apply also to imports of duty-free products. The United States acknowledged that this provision was not in existence in 1947 and, therefore, was not sheltered by the PPA. Accordingly, the United States law provided that, with respect to imports of duty-free products from a GATT contracting party, the United States would provide an injury test before the imposition of countervailing duties.

2.9 Section 331 of the Trade Act of 1974 provides, in relevant part:

"(a)(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b)(1)

(b) Injury Determination With Respect to Duty-Free Merchandise; Suspension of Liquidation.--(1) Whenever the Secretary makes a final determination under subsection (a) that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty and a determination by the Commission is required under subsection (a)(2), he shall--

(A) so advise the Commission, and the Commission shall determine within three months thereafter, and after such investigation as it deems necessary, whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States; and the Commission shall notify the Secretary of its determination;
...

(c) Application of Affirmative Determination.--An affirmative determination by the Secretary under subsection (a) with respect to any imported article or merchandise shall apply with respect to articles entered ... on or after the date of the publication in the Federal Register of such determination. In the case of any imported article or merchandise which is free of duty, so long as a finding of injury is required by the international obligations of the United States, the preceding sentence shall apply only if the Commission makes an affirmative determination of injury under subsection (b)(1)."

¹⁰ 19 U.S.C. Section 1303(a)(2)

2.10 Section 331 of the 1974 Act applies to duty-free imports from all countries that are GATT contracting parties, but are not signatories to the Subsidies Agreement.

2.11 In 1979, the United States enacted Section 701 of the Trade Agreements Act of 1979¹¹, which provides for an injury test prior to the imposition of countervailing duties on both dutiable and duty-free products imported from signatory countries of the Subsidies Agreement. Section 104 of the 1979 Act¹² provides a special transitional procedure for an injury review for all countervailing duty orders issued before 1 January 1980 which, pursuant to Section 303 of the Tariff Act of 1930, were imposed without the benefit of an injury test. It was under this statute that the United States reviewed the pre-existing countervailing duty order on non-rubber footwear from Brazil.

2.12 Section 701 of the Trade Agreements Act of 1979 provides, in relevant part:

"(a) General Rule.--If--

(1) the administering authority determines that--(A) a country under the Agreement ... is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and

(2) the Commission determines that--

(A) an industry in the United States--

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy."

2.13 Section 104 of the Trade Agreements Act of 1979 provides, in relevant part:

"(b) Other Countervailing Duty Orders.--

(1) Review by Commission upon Request.--In the case of a countervailing duty order issued under section 303 of the Tariff Act of 1930--

(A) which is not a countervailing duty order to which

subsection (a) [on waived countervailing duty orders] applies,

(B) which applies to merchandise which is the product of a country under the Agreement, and

(C) which is in effect on January 1, 1980, ...

¹¹19 U.S.C. Section 1671

¹²19 U.S.C. Section 1671

the Commission upon request of the government of such a country or of exporters accounting for a significant proportion of exports to the United States of merchandise which is covered by the order, submitted within 3 years after the effective date of Title VII of the Tariff Act of 1930 shall make a determination under paragraph (2) of this subsection.

(2) Determination by the Commission.--In a case described in paragraph (1) with respect to which it has received a request for review, the Commission shall commence an investigation to determine whether--

(A) an industry in the United States--

(i) would be materially injured, or

(ii) would be threatened with material injury, or

(B) the establishment of an industry in the United States would be materially retarded,

by reason of imports of the merchandise covered by the countervailing duty order if the order were to be revoked.

(3) Suspension of Liquidation¹³; Investigation Time Limits.--Whenever the Commission receives a request under paragraph (1), it shall promptly notify the administering authority and the administering authority shall suspend liquidation of entries of the affected merchandise made on or after the date of receipt of the Commission's notification, ... and collect estimated countervailing duties pending the determination of the Commission. The Commission shall issue its determination in any investigation under this subsection not later than 3 years after the date of commencement of such investigation.

(4) Effect of Determination.-- ...

(B) Negative Determination--Upon being notified of a negative determination under paragraph (2) by the Commission, the administering authority shall revoke the countervailing duty order then in effect, publish notice thereof in the Federal Register, and refund, without payment of interest, any estimated countervailing duties collected during the period of suspension of liquidation." (emphasis added)

2.14 On 1 January 1980, the Subsidies Agreement entered into force for both Brazil and the United States. Under the Subsidies Agreement, the United States was obliged to provide an injury determination with respect to both new countervailing duty determinations and pre-existing countervailing duty orders, including the pre-existing countervailing duty order on non-rubber footwear from Brazil.

2.15 In a letter dated 23 October 1981, Brazil requested an injury review of the 1974 countervailing duty order on non-rubber footwear pursuant to

¹³The term "suspension of liquidation" as used in the US practice means that calculation and final assessment of total customs duties on an entry (shipment) of a product does not occur at the time of the entry but at a later date. In the interim the product in question is released for delivery and/or subsequent sales.

Section 104(b) of the Trade Agreements Act of 1979. On 28 October 1981 the United States International Trade Commission ("USITC") notified the United States Department of Commerce ("DOC") of the request. No suspension of liquidation was ordered at that time because the United States had already ordered the suspension of liquidation on all entries of non-rubber footwear from Brazil on 4 January 1980.¹⁴ This earlier suspension remained in effect. As subsequently explained in the notice of revocation, "it was not necessary for the [DOC], upon notification by the USITC, to suspend liquidation of entries of the merchandise pursuant to [section 104(b) of the Trade Agreements Act of 1974], since previous suspensions remained in effect".¹⁵

2.16 The injury review was concluded by the USITC in May 1983.¹⁶ On 24 May 1983 the USITC reached a negative injury determination.¹⁷ As a result, the DOC revoked, by decision published 21 June 1983, this countervailing duty order with respect to all merchandise entered, or withdrawn from warehouse for consumption, on or after 29 October 1981, the date the DOC had received notification of the request for an injury determination. The DOC also instructed customs officers to refund any estimated countervailing duties collected with respect to these entries. The USITC's decision and the DOC revocation did not affect shipments of the merchandise entered on or before 28 October 1981.

2.17 In the same time frame as the injury review of non-rubber footwear from Brazil, the United States also conducted injury reviews pursuant to Section 104(b) of the Trade Agreements Act of 1979 of countervailing duty orders on non-rubber footwear from India and Spain. In all three cases there were negative determinations, and revocation of the countervailing duty orders was effective on the dates the review investigations were requested. The United States received thirty-eight requests for injury reviews pursuant to Section 104(b) of the Trade Agreements Act of 1979.

2.18 Also during the 1980s, pursuant to Section 331 of the Trade Act of 1974, the United States revoked outstanding countervailing duty orders on dutiable products that acquired duty-free status. The outstanding countervailing duty orders on fasteners from India, which became duty-free under the United States Generalized System of Preferences ("GSP"), and steel wire rod from Trinidad and Tobago, which acquired duty-free status as a result of the enactment of the United States Caribbean Basin Economic Recovery Act, are examples of such products. The orders in these two cases were revoked effective as of the date that the products acquired duty-free status and thus became entitled to an injury determination under Article VI.

2.19 The United States applied a similar procedure under Section 331 of the Trade Act of 1974 upon Mexican accession to the GATT in the case of outstanding countervailing duty orders on industrial lime and fabricated

¹⁴ 45 Federal Register 1013

¹⁵ 48 Federal Register 28310

¹⁶ 48 Federal Register 24796

¹⁷ 48 Federal Register 28310

auto glass -- both duty-free products. At the time of the original orders, Mexico was not a contracting party and therefore did not benefit from an injury test. Following Mexico's accession and requests from the United States Trade Representative for injury reviews, the United States, as the result of negative determinations, revoked the orders effective as of the date the United States' Article VI obligation arose vis-à-vis Mexico, i.e. the date of Mexico's accession.

3. SCOPE OF THE PROCEEDING

3.1 In their first submissions to the Panel and during the first meeting of the Panel, Brazil and the United States disagreed on the proper scope of the proceeding.

Arguments of the Parties

3.2 Specifically, Brazil presented arguments to the Panel on the administration of United States' countervailing duty laws under Article X and non-violation nullification and impairment under Article XXIII:1(b) and (c). Brazil considered that while the more basic issue before the Panel was the principle of non-discrimination in Article I:1, this principle nevertheless permeated the whole of the General Agreement and that consideration of Brazil's arguments under Articles X and XXIII:1(b) and (c) was well within the standard terms of reference of the Panel.

3.3 The United States contested Brazil's position, claiming that these issues had not been raised by Brazil in consultations nor in its request for the establishment of a panel. They were therefore outside the terms of reference of the Panel. Fundamental fairness required that these issues, which were in fact new bases for the complaint, be raised in consultations and in the request for a panel. Brazil, however, had raised these issues for the first time in its first submission to the Panel and they were therefore outside the terms of reference. The United States had not addressed these issues on the merits in its submission to the Panel and it requested the Panel to make a ruling on the matter.

4. MAIN ARGUMENTS

Findings Requested by the Parties

4.1 Brazil requested the Panel to find that with respect to the United States' countervailing duty order on non-rubber footwear from Brazil, the United States acted inconsistently with its obligations under Article I:1 by providing less favourable treatment to Brazil than to other contracting parties in the implementation of the United States' obligations under Article VI. More specifically, Brazil requested the Panel to find that in backdating the effect of its negative injury determination only to the date of Brazil's request for an injury determination (29 October 1981), rather than to the date when the obligation for the United States to provide an injury determination under Article VI entered into force (1 January 1980),

the United States acted inconsistently with its obligations under Article I:1. Brazil did not request the Panel to make a specific recommendation to the CONTRACTING PARTIES.

4.2 The United States requested the Panel to find that the United States' action in the implementation of its Article VI obligations with respect to the revocation of a countervailing duty order on non-rubber footwear from Brazil was fully consistent with United States' most-favoured-nation obligation under Article I:1.

Arguments on Article I:1

Simultaneous Application of Different Countervailing Duty Laws

4.3 Brazil stated that it did not consider that any one of the three different countervailing duty laws of the United States implementing United States obligations under Article VI, standing alone, violated Article I:1. Nor did Brazil contend the maintenance of three different countervailing duty laws in the United States to necessarily be inconsistent with the General Agreement. The United States could have as many countervailing duty laws as it liked, so long as each was consistent with the obligations of the United States under Articles I and VI of the General Agreement. Rather, Brazil stated, it was in the particular way in which the United States simultaneously applied its different countervailing duty laws that the United States, in the case of non-rubber footwear, discriminated against Brazil in violation of the most-favoured-nation provision of Article I:1.

4.4 More specifically, Brazil argued that the injury determination requirement of Article VI applied equally, and had to be applied in the same manner, to all contracting parties. However, the United States had failed to implement the injury determination requirement of Article VI in a consistent manner. In the application of its Article VI obligations, the United States treated imports from Brazil less favourably than imports from other contracting parties -- specifically, fasteners from India, steel wire rod from Trinidad and Tobago, and industrial lime and automotive glass from Mexico -- and consequently, the United States denied Brazil the unconditional benefits guaranteed under Article I:1. In the case involving non-rubber footwear from Brazil, the United States had backdated the effect of its negative injury determination to the date of Brazil's request for an injury review, whereas in the cases involving India, Trinidad and Tobago, and Mexico, the United States had backdated the effect of its negative injury determinations to the date on which United States obligations under Article VI entered into force, regardless of the date on which or by whom injury reviews had been requested.

4.5 Brazil noted that, in addition to there being a violation of a fundamental principle of the GATT, the denial of unconditional most-favoured-nation treatment in this particular case had practical implications involving litigation in the United States with more than 100 million United States dollars at stake in countervailing duties on United States imports of Brazilian footwear.

4.6 Brazil¹⁸ stated that the decision of the panel on "Belgian Family Allowances" was particularly relevant to the scope and applicability of family allowances was not only inconsistent with the provisions of Article I ..., but was based on a concept which was difficult to reconcile with the spirit of the General Agreement ... ". Brazil considered that it was significant to the present dispute that the issue in "Belgian Family Allowances" was a discriminatory method of applying charges, not the particular level of charges on particular products. It was the system applied by Belgium to the products of different countries which was discriminatory and inconsistent with Article I:1. Brazil stated that the conclusion adopted by the CONTRACTING PARTIES in the Belgian Family Allowances case was equally applicable to the present case where the United States applied a less favourable procedure to Brazil than to other contracting parties in the implementation of United States obligations under Article VI.

4.7 Brazil referred the Panel to two rulings in 1948 by the Chairman of the CONTRACTING PARTIES¹⁹ which, Brazil considered, confirmed the breadth of the scope of Article I. In the first, the Chairman ruled that the phrase "charges of any kind" in paragraph 1 of Article I applied to consular taxes and that a charge of five per cent to some countries and of two per cent to others was a violation of Article I, without reference to the particular products involved. In the second, the Chairman ruled that the most-favoured-nation principle in Article I would be applicable to any advantage, favour, privilege or immunity granted with respect to internal taxes, again without reference to the particular products involved.

4.8 Brazil²⁰ also referred the Panel to a 1968 statement by the Director-General which, according to Brazil, recognized and condemned the potential for discrimination in the non-tariff area. The Director-General stated:

"In my judgment the words of Article I - 'the method of levying duties and charges (of any kind)', and 'all rules and formalities in connexion with importation' - cover many of the matters dealt with in the Anti-Dumping Code, such as investigations to determine normal value or injury and the imposition of anti-dumping duties. In fact, the principle of non-discrimination in the imposition of anti-dumping duties on imports from different sources is written into the Code itself, in Article 8(b). Furthermore, for a contracting party to apply an improved set of rules for interpretation and application of an Article of the GATT only in its trade with contracting parties which undertake to apply the same rules would introduce a conditional element into the most-favoured-nation obligations which, under Article I of the GATT, are clearly unconditional."

¹⁸ Panel report on "Belgian Family Allowances", adopted on 7 November 1952, BISD 1S/59.

¹⁹ "The Phrase 'charge of any kind' in Article I:1 in Relation to Consular Taxes", Ruling by the Chairman on 24 August 1948, 2 BISD 12; and "Application of Article I:1 to Rebates on Internal Taxes", Ruling by the Chairman on 24 August 1948, 2 BISD 12.

²⁰ Agreement on Implementation of Article VI, Note by the Director-General, L/3149 (29 November 1968).

In Brazil's view, the principles enunciated in this statement applied as much to the countervailing duty aspects of Article VI as they did to the anti-dumping aspects of that Article. Article I:1 in the present case. In that case, Belgium levied a charge on foreign products purchased by public bodies when the products originated in countries which did not provide family allowance systems meeting Belgian specifications. Norway and Denmark complained that this discriminated against their products in violation of Article I because Belgium had granted an exemption from the levy to products originating in several other countries. The panel there concluded that "the Belgian legislation on

Like Products

4.9 The United States responded that the central requirement of Article I was that most-favoured-nation treatment be accorded to "like products". Specifically, Article I by its explicit terms required that any advantage granted on a product originating in or destined for one contracting party must be accorded immediately and unconditionally to the like product originating in or destined for all other contracting parties. In the view of the United States, Brazil's arguments called for an interpretation of Article I which completely neglected to take account of this basic "like product" requirement. Brazil's far-reaching interpretation of the like product requirement -- that all products must be accorded identical treatment -- was nowhere sanctioned in the language or interpretative history of Article I.

4.10 The United States also considered that Brazil's arguments disregarded the fact that the circumstances giving rise to Brazil's entitlement to an injury review under the Subsidies Agreement were completely different from the circumstances in which Mexico, India and Trinidad and Tobago became entitled to an injury review. Any differences in treatment were entirely explained by the way in which United States countervailing duty law had evolved -- wholly consistent with the GATT -- as United States GATT rights and obligations evolved. Brazil's contention that United States procedures applicable in other circumstances and to products other than non-rubber footwear violated United States Article I obligations was not supportable.

4.11 The United States stated that the like product standard in Article I was the expression of a fundamental reality of the GATT. As noted by the panel report on "Spain - Tariff Treatment of Unroasted Coffee"²¹, there was no obligation under the GATT to follow any particular system for classifying products; nor was there any GATT obligation to provide particular tariff treatment to any product. Differences in treatment between products were permissible. What was impermissible was discrimination based on country of origin for any particular product.

4.12 The United States went on to state that the precedent cited by Brazil did not support Brazil's assertion that a broad reading should be given to Article I:1. On the contrary, the two rulings by the Chairman, cited by Brazil, were clarifications of the treatment required for internal taxes. The first dealt with a situation where all products from certain countries

²¹Panel report on "Spain - Tariff Treatment of Unroasted Coffee", adopted on 11 June 1981, BISD 28S/102, 111.

were subject to consular taxes at one tax rate, while all products from other countries were subject to a higher rate. This system was clearly inconsistent with the requirement that like products imported from one country be treated no less favourably than like products imported from other signatories. The ruling did not however require that unlike products be treated similarly. The second ruling, with respect to the rebate of excise taxes, also did not modify the like product requirement of Article I:1.

4.13 According to the United States, the report in "Belgian Family Allowances" was equally unavailing for Brazil's position. In that case, Belgium provided exemptions from family allowance charges for all products from certain countries, and imposed the charges on all products from other countries. Thus, all products from the latter countries were disadvantaged relative to all like products from the former group.²² The panel did not consider particular products because all products from the exporting countries were affected. This case stood for the proposition that contracting parties may not discriminate against imports from another contracting party based on country practices in the other contracting party. Finally, the United States considered that the Director-General's Note in 1968, quoted by Brazil, concerning the principle of non-discrimination in anti-dumping investigations also affirmed the like product requirement of Article I:1. That Note specifically referred to Article 8(b) of the Anti-dumping Code of 1968, which states:

"When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such products from all sources found to be dumped and causing injury".

4.14 Thus, according to the United States, in determining the treatment due to a product from one signatory, reference was to be made to the treatment provided to the like product from other signatories. Article I:1 did not require that all products from all signatories be accorded the same treatment. The essential question under Article I:1 was whether the United States, in applying its countervailing duty laws, had provided non-rubber footwear from Brazil with treatment any less favourable than that accorded non-rubber footwear from other Agreement signatories. The answer was "no".

4.15 In fact, the United States noted, Brazil had omitted to mention that the United States had conducted injury review investigations of outstanding countervailing duty orders on non-rubber footwear from India and Spain at the same time as, and applying identical procedures to those used in the Brazil review. This fact illustrated clearly that United States procedures were entirely consistent with United States most-favoured-nation obligations. In all three cases, the injury review led to revocation and the revocation was effective on the date the review investigation was requested. In all three cases, the countries enjoyed the same "advantage", namely, revocation effective as soon as the country chose to exercise its right to request an injury review. Thus, Brazil had not shown, nor could it show, that non-rubber footwear from India and/or Spain received any advantage under United States countervailing duty law that the like product imported from Brazil did not receive.

²²Panel report on "Belgian Family Allowances", adopted on 7 November 1952, BISD 1S/59, 60.

4.16 The United States contended, moreover, that not only non-rubber footwear but all dutiable products from Subsidies Agreement signatories with outstanding countervailing duty orders were treated in an identical fashion under the transitional procedure of Section 104(b) of the Trade Agreements Act of 1979. A total of thirty-eight such Section 104(b) injury review requests were received by the United States.

Evolution of United States Countervailing Duty Law

4.17 The United States stated that the facts in the cases of India, Trinidad and Tobago and Mexico were very different from the facts in the case of Brazil. In the case of India, Trinidad and Tobago and Mexico, the countervailing duty orders were issued after 1 January 1980 and were not subject to the transition procedures contained in Section 104 of the Trade Agreements Act of 1979. Furthermore, each involved duty-free products, and, in the case of Mexico, accession to the GATT took place after the countervailing duty order was imposed.

4.18 The United States argued that to understand why the procedures under which Brazil received an injury determination for footwear differed from the procedures accorded the other products from India, Mexico and Trinidad and Tobago, one had to trace the evolution of the United States countervailing duty law. The original law was enacted in 1890 and had been amended several times. The amendments of concern here reflected the United States' shifting international obligations as, first, the GATT came into force and, later, the United States signed the Subsidies Agreement.

4.19 As explained by the United States, Section 303 of the Tariff Act of 1930 was enacted to provide for the imposition of countervailing duties on imports of dutiable products found to be subsidized. The law, in effect at the time the United States acceded to the GATT in 1947, did not provide for an injury determination as to subsidized imports and was therefore inconsistent with the Article VI requirement that countervailing duties be imposed only if the subsidized imports are found to be causing material injury. However, Section 303 was sheltered by the existing legislation clause of the PPA. This provision remained in effect today and applied to dutiable imports from all countries that were not signatories to the Subsidies Agreement. It was under Section 303 that the countervailing duty order on footwear was imposed on Brazil in 1974, without the benefit of an injury test.

4.20 The United States explained that it amended its countervailing duty law in 1974 to apply also to imports of duty-free products. Because this amendment -- Section 331 of the Trade Act of 1974 -- was not sheltered from Article VI obligations by the PPA, the United States provided in the law, with respect to imports of duty-free products from GATT contracting parties, for an injury test before the imposition of countervailing duties. It was under this law that the United States revoked the countervailing duty orders on fasteners from India, steel wire rod from Trinidad and Tobago, and industrial lime and automotive glass from Mexico. Under the provisions of that Section, the revocations were effective as of the date the products acquired duty-free status.

4.21 Finally, in 1979, the United States noted, the United States promulgated legislation to implement its rights and obligations under the Subsidies Agreement. Section 701 of the Trade Agreements Act of 1979 provided that the United States would apply an injury test before the imposition of countervailing duties as to both dutiable and duty-free products imported from a country as to which the Subsidies Agreement applied. Section 104 of the 1979 Act provided a special transitional procedure for an injury review for all countervailing duty orders issued before 1 January 1980, which had not, per Section 303 of the Tariff Act of 1930, received an injury test. It was this procedure that the United States applied to the injury review of the countervailing duty order on non-rubber footwear from Brazil.

4.22 The United States considered that each of these three laws, and the regime of laws taken as a whole, was fully consistent with United States obligations under Articles I and VI. These different laws provided different methods and timetables for revoking a countervailing duty order, depending on which provision of law applied to the imported products. However, United States law treated all dutiable products from all Subsidies Agreement signatories identically, just as it treated duty-free products from all Subsidies Agreement signatories (and GATT contracting parties) identically. Accordingly, neither the existence nor the application of the three countervailing duty laws of the United States was inconsistent with United States obligations under the General Agreement.

4.23 In rebuttal to the United States argument, Brazil stated that in the case of both dutiable and non-dutiable products, in the case of footwear from Brazil, fasteners from India, lime from Mexico and wire rod from Trinidad and Tobago, the Panel was dealing with the same matter: the transition procedures by which products previously not entitled to the injury test became entitled to that test. Assuming that transition procedures were permitted, as the Subsidies Agreement panel found, those procedures could not be applied in a discriminatory manner.

4.24 Brazil denied that it had failed to address the "like product" aspect of Article I, as the United States alleged. Brazil had clearly addressed this issue, but had argued for a broader interpretation of the provision than that argued by the United States. The narrow reading of like product advanced by the United States would all but write Article I out of the General Agreement. The United States reading was certainly not in accord with the principles laid down in the case on "Belgian Family Allowances". Nor was it in accord with the Director-General's Statement in 1968. According to the Director-General, use of a different method for levying duties, or use of different rules and formalities in connection with the importation of articles subject to [countervailing] duties, would violate Article I regardless of the particular products that might fortuitously be involved.

4.25 In Brazil's view, the fact that there might be no discrimination within the separate countervailing duty laws of the United States did not dispose of the issue of whether these different laws "which provide different methods and timetables for revoking a countervailing duty order" discriminated when applied. The fact that the United States claimed to

treat all footwear the same, and the fact that it claimed to treat all products "in the same posture" the same, did not dispose of the issue before this Panel. Both of these arguments disguised the discrimination that occurred.

4.26 Brazil noted that footwear from Brazil and footwear from India and Spain were treated the same not because they were footwear. They were treated the same because, for reasons of United States domestic law, they were processed under the same countervailing duty law of the United States -- Section 104 of the 1979 Act, applicable to injury reviews of pre-existing countervailing duty orders concerning dutiable products from Subsidies Agreement signatories.

4.27 In Brazil's view, the fact that footwear from India and Spain may have been discriminated against as well as footwear from Brazil did not change the fact that Brazil experienced discrimination. In the Brazilian case, there was over 100 million United States dollars in countervailing duties and interest at stake, whereas the Indian and Spanish cases involved relatively small dollar amounts.

Dutiable versus Duty-free Products

4.28 Brazil considered that the real distinction at issue was not that between footwear and everything else, but between dutiable and duty-free products. Perhaps this distinction would be valid in situations in which dutiable and duty-free were permanent, fixed categories. But that was not the case here. Products moved from dutiable to duty-free status, and from duty-free to dutiable status, within the United States for a wide variety of reasons. In recent years the most significant reason had been preferences: the United States Generalized System of Preferences, the Caribbean Basin Initiative, the Free Trade Area between Israel and the United States, and the Free Trade Agreement between Canada and the United States. Some products had become duty-free under these programs while others had returned to dutiable status.

4.29 Brazil went on to argue that not only did individual products change their duty status for preferential and other reasons, but frequently they did so for some contracting parties and not for others. Products might be duty-free under GSP for all developing countries or, if competitive need criteria were met, only for some developing countries. Brazil did not claim that this treatment violated the General Agreement insofar as it related only to customs duties. On the contrary, GATT had authorized such derogations from the most-favoured-nation clause of Article I to benefit developing countries. They were also allowed under other articles, such as Article XXIV. But the concept of a GATT derogation from most-favoured-nation treatment on tariffs to benefit developing contracting parties could not be extended so as to permit a contracting party to unilaterally establish additional limitations beyond tariffs, not sanctioned by the GATT, and to apply them to the detriment of other contracting parties. Such an extension would be a clear denial of the most-favoured-nation treatment required by Article I:1. Nothing in Article VI or elsewhere in the General Agreement would permit differential and changing standards for

the injury test depending upon the dutiable status of a particular product at a particular time.

4.30 In sum, Brazil considered that once the Article VI obligations of an injury test entered into force for the United States, Article I required that they be applied in a non-discriminatory manner. Article VI obligations were of both a substantive and a procedural nature, and these obligations were not sheltered by the PPA. What had been sheltered by the PPA until 1 January 1980 in the case of the United States was the injury test itself, and not the procedures or methods by which it was applied. It was not permissible that revocation of countervailing duty orders, in the case of a no injury finding, be backdated to the effective date of the Article VI obligation in the case of duty-free products, and to the request date in the case of dutiable products from Subsidies Agreement signatories. The Article VI obligations had to be fully applied under Article I:1 on a most-favoured-nation basis.

4.31 Brazil considered that it was no more permissible to apply two different procedures for backdating the effect of the Article VI injury test in a way that discriminated than it would be to apply two different standards for injury in a country's countervailing duty laws in a way that discriminated. Whereas it might be acceptable to have two different standards for injury -- for example, "material injury" in one law and "serious injury" in another, it would be a clear most-favoured-nation violation of Article I to apply these two different standards simultaneously to different groups of countries. Similarly, Brazil noted, while it was permissible, pursuant to Article 6.7 of the Subsidies Agreement, for a signatory to determine injury on a regional basis in exceptional circumstances, this discretionary action could not be taken in a manner that discriminated. A signatory could not decide -- consistent with Article I -- to provide the regional injury analysis for some countries but not for others.

4.32 The United States responded that the basis for the United States designating preferential duty-free status to products imported from developing countries was expressly sanctioned by the CONTRACTING PARTIES, and was embodied in the 1979 Enabling Clause. India's fasteners and Mexico's lime and automotive glass were declared duty-free under the United States GSP, and were, therefore, entitled to preferential treatment, without the United States having violated the most-favoured-nation provision of Article I. Likewise, Trinidad and Tobago received preferential treatment under the Caribbean Basin Initiative, for which the United States received a waiver of applicability of the most-favoured-nation clause. These were recognized preferences intended to provide disadvantaged countries with assistance to be able to compete with stronger economies. Providing them with preferential treatment did not violate any most-favoured-nation obligation.

4.33 The United States went on to note that Brazil was not arguing that the United States discriminated against Brazil because its footwear imports would not be duty-free by virtue of being eligible for GSP treatment, nor was Brazil arguing that its footwear qualified under the CBI preference. Nevertheless, without qualifying for the preference, it wanted the same

preferential treatment. Such an argument would undermine the purpose and function of the Enabling Clause.

4.34 The United States noted that under Brazil's argument, for example, the United States would have to provide the same treatment to the European Communities as it provided to a least developed country for which a preference had been granted under the Enabling Clause. That would undermine the preference of course, because if the European Communities were granted the same treatment as a developing country, the developing country would then be deprived of the economic assistance the preference was intended to provide.

4.35 Thus, contrary to Brazil's assertions, the United States was not asking the Panel to find that Article VI "permits differential and changing standards for the injury test depending upon the dutiable status of a particular product at a particular time". To the contrary, the United States agreed with Brazil that such changing standards would not be consistent with GATT most-favoured-nation obligations. However, that was not the case. The difference complained of by Brazil -- the need to make a request -- could be described as, at most, a de minimis procedural requirement. A more minimal requirement was hard to imagine. The reason why the United States implemented a special transition rule for cases like non-rubber footwear, on the other hand, stemmed from basic Article VI obligations. In short, the circumstances of this case were sui generis.

The Timing of Brazil's Request for an Injury Review

4.36 Brazil considered that the timing of Brazil's request for an injury review was not properly at issue in this proceeding. However, in response to a question from the Panel as to whether it was reasonable for Brazil to believe that the injury test required by Article VI would be applied as of the date the Article VI obligation became effective, and also in the light of aspersions cast by the United States upon Brazil's motives in waiting until October 1981 to request an injury review, Brazil wished to make certain points on the timing of its injury review request.

4.37 Brazil vehemently denied assertions by the United States that Brazil had attempted to manipulate the three-year window provided in Section 104(b) of the Trade Agreements Act of 1979 for requesting an injury review. Brazil eliminated its subsidy on footwear nine months after the injury test was requested. However, the injury determination was not made by the United States until fifteen months after the request, and six months after the subsidy was eliminated. The fact that the subsidy had been eliminated by the time the USITC considered the question of injury was totally within the control of the United States, and not within the control of Brazil.

4.38 Moreover, Brazil considered that it was reasonable for Brazil to conclude that the effect of a negative injury determination under Section 104(b) in the case of non-rubber footwear from Brazil would be backdated to 4 January 1980, the date on which United States authorities suspended liquidation on entries of non-rubber footwear from Brazil. This was because the 1979 Act did not indicate that revocation of a

countervailing duty order in the event of a negative injury finding was to be backdated to the date of a request for injury review. Rather, Section 104(b)(4)(B) of the 1979 Act indicated that "upon being notified of a negative determination under paragraph (2) by the Commission, the administering authority shall revoke the countervailing duty order then in effect, publish notice thereof in the Federal Register, and refund, without payment of interest, any estimated countervailing duties collected during the period of suspension of liquidation".

4.39 Brazil noted that on 28 December 1979, four days prior to the effective date of Section 104, the United States suspended liquidation on all entries of non-rubber footwear from Brazil, effective 4 January 1980. Thus, any suspension of liquidation with regard to the countervailing duty on Brazilian footwear had already occurred effective 4 January 1980 and could not have reoccurred in October 1981. In fact, as the Subsidies Agreement panel noted (SCM/94 at page 3), "no suspension of liquidation was ordered" in October 1981 "and the original suspension of liquidation ordered on 4 January 1980 remained in effect. As subsequently explained in the notice of revocation 'it was not necessary for the Department, upon notification by the USITC, to suspend liquidation of entries of the products pursuant to [Section 104 of the Trade Agreements Act of 1979], since previous suspensions remained in effect'". It was thus reasonable for Brazil to rely on the 4 January 1980 suspension of liquidation, and the backdating of the negative injury determination only to the request date of 29 October 1981 constituted unjustifiable discrimination in contravention of Article I:1.

4.40 The United States responded that Brazil was thoroughly aware that under United States law the exporting country had three years from entry into force of the Article VI obligation in which to request an injury review and that the injury review had to be completed by the USITC within three years of commencement of the injury review investigation. Brazil had taken full advantage of this three-year window, delaying its request for an injury review so as to delay the phasing out of its subsidy programme on non-rubber footwear. In fact, a key element in the USITC's negative injury finding in May 1983 -- explicitly noted by both Commissioners writing in the majority -- was that Brazil had imposed an export tax to offset the remaining subsidies and provided its assurance to the DOC that the tax would continue to be imposed even if the order were revoked. Accordingly, the timing of the injury review actually worked to Brazil's benefit.

4.41 The United States considered that the language of Section 104(b) of the 1979 Act was clear on its face. Moreover, Brazil had more than six months to study the law, before it took effect on 1 January 1980. Not only did the Brazilian Government study the law, but documents prepared by the Government of Brazil and submitted to the United States Government during the relevant period conclusively demonstrated that Brazil's understanding of the United States law was clear and, in fact, quite sophisticated. The purpose of these communications was to inform the DOC of offset measures that Brazil was in the process of implementing in order to ensure that the subsidy margins would be reduced to zero. Indeed, the Government of Brazil explicitly contemplated not requesting an injury review at all on imports of non-rubber footwear. That would have been its right and the order would have terminated without the need to examine injury at all if the margin of

subsidy was reduced to zero and remained there. Since the Government of Brazil expressly indicated its interest in exploring this possibility, the United States considered that it was inconsistent now for the Government of Brazil to adopt the contrary position. In addition, the United States had made a special effort to inform all countries with outstanding countervailing duty orders of the transitional procedures and the schedule of the USITC for conducting injury reviews. There was therefore no basis to Brazil's claim that it was not aware that the date of its request for an injury review would be the date of revocation of the order if the injury review went negative.

4.42 The United States further considered that what Brazil might term as an advantage -- the automatic backdating of an injury determination to the date of the Article VI obligation -- denied to Brazil, might by other contracting parties be considered to be a disadvantage and that the three-year window for requesting an injury review under Section 104(b) -- available to Brazil -- might be considered by other contracting parties to be an advantage denied to them. The United States wondered how Brazil would respond to such a hypothetical circumstance.

4.43 Brazil responded to these United States arguments by stating that, like the United States, Brazil considered Section 104(b) to be clear on its face but that Brazil disagreed with the United States as to the interpretation of this law "clear on its face". In particular, in view of the suspension of liquidation implemented by United States authorities on 4 January 1980, Brazil considered that it was reasonable to expect that revocation of the countervailing duty order would be backdated to this, the only, suspension of liquidation involving non-rubber footwear. The fact that Brazil had discussed various scenarios with United States authorities regarding the phasing out of the Brazilian subsidy programme in no way changed the reasonableness of this interpretation. As to the United States hypothetical concerning relative advantages and disadvantages, Brazil was not prepared to respond to such a hypothetical set of facts.

5. SUBMISSIONS BY INTERESTED THIRD PARTY

India

5.1 India made a submission to the Panel in which it supported Brazil's complaint and emphasized the categorical and unconditional nature of obligations under Article I. India considered that there was little room for doubt that the most-favoured-nation obligations of Article I applied not only to benefits flowing from the General Agreement but also those flowing from the Agreements negotiated under the Tokyo Round. In this regard, India cited the 1968 Note by the Director-General²³ and the Decision of the CONTRACTING PARTIES of 28 December 1979, entitled "Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations".²⁴ The Decision stated, inter alia, that "the CONTRACTING PARTIES also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements".

²³L/3149

²⁴BISD 26S/201

5.2 Furthermore, in the case under dispute, India considered that it was clear that the Subsidies Agreement obliged the United States to levy countervailing duties on the importation of products alleged to have been subsidized only after the determination of an injury. This obligation became effective for the United States as of 1 January 1980, once the PPA ceased to have effect in relation to Article VI. It therefore followed that the United States had to apply the injury test unconditionally to all contracting parties from the date this obligation became effective for it, irrespective of whether the exporting country specifically requested an injury determination in accordance with United States law. Any imposition and collection of countervailing duties without providing for an injury determination from 1 January 1980 would hence be inconsistent with its obligations under Article VI of the General Agreement. The United States practice of extending the benefit of injury test to some contracting parties from 1 January 1980, and denying that benefit to others, thus violated the most-favoured-nation obligation of the United States under Article I.

5.3 India noted that in the United States submission to the Panel the United States had tried to argue that the provisions of Article I applied only to "like products" and that since no discriminatory treatment was meted out to non-rubber footwear from Brazil vis-à-vis imports from other sources, there had been no breach of Article I. In India's view this line of argument was untenable. Article VI provided for imposition of countervailing duties on products alleged to be subsidized only after determination of an injury. The like product requirement of Article I might not be very relevant in that situation. What was relevant was the procedural requirement and the methodology for extending the injury test before imposition of countervailing duties. Under Article I, the United States had the obligation to extend this benefit on a most-favoured-nation basis, irrespective of what the United States countervailing duty legislation provided.

5.4 India considered that while the general extension on a most-favoured-nation basis of the injury test to all contracting parties might not be directly relevant to this particular case, it was nonetheless a fundamental policy issue of which the Panel should take due cognizance.

6. FINDINGS

Procedural Ruling

6.1 The Panel recalled that in their first submissions to the Panel, Brazil and the United States disagreed on the proper scope of the proceeding. In addition to its presentation on Article I:1, Brazil made arguments to the Panel concerning the administration of United States' countervailing duty laws under Article X and non-violation nullification and impairment under Article XXIII:1(b) and (c). Brazil considered these latter issues to be within the standard terms of reference of the Panel. The United States claimed that these issues had not been raised by Brazil in consultations or in its request for the establishment of a panel. They were therefore outside the terms of reference. The United States did not

address these issues on the merits in its submission to the Panel and it requested the Panel to make a ruling on the matter.

6.2 On 18 September 1991, the Panel made the following ruling:

Having heard and considered the arguments of Brazil and the United States as to whether or not the Panel should consider presentations on Articles X and XXIII:1(b) and (c), the Panel rules as follows:

Article X. The Panel notes that its terms of reference are limited to the matters raised by Brazil in its request for the establishment of this Panel, that is document DS18/2. In its request, Brazil referred to the discrimination in the United States' countervailing duty laws as applied to Brazil, not however to any discrimination resulting from the administration of United States' countervailing duty laws. The Panel therefore considers that the

matter raised by Brazil in its submission relating to Article X:3(a) is not part of its terms of reference. The Panel would like to emphasize however that it is ready to consider any arguments on the issue of discrimination, taking into account its terms of reference.

Article XXIII:1(b) and (c). The Panel further notes that in its request for a Panel, Brazil claimed that the United States had acted inconsistently with the General Agreement. Brazil did not claim that benefits accruing to it under the General Agreement were nullified or impaired as a result of a measure or situation of the type referred to in Article XXIII:1(b) and (c). The Panel therefore considers that the matters raised by Brazil relating to these provisions were not covered by its terms of reference.

Background to the Dispute

6.3 The Panel recalled that the dispute between Brazil and the United States involves the interrelationship of three different countervailing duty laws of the United States: (1) Section 303 of the Tariff Act of 1930; (2) Section 331 of the Trade Act of 1974; and (3) Sections 701 and 104 of the Trade Agreements Act of 1979. The first of these laws, Section 303 of the Tariff Act of 1930, provides for the imposition of a countervailing duty order on subsidized imports of dutiable products without the benefit of an injury determination. In order to bring its legal regime in the countervailing duty area into conformity with Article VI:6(a), the United States introduced the injury requirement in respect of duty-free products from contracting parties in Section 331 of the Trade Act of 1974, and in respect of dutiable products from signatories of the Subsidies Agreement in Sections 701 and 104 of the Trade Agreements Act of 1979.²⁵

²⁵ The Panel noted that Section 701 of the 1979 Act contains the general requirement of an injury determination in countervailing duty cases involving products imported from signatories of the Subsidies Agreement, whereas Section 104(b) of this Act contains the transitional provision applicable to outstanding countervailing duty orders involving products imported from such signatories.

6.4 The Panel noted that the injury determination procedure in Section 331 of the Trade Act of 1974 applies only to duty-free -- not dutiable -- products from contracting parties to GATT. Pursuant to Section 331 of the 1974 Act, whenever a dutiable product, subject to a countervailing duty order under Section 303 of the Tariff Act of 1930, imposed without the benefit of an injury test, is subsequently accorded duty-free treatment, the outstanding (pre-existing) order receives an injury review and, presuming the injury review is negative, the outstanding order is revoked effective as of the date that the product acquires duty-free status. Under this Section 331 procedure, the injury review requirement is automatically implemented, whether or not there is a specific request for such a review.²⁶ Section 331 requires that revocation of an outstanding order be made effective as of the date the product at issue becomes duty-free, unless the exporting country is not a GATT contracting party, in which case revocation is effective as of the date of accession to the GATT.²⁷

6.5 The Panel then noted that Section 104 of the Trade Agreements Act of 1979 provides a transitional procedure whereby dutiable products subject to outstanding countervailing duty orders, imposed under Section 303 of the Tariff Act of 1930 without the benefit of an injury test, become eligible for an injury review upon accession to the Subsidies Agreement by the exporting country concerned. Pursuant to Section 104(b) of the Trade Agreements Act of 1979, a contracting party signatory to the Subsidies Agreement may request an injury review within three years of the United States' accession to the Subsidies Agreement (1 January 1980) and, presuming the injury review is negative, the countervailing duty order is revoked effective as of the date the review is requested.

6.6 The Panel further noted that the United States designates products as duty-free in two different ways: Some product categories acquire duty-free status in the United States as the result of concessions granted to other contracting parties, as in the various rounds of GATT multilateral trade negotiations. Pursuant to Article I, these concessions are extended unconditionally to all contracting parties. Other products gain duty-free status in the United States only in respect of the exporting countries' status within United States preferential trading arrangements, the most important of these being the United States GSP programme which entered into force in 1974.²⁸ Such preferential programmes provide duty-free treatment only to certain products originating in the designated beneficiary countries.

6.7 The Panel then recalled that, in accordance with Section 331 of the Trade Act of 1974, the United States revoked an outstanding countervailing

²⁶ Paragraph (a)(2) of Section 331 provides: "In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination [of injury] by the Commission ...".

²⁷ See paragraphs 2.18 and 2.19 above.

²⁸ Trade Act of 1974, Title V, as amended, 19 U.S.C. Section 2416

duty order on fasteners from India. The revocation was effective as of the date that duty-free status was accorded this product (1982) pursuant to the United States GSP programme. Also under Section 331, the United States revoked outstanding countervailing duty orders on industrial lime and automotive glass from Mexico -- both duty-free products under the GSP programme of the United States -- effective as of the date that Mexico acceded to the GATT (1986).²⁹ The application of Section 331 of the Trade Act of 1974 depended on the duty-free status of the products in issue and this in turn depended upon whether the products originated in countries which were designated as beneficiaries under the United States GSP programme. In contrast, the Panel recalled that, in accordance with Section 104(b) of the Trade Agreements Act of 1979, following accession to the Subsidies Agreement by both the United States and Brazil on 1 January 1980, the United States revoked an outstanding countervailing duty order on dutiable non-rubber footwear from Brazil effective as of the date that Brazil requested the injury review (29 October 1981), not on the effective date of the United States obligation to provide an injury determination to Subsidies Agreement signatories (1 January 1980).

Applicability of Article I:1

- 6.8 The Panel noted that Article I:1 provides in relevant part:
"With respect to customs duties and charges of any kind imposed on or in connection with importation ..., and with respect to all rules and formalities in connection with importation ..., ... any advantage ... granted by any contracting party to any product originating in ... any other country shall be accorded immediately and unconditionally to the like product originating in ... the territories of all other contracting parties".

The Panel considered that the rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation, within the meaning of Article I:1.

- 6.9 The Panel proceeded to consider whether the United States, through the operation of Section 331 of the Trade Act of 1974, accords an advantage to countries subject to pre-existing countervailing duty orders on products designated as duty-free under the United States GSP programme. In the view of the Panel, the automatic backdating of the effect of revocation of a pre-existing countervailing duty order, without the necessity of the country subject to the order making a request for an injury review, is properly considered to be an advantage within the meaning of Article I:1.

²⁹ As the Panel recalled, Brazil had also argued that a countervailing duty order on steel wire rod from Trinidad and Tobago was revoked pursuant to Section 331 of the Trade Act of 1974. However, because steel wire rod from Trinidad and Tobago received duty-free treatment pursuant to the Caribbean Basin Economic Recovery Act, 19 U.S.C. Section 2801 (1983), which entered into force after the end of the three-year transitional procedure of Section 104(b) of the Trade Agreements Act of 1979, the Panel did not consider this particular application of Section 331 of the Trade Act of 1974 relevant to the analysis of the Article I issue in this case.

It was equally clear from the record that this advantage is not accorded, under Section 104(b) of the Trade Agreements Act of 1979, to contracting parties signatories to the Subsidies Agreement. When such a signatory contracting party seeks revocation of a pre-existing countervailing duty order on a dutiable product originating in its territory, it is required to request the United States authorities for an injury review, following which the United States authorities conduct a review investigation and revoke the countervailing duty order, presuming there is a negative injury determination, but with the revocation effective as of the date of the request for the review.

6.10 The Panel recalled that the United States had argued that countries subject to the automatic backdating procedure under Section 331 could conceivably make the opposite argument from that of Brazil: that they were treated less favourably than those Subsidies Agreement signatories availing themselves of the three-year period for requesting an injury review under Section 104(b). The Panel however considered that Article I:1 does not permit balancing more favourable treatment under some procedures against a less favourable treatment under others. If such a balancing were accepted, it would entitle a contracting party to derogate from the most-favoured-nation obligation in one case, in respect of one contracting party, on the ground that it accords more favourable treatment in some other case in respect of another contracting party. In the view of the Panel, such an interpretation of the most-favoured-nation obligation of Article I:1 would defeat the very purpose underlying the unconditionality of that obligation.³⁰

6.11 The Panel noted that Article I would in principle permit a contracting party to have different countervailing duty laws and procedures for different categories of products, or even to exempt one category of products from countervailing duty laws altogether. The mere fact that one category of products is treated one way by the United States and another category of products is treated another is therefore in principle not inconsistent with the most-favoured-nation obligation of Article I:1. However, this provision clearly prohibits a contracting party from according an advantage to a product originating in another country while denying the same advantage to a like product originating in the territories of other contracting parties.

6.12 The Panel consequently examined whether the products to which the United States had accorded the advantage of automatic backdating are like the products to which this advantage had been denied. The Panel noted that the products to which the procedures under Section 331 of the Trade Act of 1974 had actually been applied (industrial fasteners, industrial lime, automotive glass) are not like the product to which Section 104(b) of the

³⁰ A previous panel rejected a similar "balancing" argument in the context of the national treatment obligation in Article III:4. Panel report on United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 387.

Trade Agreements Act of 1979 had been applied in the case of Brazil (non-rubber footwear). However, the Panel also noted that Brazil not only claimed that the application of these two Acts in concrete cases was inconsistent with Article I:1 of the General Agreement but also that the United States' legislation itself was inconsistent with that provision. The Panel recalled that neither Section 331 of the 1974 Act nor Section 104(b) of the 1979 Act makes any distinction as to the particular products to which each applies, other than that the former applies to duty-free products originating in the territories of contracting parties and the latter applies to dutiable products originating in the territories of contracting parties signatories to the Subsidies Agreement. The products to which Section 331 of the 1974 Act accords the advantage of automatic backdating are therefore in principle the same products to which Section 104(b) of the 1979 Act denies the advantage of automatic backdating.

6.13 Having found that Section 331 of the 1974 Act and Section 104(b) of the 1979 Act are applicable to like products, the Panel examined whether this legislation as such is consistent with Article I:1. The Panel noted that the CONTRACTING PARTIES had decided in previous cases that legislation mandatorily requiring the executive authority to impose a measure inconsistent with the General Agreement was inconsistent with that Agreement as such, whether or not an occasion for the actual application of the legislation had arisen.³¹ The Panel recalled that the backdating provisions of the two Acts are mandatory legislation, that is they impose on the executive authority requirements which cannot be modified by executive action, and it therefore found that these provisions as such, not merely their application in concrete cases, have to be consistent with Article I:1.

6.14 As the Panel previously noted, the United States accords duty-free status under a variety of laws only to products of a particular origin, the most important being the law establishing the GSP. The GSP programme of the United States, both in its nature and in its design, accords duty-free status to only certain products originating in only certain developing countries. The Panel noted that, together with the grant of a tariff advantage to the designated beneficiary countries under this programme, Section 331 of the Trade Act of 1974 accords a non-tariff advantage to the same beneficiary countries in the form of the automatic backdating of countervailing duty revocation orders. The Panel considered that the grant of this non-tariff advantage under Section 331 of the 1974 Act to duty-free products originating in a country beneficiary of the GSP programme, which advantage is denied to dutiable products originating in the territory of a Subsidies Agreement signatory, is inconsistent with the most-favoured-nation provision of Article I:1 of the General Agreement.

³¹Panel report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 24S/136, 160; and Panel report on "European Economic Community - Regulation on Imports of Parts and Components", adopted on 16 May 1990, BISD 37S/132, 198.

6.15 The Panel then examined whether the CONTRACTING PARTIES had taken any action which would permit the United States to accord the non-tariff advantage of Section 331 of the Trade Act of 1974 to duty-free products emanating from countries beneficiaries of the GSP programme, without unconditionally and immediately according this same advantage to dutiable products originating in the territories of signatories of the Subsidies Agreement. In this regard, the Panel noted that a Decision of 28 November 1979, entitled "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of the Developing Countries"³², otherwise known as the "Enabling Clause", permits, in paragraph 2(a) thereof, "preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences ...", notwithstanding the provisions of Article I. It was clear that the Enabling Clause expressly limits the preferential treatment accorded by developed contracting parties in favour of developing contracting parties under the Generalized System of Preferences to tariff preferences only.

6.16 The Panel referred in this context to a discussion of this issue by an earlier panel concerned with the customs user fee of the United States.³³ The panel in that case considered the claim that exemption from a merchandise processing fee granted to the beneficiaries of the Caribbean Basin Economic Recovery Act was not authorized by the waiver granting the United States authority to extend duty-free treatment to these beneficiaries, and that it was also not authorized by the Enabling Clause. That panel noted that no answer in opposition to this legal claim was given and that it was not aware of any that could be given. However, in view of the fact that this claim was raised by third parties and not by the parties to the dispute, this earlier panel did not consider it appropriate to make a formal finding on the issue.

6.17 Accordingly, the Panel found that there is no decision of the CONTRACTING PARTIES justifying the given inconsistency with Article I:1 of the non-tariff advantage accorded to duty-free products originating in countries beneficiaries of the United States GSP programme in the backdating of the effect of the revocation of countervailing duty orders.³⁴

³²BISD 26S/203

³³Panel report on "United States - Customs User Fee", adopted on 2 February 1988, BISD 35S/245, 290.

³⁴The Panel noted that Brazil had also mentioned the existence of other preferential arrangements -- specifically, free-trade arrangements between the United States and other contracting parties that would be covered by Article XXIC. However, the question of whether such Article XXIV arrangements can include non-tariff preferences has repeatedly been discussed but never resolved by the CONTRACTING PARTIES. See, for example, the Report of the Working Party on the Accession of Iceland to EFTA, BISD 18S/174, 177. In any case, the Panel did not consider that the resolution of such an issue with respect to Article XXIV arrangements was necessary to the disposition of the case at hand.

Additional Issues

6.18 The Panel noted that Brazil raised an additional issue: that it was reasonable for Brazil to assume that the United States revocation of the countervailing duty on non-rubber footwear would be backdated to 4 January 1980, the date of the only suspension of liquidation by the United States authorities on entries of non-rubber footwear from Brazil, rather than to 29 October 1981, the date of Brazil's request for an injury review. Brazil considered that the United States backdating of the revocation of the countervailing duty in this context constituted discrimination in contravention of Article I:1. No separate suspension of liquidation was ordered in conjunction with the injury review request since there was already a suspension in effect dating back to 4 January 1980. The Panel recalled that Section 104 does not specify that the backdating of revocation of a countervailing duty order shall be only to the date of the request for an injury review. What Section 104 does provide, in paragraph (b)(4)(B), is that the revocation shall be backdated to the date of suspension of liquidation and, in paragraph (b)(3), that suspension of liquidation shall occur on the date the request for an injury review is received. The Panel further noted the United States argument that Brazil was fully aware of the elements of Section 104(b) upon its entry into force, and of its implications for the revocation of the countervailing duty order in this case. However, in view of the Panel's finding in the preceding paragraph, the Panel did not consider it necessary to propose a ruling on this additional issue raised by Brazil.

6.19 Similarly, the Panel did not consider it appropriate in the context of this case to address the issues raised in India's third party submission in respect of the non-applicability of the PPA. It was not clear to the Panel how India's arguments respecting the non-applicability of the PPA directly affect Brazil's case before this Panel. GATT practice has been for panels to make findings only on the issues raised by the parties to the dispute.³⁵ The Panel believed that this was sound legal practice and should also be followed in the present case. It was of course open to any contracting party which wished to raise this issue to commence consultation and dispute settlement proceedings in its own right under the General Agreement.

7. CONCLUSION

7.1 The Panel noted that Brazil requested a general ruling on the matter in dispute, but did not request the Panel to make a specific recommendation to the CONTRACTING PARTIES.

7.2 The Panel found that the United States failed to grant, pursuant to Section 104(b) of the Trade Agreements Act of 1979, to products originating in contracting parties signatories to the Subsidies Agreement the advantage accorded in Section 331 of the Trade Act of 1974 to like products originating in countries beneficiaries of the United States GSP programme,

³⁵ Panel report on "United States - customs user Fee", adopted on 2 February 1988, BISD 35S/245, 290.

that advantage being the automatic backdating of the revocation of countervailing duty orders issued without an injury determination to the date on which the United States assumed the obligation to provide an injury determination under Article VI:6(a). Accordingly, the Panel concludes that the United States acted inconsistently with Article I:1 of the General Agreement.