

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

*European Communities – Anti-Dumping Duties on
Malleable Cast Iron Tube or Pipe Fittings from Brazil*

(AB-2003-2)

Third-Participant Submission of the United States

May 19, 2003

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Service List

APPELLANT

H.E. Mr. Luiz Felipe de Seixas Corrêa, Permanent Mission of Brazil

APPELLEE

H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission

THIRD PARTIES

H.E. Mr. Alejandro Jara, Permanent Mission of Chile

H.E. Mr. Shotaro Oshima, Permanent Mission of Japan

H.E. Mr. Eduardo Pérez Motta, Permanent Mission of Mexico

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I. Introduction

1. The United States welcomes this opportunity to present its views in this proceeding on *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*. The United States is limiting its comments to certain issues relating to the proper legal interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the “AD Agreement”).

II. Executive Summary

A. Cumulation Under Article 3.3 of the AD Agreement

2. Brazil argues that an investigating authority considering whether to cumulate imports under Article 3.3 of the AD Agreement must first consider whether the volume and price effects of imports from individual countries are significant. The Panel was correct in finding that investigating authorities are under no such obligation.

3. Under Article 3.3, an investigating authority may cumulate imports if, first, the dumping margins for the individual countries are more than *de minimis*, and second, the volume of imports from the individual countries are not negligible. In addition, the investigating authority must determine that a cumulative assessment is appropriate in light of the conditions of competition both between the imported products and between the imported products and the like domestic product. These are the only specified textual prerequisites for cumulation, and there is no basis for Brazil’s argument that Article 3.3 imposes other, unmentioned prerequisites.

B. Article 3.5 of the AD Agreement and “Other” Injury Factors

4. Brazil asserts that the EC’s causality methodology breached Article 3.5 of the AD Agreement because the EC allegedly failed to conduct an analysis of the combined effects of all factors other than the dumped imports in addition to the individual analysis of each such factor. The Panel found that the EC’s individual examination and distinguishing of the effects of each of the other known causal factors satisfied Article 3.5. The United States agrees with the Panel.

5. Nothing in the text of Article 3.5 requires investigating authorities to determine whether the other injury factors “by themselves, are a sufficient cause of injury.” Similarly, nothing in the text of Article 3.5 requires investigating authorities to find that the injurious effects of increased imports are more significant than the combined effects of all other known injurious factors.

C. The EC’s Examination of Causation and the “Margin Analysis”

6. Brazil appeals the Panel’s finding that the “margin analysis” was not a “known” causal factor that the EC was required to examine as part of its causality analysis under Article 3.5. Brazil’s argument is without merit and the Appellate Body should affirm the Panel’s finding.

7. Under Article 3.5 of the AD Agreement, investigating authorities are obliged to “examine any *known* factors other than the dumped imports *which are at the same time injuring the domestic industry*” and ensure that the injurious effects caused by those factors are not attributed to the dumped imports (emphasis added). However, the obligation to examine such factors does not oblige investigating authorities to seek out and examine in each case, on their own initiative, the effects of all *possible* factors that *may* be causing injury to the domestic industry under investigation. If a particular factor is not known to the investigating authorities, or if that factor is not “at the same time injuring the domestic industry,” then the investigating authorities are under no obligation to examine that factor in the course of their causality analysis.

8. As the complainant, the burden was on Brazil to establish a *prima facie* case that the margins analysis was a “known” factor that was, at the same time, injuring the domestic industry. It failed to meet its burden.

D. Exhibit EC-12 and Articles 6.2 and 6.4 of the AD Agreement

9. The United States agrees with Brazil that the Panel erred in finding that the EC did not breach Articles 6.2 and 6.4 of the AD Agreement with respect to the information on injury factors referred to exclusively in Exhibit EC-12.

10. The information in Exhibit EC-12 was not disclosed in any form to the interested parties in the course of the investigation. It thus seems evident that the EC breached its obligations under Article 6.4 of the AD Agreement. The document at issue falls within the parameters of Article 6.4: It is not confidential; it is relevant; and the EC used the information contained in the document in the antidumping investigation. The EC has provided no reasonable explanation of why it did not provide an opportunity to see the information and to prepare presentations on the basis of that information. As such, the EC has breached Article 6.4.

11. Similarly, by failing to inform the interested parties of the information contained in the internal note, the EC breached Article 6.2 of the AD Agreement. The EC’s failure to apprise the interested parties of the note deprived those parties of the opportunity to present arguments or provide information in response to the note.

E. Exhibit EC-12 and Articles 3.1 and 3.4 of the AD Agreement

12. The Panel has already found that the EC acted inconsistently with its obligations under Article 12.2 and Article 12.2.2 by failing to set forth in a discernable manner how it evaluated certain Article 3.4 factors. The United States agrees with the Panel’s findings on this issue, which the EC has not appealed. In light of these findings, in the view of the United States, it is not necessary for the Appellate Body to reach Brazil’s Article 3.1. and 3.4 claims.

III. Argument

A. The Appellate Body Should Uphold the Panel’s Findings on the Issue of Cumulation Under Article 3.3 of the AD Agreement

13. In its appellant submission, Brazil argues that an investigating authority considering whether to cumulate imports under Article 3.3 of the AD Agreement must first consider whether the volume and price effects of imports from individual countries are significant.¹ The United States respectfully submits that the Panel was correct in finding that investigating authorities are under no such obligation.²

14. The text of Article 3.3, which sets out specific criteria for conducting a cumulative analysis, contradicts Brazil’s argument. Under Article 3.3, an investigating authority may cumulate imports if, first, the dumping margins for the individual countries are more than *de minimis*, and second, the volume of imports from the individual countries are not negligible. In addition, the investigating authority must determine that a cumulative assessment is appropriate in light of the conditions of competition both between the imported products and between the imported products and the like domestic product. These are the only specified textual prerequisites for cumulation, and there is no basis for Brazil’s argument that Article 3.3 imposes other, unmentioned prerequisites.

15. In essence, Brazil is seeking to graft the requirements of Article 3.2 of the AD Agreement onto the prerequisites for cumulation under Article 3.3. However, if Article 3.3 required investigating authorities to conduct the analysis that Brazil asserts, Article 3.3 would have included as required criteria the significance of volume and price.³ It does not. The only reference to volume in Article 3.3 is the requirement that investigating authorities not cumulate imports that are individually found to be negligible in volume. There are no other obligations relating to volume in Article 3.3.

16. Brazil’s argument suffers from another flaw as well, because it would require investigating authorities to conduct the Article 3.2 analysis before considering whether to cumulate under Article 3.3. This would turn the Agreement on its head. As the Panel correctly observed, Article 3.3 establishes specific criteria that must exist before investigating authorities may cumulatively assess the effects of aggregate imports from sources under investigation.⁴ In other words, the only obligation for investigating authorities before they may consider the effects of all subject imports on a cumulative basis is to determine whether cumulation is appropriate given the specific criteria included in Article 3.3. If anything, Brazil’s interpretation would

¹ Appellant’s Submission of Brazil, para. 94.

² Report of the Panel in *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, circulated March 7, 2003, paras. 7.225-236 (“Panel Report”).

³ See Panel Report, para. 7.234.

render Article 3.3 meaningless, contrary to the principle of effectiveness of treaty interpretation,⁴ for if the contribution to injury of imports from each country must itself be significant, the cumulation provision would serve no purpose.

17. To further support its attempt to graft Article 3.2 requirements into Article 3.3, Brazil argues that Articles 3.1 and 3.2 concern “factors” while Article 3.3 addresses “effects.”⁵ There is no textual support for this argument. Articles 3.1 and 3.2 in fact each refer explicitly to the “effect” of the dumped imports. Indeed, all references to the price considerations in those provisions is phrased in terms of “the effect of the dumped imports on prices.”⁶

18. Read in the context of Article 3 as a whole, it is clear that the term “effects” as used in Article 3.3 refers to volume and price effects, as well as the impact of imports on the domestic industry. This interpretation is confirmed by reference to Article 3.5, which refers to the “*effects of dumping, as set forth in paragraphs 2 and 4*” (emphasis added). Paragraph 3.2, in turn, addresses the volume (in relative or absolute terms) and price effects of dumped imports. Thus, the “effects” that may be considered cumulatively after application of the Article 3.3 cumulation test include the volume and price effects discussed in Article 3.2.

19. And for the first time, in its appellant’s submission, Brazil argues that before even considering whether cumulation is appropriate under Article 3.3, the investigating authorities must first determine that the dumped imports *contributed* to the volume and price effects addressed in Article 3.2, “even if it is a marginal contribution.”⁷ However, there is again no textual support for this argument. Nothing in the AD Agreement, particularly in Articles 3.2 nor 3.3, requires investigating authorities to make a preliminary finding of “contribution” to injury.

20. In fact, Article 3.2 of the AD Agreement creates no obligation for authorities to consider whether dumped imports from each individual country have “contributed” to these effects, “marginally” or otherwise. Rather, Article 3.2 requires authorities to consider whether there has been a *significant* increase in the volume of dumped imports, whether there has been *significant* price undercutting by the dumped imports, and whether the effect of such imports is otherwise to depress prices to a *significant* degree or prevent price increases, which otherwise would have occurred, to a *significant* degree – all elements of the determination of causation and injury, as made clear by the cross-reference in Article 3.5. There is no requirement under the AD

⁴ The principle of effectiveness of treaty interpretation provides that an interpreter is not to assume that terms in a text are purely redundant and have no meaning. *See, e.g., Korea Dairy*, Report of the Appellate Body at para. 80 and fn. 41.

⁵ Appellant’s Submission of Brazil, paras. 95-99.

⁶ Article 3.1 of the AD Agreement states that a determination of injury shall involve an objective examination of, *inter alia*, the “effect” of the dumped imports on prices. Article 3.2 of the AD Agreement requires investigating authorities to consider the “effect” of the dumped imports on prices, including whether the “effect” of such imports is to depress prices or prevent price increases to a significant degree.

⁷ Appellant’s Submission of Brazil, para. 100.

Agreement for multiple determinations of injury; only a single determination, which includes consideration of the effects identified in Article 3.2, and conducted after determining whether cumulation is appropriate, is required.

21. Brazil’s “example” in paragraph 107 of its appellant’s submission, moreover, does not support the argument that it is making. In its presentation, Brazil assumes that Article 3.3 of the AD Agreement makes cumulation mandatory, or that it provides no criteria for cumulation.⁸ Neither assumption is true. Article 3.3 allows for circumstances under which the investigating authorities *may* cumulatively assess the effects of imports; in no circumstances does the Agreement compel investigating authorities to cumulate. Under Article 3.3, the investigating authorities must determine, in addition to the margin and volume threshold, that “a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.” Brazil’s example and its assumption that cumulation would automatically occur ignores that the investigating authorities must assess the conditions of competition among the imports and between the imports and the domestic like product, and cannot cumulate unless they determine that cumulation is appropriate in light of these conditions.⁹

22. In sum, the Panel was correct to reject Brazil’s argument that, aside from meeting the criteria of Article 3.3, cumulation is permitted only if the investigating authority first determine that the imports from each individual country are significant with respect to volume and price effects.¹⁰

B. Article 3.5 of the AD Agreement Does Not Require Investigating Authorities to Determine Whether “Other” Injury Factors Are a “Sufficient Cause of Injury”

23. In the course of the challenged antidumping investigation, the EC identified certain factors (other than dumped imports) that were potentially causing injury to the domestic industry, conducted an examination of each, and found that “any other factors that may have contributed to the injury to the domestic industry were ‘not such as to have broken the causal link’ between dumped imports and injury.”¹¹ Brazil asserts that the EC’s causation methodology breached Article 3.5 of the AD Agreement because the EC allegedly failed to conduct an analysis of the combined effects of all of the other factors in addition to the individual analysis of each such

⁸ Furthermore, Brazil ignores that the consideration of price effects under Article 3.2 includes, *inter alia*, a consideration of whether there has been significant price suppression, which is not necessarily accompanied by underselling.

⁹ Brazil has not appealed the Panel’s findings concerning the EC’s assessment of the conditions of competition.

¹⁰ Panel Report, paras. 7.234-235.

¹¹ Panel Report, para. 7.367.

factor.¹² The Panel disagreed with Brazil, finding that the EC’s individual examination and distinguishing of the effects of each of the other known causal factors satisfied Article 3.5.¹³ The United States agrees with the Panel.

24. The basis for Brazil’s claim that the EC should have considered the combined effects of all of the other factors is its assertion that Article 3.5 has two aims: first, to ensure that the injurious effects of known factors other than dumped imports are not attributed to the dumped imports; and second, to ensure that those other factors “are not a sufficient cause of injury.”¹⁴ The United States agrees that Article 3.5 has the first aim that Brazil asserts; the purpose of the non-attribution requirement is to ensure the existence of an unsevered causal link between the dumped imports and the injury to the domestic industry. Brazil’s second asserted aim, however, is without foundation.

25. It is not surprising that Brazil is unable to point to any textual basis for this second assertion, for there is none. Nothing in the text of Article 3.5 requires investigating authorities to determine whether the other injury factors “by themselves, are a sufficient cause of injury.”¹⁵ Similarly, nothing in the text of Article 3.5 requires investigating authorities to find that the injurious effects of increased imports are more significant than the combined effects of all other known injurious factors. In fact, nothing in the text of Article 3.5 – or in the AD Agreement as a whole – requires investigating authorities to weigh the significance of any factor at all, individually or collectively.

26. Furthermore, is it not clear what purpose such an analysis would serve. Brazil cites the Appellate Body’s report in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* in support of its argument, but nothing in that report supports the view that Article 3.5 requires investigating authorities to determine whether the other injury factors “by themselves, are a sufficient cause of injury.” If anything, Brazil’s argument is more reminiscent of the panel’s finding in *Wheat Gluten* – expressly rejected by the Appellate Body – that under Article 4.2(b) of the *Agreement on Safeguards*, increased imports “‘alone’, ‘in and of themselves’, or ‘per se’, must be capable of causing injury that is ‘serious’.”¹⁶ It is also noteworthy that, in the same report, the Appellate Body rejected the interpretation that, under Article 4.2(b) of the *Agreement on Safeguards*, competent authorities must *exclude* totally the effects of factors other than increased imports from the determination of injury.¹⁷

27. As the Panel correctly noted, Article 3.5 of the AD Agreement does not provide any

¹² Appellant’s Submission of Brazil, paras. 209-219.

¹³ Panel Report, para. 7.369.

¹⁴ See, e.g., Appellant’s Submission of Brazil at para. 217.

¹⁵ Appellant’s Submission of Brazil, para. 214.

¹⁶ Appellate Body Report in *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, para. 79 (“*Wheat Gluten*”).

¹⁷ See *id.*, paras. 70, 72.

particular methodology that investigating authorities must use in examining other known causal factors.¹⁸ In the absence of specific language in the AD Agreement, investigating authorities have discretion to establish their own causation methodologies to examine other known causal factors and ensure that the injurious effects caused by those factors is not attributed to the dumped imports.

C. The Appellate Body Should Uphold the Panel’s Findings on the Issue of the “Margin Analysis”

28. In addition to challenging the Panel’s findings on the EC’s overall approach in examining the other known causal factors, Brazil also appeals the Panel’s finding that the “margin analysis” was not a “known” causal factor that the EC was required to examine as part of its causality analysis under Article 3.5 of the AD Agreement. Brazil’s argument is without merit and the Appellate Body should affirm the Panel’s finding.

29. Under Article 3.5, investigating authorities are obliged to “examine any *known* factors other than the dumped imports *which are at the same time injuring the domestic industry*” and ensure that the injurious effects caused by those factors are not attributed to the dumped imports (emphasis added).¹⁹ As the panel found in *Thai Steel*, however, the obligation to examine such factors does not oblige investigating authorities to seek out and examine in each case, on their own initiative, the effects of all *possible* factors other than the dumped imports that *may* be causing injury to the domestic industry under investigation.²⁰ If a particular factor is not known to the investigating authorities, or if that factor is not “at the same time injuring the domestic industry,” then the investigating authorities are under no obligation to examine that factor in the course of their causality analysis.

30. In the present case, Brazil appears to concede that the Brazilian respondent, Tupy, never asserted to the EC investigating authorities that the “margins analysis” was a factor causing injury.²¹ It also appears that Brazil was unable to identify any basis for the Panel to conclude that the “margins analysis” was in fact a factor causing injury, or that the EC investigating authorities had knowledge of such a factor. As the complainant, the burden was on Brazil to establish a *prima facie* case that the margins analysis was a “known” factor that was, at the same time,

¹⁸ Panel Report, para. 7.370.

¹⁹ The ordinary meaning of the term *known* connotes a great degree of certainty as to the truth of certain facts. For example, the *New Shorter Oxford English Dictionary* (1993) defines the term as “learned, apprehended mentally; familiar, . . . generally known or recognized.” Another source defines “known” as “proved, satisfactorily specific, or completely understood.” Webster’s II New Riverside University Dictionary (1984). A third source defines “know” as “to perceive or understand as fact or truth; to apprehend clearly and with certainty.” The Random House Dictionary of the English Language, Second Edition, Unabridged (1987).

²⁰ See Report of the Panel in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, April 5, 2001, para. 7.273 (“*Thai Steel*”).

²¹ See Appellant Submission of Brazil, para. 194.

injuring the domestic industry. It failed to meet its burden.

31. A substantial portion of Brazil’s argument on this issue appears to be a request that the Appellate Body engage in further fact finding.²² Appeals, however, are limited to issues of law and legal interpretations developed by the panel in question. As a matter of fact, the Panel has already found that the EC had examined the differences in cost efficiencies between the EC and Brazilian producers, and had determined that the difference in cost of production was minimal.²³ Given these factual findings, the Panel correctly concluded that the EC did not view the “margins analysis” as demonstrating a comparative cost advantage that would constitute a *known* causal factor that it was obligated to consider under Article 3.5.

32. In any event, even if the Brazilian respondent had raised the “margins analysis” as a potentially relevant Article 3.5 factor, Brazil’s factual assertions regarding the analysis are questionable. For one thing, Brazil’s argument is based on the predicate that additional or greater degrees of underselling are attributable to some competitive advantage; the EC has already found that this was not the case in the challenged investigation. Nor does Brazil’s assumption reflect economic realities. Underselling sometimes occurs because the lower priced product is less competitive, causing the market to assign a lower value to the cheaper product. For example, purchasers may be willing to pay a premium for the domestic product based on non-price considerations such as reliability of supply and customer service.

D. The Panel Erred in Finding That the EC Did Not Breach Articles 6.2 and 6.4 of the AD Agreement in its Treatment of Exhibit EC-12

33. Brazil argues that the Panel erred in finding that the EC did not breach Articles 6.2 and 6.4 of the AD Agreement with respect to the information on injury factors exclusively referred to in Exhibit EC-12.²⁴ The United States agrees with Brazil.

34. At the outset, the Panel noted that the information in Exhibit EC-12 was not disclosed in any form to the interested parties in the course of the investigation.²⁵ Based on this factual finding by the Panel, it seems evident that the EC breached its obligations under Article 6.4 of the AD Agreement. The document at issue – the “internal note for the file” – falls within the parameters of Article 6.4: It is not confidential, as evidenced by the fact that the EC submitted it as a non-confidential exhibit in these proceedings; it is relevant, as evidenced by the fact that the EC has chosen to rely on it in this dispute; and it was used by the EC in the anti-dumping investigation at issue. The EC has provided no reasonable explanation of why it did not provide the interested parties in the anti-dumping investigation the opportunity to see this information

²² See, e.g., Appellant Submission of Brazil at paras. 184-191.

²³ Panel Report, para. 7.362.

²⁴ Appellant’s Submission of Brazil, paras. 170-177.

²⁵ Panel Report, para. 7.45.

and to prepare presentations on the basis of that information. As such, the EC has breached Article 6.4.

35. Similarly, by failing to inform the interested parties of the information contained in the internal note, it appears that the EC breached Article 6.2 of the AD Agreement, which provides that “[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.” An investigating authority’s failure to disclose the existence of information or a note including such information may well affect whether an interested party has a full opportunity to defend its interests. In the present case, the EC’s failure to apprise the interested parties of the note deprived those parties of the opportunity to present arguments or provide information in response to the note.

36. In declining to find a breach of Articles 6.2 and 6.4, the Panel relied on the EC’s assertions that the data referenced in Exhibit EC-12 was “in-line” with other data that was disclosed, and that there was no “value added” to the substance of the investigation in the analysis of these factors.²⁶ The Panel found that the information contained in the internal note “was considered not relevant and was not specifically relied on by the EC in reaching its anti-dumping determination.” On this basis, the Panel concluded that Tupy was not deprived of timely opportunities to see information relevant to its case nor of an opportunity to defend its interests.

37. Accepting the Panel’s reasoning, however, would allow the EC to have it both ways. The EC has chosen to rely on the internal note in defending against Brazil’s Article 3.4 claims in this dispute, yet it chose not to release the document to the interested parties during the challenged investigation. An investigating authority should not be permitted to claim on the one hand that certain evidence is irrelevant for transparency purposes during the investigation, but then claim on the other hand that the evidence is relevant for the purposes of demonstrating its compliance with its substantive obligations under the AD Agreement.

E. The Appellate Body Need Not Reach Brazil’s Claims Regarding Articles 3.1 and 3.4 of the AD Agreement and “Exhibit EC-12”

38. Brazil argues that the Panel erred when it concluded, based in part on its evaluation of Exhibit EC-12, that the EC had met the requirements of Articles 3.1 and 3.4 of the AD Agreement.²⁷ The United States notes that the Panel has already found that the EC acted inconsistently with its obligations under Article 12.2 and Article 12.2.2 by failing to set forth in a discernable manner how it evaluated certain Article 3.4 factors.²⁸ The United States agrees with the Panel’s findings on this issue, which the EC has not appealed. In light of these findings, in

²⁶ Panel Report, para. 7.348.

²⁷ Appellant Submission of Brazil, para. 119.

²⁸ Panel Report, para. 7.435.

the view of the United States, it is not necessary for the Appellate Body to reach Brazil's Article 3.1. and 3.4 claims.

39. Finally, the United States disagrees with Brazil that the findings in paragraph 171 of the *Wheat Gluten* report bear on the Articles 3.1 and 3.4 issues in the present dispute.²⁹ The cited statements from *Wheat Gluten* concern a Member's right to decline to defend its interests on the basis of confidential information which it cannot disclose to a panel. The issue in the present dispute is whether the facts upon which the EC now relies were actually in the investigative record at the time it made its injury determination, and whether the EC may defend its determination on the basis of evidence that Tupy had no knowledge of at the time of the investigation. In this dispute, the EC has disclosed the document upon which it seeks to defend its action, albeit only in the aftermath of its determination. This is markedly different from the issue raised in *Wheat Gluten*.

IV. Conclusion

40. The United States appreciates this opportunity to comment on the issues at stake in this proceeding, and hopes that its comments will be useful.

²⁹ See Appellant's Submission of Brazil, paras. 151-152.