

Before the World Trade Organization

Panel Proceedings

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

(DS617)

EXECUTIVE SUMMARY OF AUSTRALIA

13 September 2024

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TABLE OF CASES

Short Title	Full Case Title and Citation
<i>Colombia — Frozen Fries</i>	Award of Arbitrators, <i>Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands – Arbitration under Article 25 of the DSU</i> , WT/DS591/9/ARB25 and Add.1, 21 December 2022
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Carbon Steel (India)</i>	Panel Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , 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
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257

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
USITC	United States International Trade Commission

I. PERMISSIBLE INTERPRETATIONS OF THE ANTI-DUMPING AGREEMENT

1. Australia notes that the Arbitrators in *Colombia – Frozen Fries* found the following with respect to Article 17.6(ii) of the Anti-Dumping Agreement:

- 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";¹
- 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);² and
- 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."³

2. 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.⁴ 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.

¹ Award of the Arbitrators, *Colombia — Frozen Fries*, para. 4.14. See also Australia's third party statement, para. 17(a).

² Award of the Arbitrators, *Colombia — Frozen Fries*, para. 4.13. See also Australia's third party statement, para. 17(b).

³ Award of the Arbitrators, *Colombia — Frozen Fries*, para. 4.15. See also Australia's third party statement, para. 17(c).

⁴ Award of the Arbitrators, *Colombia — Frozen Fries*, para. 4.15. See also Australia's third party statement, para. 18.

II. CUMULATION

A. CROSS-CUMULATION – DUMPED IMPORTS WITH SUBSIDISED IMPORTS

3. Australia considers the interpretation of Article 3.3 of the Anti-Dumping Agreement set out by the United States is in accordance with the customary rules of interpretation, as reflected in Article 31(1) of the Vienna Convention.⁵

4. First, the text of Article 3.3 is "silent" on cross-cumulation.⁶ 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.⁷

5. Second, 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 the case may be" reflects the fact that injury determinations can involve either or both unfair trade practices.⁸

6. Australia acknowledges that it has previously been found that Article VI:6(a) does not allow cross-cumulation.⁹ 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).¹⁰ However, injury caused by dumping and subsidisation of imports is, from the perspective of domestic producers and, in turn, an investigating authority, indistinguishable. This is because dumped imports and subsidised imports will often have cumulative volume or price effects on the relevant domestic industry. In other words, it would not always be possible to separate the injurious effects of dumped and subsidised imports. To all practically involved there would only be one "effect" not "effects".

⁵ See Australia's third party statement, paras. 7-15; Australia's third party submission, paras. 8-12.

⁶ United States' first written submission, para. 105.

⁷ See United States' first written submission, paras. 107-108; Appellate Body Report, *US — Oil Country Tubular Goods Sunset Reviews*, paras. 294-300.

⁸ United States' first written submission, para. 114.

⁹ Appellate Body Report, *US — Carbon Steel (India)*, para. 4.599; Panel Report, *US — Carbon Steel (India)*, paras. 7.347-7.348.

¹⁰ Panel Report, *US — Carbon Steel (India)*, para. 7.348.

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

8. 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 subsidised imports is not inconsistent with the WTO Agreements.¹¹ Australia agrees with the United States.

B. CONDITIONS OF COMPETITION

9. 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.¹² Such an understanding would undermine the discretion afforded to investigating authorities when undertaking this task.

10. Australia considers 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.¹³ This is a case-by-case assessment based on an objective examination of the positive evidence before the investigating authority.

11. Australia submits that the determination undertaken by USITC appears to satisfy this legal standard.¹⁴

III. THE INITIATION OF THE INVESTIGATION

12. 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

¹¹ United States' first written submission, para. 121.

¹² Argentina's first written submission, para. 294.

¹³ See Australia's third party submission, paras. 13-18.

¹⁴ See Australia's third party submission, para. 19.

on the evidence an investigating authority may rely on to justify initiation.¹⁵ 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".¹⁶

13. 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.¹⁷ This necessarily involves an investigating authority's assessment of the relevant circumstances.

¹⁵ See Australia's third party statement, paras.4-6.

¹⁶ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.26.

¹⁷ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.29.