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Committee on Subsidies and
Countervailing Measures

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BRAZIL - IMPOSITION OF DEFINITIVE COUNTERVAILING DUTIES ON IMPORTS OF MILK POWDER FROM THE EUROPEAN ECONOMIC COMMUNITY

Request by the European Communities for Conciliation under Article 17 of the Agreement

Communication from the European Communities

The following communication, dated 1 October 1992, has been received by the Chairman of the Committee from the Commission of the European Communities.

1. The European Community wishes to refer the above proceeding to the Committee on Subsidies and Countervailing Measures for conciliation in accordance with Article 17 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade ("the Subsidies Code").
2. This proceeding has already been the subject of one request by the European Community for conciliation under Article 17 of the Subsidies Code, which was considered at a special meeting of the Committee on 21 July 1992. This request related mainly to Brazil's imposition of a provisional duty on 9 April 1992 without a preliminary investigation having been carried out, an action which the European Community considers to have been in breach of Articles 1 and 5:1 of the Subsidies Code.

Following this meeting, the Chairman of the Committee encouraged the delegations of the European Community and Brazil to make further efforts to reach a mutually satisfactory solution consistent with the Subsidies Code, as provided for in Article 17:2. The European Community has approached Brazil on this matter, but in view of Brazil's unwillingness to withdraw the provisional measures, it has not been possible to reach such a solution. Therefore, the European Community still maintains its position set out in document SCM/149 of 10 July 1992.
3. On 11 August 1992, Brazil imposed a definitive countervailing duty of 20.7 per cent on imports of milk powder from the European Community. The Community considers that Brazil has infringed several provisions of the

Subsidies Code in imposing this duty, and on 31 August 1992 it requested consultations under Article 3:2 of the Subsidies Code, to be held in Brasilia, in order to attempt to arrive at a mutually agreed solution. In view of Brazil's unwillingness to accept this request for consultations, and its failure to respond adequately to written requests for information, the European Community has decided to refer the matter to the Committee for conciliation.

4. The following breaches of the Subsidies Code have been noted by the Community:

- (A) (i) There is no evidence in the Decision imposing the definitive duty (Portaria No. 569) to show that the domestic industry in Brazil has suffered material injury and still less indication that any such injury has been caused by imports from the Community.

Article 6:1 of the Subsidies Code states that a determination of injury "...shall involve an objective examination of both

- (a) the volume of subsidized imports and their effect on prices in the domestic market for like products and
- (b) the consequent impact of these imports on domestic producers of such products."

These two notions are elaborated on in Articles 6:2 and 6:3 of the Code. Needless to say, in a definitive determination the investigating authority must be in possession of conclusive evidence as to the above factors.

- (ii) As regards the volume of imports, paragraph (e) of the Decision states that imports from the Community were equivalent to 22.6 per cent, 9.8 per cent and 20.4 per cent of domestic production in the years 1989, 1990 and 1991. The Community submits that this is simply incorrect, and has now established that these figures almost certainly refer to the Community's share of total imports rather than the domestic market share. Therefore, this part of Brazil's injury determination is completely misleading.

The same paragraph goes on to say that total imports from all sources represented 19 per cent of domestic production in 1989, but only 7.5 per cent in 1991. This contradicts the previous data advanced by Brazil relating to the Community's market share, and indicates that the Community's market share has fallen substantially to only about 1.5 per cent in 1991. (The Community's own statistics indicate that the market share may be even lower - below 1 per cent).

- (iii) Concerning prices, there is no evidence in the Brazilian Decision of any undercutting of the domestic industry's prices by imports from the Community, nor of any price depression or suppression caused by such imports.
 - (iv) As regards the state of the domestic industry, the Decision refers only to "stagnation of national production" in paragraph (e), with no further elaboration given regarding quantities or other factors which may have a bearing on material injury, according to Article 6:3 of the Subsidies Code.
 - (v) Furthermore, even if it had been demonstrated that the domestic industry had suffered material injury (which the Community submits it has not), Brazil has not shown that such injury has been caused by subsidized imports from the Community, and has taken no account of whether other factors may be causing injury, as is required by Article 6:4 of the Subsidies Code.
 - (vi) Brazil has not been willing to elaborate on its findings nor to provide more detailed data on injury indicators in non-confidential form, in spite of a request from the Community under Article 3:4 of the Subsidies Code. In fact, the Community understands that at the time of the imposition of definitive measures Brazil had not yet collected information with regard to the injury criteria set out in Articles 6:2 and 6:3 of the Subsidies Code.
 - (vii) The Community therefore submits that it has not been shown that the domestic industry has suffered injury within the meaning of Article 6 of the Subsidies Code and Article VI of the General Agreement on Tariffs and Trade, and that in any event, imports from the Community could not have caused injury in view of their low and declining market share and the total absence of any proof of price undercutting, depression or suppression, particularly in view of the incorrect and misleading data described in paragraph 4(a)(ii) below.
- (B) In spite of repeated requests, the Community has received no explanation from Brazil concerning the calculation of the 20.7 per cent rate of countervailing duty. The Community considers that the method of calculation should be available in the non-confidential data requested under Article 3:4 of the Subsidies Code, and that in any event it is entirely unreasonable that a signatory of the Code should be denied an explanation of the calculation method, since this effectively deprives it of its rights of defence (or of any opportunity to correct errors) with regard to Brazil's compliance with Article 4 of the Subsidies Code.

5. In view of the above, the European Community submits that the imposition of definitive measures by Brazil violates Articles 1 and 6 of the Subsidies Code, and maintains its position taken at the conciliation meeting of 21 July 1992 that Brazil had previously violated Article 5:1. In addition, it also underlines its objection to Brazil's lack of compliance with Subsidy Code procedure (paragraph 4(B) of this note and document SCM/149 of 10 July 1992), and repeats that Brazil's unwillingness to disclose any information with regard to its findings has deprived the Community of its legitimate rights of defence and represents unacceptable behaviour from a signatory of the Subsidies Code.

6. Following the failure of Brazil to respond to the Community's request for bilateral consultations, and in view of the fact that definitive duties are now in force, the European Community requests the Committee on Subsidies and Countervailing Measures to undertake conciliation under Article 17 of the Subsidies Agreement as soon as possible, in order to review the facts and to encourage a mutually acceptable solution.