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Committee on Subsidies and
Countervailing Measures

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BRAZIL - IMPOSITION OF PROVISIONAL AND DEFINITIVE COUNTERVAILING DUTIES ON MILK POWDER AND CERTAIN TYPES OF MILK FROM THE EUROPEAN COMMUNITY

Request by the European Community for the Establishment of a Panel under Article 17:2 of the Agreement

The following communication, dated 23 December 1992, has been received by the Chairman of the Committee from the European Community.

1. On 9 April 1992, Brazil imposed provisional countervailing duties of 31-52 per cent on imports of milk powder and certain types of milk originating in the European Community.

2. The Community considers that the imposition of these provisional duties violates Article 5:1 of the Subsidies Code, which states that:

"Provisional measures may be taken only after a preliminary finding has been made that a subsidy exists and that there is sufficient evidence of injury as provided for in Article 2, paragraph 1(a) to (c). Provisional measures shall not be applied unless the authorities concerned judge that they are necessary to prevent injury being caused during the period of investigation."

3. The wording of Article 5:1 speaks of a "preliminary affirmative finding" of the existence of a subsidy and of sufficient injury. Such a "preliminary affirmative finding" cannot be made without some preliminary investigation; the investigating authorities cannot just base themselves on the complaint; they must make an "affirmative finding" which cannot but be independent of the complaint, and therefore they need to give adequate opportunity to parties concerned to provide evidence. Furthermore, the investigating authorities must be in a position to judge that provisional measures are necessary to prevent injury being caused during the period of investigation, before they can apply such measures. The investigating authority can only put itself in this position by marshalling a certain amount of evidence to this effect.

It has long been accepted in GATT that provisional measures should be applied with moderation. This was stated as long ago in 1961 in the report of the GATT Expert Group on Anti-Dumping and Countervailing Duties

(page 181), and it was in order to prevent the premature and unwarranted imposition of such duties that the conditions in Article 5:1 were set out in the current Subsidies Code.

4. In this case no investigation was carried out before the provisional duty was imposed. The questionnaire relating to this proceeding was sent to the Community on 18 May 1992, more than one month after the imposition of the provisional measures, and this was the first occasion on which the Community had been officially notified of the opening of the investigation (which had been announced in the Brazilian Official Journal on 16 March 1992), although the Community accepts that pre-consultations under Article 3:1 of the Subsidies Code were offered by Brazil in January 1992 following receipt of the complaint. The exporters in the Community were never asked to provide information in the proceeding, since Brazil made no attempt to identify the exporters concerned.

The Community concludes from this that Brazil imposed the provisional measures solely on the basis of the data in the complaint, without carrying out a preliminary investigation or informing and requesting information from the parties concerned in order to ensure their rights of defence. The Community submits that this makes the imposition of the provisional duty incompatible with Article 5:1 of the Subsidies Code.

5. Furthermore, in its determination of 9 April 1992, Brazil provides no evidence to demonstrate that the requirements of Article 5:1 of the Subsidies Code are met. There is no evidence which could lead to a preliminary affirmative finding of the existence of a subsidy, nor to the conclusion that there is sufficient evidence of injury being caused or threatened by such a subsidy, as provided for in Article 2, paragraph 1(a) to (c) of the Subsidies code. Nor did Brazil provide any evidence to show that provisional measures were necessary to prevent injury during the investigation. The Community subsequently requested clarification on these points but never received a satisfactory reply.

6. On 11 August 1992 Brazil imposed a definitive countervailing duty of 20.7 per cent on imports of milk powder and certain types of milk originating in the European Community.

7. The Community considers that the imposition of these measures on imports of milk powder violates Article 6 of the Subsidies Code, and in particular Article 6:1, which states that:

"A determination of injury for the purposes of Article VI of the General Agreement shall involve an objective examination of both (a) the volume of the 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."

8. As regards the impact on the domestic producers (Article 6:1(b)), the criteria for which are elaborated in Article 6:3 of the Code, this subject is not addressed in the definitive duty determination. Except for a vague

reference to production having stagnated (which is totally contradicted by data received from the investigating authority in Brazil in July 1992, showing a 50 per cent increase in milk powder production between 1989 and 1991, and by the data in the determination comparing import volumes to production, from which it can be deduced that Brazilian production of milk powder rose by 9 per cent from 172,000 tonnes in 1989 to 188,000 in 1991) there is no mention of any of the indicators which Brazil is required to evaluate in Article 6:3. Brazil has never provided any definitive data on production, consumption, profitability, capacity utilization, market share or any of the other factors in 6:3 to the Community, nor are these issues dealt with in the definitive determination.

9. During the initial consultations on this case, Brazil insisted that it was for the Community to demonstrate that the allegedly subsidized imports have not caused injury rather than for Brazil to provide evidence of injury. Later, in a written reply to the Community following the imposition of definitive duties, Brazil stated the following:

"The Brazilian authorities consider that the level of subsidized imports in relation to domestic production and the price differential between the subsidized imported product and the domestic price are sufficient proof of injury to the domestic industry."

It is clear from this that Brazil believes that it is necessary to look at only import volumes and prices, and not at their consequent impact on the domestic producers, as required by Article 6:1(b) of the Subsidies Code. This approach is therefore a blatant violation of the Subsidies Code.

10. Article 6:4 of the Subsidies Code states that it must be demonstrated that subsidized imports are, through the effects of the subsidy, causing material injury. In its definitive determination, Brazil has made no attempt to consider whether factors other than the allegedly subsidized imports have caused injury. In particular, no account has been taken of a rapid increase in imports from Poland, which rose from zero in 1989 to 19,000 tonnes in 1991, and entered Brazil at prices below those of imports from the Community. In any event, since Brazil has not demonstrated injury as required by Article 6:1, it cannot logically show causality in accordance with Article 6:4.

11. In addition, it is noted that as well as taking measures against imports of milk powder, a definitive countervailing duty has also been imposed on certain types of milk. However, the determination contains absolutely no evidence of any material injury to domestic producers having been caused by imports of these products from the Community, and therefore the Community submits that the duty has been imposed in violation of Article 6 of the Subsidies Code, since no investigation has taken place on imports of milk and their possible impact on the domestic industry.

12. It has not proved possible to resolve any of the matters relating to the provisional and definitive countervailing duties and to develop a mutually acceptable solution through bilateral consultations or through

conciliation under Article 17:2 of the Subsidies Code. The European Community therefore requests the Committee to establish a panel pursuant to Article 17:3 of the Subsidies Code, in order to have the facts of the matter reviewed and the rights and obligations of the Community and Brazil clarified.

13. More specifically, the European Community requests that such a panel be established to find that:

- (a) the provisional countervailing duty imposed by Brazil on imports of milk powder and certain types of milk originating in the European Community violates Articles 1 and 5:1 of the Subsidies Code, because
 - the provisional duty was imposed without any preliminary investigation;
 - no evidence was presented in the Brazilian determination of 9 April 1992 which could lead to a preliminary affirmative finding of the existence of a subsidy or of sufficient evidence of injury;
 - no ground or preliminary evidence was adduced for the determination that provisional measures were necessary to prevent injury being caused during the period of investigation:
- (b) the definitive countervailing duty imposed on imports of milk powder originating in the European Community violates Articles 6:1, 6:3 and 6:4 of the Subsidies Code, given that:
 - (i) no attempt was made to examine the impact of imports on the domestic industry,
 - (ii) there is no evidence of causality nor of the impact of other factors,
- (c) the definitive countervailing duty imposed on imports of certain types of milk originating in the European Community violates Article 6 of the Subsidies Code, since no evidence is provided of the existence of material injury having been caused by such imports,

and to recommend that the countervailing duties thus illegally imposed by Brazil on imports of milk powder and certain types of milk originating in the European Community be immediately lifted.