



17 November 2016

(16-6329)

Page: 1/5

Original: English

UNITED STATES – COUNTERVAILING MEASURES ON COLD- AND HOT-ROLLED STEEL FLAT PRODUCTS FROM BRAZIL

REQUEST FOR CONSULTATIONS BY BRAZIL

The following communication, dated 11 November 2016, from the delegation of Brazil to the delegation of the United States and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of the United States of America pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"); Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") concerning certain countervailing measures adopted by the *United States Department of Commerce* ("USDOC") and the *United States International Trade Commission* ("USITC") with respect to *Cold- and Hot-Rolled Steel Flat Products from Brazil*.

1. Factual Background

In 2015, the USDOC received countervailing duty petitions concerning imports of cold¹- and hot-rolled² steel from Brazil involving 36 governmental measures. Shortly thereafter³, the USDOC initiated countervailing investigations on the exports of both products and encompassing all 36 Brazilian measures. It is important to remark that, during the consultations in the countervailing investigations⁴, the Brazilian Government provided more than sufficient evidence that the assertions made by the petitioners were unfounded.

In January 2016, despite all the evidence to the contrary, the USDOC issued a preliminary determination imposing provisional duties on the exports of the products under investigation, which allegedly had benefited from subsidies granted by Brazil through six governmental measures⁵. Later on, upon the conclusion of the investigation, the USDOC determined that countervailable subsidies were being provided to producers and exporters of certain cold⁶- and hot-rolled⁷ steel flat products from Brazil, in relation to the following seven Brazilian measures (one more than the six measures subjected to the preliminary decision): "IPI for Machines and Equipments"; "Ex-Tarifário"; payroll tax exemption; Integrated Drawback Scheme; "Reintegra";

¹ 28 July 2015, as per the Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from Brazil. Pg. 01.

² 11 August 2015, Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from Brazil. Pg. 01.

³ August 2015

⁴ September 2015

⁵ On August 17, 2015, as per the Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from Brazil. Pg. 01. On 31 August 2015, as per the Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from Brazil. Pg. 01.

⁶ 20 July 2016, as per Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from Brazil. Pg. 01.

⁷ 4 August 2016, as per Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from Brazil. Pg. 01.

"BNDES-FINAME"; and loans from the "Bahia State Industrial Development and Economic Integration Program" ("Desenvolve Bahia").

Notwithstanding the excessive and unnecessary burden to the Brazilian Government and companies caused by the inclusion in the investigation of 36 measures that are clearly not countervailable subsidies or did not benefit the sector at issue, Brazil and the concerned Brazilian exporters⁸ provided all the necessary information to assist the investigation. All the questions put forward by the USDOC were properly answered on a timely and due manner.

Despite Brazil's best efforts to present complete and correct information on the nature and scope of the inexplicably large number of Brazilian governmental measures under the purview of the investigation, the USDOC decided to rely, as a rule, on the use of so-called "adverse facts available", systematically disregarding the information supplied by the Brazilian Government concerning its legislation and public policies.

By disregarding the information provided, the United States mischaracterized the nature of the measures investigated and incorrectly determined that generally applicable import duties like the "ex-tarifário" and non-discriminatory internal taxes - such as the IPI rates applicable for capital goods and the so-called "payroll tax exemption" - were countervailable subsidies. The United States also calculated an inflated amount of subsidy, by using incorrect benchmarks. As for the remaining Brazilian measures determined to be countervailable, the United States either disregarded that they are generally applicable to all industries meeting objective criteria - and, as such, could not be considered a specific subsidy under the SCM Agreement - or, in the case of "Drawback" and "REINTEGRA", disregarded that they are completely in line with WTO rules.

2. The matter at issue

This request for consultations concerns countervailing measures imposed by the United States in relation to *Hot- and Cold-Rolled Steel Flat Products from Brazil* (Cases Nos. C-351-844 and C-351-846), that were imposed pursuant to Title VII of the Tariff Act of 1930, as amended. The countervailing measures were imposed based on, but not limited to, the following actions:

1. *The initiation of countervailing duties investigations, checklist, questionnaires, verification reports, calculations memoranda, other determinations, memoranda, reports and measures related to the investigation of Countervailing Duty Investigation of Certain Hot-Rolled and Cold-Rolled Steel Flat Products from Brazil.*
2. *Certain Cold-Rolled Steel Flat Products From Brazil, India, the People's Republic of China, the Republic of Korea, and the Russian Federation: Initiation of Countervailing Duty Investigations*, 80 FR 51206 (August 24, 2015);
3. *Notice by the International Trade Commission on Cold-Rolled Steel Flat Products From Brazil, China, India, Japan, Korea, Netherlands, Russia, and the United Kingdom (Preliminary)*, 80 FR 55872 (September 17, 2015)
4. *Notice by the International Trade Commission on Hot-Rolled Steel Flat Products From Brazil, China, India, Japan, Korea, Netherlands, Russia, and the United Kingdom (Preliminary)*, 80 FR 58787 (September 30, 2015)
5. *Certain Cold-Rolled Steel Flat Products From Brazil, India, the People's Republic of China, the Republic of Korea, and the Russian Federation: Postponement of Preliminary Determinations in the Countervailing Duty Investigations*, 80 FR 60881 (October 8, 2015);
6. *Calculations for Preliminary Determination of Critical Circumstances in the Antidumping Duty and Countervailing Duty Investigations of Certain Hot-Rolled Steel Flat Products from Brazil* (December 2, 2015)

⁸ *Companhia Siderúrgica Nacional ("CSN") and Usinas Siderúrgicas de Minas Gerais S.A. ("USIMINAS").*

7. *Issues and Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from Brazil*, Fed. Reg. (December 15, 2015);
8. *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From Brazil: Preliminary Affirmative Determination and Alignment of Final Determination With Final Antidumping Duty Determination*, 80 FR 79569 (December 22, 2015);
9. *Certain Hot-Rolled Steel Flat Products From Brazil: Affirmative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 81 FR 15235 (March 22, 2016).
10. *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from Brazil*, Fed. Reg. (July 20, 2016);
11. *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From Brazil: Final Affirmative Determination*, 81 FR 49940 (July 29, 2016);
12. *Calculations for the Final Determination for Usinas Siderúrgicas de Minas Gerais SA* (August 4, 2016);
13. *Calculations for the Final Determination for Companhia Siderúrgica Nacional (CSN)* (August 4, 2016);
14. *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From Brazil: Final Affirmative Determination, and Final Determination of Critical Circumstances, in Part*, 81 FR 53416, (August 12, 2016);
15. *Notice by the International Trade Commission on Cold-Rolled Steel Flat Products From Brazil, China, India, Japan, Korea, Netherlands, Russia, and the United Kingdom (Final)*, 81 FR 63806 (September 16, 2016);
16. *Certain Cold-Rolled Steel Flat Products from Brazil, India, and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order (the Republic of Korea) and Countervailing Duty Orders (Brazil and India)*, 81 FR 64436 (September 20, 2016);
17. *Notice by the International Trade Commission on Hot-Rolled Steel Flat Products From Brazil, China, India, Japan, Korea, Netherlands, Russia, and the United Kingdom (Final)*, 81 FR 66996 (September 29, 2016);
18. *Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders*, 81 FR 67960 (October 03, 2016);

The measures at issue in this request also include any and all determinations or actions by the US Department of Commerce, the US International Trade Commission, or the US Customs and Border Protection relating to the investigation, imposition and collection of countervailing duties on *Hot-and Cold-Rolled Steel Flat Products from Brazil* (Cases Nos. C-351-844 and C-351-846).

These investigations, the resulting determinations and the application of the corresponding countervailing duties constitute measures Brazil deems inconsistent with the United States' obligations under the relevant provisions of the Covered Agreements, including, but not limited to: Articles 1; 2; 10; 11 (in particular 11. 2, 11.3, 11. 4 and 11.9); 12 (in particular 12.3, 12.5 and 12,7); 14; 15; 16; 17; 19 and 32.1 of the SCM Agreement; as well as Annexes II and III of the SCM Agreement and Article VI of the GATT 1994.

For the sake of clarity, Brazil claims may be organized in four main groups, as described below:

a. Claims related to the procedures applied in the countervailing duty investigations

The United States initiated countervailing duty investigations in the absence of sufficient evidence and based on clearly inaccurate data with respect to the regimes at issue, and did not perform an adequate review to establish the "accuracy and adequacy" of the evidence annexed to the initial applications. The United States not only failed to reject the unsubstantiated assertions made in the application, but also decided not to terminate the investigation after being informed by the Government of Brazil and the concerned industry about the above-mentioned failures, refusing to collect or accept a great deal of relevant information.

In many instances, the United States drew adverse inferences or relied upon adverse facts available in an inappropriate manner, rejecting sound information provided in a timely manner from interested parties or failing to request information from interested parties concerning the factual issues in question.

In connection with these issues the United States seems to have violated Articles 11 (in particular 11. 2, 11.3, 11. 4 and 11.9); 12 (in particular 12.3, 12.5 and 12. 7); 17; 19 and 32.1 of the SCM Agreement, and Article VI of the GATT.

b. Claims related to the determinations of injury and domestic industry

With regard to the determination of injury, it is not clear from the documentation in the procedures that the decision was based on positive evidence or involved an objective examination of the facts.

Moreover, the definition of domestic industry did not refer to the domestic producers as a whole, considering that in a universe of twelve producers, only data related to seven of them were taken into account.

In connection with this item, the United States seems to have violated Article 15 and 16 of the SCM Agreement, and Article VI of the GATT.

c. Claims related to the characterization of certain governmental measures as countervailable subsidies

The determinations that the Brazilian governmental measures aforementioned are countervailable subsidies are contrary to the evidence on the record of the investigations, and do not meet the necessary requirements that allow for the imposition of provisional and final duties.

With regard to the characterization of a subsidy within the meaning of Article 1 of the SCM Agreement, the United States failed to demonstrate that the application of certain legislation⁹, notably related to the level of IPI rates for capital goods, the "integrated drawback scheme", the "ex-tarifário", the "REINTEGRA", the so-called "payroll tax exemption, and the "Desenvolve Bahia", entailed a financial contribution and conferred a benefit within the meaning of the SCM Agreement. With regard to specificity, the United States did not meet its burden of demonstrating that the tax legislation is specific within the meaning of the SCM Agreement.

With regard to FINAME, the United States failed to demonstrate that the loans provided conferred a benefit for Certain Hot-Rolled and Cold-Rolled Steel Flat Producers within the meaning of Article 1 of the SCM Agreement and that they were specific under the SCM Agreement. Particularly, the United States disregarded the methodologies set forth in the SCM Agreement to establish a benefit with regard to loans.

⁹ Notably: IPI levels for capital goods, the integrated drawback scheme, the *ex-tarifário*, the REINTEGRA, the so-called payroll tax exemption, FINAME and Desenvolve Bahia.

The United States thus seems to have violated Articles 1, 2 and 19 of the SCM Agreement, as well as Annexes II and III of the SCM Agreement and Article VI of the GATT 1994, and Article VI of the GATT.

d. Claims related to the calculation and determination of the subsidy margins for the tax legislation and loans

Brazil understands that the amount of countervailable subsidies, if they are recognized as such, were calculated in excess of the actual "benefit" that was provided, namely because the benchmarks used in the investigation were flawed and the margins were, consequently, inflated.

The United States seems to have applied an amount of countervailing duties in a manner inconsistent with Articles 19.3 and 19.4 of SCM Agreement, and Article VI of the GATT;

Brazil deems the United States' measures at issue to have a serious systemic impact, as well as adverse effect on the export of subject goods to the United States. Furthermore, Brazil considers that those measures cause nullification or impairment of benefits accruing to the country, directly or indirectly, under the cited Agreements.

Brazil reserves the right to raise additional claims and measures and address additional legal and factual issues under other provisions of the covered agreements during the course of the consultations.

We look forward to receiving United States' reply to this request in accordance with Article 4.3 of the DSU. Brazil proposes that the date and venue of the consultations be mutually agreed by the parties.
