Before the World Trade Organization

Panel Proceedings

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

(DS617)

THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA

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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
CVD	Countervailing Duty
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)
Member	Member of the World Trade Organization
OCTG	Oil Country Tubular Goods
Vienna Convention	Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331
USITC	United States International Trade Commission

I. INTRODUCTION

1. Australia welcomes the opportunity to present its views to the Panel. The proceedings initiated by Argentina raise important questions in relation to the application and interpretation of the Anti-Dumping Agreement.

2. In this submission, Australia will address two issues raised in this dispute:

   a. the standard of review under the Anti-Dumping Agreement; and

   b. the cumulation of imports from Argentina with imports from other sources subject to simultaneous investigations.

3. Australia reserves the right to raise other issues at the third party hearing before the Panel.

II. STANDARD OF REVIEW

4. Australia notes there are material differences between the submissions of the United States and Argentina with respect to the standard of review in these proceedings.

5. Australia observes that underlying the standard of review in anti-dumping proceedings is a "special deference to investigating authorities"[1] granted under Article 17.6 of the Anti-Dumping Agreement. Accordingly, Australia broadly agrees with the United States in relation to the panel's task when reviewing the investigating authority's establishment and assessment of the facts.[2]

6. In short, Australia submits the standard of review can be understood as: whether an unbiased and objective investigating authority, in light of the evidence before it and the explanations provided, could have reached the same conclusions as the relevant investigating authority. A panel's task is not to carry out a *de novo* review of the information and evidence on the record of the underlying investigation, and a panel cannot substitute its judgment for

[1] Award of the Arbitrators, *Colombia — Frozen Fries*, para. 4.12.
[2] See, e.g., United States' first written submission, para. 15.

that of the investigating authorities, even though the Panel might have arrived at a different determination were it considering the record evidence for itself.[3]

III. CUMULATION

7. Australia makes the following submissions to assist the Panel in its consideration of the parties' arguments with respect to cumulation of imports under Article 3.3 of the Anti-Dumping Agreement:

a. Article 3.3 of the Anti-Dumping Agreement allows the cross-cumulation of dumped imports with subsidised imports; and

b. When assessing the "conditions of competition" for the purposes of Article 3.3 of the Anti-Dumping Agreement, the appropriate legal standard can be derived from the panels' findings in *EC — Tube or Pipe Fittings* and *EU — Footwear (China)*, and the United States has satisfied this standard as set out below.

A. CROSS-CUMULATION – DUMPED IMPORTS WITH SUBSIDISED IMPORTS

8. Article 3.3 of the Anti-Dumping Agreement provides:

> Where imports of a product from more than one country are ***simultaneously subject to anti-dumping investigations***, the investigating authorities may cumulatively assess the effects of ***such imports*** only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) 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 (emphasis added).

9. Argentina contends that only *dumped* imports subject to simultaneous investigations can be included in a cumulative injury assessment.[4] Argentina, in particular, relies on the findings of the panel and the Appellate Body in *US — Carbon Steel (India)*.[5]

[3] Panel Report, *US — Softwood Lumber VI*, para. 7.15. See also Award of the Arbitrators, *Colombia — Frozen Fries*, para. 4.9.
[4] Argentina's first written submission, para. 276.
[5] See Argentina's first written submission, paras. 281-288. See also Panel Report, *US — Carbon Steel (India)*, para. 7.341; Appellate Body Report, *US — Carbon Steel (India)*, paras. 4.587-4-600.

10. In response, the United States submits that Article 3.3 does not prohibit cross-cumulation of dumped imports with subsidised imports.[6] The United States' interpretation, in accordance with Article 31(1) of the Vienna Convention, is based on the ordinary meaning of the terms of the Anti-Dumping Agreement in their context and in the light of its object and purpose. Specifically, the United States notes:

a. The text of Article 3.3 is "silent" on cross-cumulation.[7] The Appellate Body has found that the "silence" of Article 3.3 of the Anti-Dumping Agreement on the permissibility of a particular methodological approach towards cumulation does not indicate that the methodology is prohibited.[8]

b. Article 3.1 of the Anti-Dumping Agreement and, in turn, Article VI of the GATT, provide relevant context for the interpretation of Article 3.3 of the Anti-Dumping Agreement. In particular, Article 3.1 is an "overarching provision" that informs the more detailed obligations in the subsequent paragraphs of Article 3,[9] and Article 3.1 specifically refers to Article VI of the GATT. In terms of injury determinations, Article VI:6(a) of the GATT acknowledges the cumulation of dumped and subsidised imports, when it states, "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 to an established domestic industry (emphasis added)."[10]

c. The object and purpose of Article 3.3 is to "ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination".[11]

11. The United States also notes the practical implications of finding that cross-cumulation between dumped and subsidised imports is impermissible. Specifically, whenever dumping and subsidisation are simultaneously occurring in the market, there often

[6] United States' first written submission, para. 104.
[7] United States' first written submission, para. 105.
[8] See United States' first written submission, paras. 107-108; Appellate Body Report, *US — Oil Country Tubular Goods Sunset Reviews*, paras. 294-300.
[9] Appellate Body Report, *Thailand – H-Beams*, para. 106.
[10] See United States' first written submission, paras. 111-114.
[11] United States' first written submission, para. 115; Appellate Body Report, *US — Oil Country Tubular Goods Sunset Reviews*, para. 297.

will be cumulative price or volume effects from the dumped and subsidised imports. These effects would be indistinguishable to domestic producers injured by those imports, and in turn, an investigating authority. The inability of an investigating authority to consider such effects, because of their indistinguishable nature when viewed in the market, would prevent an investigating authority from properly taking into account the combined injurious impact of all imports that are affecting an industry at the very same time.[12] Consequently, the interpretation put forward by Argentina would appear to be contrary to the object and purpose of the relevant Agreements.

12. In sum, Australia submits the Panel should find that 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*.[13]

B. CONDITIONS OF COMPETITION

13. Australia recalls the relevant part of Article 3.3 of the Anti-Dumping Agreement is: "(b) 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."

14. The ordinary meaning of the key elements of this part of Article 3.3, the word "appropriate" and the phrase "conditions of competition", were considered by the panel in *EC — Tube or Pipe Fittings*. In relation to the former, the panel stated:

> In light of the general wording of the provision and the nature of the term "appropriate", an investigating authority ***enjoys a certain degree of discretion*** in making that determination on the basis of the record before it. However, it is clear to us that cumulation must be suitable

[12] United States' first written submission, para. 121.
[13] The Arbitrators in *Colombia – Frozen Fries* found that, under Article 17.6(ii) of the Anti-Dumping Agreement, the panel is called upon to assess whether the interpretation is "permissible" (i.e., allowable or acceptable) under the Vienna Convention method for treaty interpretation: see Award of the Arbitrators, *Colombia — Frozen Fries*, paras. 4.14-4.15.

> or fitting in the particular circumstances of a given case in light of the particular conditions of competition extant in the marketplace (emphasis added).[14]

15. In relation to the phrase the "conditions of competition", the panel noted it referred to "the dynamic relationship between products in the marketplace." The term is "unqualified" and is not subject to "any fixed rules dictating precisely and exhaustively the relative percentages or levels of such indicators that must be present."[15]

16. In *EU — Footwear (China)*, the panel built on the findings of *EC — Tube or Pipe Fittings,* but also relevantly noted the interaction between Articles 3.1 and 3.3 of the Anti-Dumping Agreement:

> While we agree… that Article 3.1 informs the obligations under Article 3.3 as a general matter, we consider that this obligation requires that the investigating authority rely on positive evidence and an objective examination of that evidence in exercising its right to undertake a cumulative assessment. ***It does not, however, establish any substantive obligations on the analysis of whether a cumulative assessment of the effects of imports is appropriate*** (emphasis added).[16]

17. On this basis, investigating authorities enjoy an element of discretion in making a determination that cumulation is appropriate in light of the conditions of competition. There is no requirement that "any" factor affecting the competitive relationship must be considered as Argentina suggests.[17] Such an understanding would undermine the discretion afforded to investigating authorities when undertaking this task.

18. Rather, in light of the above cases, an investigating authority must determine whether cumulation is suitable or fitting in the circumstances of a given case in light of the particular conditions of competition extant in the marketplace. This is a case-by-case assessment based on an objective examination of the positive evidence before the investigating authority.

[14] Panel Report, *EC — Tube or Pipe Fittings*, para. 7.241. See also Panel Report, *EU — Footwear (China)*, para. 7.403.
[15] Panel Report, *EC — Tube or Pipe Fittings*, para. 7.242.
[16] Panel Report, *EU — Footwear (China)*, para. 7.403.
[17] Argentina's first written submission, para. 294.

19. Australia submits that the determination undertaken by USITC appears to satisfy this legal standard. Specifically, Australia finds the following elements of USITC's determination as relevant evidence that USITC complied with the legal standard:

a. Exercising its discretion, USITC established an objective analytical framework that considered the following factors:

   – the degree of fungibility between subject imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;

   – the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product;

   – the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and

   – whether the subject imports are simultaneously present in the market.[18]

b. USITC considered arguments and submissions from interested parties and took those views into account in forming their determination.[19] It is notable that Argentina appears to be repeating many of those arguments in its first written submission.[20]

c. In considering the abovementioned factors, USITC examined the positive evidence. As the following quote demonstrates, "because ***the record shows*** a reasonable overlap of competition between and among domestically produced

[18] United States' first written submission, para. 130; Final Determination (Exhibit ARG-01), p. 17.
[19] Final Determination (Exhibit ARG-01), pp. 18-19.
[20] United States' first written submission, para. 137.

OCTG and imports from each subject country, we cumulate subject imports from Argentina, Mexico, Russia, and South Korea (emphasis added)".[21]

IV. CONCLUSION

20. Australia has submitted its views in relation to two issues that relate to the special deference and discretion granted to investigating authorities under the Anti-Dumping Agreement. These are:

a. the standard of review under Article 17.6 of the Anti-Dumping Agreement; and

a. the cumulation of imports from an exporting Member with imports from other sources subject to simultaneous investigations under Article 3.3 of the Anti-Dumping Agreement.

21. In Australia's view, the deference and discretion granted to investigating authorities under these provisions is fundamental to the proper functioning of the Anti-Dumping Agreement. Australia encourages the Panel to take this into consideration when making its findings.

22. Australia thanks the Panel for the opportunity to submit its views on the issues raised in this dispute.

[21] Final Determination (Exhibit ARG-01), p. 23.