REQUEST FOR CONCILIATION UNDER
ARTICLE 17 OF THE AGREEMENT

Communication from India
(Item F of the Agenda)

The representative of India has requested that the attached information
be brought to the attention of the Committee.
The implementation of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (hereinafter called Subsidies Code) by the U.S. authorities in respect of certain Indian products is in contravention of the Code. India has been and is being adversely affected as a result of these actions. Some of these actions are also not in consonance with the obligations of the U.S. Government under the General Agreement on Tariffs and Trade. Without prejudice to our rights of seeking relief under the General Agreement on Tariffs and Trade in an appropriate manner, we would like to place before the Subsidies Committee the following facts within the purview of the Subsidies Code with the objective of getting appropriate relief in this regard in the Subsidies Committee.

2. Specifically, the violation of the Subsidies Code by the U.S. authorities in relation to certain Indian products is in the following three fields:

(A) Non-extension of the benefit of injury criterion for industrial fasteners.

(B) Improper methods and principles of calculating countervailing duties in case of industrial fasteners, iron metal castings and leather footwear and uppers.

(C) Improper retroactive application of countervailing duties on leather footwear and uppers.

(A)(a): India accepted the Subsidies Code on 11 July, 1980 and thus the Code entered into force for India on the thirtieth day following the date of acceptance. The United States Government invoked the provisions of Article 19.9 of the Code and it was their claim that through such invocation the Code did not apply between the U.S. and India. The U.S. Government later withdrew its invocation of Article 19.9 with respect to India with effect from 25.9.1981. Thus, the United States consented that the rights and obligations of the Code would apply between the United States and India with effect from September 25, 1981.

The case relating to countervailing duty on industrial fasteners exported from India was decided by the U.S. authorities on 21.7.1980 whereby the U.S. authorities imposed countervailing duty on the industrial
fasteners exported from India. In this investigation, the U.S. authorities had not extended to India the benefit of the injury criterion for the reason, as professed by them, that the obligation regarding injury criterion was not applicable to them vis-a-vis India. Thus, the countervailing duty on industrial fasteners had been imposed by the U.S. authorities without examining the existence of injury.

The countervailing duty continued even after 25.9.1981 when U.S. accepted its obligations under the Code in respect of India. It is still continuing.

Such continuation of the countervailing duty on industrial fasteners is in violation of Article 4(9) of the Code which lays down, inter alia, "A countervailing duty shall remain in force only as long as ........ necessary to counteract the subsidisation which is causing injury". This provision thus clearly lays down that countervailing duty can continue only if the subsidisation is causing injury. Hence, continuation of such duty is dependent on two necessary elements, namely (i) subsidisation, and (ii) injury.

As already mentioned above, there had been no investigation regarding existence of injury in this case. Hence, continuation of countervailing duty at least beyond 25.9.1981 without a finding regarding existence of injury is clearly violating Article 4(9). This, we say without any prejudice to our case relating to the period before 25.9.1981.

In our consultations with the U.S. authorities we have been informed that some provision of the U.S. law, which apparently has been promulgated with the objective of implementation of the Subsidies Code and other codes of the post-MTN period, does not provide for injury determination in cases decided between 1.1.1980 and the date when a country is declared by U.S. as a country under the Agreement. Any such law, if it exists, is, as mentioned above, clearly contravening Article 4(9).

India is being adversely affected and is suffering nullification and impairment of its rights under the Code by the refusal of the U.S. authorities to have injury investigation in case of industrial fasteners and, at the same time, by the continuation of the countervailing duty.

(A)(b): It may also be mentioned here that two of the six tariff lines relating to industrial fasteners have become duty-free in the U.S. as a result
of the withdrawal of safeguard duty on these two tariff lines. The U.S. Government has been extending injury test on non-dutiable products to all countries since 1974. In spite of this practice, and the requirement of the U.S. law itself, the U.S. authorities have not found it possible to extend the injury test benefit to India even on these two duty-free tariff lines with effect from 5.1.1982 when these two tariff lines became duty-free.

(B): The method and principle applied by the U.S. authorities in calculating countervailing duty in respect of industrial fasteners, iron metal castings and leather footwear and uppers exported from India violate Article 4(2) of the Code which lays down, "No countervailing duty shall be levied on any imported product in excess of the amount of subsidy found to exist, calculated in terms of subsidisation per unit of the subsidised and exported product". In respect of the three categories of products mentioned above, the U.S. authorities have levied countervailing duty in excess of the amount of subsidy.

Government of India pays Cash Compensatory Support on these items the main part of which is meant to compensate for the indirect taxes payable when the products are consumed in the country. The U.S. authorities have imposed countervailing duties on these items to the full extent of the Cash Compensatory Support without deducting from it the rebate of indirect taxes. The U.S. authorities have themselves accepted at the time of final determination of countervailing duties for industrial fasteners and iron metal castings that the products in question bore such taxes which were refunded through the Cash Compensatory Support. They were thus legally bound to deduct this portion from the Cash Compensatory Support but they did not do so and determined the entire payment as the subsidy.

Such refund of taxes is not considered a subsidy according to the provisions of GATT or the Subsidies Code. Therefore, quite clearly the U.S. authorities have levied countervailing duty in excess of the amount of the subsidy.

The U.S. authorities seem to hold the view that any such rebate for the taxes will be allowed only if the programme for payment of the Cash Compensatory Support had been originally designed for the purpose of such rebate and that it would not accept what it calls "ex-post-facto rationalisation" of the payment. As mentioned above, it is well recognised that the refund of
such duties or taxes is not a subsidy and is not liable for the imposition of countervailing duty. The real test for the assessment of subsidy is the extent of subsidisation at the point when the product crosses the national border of the importing country. The intention of the exporting Government in instituting a particular export assistance programme and the linking of the taxes and the payment to the exporters in the government programme would not appear to be quite relevant so long as it can be shown that the payment for the products crossing the border of the importing country is partly or fully covered by the indirect taxes. If it is fully covered, there can be no imposition of countervailing duty since there is no subsidy; if, on the other hand, it is partly covered, the extent of the countervailing duty will be the difference between the payment and the rebate of taxes. The insistence of the U.S. authorities regarding the historical linkage is not in accordance with the GATT and the Subsidies Code.

The U.S. authorities, though accepting that part of the Cash Compensatory Support was meant for the rebate of taxes, failed to make appropriate deductions from the Cash Compensatory Support, and thereby infringed Article 4(2) of the Code while determining the countervailing duty.

(C)(a): In case of leather footwear and uppers exported from India, the U.S. authorities have violated the provisions of Article 5 of the Code while making retroactive determination of the countervailing duty in February 1982 effective from 1.1.1980.

Article 5 of the Code lays down the conditions for retroactive determination of the countervailing duty, the limitations regarding the period of retroactive operation, and the limitation in respect of the amount of duty covered by such retroactive determination. The U.S. authorities have violated all these provisions.

In October 1979, countervailing duties were assessed at the rate of 4.04 per cent on footwear and 1.01 per cent on uppers. In the administrative review of this case on 17.2.1982, the rates of the countervailing duties were raised to 15.08 per cent on footwear and 12.58 per cent on uppers both retroactively with effect from 1.1.1980. Here again, it may be mentioned incidentally that the raise in the countervailing duty was mainly based on the decision that there had been no linkage between the Cash Compensatory Support and the rebate for taxes, a point which has been analysed above as violative of Article 4(2) of the Code.
The Subsidies Code provides for the retroactive levy of countervailing duties between the preliminary affirmative determination and final determination with the proviso that the imposition of the provisional measures should not exceed four months. Besides, under critical circumstances, as mentioned in Article 5(9), retroactive determination can extend to imports within 90 days prior to the date of application of provisional measures.

Without any prejudice to our claim that the conditions of retroactive application of levy have not been met in this case, we would like to mention that in this case the violation of the provisions is at least on the following grounds:

(i) The earlier determination of countervailing duty in October 1979 was itself a final affirmative determination and not a provisional determination.

(ii) The period of retroactive determination has been extended to more than 25 months.

(iii) The quantum of the retroactive duty is far in excess of the earlier duty as operating from October 1979 till February 1982.

(C)(b): Another point which is relevant in this regard is that the U.S. authorities have been asking for cash deposits or bonds from the importers on a large number of items of leather footwear which are in fact not within the purview of the countervailing duty order. This problem has arisen because of the classification of these items. The footwear items (sandals) on which Government of India grants Cash Compensatory Support at the rate of 5 per cent of the f.o.b. value of exports has been treated by the U.S. authorities on par with the other footwear items (closed shoes) which receive 15 per cent Cash Compensatory Support on the f.o.b. value of exports. The earlier order of October 1979 took account of this difference but the new order ignores this difference completely and the U.S. authorities are now collecting countervailing duties on some footwear items which were not within the purview of the original order.

The footwear items which have been incorrectly classified form the bulk of India's exports of footwear to USA. Even then, the total export of this item from India to the U.S. is so small that it would, under any normal situation, not be found to cause injury. In this
case, while the benefit of the injury test is available to us, and while we are confident that in any investigation of injury determination the result will be non-existence of injury, the sad aspect is that the legal deadline by which injury test benefit on this item will be available to India is said to be around October 1984. Thus, if the U.S. authorities have their way, they would go on collecting the duties and deposits till then. Apart from the legal lacuna, as mentioned above, it is not in conformity with the principle of quick relief.

3. As mentioned in the beginning, while reserving all our rights for relief under the General Agreement itself, we are placing these facts before the Committee with the request that the actions, methods and principles of the U.S. authorities, as mentioned above, be declared violative of the various provisions of the Subsidies Code as detailed above, and appropriate recommendation be made so that we get relief.

It is also important to mention that these aspects of the implementation of the Subsidies Code are of importance to all other signatories as also to other governments who are engaged at the moment in weighing the pros and cons of accepting/acceding to the Subsidies Code. Thus, a thorough consideration of this matter in the Committee with a view to finding out solutions as suggested above is of utmost importance.