

**GENERAL AGREEMENT
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Committee on Anti-Dumping Practices

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

Request for Conciliation under Article 15:3 of the Agreement

Communication from Brazil

The following communication, dated 29 November 1993, has been received from the Permanent Mission of Brazil.

I. BACKGROUND

1. In 1989, the Committee of the cotton and allied textile industries of the European Communities ("Eurocotton") filed a complaint with the Commission of the EC, alleging the existence of dumping of cotton yarn originating in Brazil and other countries, and of injury resulting therefrom.
2. In a notice published in the Official Journal of the European Communities ("O.J.") of 22 March 1990, No. C72, the Commission of the EC announced the initiation of an anti-dumping proceeding against imports of cotton yarn originating in the countries mentioned in the complaint.
3. On 23 September 1991, the Commission of the EC issued a regulation imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil and two of the other countries, terminating the anti-dumping proceeding in respect of cotton yarn originating in two others (O.J. L 271/17, 1991, Appendix 1 hereto).
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, the Council of the EC issued a regulation imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and on one other country (O.J. L 82/1, 1992, Appendix 2 hereto).
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. In a notice published in the Official Journal of 11 May 1993, the Commission of the EC announced the initiation of a review of the regulation whereby definitive anti-dumping duties were imposed on cotton yarn originating in Brazil and on one other country (O.J. C 131/2, 1993). This "newcomer" review was published in the Official Journal of 24 November 1993. The EC authorities do not appear to have changed the methodology used in the original proceeding.

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

9. Brazil is of the opinion that the anti-dumping duty imposed is not in conformity with the provisions of the Agreement on Implementation of Article VI of the GATT ("the Agreement"). At the same time, the adverse effect can be illustrated by a drop of 50 per cent in exports of cotton yarn from Brazil to the EC. As a result, Brazil's benefits under the Agreement have been impaired and nullified. Brazil has therefore decided to refer the matter to the Committee on Anti-Dumping Practices of the GATT for conciliation under Article 15:3 of the Agreement.

II. MAIN ISSUES

10. The main issues in this case concern the determination of dumping and the determination of injury, as well as the status of Brazil as a 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 (based on domestic sales or on costs of production) 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 textile bilateral agreement precluded a finding of injury, especially in the light of provisions of Article 13.
- Article 13, by not giving due consideration to the situation of Brazil as a developing country.

1. DETERMINATION OF DUMPING

11. Two main issues concerning Article 2 are to be underlined. Brazil considers that the EC violated Article 2:4 of the Code by its failure to consider the "particular market situation" prevailing in Brazil during the period of investigation. Brazil also considers that there was violation of Article 2:6, since, to effect a fair comparison between normal value (based on domestic sales or on costs of production) and export price, allowance should have been made to take into account distortions arising from the artificial fixing of exchange rates.

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

12. Whereas under normal circumstances the dumping margin is established by comparing domestic with export prices. Article 2:4 of the Code also provides that where the particular market situation does not permit a proper comparison, the margin of dumping shall be determined otherwise.

13. At the beginning of the period of investigation, the year of 1989, Brazil was experiencing a deep economic crisis, including very high inflation. **Urgent economic policy measures of a general nature were needed and were applied in a manner consistent with Brazil's obligations under the GATT and the Code. They could not be tailored to prevent situations of distortion of domestic and export prices on a case by-case-basis.** At the same time, while domestic prices of cotton yarn were increasing at approximately the same rate of inflation, this high inflation was not fully reflected, during 1989, in the depreciation of the national currency - (the *cruzado*) against the currency in which exports were made (US dollar), which clearly introduced a distortion into any comparison between domestic sales and export sales.

14. It is therefore evident that during the investigation period there was a *particular market situation* prevailing in Brazil within the meaning of Article 2:4 of the Code as a result of which a normal value based on sales of the like product in the domestic market would not, **in the exceptional conditions prevailing**, generally permit a proper comparison with export price.

15. 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 due consideration to the special circumstances prevailing**.

16. Normal value for the remaining sales was determined on the basis of costs of production. Brazil considers that this determination also infringed Article 2:4 of the Code.

17. Brazil would like to emphasize that the overriding principle of Article 2:4 of the Code is that the methodology adopted should "permit a proper comparison". This is a fundamental principle of the Code 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 the artificial fixing of exchange rates in comparing normal value (based on domestic sales or on costs of production) and export price.

18. The only appropriate basis on which normal value could have been established in this proceeding, under the exceptional circumstances then prevailing, would have been sales to any third country.

19. However, even if it could be accepted that normal value could be calculated, under those exceptional circumstances, on the basis of domestic sales or costs of production, Brazil claims that there should have been adjustments in order to take account of distortions in the price comparison arising from Brazil's general economic policy. No such adjustments were made by the EC. In this respect, the Brazilian Government considers that the EC infringed Article 2:6 of the Code.

20. In the Definitive Regulation, 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 antidumping proceeding (...). 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 antidumping case" (emphasis added).

21. Brazil considers that the reasoning of the EC on this point cannot be supported by the wording of the Code. Indeed, the EC is under an obligation to make the necessary adjustments, since the Code requires that a "fair comparison" is made and that adjustments are made for differences affecting price comparability.

22. The statement that the fixing of official exchange rates cannot be subject to appreciation in the framework of an anti-dumping proceeding is groundless. In making the appropriate adjustments, the EC would not be judging the legality or the appropriateness of the economic policy of Brazil nor interfering with the internal economic affairs of Brazil in any way. The Government of Brazil has, in fact, formally requested the EC to reconsider its decision.

23. 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 Code. 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 adjustment 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.

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

25. 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 Code, that of the "fair comparison", would only have been fulfilled by allowing the methods outlined in section 1 or, alternatively, section 2. Brazil therefore considers that the EC, in failing to make the necessary adjustment, failed to make a fair comparison between normal value and export price.

2. DETERMINATION OF INJURY

26. 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 Code for the reasons that the injury findings were not based on *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.

27. The data on the volume of EC imports of Brazilian cotton yarn used by 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 original 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 EC authorities when the goods are imported. The EC has never challenged the accuracy of these statistics.

28. 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.

29. The use of the correct Brazilian CACEX figures in the context of this proceeding would have shown that 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.

30. 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 yarns 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.

31. Article 3:4 of the Code 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 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.

32. The expected results 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.

33. Article 8:2 of the Code 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).

34. The definitive Regulation states that the injury analysis was based on the volume of "dumped imports". This was apparently so for imports from the other two 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 definitive Regulation 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.

35. 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 have been considered *de minimis*.

36. The EC authorities further concluded that imports from other countries did not significantly contribute to the injury. However, injury 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.

37. 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."

38. Nowhere in the definitive Regulation 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 from taking this additional trade measure is relevant for the consideration of the violation of Article 13 of the Code, as explained below.

3. STATUS OF BRAZIL AS A DEVELOPING COUNTRY

39. 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."

40. 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, and also, as applicable, under Article 13, second sentence.

41. 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".

42. 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.

III. REQUEST FOR CONCILIATION

43. 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 1 (Principles), for not conducting an investigation in accordance with the provisions of the Agreement;
- Article 2 (Determination of Dumping), paragraphs 4 and 6;
- Article 3 (Determination of Injury), paragraphs 1, 2, 3 and 4;
- Article 8 (Imposition and Collection of Anti-Dumping Duties), paragraph 2;
- Article 13 (Developing Countries).

44. As consultations have failed to achieve a mutually agreed solution and final action has been taken by the administering authorities, Brazil refers hereby this matter to the Committee, for conciliation under Article 15.3 of the Agreement. Brazil will make its best efforts to reach a mutually satisfactory solution throughout the period of conciliation.

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