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Committee on Anti-Dumping Practices

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EC - IMPOSITION OF ANTI-DUMPING DUTIES ON IMPORTS OF COTTON YARN FROM BRAZIL

Request for the Establishment of a Panel under Article 15:5 of the Agreement

Communication from Brazil

The following communication, dated 5 April 1994, has been received from the Permanent Mission of Brazil.

I. Background

1. In 1989, the European Commission received a complaint lodged by the Committee of the cotton and allied textile industries of the European Communities ("Eurocotton") on behalf of producers of cotton yarn in the Community alleging dumping on this product originating in Brazil, Egypt, India, Thailand and Turkey and material injury resulting therefrom.

2. As a result, in a notice published in the Official Journal of the European Communities ("O.J.") of 22 March 1990, N. C 72, the European Commission announced the initiation of an anti-dumping proceeding against imports of cotton yarn originating in the countries mentioned in the complaint. The investigation concerning anti-dumping covered the period 1 January 1989 to 31 December 1989.

3. On 23 September 1991, the European Commission issued a regulation imposing provisional anti-dumping duties on imports of cotton yarn originating in Brazil and two of the other countries concerned, and terminating the anti-dumping proceeding in respect of cotton yarn originating in two other countries (O.J. (1991) L 271/17).

4. On 11 November 1991, consultations were held between Brazil and the EC under Article 15:2 of the Agreement.

5. On 23 March 1992, definitive anti-dumping duties were imposed on imports of cotton yarn originating in Brazil and one other country (O.J. (1992) L 82/1).

6. In April and October 1992, Brazil addressed the Committee on Anti-Dumping Practices on a number of the issues involved in the measures adopted by the EC against imports of cotton yarn from Brazil.

7. Consultations on the definitive duties, held on 27 October 1993 in Geneva failed to achieve a mutually agreed solution.

8. Brazil therefore referred the matter to the Committee on Anti-Dumping Practices of the GATT for conciliation under Article 15:3 of the Agreement and a meeting was held for this purpose on 20 December 1993. Unfortunately, despite considerable efforts undertaken by Brazil throughout the period of conciliation and thereafter, no mutually satisfactory solution could be reached. Brazil therefore concludes that the conciliation has been unsuccessful.

9. Brazil continues to be of the opinion that the anti-dumping duties imposed are not in conformity with the provisions of the Agreement on Implementation of Article VI of the GATT ("the Agreement") and that Brazil's benefits under the Agreement have thus been impaired and nullified.

II. Brazil's claim

10. The main issues in the proceedings on cotton yarn concern the determination of dumping and the determination of injury, as well as the status of Brazil as developing country under the Agreement. Brazil argues that the EC has violated the following provisions:

- Article 2:4, by failing to consider the particular market situation prevailing in Brazil;
- Article 2:6, by failing to effect a fair comparison between normal value and export price;
- Articles 3:1 and 3:2, by not basing the injury findings on "positive evidence", and not making an objective examination of the relevant facts;
- Articles 3:2, 3:3 and 3:4, by not giving a reasonable explanation of how the facts supported the injury determination;
- Article 3:2 in combination with Article 8:2, by discriminating against Brazilian exporters;
- Articles 3:2, 3:3 and 3:4, by failing to take into account that quotas agreed under the bilateral textile agreement precluded a finding of injury, especially in light of the provisions of Article 13;
- Article 13, by not giving due consideration to the situation of Brazil as a developing country.

11. The result of these failures is that the benefits accruing to Brazil under the Agreement have been nullified or impaired, which may be illustrated by the fact that exports of cotton yarn from Brazil to the EC dropped by more than 50 per cent since the imposition of the anti-dumping duties.

Therefore, Council Regulation (EEC) No.738/92 should be revoked as far as imports of cotton yarn originating in Brazil are concerned and the duties collected accordingly should be reimbursed.

III. Main issues

12. The main arguments put forward by Brazil may be summarized as follows:

A. DETERMINATION OF DUMPING

13. In respect of Article 2 of the Agreement, Brazil considers that two main aspects merit special attention. First, Brazil considers that the EC violated Article 2:4 of the Agreement in that it failed to take account of the particular market situation prevailing in Brazil during the period of investigation. Moreover, Brazil considers that there has been a violation of Article 2:6, since a fair comparison between the normal value and the export price should have led the EC to make at least an allowance in order to take account of the distortions arising from a situation whereby very high inflation on the domestic market was coinciding with a freeze of the exchange rates.

Violation of Article 2:4 : Failure to consider the particular market situation prevailing in Brazil

14. Whereas under normal circumstances the dumping margin is established by comparing domestic prices with export prices for the like product, Article 2:4 of the Agreement also provides that where the particular market situation prevailing in the exporting country does not permit a proper comparison, the margin of dumping shall be determined otherwise.

15. At the beginning of the period of investigation, i.e. at the beginning 1989, Brazil experienced a deep economic crisis, including very high inflation. Urgent economic policy measures of a general nature were therefore needed and were applied in a manner consistent with Brazil's obligations under GATT and the Agreement. These measures, however, could not be tailored to prevent situations of distortion of domestic and export prices on a case by case basis. In particular, in the first quarter of 1989, the Brazilian Government froze the exchange rate in order to curb the high inflation rate and to decrease the money supply. However, domestic prices continued to rise at a rate more or less equivalent to the rate of inflation while at the same time, export earnings converted into domestic currency remained stable. This evidently led to a gross distortion of any comparison between domestic and export prices. Interestingly enough, the highest dumping margins in the cotton yarn proceeding were found in the first quarter of 1989. Even though, in the course of 1989, the Brazilian Government changed its policy and adapted, in regular intervals, the exchange rates to the domestic inflation, these regular new fixings of the exchange rates did not entirely eliminate the distortions outlined above. As a result, higher dumping margins were found by the EC authorities towards the end of each month, when the gap between the domestic inflation and the fixed exchange rate became wider, while no dumping or only very small dumping was found immediately after the exchange rate had been readjusted.

16. While Brazil does not contest that the majority of sales on the domestic market had been made in the ordinary course of trade from an internal Brazilian perspective, it is also evident that during the period under investigation, there was clearly a particular market situation prevailing in Brazil within the meaning of Article 2:4 of the Agreement, as a result of which the establishment of a normal value on the basis of domestic sales of the like product did not, in the exceptional conditions prevailing, permit a proper comparison with export prices.

17. Despite this fact, the EC determined normal value for the great majority of imports from Brazil on the basis of sales of the like product in the domestic market without giving due consideration to the special circumstances prevailing. Accordingly, Brazil considers that, in respect of those determinations, the EC infringed Article 2:4 of the Agreement.

18. Normal value for the remaining sales was determined on the basis of cost of production. Brazil considers that this determination equally infringed Article 2:4 of the Agreement. Even though, in the event of a particular market situation, Article 2:4 in principle offers the possibility to establish normal value on the basis of cost of production, in this proceeding the nature of the particular market situation had the effect of making equally unreliable, as a basis for normal value, both domestic sales and cost

of production. As a matter of fact, where the particular market situation, as was the case of this proceeding, consists of a combination of high domestic inflation and a freeze of exchange rates, any determination based on domestic data will result in a gross distortion making it impossible to carry out a proper comparison.

19. Brazil would like to emphasize that the overriding principle of Article 2:4 of the Agreement is that the methodology adopted should permit a proper comparison. This is a fundamental principle of the Agreement and is reiterated throughout its text. This fundamental principle has clearly been violated in this proceeding.

Violation of Article 2:6 : Failure to take into account distortions arising from high domestic inflation combined with fixed exchange rates in comparing normal value and export price

20. The only appropriate basis on which normal value could have been established in this proceeding, under the particular market situation then prevailing, would have been sales to any third country.

21. However, even if it could be accepted that - for the last three quarters of 1989 - normal value could have been calculated on the basis of domestic sales or costs of production, Brazil considers that there should have been adjustments in order to take account of distortions in the comparison arising from Brazil's general economic policy. Since no such adjustments were made by the EC, Brazil considers that the EC infringed Article 2:6 of the Agreement.

22. In the Regulation imposing the definitive anti-dumping duties, the EC states that:

> "the establishment, by the competent authorities, of the exchange rate of a third country's currency is a decision which cannot be subject of appreciation by the Community institutions in the framework of an anti-dumping proceeding. It is, therefore, the Commission's constant practice, confirmed in the case-law of the Court of Justice, to use the official exchange rate applied to international commercial transactions. To adjust this exchange rate for the purposes of dumping calculations would be inappropriate and contrary to the principle of neutrality as regards the monetary aspects of an anti-dumping case."

23. Brazil considers that the reasoning of the EC in this point cannot be upheld in light of the provisions of the Agreement. Indeed, the EC is under an obligation to make adjustments for differences affecting price comparability, since the Agreement requires that a "fair comparison" be made. As outlined above, it is beyond any doubt that the measures imposed by the Brazilian Government affected the comparability of prices.

24. The statement that the fixing of official exchange rates cannot be subject to appreciation on the framework of an anti-dumping proceeding has no legal foundation. In making the appropriate adjustments, the EC would not be judging the legality or the appropriateness of the economic policy of Brazil, nor would it be interfering with the internal economic affairs of Brazil in any way. The Government of Brazil has, in fact, formally requested the EC, in the course of the proceeding, to reconsider its decision in this respect. Moreover, Article 2:6 of the Agreement expressly mentions "differences in taxation" as one of the factors affecting price comparability for which adjustments should be made. Taxes, however, are typical economic measures imposed by a Government and are therefore comparable, in this respect, to the fixing of exchange rates.

25. The statement of the EC authorities mentioned in paragraph 22 above does not even appear to be founded under internal EC law. Indeed, in the same proceeding, special rates of exchange in force for transactions of raw cotton have been applied in respect of another country concerned by the proceeding.

26. The EC also refers to a principle of neutrality as regards monetary aspects of an anti-dumping case. No reference is made to such a "principle" in the Agreement. In any event, to the extent that such a principle would exist, Brazil considers that it would have been met most effectively by basing normal value on sales to third countries, under the exceptional circumstances prevailing at the time of the investigation, by making the necessary adjustments to normal value based on domestic sales or costs of production, or by simply ignoring alleged "dumping" merely caused by temporary and unexpected exchange rate fluctuations.

27. During the consultations held in respect of this proceeding, the EC also expressed the opinion that the general obligation of making adjustments which take into account the distortions arising from the fixing of exchange rates, for the purpose of a fair comparison, would be "far beyond the scope" of the Agreement. This does not seem to be the opinion of the other GATT Contracting Parties, nor of the EC itself, since Article 2.4.1 of the new Agreement on Implementation of Article VI agreed upon in the framework of the Uruguay Round negotiations precisely contains provisions as to how to deal with exchange rates in general and exchange rates fluctuations in particular.

28. If the difference between official and adjusted exchange rates had been taken into consideration, no dumping would have been found.

29. In a situation where it was impossible for exporters to avoid a dumping finding because of the methodology used by the EC, the overriding principle of the Agreement, that of the "fair comparison", would only have been fulfilled by allowing the methods referred to in paragraphs 20 or, alternatively, 21 above. Brazil therefore considers that the EC, in failing to make the necessary adjustment, infringed Article 2:6 of the Agreement.

B. DETERMINATION OF INJURY

30. Several aspects concerning the determination of injury are to be mentioned. Brazil considers that the EC violated Article 3:1, Article 3:2 and Article 3:4 (and Article 3:2 in combination with Article 8:2) of the Agreement for the reasons that the injury findings were not based in positive evidence; that the EC authorities did not make an objective examination of the relevant facts and did not give a reasonable explanation of how the facts supported the injury determination; that Brazilian exporters were discriminated against in the injury findings; and that quotas agreed under the bilateral textile agreement precluded a finding of injury.

Violation of Article 3:1 and Article 3:2 : Injury findings not based on *positive evidence*, and failure to make an objective examination of the relevant facts

31. The data on the volume on the EC imports of Brazilian cotton yarn used by the EC in its injury analysis were based on Eurostat statistics. However, these statistics reported a considerably higher figure than the official Brazilian export statistics, CACEX. CACEX figures are gathered under a strict system imposed by the bilateral textile agreement which Brazil concluded with the EC in the framework of the Multi Fibre Agreement (MFA). They are based on origin statements issued in Brazil after shipment. The proof of the shipment is the Bill of Lading. By applying such a system, the Brazilian authorities are in a position to monitor accurately all exports of cotton yarn to the EC. In addition,

these imports are also checked by the EC authorities when the goods are imported. The EC has never challenged the accuracy of these statistics.

32. Eurostat figures, on the contrary, are merely the result of adding up import data gathered by the customs authorities of each individual EC member State. Experience shows that, at times, errors have crept into the system.

33. It clearly resulted from the evidence and arguments presented to the EC during the proceeding that in this case, CACEX figures were more reliable. Indeed, if Eurostat figures were correct, Brazil would have exceeded its import quota under the bilateral textile agreement both in 1987 and 1988. Interestingly enough, even though in such a case the bilateral agreement provided for immediate information of the Brazilian authorities by the EC, no such notification was made to Brazil. In other words, the EC itself considered the CACEX figures as being more reliable than Eurostat figures.

34. The use of the correct Brazilian CACEX figures in the context of this proceeding would have shown that, as for a number of other developing countries involved in this proceeding, the market share of Brazilian cotton yarn in the EC market was *de minimis*, and that a termination of the proceeding in respect of Brazil without the imposition of measures would have been the only justified outcome.

Violation of Article 3:2, Article 3:3 and Article 3:4 : Lack of an acceptable explanation of how the facts supported the injury determination

35. The EC authorities actually determined that there was a decrease of imports of cotton yarn from Brazil both in absolute terms and in relative terms. On the other hand, price undercutting of these imports was the lowest among the countries that were investigated, and indeed, export prices of cotton yarn from Brazil increased during 1989 (logical result of an overvalued currency). However, the EC failed to explain how it had taken into account these findings in its determination of injury.

36. Article 3:4 of the Agreement states that "injury caused by other factors must not be attributed to the dumped imports". The EC determined, however, that "the investigation did not reveal any factors other than the dumped imports which caused material injury to the Community industry". The findings clearly show the existence of other potential causes of injury, particularly the existence of numerous non-dumped imports which undercut the Community producer's prices, whereas price undercutting was considered the main cause of injury. Here again, the EC failed to reasonably explain how the facts supported its determinations.

37. The expected result of disregarding the injury caused by other imports has been that, from the entry into force of the anti-dumping duties, Brazilian imports have decreased whereas imports from other countries, considered then non-injurious by the EC, have soared.

Violation of Article 3:2 in combination with Article 8:2 : Discrimination against Brazilian exporters in the injury findings

38. Article 8:2 of the Agreement embodies the fundamental GATT principle of non-discrimination in the following terms, as recalled:

> "when an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected (...) on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury" (emphasis added).

39. The Regulation imposing definitive anti-dumping duties states that the injury analysis was based on the volume of "dumped imports". This was apparently so for imports from two other countries. However, in relation to Brazil, the injury analysis was based on all imports, whether or not dumped (not all imports from Brazil were found to have been "dumped"). The same applies to the market share analysis. The Regulation imposing definitive duties fails to explain how "dumped imports" from other countries have been calculated, and is consistently unclear on whether the Commission is taking all imports or only dumped imports into consideration.

40. While it is the practice of the EC authorities to either "cumulate" or consider *de minimis* a given amount of dumped imports, they must in any event do so in a non-discriminatory way. Given the small market share of "dumped" imports from other countries (respectively 0.7 per cent and 0.1 per cent), the EC did not "cumulate" these countries. The Brazilian cotton yarn imports into the EC were as marginal as those from at least one of the other countries, and therefore should also have been considered *de minimis*. This is even more true if one takes into consideration the fact that the import and market share figures relating to Brazil were based on total imports and not on "dumped" imports. If "dumped" imports would have been considered, the market share would have even been lower.

41. The EC authorities further concluded that imports from other countries did not significantly contribute to the injury. However, imports from Brazil had the same effect on the Community industry as the ones from those countries, since, although they accounted for a slightly higher market share, undercutting of imports from two other countries was much higher, and price undercutting was deemed to be the main factor causing injury. The EC authorities failed to explain reasonably why these imports were excluded, when the positive evidence contradicted their findings.

Violation of Article 3:2, Article 3:3 and Article 3:4 : Quotas agreed under the bilateral textile agreement precluded a finding of injury

42. Trade in textiles (including cotton yarn) between the EC and Brazil is regulated by bilateral agreements negotiated within the MFA framework. The quotas and monitoring provisions laid down under the MFA and bilateral arrangements have been established to take the fullest possible account of the serious economic and social problems at present affecting the textile industry in both importing and exporting countries, and in particular, to eliminate real risks of market disruption on both the market of the EC and the textile trade in Brazil. Any trade disruption should be settled within the framework of the special procedure set up by the agreement in question. As a matter of fact Article 9:1 of the MFA provides expressly that:

> "In view of the safeguards provided for in this Arrangement, the participating countries shall, as far as possible, refrain from taking additional trade measures which may have the effect of nullifying the objectives of this Arrangement."

43. Nowhere in the Regulation imposing definitive anti-dumping duties has the EC offered any reason explaining why it has not been possible to refrain from taking additional measures. The EC simply stated that quantitative restrictions cannot prevent injury resulting from unfair trading practices such as dumped imports at very low prices. The failure to refrain taking this additional trade measure is relevant for the consideration of the violation of Article 13 of the Agreement, as explained below.

C. STATUS OF BRAZIL AS A DEVELOPING COUNTRY

44. The EC authorities did not give due consideration to the situation of Brazil as a developing country, as established by Article 13 of the Agreement. Article 13, first sentence, reads:

> "Special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code."

45. This obligation is basically an obligation of conduct: "due consideration shall be given". Specific violations have been outlined above in that the EC failed to explain how these interests were taken into account at the different stages of the investigation. The failure by the EC to refrain from taking a trade measure additional to the quantitative restrictions in the textile agreement, and the draconian positions adopted by the EC also in relation to *de minimis* and *proper comparison* in this case are incompatible with their obligations under Article 13, first sentence, under Article 13, second sentence, as applicable, and under the MFA.

46. Article 13, second sentence, reads:

> "Possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries."

The EC has failed to fully explore the possibility of adopting the constructive remedies, although in previous cases the EC authorities have concluded they were under an obligation to do so.

47. Finally, Brazil has been the only developing country involved in this proceeding which has been subject to anti-dumping duties. While due consideration has been given to the developing status of the other countries involved in this proceeding, to the extent that they have been excluded from the proceeding on the grounds of *de minimis* imports or - after the recalculation of the dumping margin by taking into account special exchange rates - on the ground of *de minimis* dumping margins, arguments and evidence put forward by Brazil have consistently been ignored or neglected by the EC authorities. Thus, Brazil considers that the EC has not only failed to fulfil its obligations under Article 13 of the Agreement but, in addition, clearly discriminated Brazil as compared to other developing countries involved in this proceeding.

IV. Request for a panel

48. In view of the above, Brazil submits that the anti-dumping action by the EC on cotton yarn from Brazil, with the imposition of definitive duties, violates several provisions of the Agreement, including:

- Article 2 (Determination of Dumping), paragraphs 4 and 6;
- Article 3 (Determination of injury), paragraphs 1, 2 (in combination with Article 8:2), 3 and 4;
- Article 13 (Developing Countries).

49. Brazil therefore requests the Committee on Anti-Dumping Practices of the GATT to establish a panel under Article 15:5 of the Agreement to examine the matter.

50. Brazil reserves its right to amend and complement the information hereby transmitted to the Committee, as appropriate.