Before the World Trade Organization

Panel Proceedings

UNITED STATES — ANTI-DUMPING MEASURE ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA

(DS617)

THIRD PARTY ORAL STATEMENT OF AUSTRALIA

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CONTENTS

TABLE OF CASES

Short Title	Full Case Title and Citation
Colombia — Frozen Fries	Award of Arbitrators, *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands – Arbitration under Article 25 of the DSU,* WT/DS591/9/ARB25 and Add.1, 21 December 2022
Pakistan – BOPP Film (UAE)	Panel Report, *Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates*, WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021, appealed on 22 February 2021
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Carbon Steel (India)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R, DSR 2014:VI, p. 2189
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report*, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Pipes and Tubes (Turkey)	Panel Report*, United States – Countervailing Measures on Certain Pipe and Tube Products from Turkey*, WT/DS523/R and Add.1, circulated to WTO Members 18 December 2018, appealed on 25 January 2019

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of GATT 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201
GATT	Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994)
Vienna Convention	Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331
USDOC	United States Department of Commerce

I. INTRODUCTION

1. Chair, distinguished members of the Panel – good morning. Thank you for this opportunity for Australia to participate as a third party in this dispute, and to make an oral statement at this session. In particular, Australia is a supporter of transparency and is pleased to participate in this open hearing.

2. Australia considers this case raises important questions in relation to the application and interpretation of the Anti-Dumping Agreement. I will make three key points. First, I will briefly discuss the initiation of the investigation. Then, I will expand on Australia's submission that cross-cumulation between dumped imports and subsidised imports is permissible under the Anti-Dumping Agreement. Finally, I address the concept of permissible interpretations of the Anti-Dumping Agreement.

3. Before proceeding to set out Australia's views on the legal issues in this dispute, Australia would like to reiterate its ongoing support for Ukraine and to again condemn in the strongest terms Russia's illegal and immoral invasion of Ukraine. Russia's aggression is a gross violation of international law, including the Charter of the United Nations, and is inconsistent with the global rules and norms that underpin multilateral organisations such as the WTO. There is no other place within the WTO system where the rules-based nature of the organisation is more evident than in the dispute settlement system and through disputes such as the one we are here for today. That is why we cannot talk about the rules without mentioning Russia's gross violation of such rules.

II. THE INITIATION OF THE INVESTIGATION

4. Argentina submits the United States acted inconsistently with Article 5.3 of the Anti-Dumping Agreement. In particular, Argentina raises concerns that USDOC relied upon "outdated data"[1] and that the decision in *Pakistan – BOPP Film (UAE)* "shows that there will be particular concerns with the accuracy and adequacy of the application evidence when it relates to an outdated period."[2]

[1] Argentina's first written submission, para. 128.
[2] Argentina's first written submission, para. 227.

5. Australia notes that the panel report in *Pakistan – BOPP Film (UAE)* does not state that Article 5.3, or any provision in the Anti-Dumping Agreement, impose temporal limitations on the evidence an investigating authority may rely on to justify initiation. The age of the evidence on which the application is based is one consideration for an investigating authority. However, it alone does not answer the question of whether there is sufficient evidence to justify initiation of an investigation. In fact, the panel in *Pakistan – BOPP Film (UAE)* notes "the mere fact that data relate to the past does not … mean that they cannot be used to establish the existence of current injurious dumping".[3]

6. What matters for the purpose of Article 5.3 is whether there is sufficient evidence to justify initiation of an investigation, which is evidence pertaining to dumping, injury and causation at the time of initiation.[4] This necessarily involves an investigating authority's assessment of the relevant circumstances.

III. CROSS-CUMULATION – DUMPED IMPORTS WITH SUBSIDISED IMPORTS

7. As Australia set out in its written submission, the interpretation of Article 3.3 of the Anti-Dumping Agreement set out by the United States in its first written submission is in accordance with the customary rules of interpretation, as reflected in Article 31(1) of the Vienna Convention.

8. First, as the United States points out, the text of Article 3.3 is "silent" on cross-cumulation.[5] It is notable that the Appellate Body has found that the "silence" of Article 3.3 on the permissibility of a particular methodological approach towards cumulation does not indicate that the methodology is prohibited.[6]

9. Second, as the United States outlines the language "the effect of the dumping or subsidization, as the case may be" in Article VI:6(a) of the GATT provides relevant context to understand Article 3.3 of the Anti-Dumping Agreement. The United States argues the use of the word "or" to join the words "dumping" and "subsidization" and the use of the phrase "as

[3] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.26.
[4] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.29.
[5] United States' first written submission, para. 105.
[6] See United States' first written submission, paras. 107-108; Appellate Body Report, *US — Oil Country Tubular Goods Sunset Reviews*, paras. 294-300.

the case may be" reflects the fact that injury determinations can involve either or both unfair trade practices.[7]

10. Australia acknowledges that it has previously been found that Article VI:6(a) does not allow cross-cumulation.[8] It was historically found that in order for the United States' argument to be accepted, the plural "effects" would be used instead of "effect" in Article VI:6(a).[9] However, as the United States explained injury caused by dumping and subsidization of imports is, from the perspective of domestic producers and, in turn, investigating authorities, indistinguishable.[10] This is because dumped imports and subsidized imports will often have cumulative volume or price effects on the relevant domestic industry.

11. Previous panels have recognised this problematic practical outcome. For example, in *US – Pipes and Tubes (Turkey)*, the panel acknowledged "the United States' and Japan's practical concern, recognizing that economic and statistical methodologies available to investigating authorities do not easily permit separating the injurious effects of dumped and subsidized imports".[11]

12. In other words, it would not always be possible to separate the injurious effects of dumped and subsidized imports. Thus, "the effect" of simultaneous dumping and subsidization would be indistinguishable to domestic producers injured by those imports, and in turn, an investigating authority. To all practically involved there would only be one "effect" not "effects".

13. Once it is accepted there would be one "effect" where there is simultaneous dumping and subsidization, the language "or" and "as the case may be" must be naturally read as being inclusive of both dumping and subsidization. Consequently, a natural reading of the provision suggests that the cumulation of dumping and subsidized imports is allowed under Article VI:6(a) of the GATT.

[7] United States' first written submission, para. 114.
[8] Appellate Body Report, *US — Carbon Steel (India)*, para. 4.599; Panel Report, *US — Carbon Steel (India)*, paras. 7.347-7.348.
[9] Panel Report, *US — Carbon Steel (India)*, para. 7.348.
[10] United States' first written submission, para. 120. See also Australia's third party submission, para. 11; Japan's third party submission, paras. 36-40.
[11] Panel Report, *US – Pipes and Tubes (Turkey)*, fn. 508.

14. Finally, the United States' interpretation is premised on the understanding that the object and purpose of Article 3.3 of the Anti-Dumping Agreement supports the proposition that the cumulation of dumped and subsidized imports is not inconsistent with the WTO Agreements.[12] Australia agrees with the United States.

15. The negotiation history of the Uruguay Round confirms that the purpose of cumulative injury assessments is to address the "hammering effect" or the collective impact of imports from multiple sources.[13] In essence, it is acknowledged that where there are multiple causes of injury, it may not be possible to disaggregate the effects of each, however it can be demonstrated that each contributed, and the cumulative outcome was injury.[14]

IV. PERMISSIBLE INTERPRETATIONS OF THE ANTI-DUMPING AGREEMENT

16. As the Panel will recall, the text of Article 17.6(ii) of the Anti-Dumping Agreement concerns permissible interpretations of the Agreement.

17. The meaning given to this provision has been highly contested.[15] However, Australia notes that the Arbitrators in *Colombia – Frozen Fries* found the following with respect to Article 17.6(ii):

a. In applying the first sentence of Article 17.6(ii), it must be accepted that "different treaty interpreters applying the same tools of the Vienna Convention may, in good faith and with solid arguments in support, reach different conclusions on the 'correct' interpretation of a treaty provision";[16]

b. By referring to the customary rules of treaty interpretation, the first sentence of Article 17.6(ii) provides "a yardstick" for permissibility for the second sentence of Article 17.6(ii);[17] and

[12] United States' first written submission, para. 121.
[13] S. Nishimura, "Giving Meaning to Limitations – Exploring WTO Disciplines on Cumulation in Anti-Dumping Cases" (2024), Vol. 58, No. 2, *Journal of World Trade* 58(2), p. 10.
[14] T.P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)*, (Kluwer Law and Taxation Publishers, 1993), p. 1594.
[15] See e.g., D. McRae, "Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement" in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011).
[16] Award of the Arbitrators, *Colombia — Frozen Fries*, para. 4.14.
[17] Award of the Arbitrators, *Colombia — Frozen Fries*, para. 4.13.

c. The search for a "permissible" interpretation differs from an attempt to find one's own "final" and "correct" interpretation. Instead, the question is whether: "someone else's interpretation is 'permitted', 'allowable', 'acceptable', or 'admissible' as an outcome resulting from a proper application of the interpretative process called for under the Vienna Convention."[18]

18. In other words, when a panel is evaluating an interpretation adopted by an investigating authority, the panel must assess whether the relevant interpretation has crossed a line of no longer being "permissible" under the Vienna Convention method of treaty interpretation.[19] It is only when that interpretative threshold is crossed that a panel can find that a measure is not in conformity with the Anti-Dumping Agreement.

V. CONCLUSION

19. In conclusion, Australia recalls its key submission in these proceedings: the interpretation of Article 3.3 of the Anti-Dumping Agreement as set out by the United States in its first written submission is properly founded on the text of the Anti-Dumping Agreement, as interpreted under the customary rules of interpretation, reflected in Article 31(1) of the Vienna Convention. This interpretation, at a minimum, satisfies the Article 17.6(ii) standard of review articulated by the Arbitrators in *Colombia – Frozen Fries*.[20]

20. Accordingly, Australia submits the cross-cumulation of dumped imports with subsidised imports is consistent with the Anti-Dumping Agreement.

21. Australia thanks the Panel for its consideration of this matter.

[18] Award of the Arbitrators, *Colombia — Frozen Fries*, para. 4.15.
[19] Award of the Arbitrators, *Colombia — Frozen Fries*, para. 4.15.
[20] See Australia's third party submission, paras. 8-12.