

UNITED STATES - COUNTERVAILING DUTIES ON
NON-RUBBER FOOTWEAR FROM BRAZIL

*Report by the Panel
(SCM/94)*

1. INTRODUCTION

1.1 In a communication dated 13 June 1988, which was circulated in document SCM/87, the delegation of Brazil referred to the Committee on Subsidies and Countervailing Measures ("the Committee") a dispute between Brazil and the United States concerning the collection of countervailing duties by the United States on entries of non-rubber footwear from Brazil between 1 January 1980 and 28 October 1981. As it had not been possible for the Committee to resolve the matter under the conciliation provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade ("the Code") the Committee agreed, at its meeting of 6 October 1988 (SCM/M/40 and Add.1) to establish a panel with the following terms of reference:

"To examine, in the light of the relevant provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, the matter referred to the Committee by Brazil in SCM/87, and to make such findings as will assist the Committee in making recommendations and rulings as to the rights and obligations under the Agreement of the signatories party to the dispute."

1.2 Pursuant to the authorization by the Committee, and after securing the agreement of the parties concerned, the Chairman of the Committee decided on the following composition of the Panel (SCM/M/40 and Add.1):

Chairman: Mr. Luzius Wasescha

Members: Mr. Robert J. Arnott
 Mr. Peter P.T. Cheung

1.3 The Panel met with the two parties on 24 February and 20 April 1989. In addition, the Panel met on 1 June, 21 June, 5 July, 19 July and 28 July 1989.

2. FACTUAL ASPECTS

2.1 On 12 September 1974 the US Department of the Treasury issued a countervailing duty order (T.D. 74-233, 39 FR 32903) regarding non-rubber footwear from Brazil. Pursuant to this order countervailing duties were imposed, as of that date, under Section 303 of the Tariff Act of 1930 which had been covered by the existing legislation clause under the GATT Protocol of Provisional Application,

and therefore no injury determination was made. In accordance with the US law and practice then in effect, suspension of liquidation¹ was not ordered and duties in the amounts determined in the countervailing duty order were collected upon entry.

2.2 On 28 December 1979 the US Department of the Treasury issued a notice (T.D. 80-12) announcing the suspension of liquidation of all entries of footwear exported from Brazil on or after 7 December 1979 and entered or withdrawn from warehouse, for consumption, on or after 4 January 1980. The notice was published in the Federal Register (45 FR 1013) of 4 January 1980. This suspension was to remain in force pending receipt of updated information on subsidies remaining after the Industrial Products Tax (IPI) programme had been eliminated. Until such time a deposit of the estimated countervailing duty, the net amount of which had been calculated to be 1.0 per cent, would be required. For that purpose "... effective on January 4, 1980 and until further notice ... there shall be deposited ... countervailing duties in the amount estimated in accordance with the above declaration" (1 per cent, the estimated value of the remaining subsidies). The notice specified the reasons for choosing the date of 7 December 1979: "... on December 7, 1979, the Government of Brazil announced that the export payments, which were in the form of IPI credits, would be eliminated immediately instead of over a 4-year period Accordingly, this notice adjusts the countervailing duty rates on the subject merchandise to take into account the immediate elimination of the IPI credits."

2.3 On 1 January 1980 the Code entered into force. Brazil and the United States were among the original signatories of the Code and neither of them had entered any reservation in terms of Article 19:3. On the same date the provisions of Title I of the US Trade Agreements Act of 1979 (TAA) became effective. On 2 January 1980, the authority for administering the countervailing duty law was transferred from the US Department of the Treasury to the US Department of Commerce (DOC). Section 104 (b) of the TAA provided that signatories might request, within a three year period starting 1 January 1980, an injury review for pre-existing countervailing duty orders. According to Section 104 (b)(3), whenever the US International Trade Commission (USITC) received such a request, it should promptly notify the DOC, and the DOC should suspend liquidation of entries of the affected merchandise made on or after the date of the receipt of the USITC's notification. According to Section 104(b)(4) if the USITC determined that an industry in the United States would not be materially injured if the countervailing duty order were to be revoked, the DOC should revoke this order and refund "... any estimated countervailing duties collected during the period of suspension of liquidation. "

2.4 On 28 October 1981 the USITC notified the DOC that the Government of Brazil had requested, a letter dated 23 October 1981 and received on 26 October 1981, an injury determination for the 1974 countervailing duty order under Section 104(b) of the TAA. No suspension of liquidation was ordered at that time and the original suspension of liquidation ordered on 4 January 1980 remained in effect. As subsequently explained in the notice of revocation (48 FR 28310, 21 June 1983) "it was not necessary for the Department, upon notification by the USITC, to suspend liquidation of entries of the merchandise pursuant to that section (section 104 (b)) of the TAA), since previous suspensions remained in effect."

2.5 Effective 26 July 1982 the Government of Brazil subjected exports of non-rubber footwear to the United States to an offsetting export tax of 8.0 per cent of the f.o.b. invoice price; this was in addition to an export tax imposed on 4 May 1981. By letter of 22 April 1983, the Brazilian Minister of Finance confirmed to the US Secretary of Commerce that the tax was of indefinite duration and would not be affected by revocation of the countervailing duty order.

¹The term "suspension of liquidation" as used in the US practise means that calculation and final assessment of total customs duties on an entry (shipment) of a product does not occur at the time of the entry but at a later date. In the meantime the product in question is released for delivery and/or subsequent sales.

2.6 On 24 May 1983 the USITC determined that an industry in the United States would not be materially injured, or threatened with material injury, by reason of imports of Brazilian non-rubber footwear if the countervailing duty order were revoked (48 FR 24796, 2 June 1983). As a result, the DOC revoked, by decision dated 15 June 1983 and published on 21 June 1983 (48 FR 28310), this countervailing duty order with respect to all merchandise entered, or withdrawn from warehouse for consumption, on or after 29 October 1981, the date the DOC had received notification of the request for an injury determination. The DOC also instructed customs officers to refund any estimated countervailing duties collected with respect to these entries. The USITC's decision and the DOC revocation did not affect shipments of the merchandise entered on or before 28 October 1981.

2.7 On 19 April 1985 the DOC published the final results of its administrative review of the countervailing duty order on non-rubber footwear from Brazil concerning goods exported between 7 December 1979 and 31 December 1980. The countervailing duty levied on the entries between 1 January 1980 and 31 December 1980 was 8.84 per cent. On 9 January 1987 the DOC published the final results of its administrative review of this order concerning goods exported between 1 January 1981 and 28 October 1981 and accordingly levied a duty of 6.04 per cent.

2.8 According to the Government of Brazil "the total potential liability for imports between 4 January 1980 through 28 October 1981 exceeds US\$80 million in countervailing duties and interest".

2.9 Subsequent to the publication by the DOC of the final results of its administrative review US importers filed actions in the US Court of International Trade to appeal the DOC's determination. One ground of the appeals was that the countervailing duty order should have been revoked for all entries on or after 4 January 1980, the date of the suspension of liquidation, in the light of the USITC's determination of no injury.

2.10 In the course of the first (letter to the DOC dated 19 July 1983) and the second administrative review (52 FR 844), the Government of Brazil claimed that section 104(b)(4)(B) of the TAA referred to any countervailing duties collected since the TAA became effective. It argued that revocation of the order should apply from the first day of suspension of liquidation, not just the date of the USITC's notification to the DOC. All estimated countervailing duties collected since the earlier date should be refunded. The DOC position was that: "Section 104(b) of the TAA directs that revocations resulting from negative injury determinations apply retroactively to the date of the USITC's notification to the Department of the request for injury review. We have uniformly applied this procedure in all section 104(b) revocations".

3. MAIN ARGUMENTS

Articles 1 and 4

Brazil

3.1 Brazil requested the Panel to find that the collection of countervailing duties by the United States on entries of non-rubber footwear from Brazil between 4 January 1980 and 28 October 1981 violated Article VI:6 (a) of the General Agreement and Articles 1 and 4 of the Code where a negative determination of injury had been made. It stated that the question of whether the United States procedures in section 104 of the TAA were inconsistent with the US obligations under the Code was not the issue before the Panel. The Government of Brazil had never contended that the specific provisions of US law were inconsistent with the United States international obligations. In fact, the Government of Brazil believed that the US Congress had fulfilled its obligations under Article 19:5 of the Code to implement the international obligations through domestic legislation. The problem was that the DOC had - by virtue of its actions - arbitrarily limited the effect of its own law and had thus

placed the United States in violation of its Code obligations. Brazil also argued that US law could not be interposed as a defence of US actions where the Government of Brazil challenged the consistency of those actions with US international obligations. Therefore, Brazil stated that it did not seek a declaration that US authorities had misinterpreted US law. Brazil agreed with the United States that such a declaration would be improper and would go outside the Panel's mandate to define the respective rights and obligations of the United States and Brazil. Brazil considered that the question of whether US authorities had misinterpreted US law was a matter to be determined by US courts. Thus, it was the US action which had to be justified, not by reference to US law but by reference to the Code and the General Agreement. Article VI:6(a) of the General Agreement and Articles 1 and 4 of the Code did not permit the collection of any countervailing duty unless national authorities determined that imports of the product in question caused or threatened material injury to a domestic industry. This meant that after 1 January 1980, the effective date of the United States' obligations and Brazil's rights under the Code, the United States could not collect countervailing duties on any entries from Brazil over which the United States maintained administrative control in the face of a finding of no injury (i.e. entries subject to the 4 January 1980 suspension of liquidation). Brazil stated that it did not contend that the United States was obligated to eliminate its countervailing duties on footwear on 1 January 1980 and it had never suggested that the 1974 countervailing duty order was somehow "invalidated" on 1 January 1980 but it contended that, effective 1 January 1980, the United States had an obligation to extend the injury test to entries from all signatories. By ordering the collection of countervailing duties on all entries of non-rubber footwear from Brazil between 4 January 1980 and 28 October 1981, despite a finding of no injury by the USITC, the United States had breached its obligations under the Code and the General Agreement.

3.2 Brazil further noted that as of the date on which the provisions of the Code became effective between the United States and Brazil any GATT rights the United States had under the Protocol of Provisional Application regarding countervailing duty legislation had disappeared. Thus, there would be no legal grounds upon which to base an assertion in this proceeding that the reservation of the Protocol somehow survived the signing of the Code with respect to other Code signatories. Consequently, the United States was not authorized, under the Code, to impose countervailing duties on merchandise exported by a signatory entering the country after 1 January 1980 without the benefit of an injury test. Article 19:1 of the Code made it perfectly clear that any reservation under the Protocol concerning Article VI of the General Agreement was superseded by the Code with respect to other signatories. A principal obligation imposed on all signatories of the Code in Article 1 was to implement Article VI of the General Agreement with respect to all merchandise entered on or after the effective date of the Code. Furthermore, Article 4:4 of the Code provided that countervailing duties might be imposed only "if ... a signatory makes a final determination of the existence and amount of a subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose countervailing duties ...". This obligation had been extended, as of 1 January 1980, to all imports from signatories, regardless of their prior status.

3.3 Brazil was therefore of the view that there was no limiting language in Article VI of the General Agreement or in the Code which could justify the collection, after 1 January 1980, of countervailing duties on any entry of any product from an original signatory country without the requisite finding of injury. To the contrary, Article 19:1 specifically provided that "[n]o specific action against a subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement."

3.4 Brazil noted that, with regard to entries of merchandise of a signatory after 1 January 1980, the Code did not distinguish between entries covered by countervailing duty orders issued pursuant to the existing legislation clause under the Protocol of Provisional Application and those orders issued after 1 January 1980. Code signatories had bargained for full application of Article VI of the General Agreement effective for all imports as of 1 January 1980. As such, the Code eliminated any such

distinction by subjecting all imports after 1 January 1980 to the same rules. Article 1 of the Code and Article VI:6(a) of the General Agreement referred to the imposition of a countervailing duty on imports of another signatory. The United States, like all other signatories, had an obligation to implement fully the provisions of the Code with respect to imports from all other signatories unless it explicitly expressed a reservation consented to by the other signatories (Article 19:3) or unless the United States explicitly refused to extend the benefits to another signatory pursuant to Article 19:9. The United States had not taken any of these measures. Therefore, the fact that the US law distinguished between orders issued prior to 1 January 1980 and those issued after that date was in no way persuasive of the issue of whether the Code made any such distinction. In the Brazilian view the Code made none. Moreover, Article 19:1 of the Code made clear that it was the Code itself, not national law, which ultimately determined the rights and obligations of the signatories vis-à-vis each other.

3.5 Brazil further argued that neither the Code nor the General Agreement defined signatories' obligations in terms of countervailing duty orders, whether pre-existing or future. Instead, Article 1 of the Code incorporated and made binding all the provisions of Article VI of the General Agreement, which defined a signatory's obligation in terms of the "levy" of countervailing duties on "importations". Thus it was the collection of the duty on entries without an injury test that was prohibited by the Code. The date of the order was irrelevant. Furthermore, the US position that the Code did not apply to pre-existing orders misconstrued the purpose of Article 2 of the Code and ignored Article VI:6(a) of the General Agreement as implemented by the Code. In the case of pre-Code orders, the existence of a subsidy had already been established. The only change which had occurred on 1 January 1980 was that, as far as signatories were concerned, the US exemption from the injury requirement under Article VI:6 ended on that date. In light of the new requirement the United States had become obligated to extend the injury test to entries after 1 January before imposing countervailing duties. The method by which the United States was to implement its obligations to extend the injury test to imports which had previously been subject to countervailing duty orders had been up to the United States, subject to the conditions of Article 19:5. Yet, the US reading of Article 2 of the Code to support its view that the Code did not apply to pre-existing orders directly contradicted the express provisions of Article VI:6(a) of the General Agreement and Article 1 of the Code and, if accepted, would result in a two-tier system in which an injury determination would be required only for countervailing duty investigations commenced after 1 January 1980, but not for imports covered by pre-Code orders. Such an interpretation was contrary to the Code. Given the legal relationship between the Code and Article VI of the General Agreement, any interpretation of a Code provision which would, in effect, nullify the terms of Article VI had to be rejected if a more reasonable interpretation was possible. As such, the obligations of the General Agreement and the Code to extend the injury test to pre-Code orders had existed to exactly the same degree and had commenced on the same date - 1 January 1980 - as the obligation for post-1 January countervailing duty investigations.

3.6 Brazil agreed that the Code obligations were prospective in the sense that they were effective beginning on 1 January 1980. Thus the Code had not required the United States to perform an injury determination before collecting countervailing duties on Brazilian footwear entering the United States before that date. However, the prospective application of the Code had nothing to do with the United States' conclusions that countervailing duties could be collected on entries after 1 January 1980 without the basic requirement of an injury determination. That merchandise was entering after 1 January 1980 and was therefore governed by the Code's "prospective" requirements. The United States was confusing the concept of prospective application of the Code - with which Brazil agreed - with the question of whether the Code's requirements applied to entries which were covered by orders predating the Code. Brazil submitted that nothing in the Code suggested that these entries should be treated differently than any other merchandise from signatory countries entering after 1 January 1980. Brazil contended that the Code, by implementing Article VI of the General Agreement, adopted the general rule that countervailing duties cannot be collected on entries without an affirmative injury finding.

Without an express exception for entries covered by pre-existing orders this general rule had to stand. The silence of the Code on this particular issue could only support this contention.

3.7 Brazil pointed out that the US position regarding the prospective nature of the Code was inconsistent with its position in some other cases. In particular, the DOC stated in Certain Fasteners from India case that it lacked authority to impose countervailing duties where an international obligation of the United States requiring injury existed unless an affirmative injury determination was made. It also stated that the injury requirement extended beyond the issuance of the countervailing duty order throughout the life of an order whenever duties are assessed or collected (47 FR 44129 and 44130, dated 6 October 1982). The DOC took exactly the same legal position in the case of carbon steel wire rod from Trinidad and Tobago (50 FR 19561, 9 May 1985); in addition in the case of lime from Mexico, a similar view was expressed in the letter from the United States Trade Representative to the USITC dated 31 January 1989.

3.8 Brazil further argued that the United States had been cognizant of its obligation to extend the injury test to entries of merchandise of all signatories after 1 January 1980. To deal with countervailing duty orders already in existence, the United States law had provided that foreign governments could request an injury determination for such entries within three years after 1 January 1980. US law had further provided that if the result was negative, the countervailing duty order would be revoked and that "any estimated countervailing duties collected during the period of suspension of liquidation" would be refunded. The Government of Brazil had requested an injury determination for non-rubber footwear well within the three year period provided by US law. At that time the only suspension of liquidation covering imports of this product had become effective on 4 January 1980 and had still been in effect at the time of the determination of no injury by the USITC.

3.9 Brazil complained that rather than to give full effect to the determination of no injury, the United States had arbitrarily limited the revocation of the countervailing duty order to imports on or after 29 October 1981. As a result of this decision, the United States had ordered the collection of duties for entries between 4 January 1980 and 28 October 1981. Brazil considered that this arbitrary action by the United States constituted a violation of its obligations under Article VI:6(a) of the General Agreement and Articles 1 and 4 of the Code which clearly required the United States to revoke the countervailing duty order for entries between 4 January 1980 and 28 October 1981 as a result of the determination of no injury issued by the USITC on 24 May 1983.

3.10 Brazil considered that the US position that its May 1983 determination of no injury was "prospective" only was untenable since the United States had been obligated to extend the injury test to all imports of signatories after 1 January 1980. There was no presumption of injury in the Code regarding imports from a signatory after 1 January 1980. That was the question to be decided. The issue under the Code concerned the proper effect of the no injury determination. Brazil noted that when the no injury decision had been rendered in May 1983, the United States had given it what it characterized to be "retroactive" effect as of 29 October 1981 even though entries during both periods were covered by the same suspension of liquidation. In other words, while the no injury determination could be "retroactively" applied to imports between 29 October 1981 through May 1983, the United States contended that there was no reason to apply that determination retroactively to imports between 4 January 1980 through 28 October 1981. The issue, then, was not the so-called "retroactive" nature of the no injury determination. The issue was why the United States had not given full effect to that decision as required by the Code. In addition, Brazil pointed out that the United States characterization of the USITC determination as prospective was not supported by the facts. The USITC had made its determination in the context of three injury investigations involving non-rubber footwear from Brazil, India and Spain. After analysing the health of the US industry from 1980 through 1982, it concluded that the domestic industry had been at that time generally healthy.

3.11 Regarding the prospective nature of the US obligations, Brazil referred to three cases where there had been either a change of the status of the country (Mexico, upon its accession to the GATT) or of the status of a product (products imported from India and Trinidad and Tobago had become non-dutiable).¹ In all those cases the DOC had concluded that the United States could not continue to collect countervailing duties on entries occurring subsequent to the date on which the status had changed if it could be shown in a review that respective imports had not been causing injury. Thus the United States had clearly recognized the nature of its international obligation to provide an injury test for pre-existing cases and that the implementation of that obligation was retroactive to the date on which the obligation had arisen, irrespective of the date of the request for injury review. By failing to fulfil this obligation and by recognizing and giving effect to these same obligations in the case of Mexico, India and Trinidad and Tobago, the United States had denied most favoured nation treatment to Brazil.

3.12 Brazil considered that the procedures under section 104(b) of the TAA could not be identified with those under Article 4:9 of the Code. Article 4:9 provided the basis for changed circumstances reviews. Such a review presumed that an injury determination had already been made and provided a procedure to review whether such injury still existed. Thus, the premise of Article 4:9 was that duties could be collected only "as long as, and to the extent necessary to counteract subsidization which is causing injury". The United States had not shown that the entries had been causing injury and without this threshold showing, the United States had no legal basis to collect duties on entries. The fact that section 104(b) was structurally analogous to the changed circumstances review procedures in Article 4:9 of the Code was wholly irrelevant.

3.13 Referring to the US contention that Brazilian attempts in 1981 to find a settlement to this case constituted evidence that Brazil had known that the duties were definitive and had accepted this fact, Brazil stated that it had been, pure and simple, an offer of settlement. Brazil had been willing to recognize those duties as final at 1 per cent in exchange for revocation of the countervailing duty order and for the certainty it would bring to the trade and for avoiding the long drawn-out legal proceedings that would be necessary to indicate Brazil's rights. Furthermore, the fact that Brazil had not challenged the effective date of the DOC revocation of the countervailing duty order in court at the time of the DOC's final notice of revocation did not support the US contention that Brazil had accepted this action but resulted from the fact that the US law would not have permitted such a challenge. Brazil submitted a letter on 19 July 1983, in the context of the administrative review of 1980 entries, protesting that the revocation ordered one month earlier was required by US law to extend to all entries subject to the suspension of liquidation effective 4 January 1980. Under US law, this was the only available avenue to challenge US actions. As the entries in question had still been under the administrative control of the DOC the US courts would have rejected the case as premature. It should be clear that Brazil had neither accepted nor acquiesced in US actions in 1983.

3.14 Finally Brazil, while stressing that this issue was of little relevance to the legal issue before the Panel, denied that the delay of its request for an injury determination had anything to do with tactical considerations. The Brazilian Government simply had had no reason to believe that there would have been any adverse consequence from requesting an injury determination during the three year statutory period. Thus, Brazil had not requested an injury determination for any of the products covered by countervailing duty orders until mid-1981. There was no evidence of any scheme to delay the request on non-rubber footwear until such time when no injury would be found. Liquidation on all the non-rubber footwear entries (as well as the entries of castor oil products, scissors and shears, and cotton yarn) had remained suspended since 4 January 1980, and the Brazilian Government had reason to believe that estimated duty deposits on all these entries would be refunded if the USITC found no injury.

¹47 FR 44129 and 50 FR 19561 respectively.

Brazil found the United States claim that the Brazilian Government had announced the imposition of an export tax in order to manipulate the USITC determination equally incredible. This assertion was especially difficult to understand given the negotiations that had occurred between the two governments during the early 1980-2. The reduction of the IPI/ICM premium and the imposition of an export tax had been the subject of protracted negotiations between the United States and Brazil. When balance of payments difficulties had made it impossible for Brazil to dispense with the IPI/ICM premium, an export tax of 15 per cent had been imposed to ensure that all products subject to US countervailing duty orders would not benefit from the premium. Effective 26 July 1982, the Government of Brazil had imposed an additional export tax of 8 per cent on all exports of non-rubber footwear in order to offset any and all other subsidies possibly received by the Brazilian footwear industry. Bilateral negotiations had continued, and eventually the two Governments had agreed on a phasing out commitment by Brazil of that subsidy. But the United States had agreed on the express condition that Brazil had to continue to impose export taxes to offset completely all net subsidies found by the United States on certain "sensitive products", specifically including footwear.

3.15 For all above explained reasons, the Government of Brazil requested that the Panel find that the collection of countervailing duties by the United States on entries of non-rubber footwear from Brazil between 4 January 1980 and 28 October 1981 violated Article VI:6(a) of the GATT and Articles 1 and 4 of the Code where a negative determination of injury had been issued.

The United States

3.16 The United States stated that the Brazilian contention that the US action in this case, but not US law, were inconsistent with the Code was factually incorrect and that for the Panel to express an opinion that the US authorities misconstrued US law would be wholly improper and would go outside the Panel's mandate to define the respective rights and obligations of the United States and Brazil under the Code. The Panel was therefore, in the US view, presented with a clear-cut question as to the consistency of US law, as embodied in section 104 with US obligations under the Code. The United States requested the Panel to find that the US measures with respect to subsidized imports of non-rubber footwear from Brazil were fully consistent with the US obligations under the Code.

3.17 The United States contested the Brazilian argument that it was obligated to eliminate its countervailing duties on footwear on 1 January 1980, the date of Brazil's accession to the Code. It stated that the Code obligations were prospective in nature and did not invalidate existing countervailing duty orders. The countervailing duty order issued by the US authorities on 12 October 1974 on Brazilian footwear had been fully consistent with US rights and obligations when issued and had not been called into question by the Code.

3.18 The United States further argued that the prospective nature of the Code's obligations (and of those terms of the General Agreement, covered by the Protocol of Provisional Application that were incorporated by reference in the Code) was made clear by Article 1 of the Code and further illustrated by Articles 2 and 19:5. Article 2 of the Code underscored that the obligations created by the Code applied prospectively as they applied to the imposition of countervailing duties pursuant to new investigations "initiated and conducted" after the entry into force of the Code. The key term here was the term "imposition". It was not synonymous with "levy". The word "levy" was defined in footnote 14 to Article 4:2 of the Code to be the definitive collection of the countervailing duty. The term "impose" clearly referred to the decision that led to the levying. In the US law and practice the decision to impose was made in the countervailing duty order. Read in conjunction with Article 19:5 of the Code, the two provisions referred to the application of laws and regulations to investigations initiated after 1 January 1980, when the Code had entered into force. It had been contemplated that signatories would, by the date of entry into force of the Code, take "necessary steps" to amend their laws,

regulations, and procedures, pursuant to Article 19:5. Thereafter, they would be in a position to ensure that future investigations would be conducted in accordance with Article 2 of the Code.

3.19 The United States also pointed out that the drafters of the Code had specifically omitted any obligation to re-examine countervailing duty orders that predated the Code. There was no mention in Article 19:5 of the Code of any obligation to reinvestigate existing countervailing duty orders that had been issued prior to 1 January 1980 and were entirely valid when issued. Nor had there been any support for this proposition in the drafting history of the Code. This deliberate omission made the prospectivity of the Code obligations very clear. Furthermore, since the Code (as well as the Anti-Dumping Code) substantially clarified and altered existing requirements with respect to many procedural aspects of anti-dumping and countervailing duty laws, it was plainly impractical to require signatories to re-examine the numerous existing orders in light of subsequent Code obligations that could not have been anticipated when the orders had been issued. For, while the issue before this Panel involved findings of injury, Brazil's legal theory applied with equal force to all procedural elements of the Codes, including those relating to initiation, time-limits, provisional measures, injury criteria, undertakings, evidence, and protective orders. The Code's changes had been so extensive that such a requirement would often have required a reinvestigation in order to develop new information in a manner consistent with Code procedures. To impose such a massive administrative burden with respect to pre-existing countervailing duty orders (and anti-dumping findings) would have created a major deterrent to Code accession. Accordingly, the drafters had adopted the sensible solution, which was to make the Code obligations prospective. All Code signatories with active anti-dumping and countervailing duty programmes had shared this interpretation, since none had engaged in such an exercise. Nor had new signatories to the Code or Anti-Dumping Code indicated any intention to terminate and reinvestigate their existing orders as of the time the orders were issued. On 1 January 1980 there had been thirty-eight pre-existing countervailing duty orders in the United States. They had covered fifteen countries which became the Code's signatories. Not one of these signatories had challenged the Code consistency of the US transition provision either in the GATT or in the courts. Indeed when the US legislation had been reviewed by the Committee in October 1980, no-one questioned the transition provision.

3.20 The United States conclusion on this matter was that, because of the prospective nature of the Code's obligations, there had been no requirement to issue an injury finding with respect to the countervailing duty order in question. In any case, the United States had, in section 104 (b) of the TAA, provided a reasonable opportunity for Brazil to obtain an injury review of existing countervailing duty orders that could have been effective immediately after 1 January 1980, a review which was closely analogous to that provided for in Article 4:9 of the Code. In the event of a negative determination by the USITC, the DOC was authorized to revoke the countervailing duty order as of the date of request. Because the decision to file a request was left to the government of the exporting country, the latter was allowed to make its own decision whether and when to obtain an injury review of its outstanding countervailing duty orders within a three-year period. This provided each signatory considerable flexibility in choosing the most convenient or auspicious period of time to be reviewed. Accordingly, if a country determined it to be in its best interest to request a review on 1 January 1980, it could do so, and if the USITC found that injury would not result if the order were revoked, the revocation would be effective on or shortly after 2 January 1980. Conversely, the failure to file a request meant that the order remained valid and that the circumstances which had led to its issuance had not changed. Section 104 was clear and unambiguous, and the Brazilian authorities had been fully aware of the implications of their decision. There was documentary evidence that (1) Brazil had accepted the right of the United States to impose a final duty on post 1 January 1980 entries and (2) Brazil specifically took actions after 1980 to create a basis for finding of no injury and revocation of the order. Furthermore Brazil had requested reviews in several other cases, but had not claimed in those instances where an injury determination was negative that the revocation should have been retroactive to 1 January 1980. Accordingly the United States believed that Brazil had shifted its reading of the Code

and of US procedures to suit its needs in the present case. The US procedures had been reasonable in the circumstances and had been accepted by other signatories.

3.21 In the United States' view the fact that Brazil had not chosen to avail itself of the opportunity to obtain a revocation immediately after 1 January 1980 but to wait for a review until late in 1981 had been the result of tactical considerations relating to the specific facts of the non-rubber footwear situation. Brazil had provided extensive export subsidies to footwear companies at the time the order was issued in 1974. In 1980 however, Brazil had begun to phase down some of its subsidy programmes. On 1 April 1981, however, Brazil had reinstated one of them, the IPI export tax credit at 15 per cent of f.o.b. value of exports. This meant that the 1 per cent estimated duty deposit rate had resulted in a substantial undercollection of the actual subsidy being bestowed by the Brazilian Government on its footwear exports. On 28 September 1981, shortly before filing the request for a review under section 104(b), the Brazilian Ministry of Foreign Relations had submitted a memorandum in which it had formally proposed that the US authorities definitely levy a final duty of 1 per cent on entries of footwear after February 1980. Accordingly, contrary to its current position before this Panel, the Brazilian Government had fully accepted that a definitive duty could be levied on imports of Brazilian footwear entered after 1 January 1980 without any determination of injury under Article 6 of the Code and in fact had proposed imposition of 1 per cent duty as a final rate. Given the September 1981 letter it was clear that Brazil had not had any expectation under the Code that the duty would be revoked as of 1 January 1980. Instead, the Brazilian Government had fully accepted that "final" and "definitive" duties could be levied on footwear entered prior to the submission of a request for a section 104 review. If, as Brazil now contended, it had had a clear expectation that the duties would have been revoked as of the Code's entry into force or that no duty could be collected unless there had been first an injury determination, the September 1981 letter would have made reference to this alleged Code "obligation". The letter however was silent. On the contrary, it showed that the Government of Brazil had been acutely aware of the possible effect of the then existing subsidy rate on the USITC proceeding. Indeed, as the letter explained, Brazil had sought to reach agreement with the DOC on a subsidy rate to be reported to the USITC with the objective of laying the basis for a negative USITC finding. After the US authorities had rejected the September 1981 proposal, Brazil had adopted a new approach. In July 1982 the Brazilian Government had imposed an export tax to offset the remaining subsidies. Finally, in April 1983, the Brazilian Finance Minister had assured the US Secretary of Commerce that the export tax was of indefinite duration and would continue to be imposed even if the order were revoked.

3.22 On 24 May 1983, the USITC issued a finding that the revocation of the Brazilian footwear order would not cause or threaten material injury to the US footwear industry. The imposition of the offsetting tax had been the key to the USITC's negative determination in the injury review. The opinions of the two Commissioners voting to revoke the Brazilian order showed that they had believed that continued imposition of the export tax had ensured that lifting the order would not have an effect on the price of imports of Brazilian footwear into the US market. The export tax had not been imposed and finalized until 1982-83 and it was only after the export tax had been in place that the USITC had found that revocation of the order would not lead to material injury. Prior to that time, the US footwear industry had been at a major price disadvantage because of Brazilian export subsidies. Accordingly, there had been no factual basis justifying a revocation of the duty as of 1 January 1980. If the Brazilian Government had truly believed that its subsidized footwear exports had not been causing injury in 1980-81, it was difficult to understand why it had imposed an export tax. While Brazil appeared to be arguing now that the US authorities had been obligated to find that there was no injury as of 1 January 1980, its position here was totally at odds with its actions in 1981-83 and the USITC's findings. In June 1983 when the US authorities had revoked the footwear order effective 29 October 1981, Brazil had accepted the action and had not suggested that revocation should be effective at any other time. Brazil could have challenged the effective date of the revocation in US courts by challenging the DOC's final notice of revocation but had not done so.

3.23 The United States' view was that in this case as in the case when injury was considered within the context of a review of an existing order under Article 4:9 of the Code, the focus of enquiry was quite different than within the context of an initial investigation. The reason was that, at the time of the review, the countervailing duties had already been imposed to offset the injurious effect of the subsidized imports and their application had prevented injury from taking place. At this point of time a purely retrospective analysis of whether injury was occurring would necessarily result in a negative finding, since the countervailing duty eliminated the effects of the subsidized imports during the period covered. Yet, assuming the subsidy still existed, revocation of the order would simply lead to the resumption of subsidized competition, renewed injury, and a new countervailing duty case. This would make no sense from the point of practical countervailing duty and anti-dumping administration. For this reason, the relevant enquiry in a review context was whether injury would occur as a result of the subsidized imports if the order imposing countervailing duties were lifted. The enquiry was a prospective one that had to focus on the effects of lifting the order. Because the injury finding in this review context was a prospective one, there was no rationale or basis for refunding countervailing duties retroactively for goods entered prior to submission of the request for an injury review, even if the determination upon review was that there would be no injury if the order were revoked.

3.24 The United States concluded by stressing that the factual record established two key points. First, through 1981-1982 Brazil had accepted that the United States authorities could levy final and definitive duties on subsidized footwear imports from Brazil, thus contradicting its current position that the order had been invalid as of 1 January 1980 and that the duties had been provisional measures. Second, the decision by Brazil to impose and make permanent the export tax fundamentally undercut its position that the order had been void on 1 January 1980. Brazil had clearly regarded the 1982 imposition of an offsetting tax as the basis for revocation of the order, a circumstance that had not taken place when the contested duties were collected for 1980-1981.

3.25 For the foregoing reasons the United States urged the Panel to find that the US measures with respect to subsidized imports of non-rubber footwear from Brazil were fully consistent with the US obligations under the Code.

Article 5

Brazil

3.26 Brazil requested the Panel to find that the collection by the United States of cash deposits and countervailing duties in excess of the cash deposits violated Article 5 of the Code where a negative determination of injury had been made. Brazil noted that the Code provided for only two types of countervailing duties: definitive duties imposed pursuant to Article 4, or provisional duties deposited pursuant to Article 5. In order to collect definitive duties, Article 4 required a signatory to make a final affirmative determination of subsidy and a determination that the subsidy was causing injury. In the absence of an injury determination, duties deposited on entries of non-rubber footwear after 4 January 1980, could not be definitive duties. Brazil further noted that provisional measures were those estimated duties posted after a preliminary or final finding of subsidy but before the final determination of injury. In this case, the final subsidy determination had been rendered before 1980 but as of 1 January 1980, Brazil had had a right to an injury determination for these entries and, effective 4 January, the United States had required importers to post estimated countervailing duties on all such entries. The United States had not made its final determination of no injury until May 1983. Brazil therefore considered that the duties posted on entries after 4 January 1980 had to, by definition, be provisional measures.

3.27 Brazil referred to Article 5:1 of the Code which provided that "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." It also noted that Article 5:8 expressly required the reimbursement

of provisional measures where the determination of material injury was negative. Since the USITC had determined that imports of non-rubber footwear from Brazil were not causing material injury to an industry in the United States, the use of provisional measures and the intention to collect definitive duties for imports covered by the provisional measures between 4 January 1980 through 28 October 1981 violated Article 5:1 and 5:8 of the Code.

3.28 Brazil also considered that the announcement by the DOC not only to retain the cash deposits on estimated countervailing duties on imports of non-rubber footwear from Brazil in calendar years 1980 and 1981, but also to impose liability in an additional amount, notwithstanding a final negative injury finding by the USITC, was directly contrary to Article 5:8 of the Code. Brazil pointed out that even in cases where an affirmative injury determination was rendered, Article 5:6 of the Code provided that if the definitive countervailing duty was higher than the amount guaranteed by the cash deposit or bond, the difference should not be collected. This provision was designed to reduce the uncertainty created when importers did not know, at the time of entry, the definitive amount of duties they would be required to pay. When provisional measures were applied in a manner that was consistent with the Code, importers did know, at the time of entry, at least the maximum potential amount of duty liability they could be required to pay, and could plan accordingly. In other words, the uncertainty was limited to the question of whether their ultimate duty liability would be decreased from the estimated duty imposed at the time of entry. The collection of countervailing duties in excess of the amount of the estimated duty would violate the provisions of Article 5:6 of the Code. Specifically, the United States had announced plans to impose duties of an amount which exceeded by 7.84 percentage points the amount of the provisional measures imposed on goods exported between 1 January 1980 and 31 December 1980 and by 5.04 percentage points on goods entered between 1 January 1981 and 28 October 1981. The fact that this action had taken place in the context of a determination of no material injury had made the violation even more egregious.

3.29 Brazil noted, furthermore, that the United States had recognized the provisional nature of the duties deposited on entries of non-rubber footwear from Brazil and its obligations under Article 5 of the Code by refunding the duties deposited between 29 October 1981 and 21 June 1983. The nature of the duties deposited prior to 29 October 1981, were no different from those refunded after 29 October 1981 either under the General Agreement or US law. All of those estimated duties were deposited pursuant to the same suspension of liquidation effective on 4 January 1980. By arbitrarily refusing to refund the provisional duties deposited between 4 January 1980 through 28 October 1981, however, the United States violated its obligations under Article 5 of the Code.

United States

3.30 The United States considered Brazil's contention that Article 5 of the Code applied to the countervailing duties in dispute seemed to rest on basic misunderstanding of US countervailing duty procedures and law in relation to the Code. Article 5 of the Code concerned provisional measures, such as a cash deposit or bond, that could be required between a preliminary affirmative finding of subsidy and injury and a final finding. The US measures imposed in 1974 and implemented with respect to Brazil's footwear entered after January 1980, had not been provisional measures under Article 5 of the Code, as alleged by Brazil, but had involved the collection of final countervailing duties pursuant to a valid countervailing duty order. While the order had been issued under GATT Article VI and the Protocol of Provisional Application, it was, if anything, analogous to an action under Article 4 of the Code. The Code provided that once a countervailing duty was imposed it might not be levied in excess of the amount of the subsidy found to exist. The duty in question was imposed on 12 September 1974. Before 1980 the US practice had been to calculate the amount of the duty at the time of the investigation and then simply to liquidate each entry at that rate. This had been a prospective method which continued to be used by some other Code signatories. In the TAA, however, the United States had made major changes in its countervailing duty procedures to conform to the Code. One change had been to switch from prospective assessment of duty to a system of administrative reviews

during which the definitive amount of duties for the period under review would be calculated ex post to reflect precisely the amount of subsidies actually bestowed on imports of the product during that period. Pending the final results of a review, liquidation of an entry was suspended while estimated duties were collected or secured by a cash deposit or bond. The goal of the review was to ensure that the duties actually assessed reflected the true margin of subsidization for each period reviewed. This ex post calculation was much more precise than the use of past levels of subsidization to determine duties on future entries. Both methods arguably met the Code obligation that the countervailing duty finally imposed should not exceed the amount of subsidy but the United States believed that its method was the more accurate of the two.

3.31 The United States could not agree with the Brazilian claim that the entry into force of the Code had converted the non-rubber footwear order from a final decision under Article VI of the General Agreement (and Article 4 of the Code) into an "investigation" in progress under Article 5 of the Code and, therefore, interim duties collected by the US authorities during the period of suspension of liquidation represented "provisional measures". Article 19:5 of the Code omitted any reference to pre-existing countervailing duty orders and did not undercut their validity. Nor did it place any obligation on signatories to apply amendments and changes resulting from the Code retroactively to pre-existing orders. It followed that the order was valid and that the circumstance had not been affected by the Code's entry into force. The duties were, therefore, final duties, corresponding to measures under Article 4 of the Code, and were not provisional measures. This fact had not been changed because the method used to assess their definitive amount had been based on ex post rather than ex ante calculation.

4. FINDINGS AND CONCLUSIONS

4.1 The Panel recalled that the basic facts underlying this dispute were the following: the United States had imposed a countervailing duty order on entries of non-rubber footwear from Brazil in 1974 without an injury determination in accordance with the existing legislation clause of the GATT Protocol of Provisional Application; on 1 January 1980 the Code entered into force for both the United States and Brazil; in October 1981 Brazil requested the United States to undertake an injury review; in May 1983 the United States made a negative injury finding, with revocation of the countervailing duty order effective from the date of Brazil's request in 1981, but with duties to be collected on entries prior to that date.

4.2 The Panel considered the dispute between the parties regarding the United States' obligations under the Code to provide an injury determination for its countervailing duty order on entries of non-rubber footwear from Brazil issued before the Code entered into force for these two parties. At the centre of the dispute was whether the United States had an obligation to provide an injury determination with respect to all countervailing duties collected on imports from signatories after entry into force of the Code. Brazil contended that the United States, as a Code signatory, was under an obligation, effective 1 January 1980, to provide an injury determination and that, given the subsequent negative determination of injury in this case, the collection of countervailing duties between 4 January 1980 and 28 October 1981 violated Article VI:6(a) of the General Agreement and Articles 1 and 4 of the Code. The United States denied that it had any obligation to provide an injury determination with regard to its pre-existing countervailing duty orders and further argued that even if such an obligation existed, it had been satisfied by the procedure available to Brazil in this case.

4.3 The Panel noted that the circumstance of a pre-existing countervailing duty order was not specifically addressed in the Code, and therefore considered that it should examine the relevant provisions of Article VI of the General Agreement before proceeding to examine how the provisions of the Code related to this issue. The Panel considered that the provisions regarding the application of countervailing duties under Article VI of the General Agreement constituted an integral part of rights and obligations of signatories under the Code. The Panel therefore was of the view that the Code had to be read together

with the relevant provisions of Article VI of the General Agreement. This view was based on the provisions of the Preamble to the Code ("Desiring to apply fully and to interpret the provisions of Articles VI...") including footnote 2, and on operative provisions of the Code, in particular Articles 1 and 19:1. This view was further supported by the provision of Article 19:2(c) according to which a non-contracting party could not accede to the Code unless it agreed with the signatories on special terms of accession.¹ It was therefore clear that the drafters of the Code did not intend to have different categories of signatories with different rights and obligations unless such different terms had been specifically agreed. Consequently, a contracting party, by accepting without reservation the Code, accepted, in its relations with the Code's signatories, all relevant provisions of the General Agreement and these provisions constituted an integral part of its rights and obligations under the Code. The Code confirmed general principles of Article VI of the General Agreement with respect to countervailing measures and established a number of procedural requirements regarding the interpretation and application of Article VI as between signatories. The Panel therefore considered that it needed to examine the rights and obligations of signatories resulting from the Code's implementation of Article VI:6(a) of the General Agreement.

4.4 In conducting this examination, the Panel noted the following: Article VI:6(a) of the General Agreement provided that "[n]o contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury...". Article VI:6(a) did not stipulate how this principle should be fulfilled, i.e. whether this determination should be on a shipment-by-shipment basis or for all subsequent imports. In particular, the term "levy" had not been defined. However, the Panel noted that the CONTRACTING PARTIES, in a report adopted on 27 May 1960, agreed that although the ideal method of fulfilling this principle would be to make an injury determination in respect of each single importation of the product concerned, this was clearly impracticable and that a pre-selection system seemed to be the most satisfactory (BISD 9S/194, paragraphs 8-9 in the light of paragraph 31). The Panel considered that the adoption of this report endorsed the pre-selection system as a procedure implementing Article VI:6(a) but it did not change the basic rights and obligations resulting from Article VI:6(a), regarding the imposition of countervailing duties on products imported from other contracting parties. The use of the pre-selection system² was a practical solution under which an investigation to determine the existence of injury had to take place and countervailing duties could be imposed only if there were an affirmative finding. Subsequently, countervailing duties could be levied on each single importation without each time making a new determination. However, the fact that Article VI:6(a) required an injury determination to levy duties, combined with the fact that it had been implemented by the pre-selection system, made it necessary to introduce a review mechanism under which countervailing duties, once imposed, had to be reviewed if the circumstances justifying their imposition had changed. In other words, the continuing obligation regarding determination of injury was implemented through periodic reviews. Such a review was conducted either on the initiative of the investigating authority or upon request by an interested party.³ The Panel also noted that because of the fact that countervailing duties were already in place,

¹The Panel noted that the purpose or aims of the negotiations on terms would be to secure an overall parity of rights and obligations as between Parties to the Code which were contracting parties to the GATT and those that were not (MTN/P/5, paragraphs 4 and 9).

²According to a study by the GATT secretariat, presented to the CONTRACTING PARTIES at the Twelfth Session in November 1957 (see Anti-Dumping and Countervailing Duties, GATT, Geneva, July 1958) covering eight contracting parties which, at the time, made use of their anti-dumping and countervailing duty provisions, six contracting parties used the pre-selection system.

³See, for example, Report adopted by the CONTRACTING PARTIES (BISD 8S/151, paragraph 23) and the drafting history of the 1967 Anti-Dumping Code, in particular the UK proposal in Spec(65)86, section J and the subsequent discussion in TN.64/NTB/W/2/Rev.1, and TN/NTB/W/10 and addenda.

any such review could only be prospective in nature, in that it determined whether subsequent importations would be causing injury if the duties were removed. This approach had been codified in injury review provisions of the Anti-Dumping Codes (1967 and 1979) and in Article 4:9 of the Code.

4.5 The Panel recalled that Article VI:6(a) of the General Agreement required a contracting party not to levy a countervailing duty on the importation of goods unless there had been an injury determination and that this requirement imposed an ongoing obligation throughout the life of the decision to impose such a duty. This ongoing obligation also applied in cases where the pre-existing decisions to impose countervailing duties without injury determinations subsequently became subject to Article VI:6(a). There was nothing in the General Agreement that would automatically invalidate these pre-existing decisions but, in the Panel's view, the further implementation of such decisions had to be done with due regard to the ongoing obligation under Article VI:6(a). Consequently, the existence of a valid decision on the one hand, and the entry into effect of a new obligation on the other, required that this decision be re-examined in the light of this new obligation. This interpretation was confirmed by the general principles of international law governing the application of treaties as codified in the Vienna Convention on the Law of Treaties. Under Article 28 of that Convention new treaty provisions did not bind parties in relation to any act or fact which had taken place before the date of entry into force of the treaty. However, the treaty provisions did bind parties in relation to a situation which had arisen from a previous act (decision to impose countervailing duties) which situation (levying of countervailing duties) continued to exist.

4.6 In general terms, the Panel considered that the obligation regarding injury determination of a Code signatory with respect to pre-existing decisions to impose countervailing duties would be satisfied as long as the signatory subject to such a decision had a right to an injury examination as of entry into force, through the Code, of the Article VI:6(a) obligations. If such an examination were to be made on the initiative of the investigating authorities, it would have to cover the period starting on that date; if there were a finding of no injury it would have to apply as of that date. However, the Panel noted that nothing in Article VI excluded another procedure for the injury examination, i.e. an examination upon request. Indeed, as noted in paragraph 4 above, such a procedure had been used under the pre-selection system to implement the continuing obligation regarding the determination of injury. This procedure could, therefore, be used provided the right to an injury examination as of the date of entry into force were observed. To this effect, the Panel considered that the examination procedure would comply with obligations under Article VI:6(a) as long as the request for an examination could be made as of the date of entry into force of the Article VI obligations for the parties concerned and, if a finding of no injury were made, countervailing duties could be revoked as of the date of the request. If, however, the signatory subject to the pre-existing countervailing duty decision were to choose not to invoke its right as of that date but made its request at a later date, again there was nothing in Article VI or in its subsequent interpretation in the Code to imply that any earlier date than the date of the request would be relevant for an injury determination and possible revocation of countervailing duties.

4.7 The Panel noted that the interpretation and application of Article VI through the use of the pre-selection system had been codified in the 1967 Anti-Dumping Code and subsequently in the relevant MTN Codes. In particular, a distinction had been introduced in the Code between "levy" and "imposition" of a countervailing duty.¹ The term "levy" had been defined in the Code to mean the definitive or final legal assessment or collection of a duty or tax (Article 4, footnote 14). The term "imposition", although not expressly defined, had been consistently used in the Code (and the 1967 and 1979 Anti-Dumping Codes) in the sense of a decision, following the conduct of an investigation, to collect from a specific date a countervailing (respectively anti-dumping) duty on an

¹The Panel noted that the 1967 and 1979 Anti-Dumping Codes also made a distinction between "imposition" and "collection".

imported product.¹ The Panel noted that in general Article 1 of the Code stipulated that the imposition of a countervailing duty had to be in accordance with the provisions of Article VI of the General Agreement and, as explained above (paragraph 5), Article VI:6(a) established an ongoing obligation regarding injury determination throughout the life of a decision to impose a countervailing duty. The Panel therefore considered that the Code, in particular its distinction between "imposition" and "levy" and the subsequent injury review, reflected the pre-existing interpretation and practical application of Article VI of the General Agreement.

4.8 In further considering the text of the Code itself, the Panel noted that Article 19:5(a) of the Code required a signatory to take all necessary steps to ensure, not later than the date of entry into force of the Code for it, "the conformity of its laws, regulations and administrative procedures" with the provisions of the Code. The fact that in the Code there was no specific reference to pre-existing orders or to any special transitional procedure for such orders which were in force on 1 January 1980 supported the conclusion that the drafters did not intend to restrict respective rights and obligations resulting from Article VI:6(a) of the General Agreement and to require Code signatories to subject these orders to an injury examination automatically as of 1 January 1980.

4.9 The Panel noted that the sequence of events under the Code for a countervailing duty case was as follows:

- (a) initiation of an investigation;
- (b) preliminary determination of the existence of a subsidy and of injury caused thereby, provisional measures if taken;
- (c) determination of the existence of a subsidy and of injury caused thereby;
- (d) imposition of countervailing duties;
- (e) levying (collection) of countervailing duties (the amount of which may be determined *ex ante* or *ex post*);
- (f) review under Article 4:9 of the need for continued imposition of the duty.

Applying the above sequence to the case before it, the Panel noted that the Code entered into force at the point covered by point (e) above. At that time, countervailing duties on non-rubber footwear from Brazil were being levied pursuant to a decision taken by the United States in 1974 under section 303 of the Tariff Act of 1930, covered by the existing legislation clause of the Protocol of Provisional Application. The Panel concluded that there was nothing arising from the Code that would require retroactive application. Accordingly, the Panel concurred with Brazil and the United States that the 1974 countervailing duty order was not invalidated on 1 January 1980. The Panel considered that these definitive duties could continue to be levied but, because of the entry into force of the Code between the United States and Brazil, imports of non-rubber footwear from Brazil became eligible for a finding as to whether its subsidization was causing injury. This could not be an injury determination in the sense of Article 4:4 (imposition of final duties as a result of an investigation under Article 2) since the countervailing duty had already been imposed in 1974, but could only be an examination of injury resulting from the US obligation derived under the Code from Article VI:6(a) of the General Agreement (see paragraphs 4.3-4.6 above).

4.10 The Panel therefore considered that the requirements of Article 4:9 applied, mutatis mutandis, to a case under the Code where a countervailing duty imposed without an injury determination, subsequently became subject to the Code's provisions and therefore eligible for an injury determination. In this regard, the Code had not created any new obligations but only codified the existing interpretation

¹This meaning was discernible from the usage of this term in the Code, in particular in Articles 2:1, 4, 5:3 and 5:4.

of Article VI which had been generally implemented through the use of the pre-selection system, including an injury review mechanism. The Panel further noted the requirement of Article 19:1 of the Code that "[n]o specific action against a subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement". In addition, international law as codified in the Vienna Convention on the Law of Treaties supported the conclusion that the Code required signatories to provide the opportunity for an injury examination with respect to pre-existing countervailing duty decisions. Applying Article 28 of the Vienna Convention to the case before the Panel, the existence of a valid countervailing duty decision would be a pre-existing "act or fact" and the continued levying of countervailing duties after entry into force of the Code would be the continuing "situation". Thus, a signatory's further implementation of a pre-existing decision to impose countervailing duties would have to be undertaken with due regard for the provisions of Article VI:6(a) of the General Agreement, as interpreted by the Code.

4.11 In relation to the countervailing duty order concerning imports of non-rubber footwear from Brazil, which had not previously benefited from the injury test, the Panel concluded that the United States was, as of 1 January 1980, under an obligation to extend to Brazil a procedure for determining whether the subsidization in question would be causing injury if the countervailing duties were eliminated. In the Panel's view the US legislation implementing the Code (in particular section 104(b) of the TAA) effectively provided Brazil with a procedure for the examination of injury and the possible subsequent revocation of the pre-existing countervailing duty order as of the date of the request.^{1,2} The Panel concluded that the approach taken in this case was consistent with US obligations under the Code as derived from Article VI:6(a) of the General Agreement because Brazil's request could have been made on 1 January 1980 and, in the case of a negative injury determination, the countervailing duty order could have been revoked as of the date of the request. Brazil chose not to invoke its rights on 1 January 1980 but submitted its request at a later date. The Panel recalled its views presented in paragraph 6 above that if the signatory subject to the pre-existing countervailing duty decision were to choose not to invoke its right as of 1 January 1980 but made its request at a later date, there was nothing in Article VI or in its subsequent interpretation in the Code to imply that any earlier date than the date of the request would be relevant for an injury determination and possible revocation of countervailing duties.

4.12 The Panel recalled the additional argument by Brazil that the United States was obligated to revoke its countervailing duty order as of the suspension of liquidation ordered on 4 January 1980 rather than as of the date of the notification of the DOC by the USITC of Brazil's request for an injury review (29 October 1981). The Panel considered that the act of suspension of liquidation was of no particular relevance under the provisions of the Code. This issue was a matter related to the conformity of US administrative procedures with US law. The Panel therefore decided that under its terms of reference it would not be appropriate to examine this matter further.

¹The Panel noted that under section 104(b)(3) the effective date was the date of the notification of the DOC by the USITC rather than the date of the receipt of the request by the USITC. The Panel further noted that in this case there was a small discrepancy of two days between these two dates and considered that such a discrepancy could be tolerated as resulting from necessary administrative procedures.

²The Panel noted that the US legislation had been submitted to the Committee on Subsidies and Countervailing Measures for examination, in the course of which section 104(b) had not been contested. The Panel also noted that a number of signatories, including Brazil, had availed themselves of this provision without contesting it in the Committee at that time. However, the Panel considered that the past practice of the parties was not dispositive of their rights and obligations. Neither was it the Panel's intention, in making the above observations, to pass judgement on the conformity of the US law or section 104(b) thereof with the Code.

4.13 The Panel finally examined the argument by Brazil that the collection by the US of cash deposits and countervailing duties in excess of the 1 per cent cash deposit violated Article 5 of the Code where a negative determination of injury had been made. Brazil maintained that because the 1974 imposition of countervailing duties became eligible for an injury determination upon entry into force of the Code, the duties levied after 1974 imposition of countervailing duties became eligible for an injury determination upon entry into force of the Code, the duties levied after 1 January 1980 had to be in the nature of provisional duties. As previously noted, the Panel was of the view that the final countervailing duty order imposed in 1974 continued to be in force after 1 January 1980 and was not invalidated by the acceptance of the Code by the United States at that date. The duties assessed by the United States after the entry into force of the Code therefore continued to be definitive, rather than provisional, duties and consequently there was, in the view of the Panel, no basis for the application of Article 5.

4.14 For the foregoing reasons, the Panel concluded that the collection of countervailing duties by the United States on entries of non-rubber footwear from Brazil between 4 January 1980 and 28 October 1981 was consistent with the United States' obligations under the Code.