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UNITED STATES - CERTAIN MEASURES REGARDING ANTI-DUMPING METHODOLOGY

Request for Consultations by Brazil

The following communication, dated 18 September 2001, from the Permanent Mission of Brazil to the Permanent Mission of the United States and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

Upon instruction from my authorities, I hereby wish to convey the request of the Government of Brazil for consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 17 of the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement), including Article 17.4 thereof.

Article 5.8 of the Anti-Dumping Agreement determines that the margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. Article 18.3 of the Anti-Dumping Agreement determines that its provisions "shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO". Furthermore, the *de minimis* threshold established in Article 5.8 of the Agreement is also applicable to the context of Article 11, which governs the rules pertaining to the duration of the duty. Pursuant to Article 11.1, an anti-dumping duty can remain in force "only as long as and to the extent necessary to counteract dumping which is causing injury". Since Article 11 does not contain a separate definition of "dumping which is causing injury", the definitions established elsewhere in the Agreement are applicable in this context.

Prior to the Uruguay Round, the United States Department of Commerce´s practice was to treat as *de minimis* margins of 0.5 per cent or less for both investigations and reviews in anti-dumping cases. After the conclusion of the WTO Agreements, the United States changed its statutory laws in apparent compliance with the provisions contained in Articles 5.8 and 18.3 of the Anti-Dumping Agreement. Section 213 of United States law, contained in the Uruguay Round Agreements Act (URAA) of 1994 (amending Section 733(b)(3) of the Tariff Act of 1930), establishes that a 2 per cent margin is *de minimis*. However, in applying this statute, the U.S. Department of Commerce applies a 2 per cent *de minimis* rule only in the case of investigations; it allows for a *de minimis* margin of merely 0.5 percent in the case of reviews, even when such reviews are meant to determine whether the antidumping duty order should be revoked. This standard is expressed in Section 351.106(c) of the United States Department of Commerce's regulations.

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In spite of the Article´s plain language, the U.S. Government´s position, as expressed by the United States Department of Commerce´s comments to Article 5.8 of the Anti-Dumping Agreement, is that the article applies only to dumping investigations, but not to reviews, irrespective of their purpose.

Brazil understands that the requirements of Article 5.8 apply both to investigations and to at least reviews of anti-dumping duty orders contemplated in Article 11.2, for the revocation of such orders. It is the Brazilian Government's position that the United States´ current legislation and rules on the subject, that is, Section 213 of URAA and Section 351.106(c) of the Department of Commerce regulations, is in a departure from the Anti-Dumping Agreement. Current U.S. methodology regarding reviews is, therefore, unauthorized by WTO Agreements.

A panel established by the WTO Dispute Resolution Body concluded that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in anti-dumping investigations, was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. This finding was recently upheld by the Appellate Body. (Cotton-type bed linen from India, WT/DS141/AB/R, 1 March 2001 (AB2000-13)) Although the dispute underlying this decision involved the investigative phase of the anti-dumping proceeding, Article 9.3 of the Anti-Dumping Agreement provides that the amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2. Thus, the principle of fair comparison set forth in Article 2.4.2 is equally applicable to reviews as well as investigations. For this reason, Brazil understands that the practice of zeroing is disallowed under Article 2 when calculating the dumping margin in reviews as well as investigations. The United States Department of Commerce currently applies the identical practice of "zeroing" when establishing the dumping margin in investigations and reviews. This methodology, as interpreted by the Panel and the Appellate Body, is unauthorized by the Anti-Dumping Agreement.

In light of the DSU provisions governing this matter, including Article 4.3 thereof, as well as Article 17 of the Anti-Dumping Agreement, my authorities look forward to receiving in due course the reply of the United States to this request. Brazil is ready to consider with the United States mutually convenient dates to hold consultations in Geneva.

The Government of Brazil reserves the right to raise additional factual or legal points related to the aforementioned measure during the course of consultations.

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