

## ANNEX B

### Third Party Submissions

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## ANNEX B-1

### THIRD PARTY SUBMISSION OF JAPAN

#### I. INTRODUCTION

1. Japan has joined this proceeding as a Third Party to highlight certain systematic violations of WTO obligations that the European Communities (EC) appears to have committed in imposing anti-dumping (AD) duties on malleable cast iron tube or pipe fittings (pipe fittings).<sup>1</sup> While Japan takes no position on factual issues, Japan requests that the Panel carefully review EC's measures to determine whether they violated Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Articles 1, 2.4, 2.4.2, 3.1, 3.4, 3.5, 12.2.1(iv) and 12.2.2 of the Agreement on Implementation of Article VI of GATT 1994.

2. Specifically, Japan advances the following four claims:

- by “zeroing” negative dumping margins calculated for certain products, the EC violated Articles 2.4 and 2.4.2 of the AD Agreement;
- by failing to examine each of the injury factors listed at Article 3.4 of the AD Agreement and each of the other relevant factors, the EC violated Articles 3.1, 3.4, 12.2.1(iv) and 12.2.2 of the AD Agreement;
- the EC violated Articles 3.1 and 3.5 of the AD Agreement because it failed to ensure that injury from factors other than imports was not attributed to imports; and
- by acting in the manner set out in the three claims above, the EC violated Article 1 of the AD Agreement and Article VI of GATT 1994 because it failed to conduct its anti-dumping investigation or apply its anti-dumping measure in accordance with the provisions of the AD Agreement.

3. WTO dispute settlement decisions already have resolved most of the issues presented in this Third Party Submission. In particular, the EC's zeroing practice already has been declared inconsistent with the EC's obligations under Article 2.4 of the AD Agreement.<sup>2</sup> Also, panels and the Appellate Body have declared, time and again, that Article 3.4 of the AD Agreement requires an authority to assess each of the 15 listed injury factors, as well as any other relevant factors, and to present the assessments in the public injury determination or in another public document.<sup>3</sup> The EC

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<sup>1</sup> Since the Government of Japan was not party to the anti-dumping proceeding, it has no independent knowledge of the facts. Japan's allegations of WTO violations are based on the public notices of determinations made by the EC authorities and by the factual recitation made by Brazil, the complaining Member, in its submission to the Panel.

<sup>2</sup> *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (1 March 2001) (*Bed Linen*) at para. 66 (“the practice of ‘zeroing’ when establishing ‘the existence of margins of dumping’, as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*”).

<sup>3</sup> See, e.g., *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (12 March 2001) (*H-Beams*) at paras. 125-128.

did not do this and, further, fell short of its “non-attribution” obligation under Articles 3.1 and 3.5 of the AD Agreement.<sup>4</sup>

## II. ARGUMENT

### A. BY “ZEROING” NEGATIVE DUMPING MARGINS CALCULATED FOR CERTAIN PRODUCTS, THE EC VIOLATED ARTICLES 2.4 AND 2.4.2 OF THE AD AGREEMENT

4. The EC “zeroed” the negative dumping margins it calculated for some product types exported to the EC during the period of investigation in violation of Articles 2.4 and 2.4.2 of the AD Agreement. The EC then failed to offset the margins of dumping which were calculated to be negative against those margins of dumping which it calculated to be positive. Thus, the EC failed to make a fair comparison between export price and normal value, in violation of Article 2.4, and calculated a distorted margin of dumping, in violation of Article 2.4.2. If the EC had met its obligations under Articles 2.4 and 2.4.2, the normal value and, thus, any dumping margins would have been lower.

5. According to the first sentence of Article 2.4, “A fair comparison shall be made between the export price and the normal value”. Article 2.4.2 further specifies that:

Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.

6. In *Bed Linen*, the Panel concluded that Articles 2.4 and 2.4.2 prohibit a Member (in that case, as here, the EC) from “establishing the existence of margins of dumping on the basis of a methodology which include[s] zeroing negative price differences . . .”.<sup>5</sup> The Appellate Body upheld this conclusion on appeal:

[w]hen “zeroing”, the European Communities counted as zero the “dumping margins” for those models where the “dumping margin” was “negative”. As the Panel correctly noted, for those models, the European Communities counted “the weighted average export price to be equal to the weighted average normal value . . . despite the fact that it was, in reality, higher than the weighted average normal value.” By “zeroing” the “negative dumping margins”, the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where “negative dumping margins” were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish “the existence of margins of dumping” for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of “zeroing” at issue in this dispute – is *not*

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<sup>4</sup> *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001) (*Hot-Rolled Steel*) at paras. 222-234.

<sup>5</sup> *Bed Linen*, WT/DS141/R (30 October 2000) at para. 6.119.

a “fair comparison” between export price and normal value, as required by Article 2.4 and by Article 2.4.2.<sup>6</sup>

7. Thus, Article 2.4 applies when an authority is comparing weighted average export prices and weighted average normal values. When the authority aggregates the results of the individual type comparisons to calculate a dumping margin, the authority must include – and must not treat as zero – any “negative dumping”.

8. The EC applied its now-prohibited zeroing methodology in determining the *Pipe Fittings* case, as described in detail in Brazil’s First Submission (10 October 2000) at 110-112.

9. Thus, the EC violated Article 2.4.2 by calculating a distorted dumping margin for the product concerned. Also, the EC violated Articles 2.4 and 2.4.2 by failing to make a fair comparison between the export price and the normal value. Had the EC adhered to its obligations under Articles 2.4 and 2.4.2, the normal value would have been lower, which in turn would have reduced the overall dumping margin, if any.

B. BY FAILING TO EXAMINE EACH OF THE RELEVANT INJURY FACTORS AND EACH OF THE FACTORS LISTED AT ARTICLE 3.4 OF THE AD AGREEMENT, THE EC VIOLATED ARTICLES 3.1, 3.4, 12.2.1(IV) AND 12.2.2 OF THE AD AGREEMENT

**1. An Authority Must Examine Each of the Injury Factors Listed in Article 3.4 and That Evaluation Must Be Apparent from the Final Determination**

10. The EC violated its obligations under Article 3.1 and Article 3.4 of the AD Agreement, as alleged in Brazil’s First Submission (10 October 2001) at 174-208. The EC also violated Articles 12.2.1(iv) and 12.2.2 of the AD Agreement. The EC’s finding of injury was not based on positive evidence: the EC failed to evaluate all 15 of the injury factors specified in Article 3.4, and failed to fully address those which it did evaluate. Moreover the factors which the EC did evaluate do not provide a sufficient basis for the EC’s positive finding of injury. Finally, by failing to describe all elements that EC considered in its injury determination in the Provisional Regulation and the Definitive Regulation<sup>7</sup>, the EC violated Articles 12.2.1(iv) and 12.2.2 of the AD Agreement.

11. Article 3.1 requires that a finding of injury be based on “positive evidence” and involve an “objective examination” of the factors mentioned therein. Article 3.4 of the AD Agreement sets out a non-exhaustive list of factors which an authority must consider in investigating injury. According to Article 3.4:

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

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<sup>6</sup> *Bed Linen*, WT/DS141/AB/R (1 March 2001) at para. 55 (footnote omitted).

<sup>7</sup> Council Regulation (EC) No 1784/2000 (11 August 2000), published in the *Official Journal* L208 (18 August 2000); Council Regulation (EC) No 449/2000 (28 February 2000), published in the *Official Journal* L 055 (29 February 2000).

12. Article 3.4 has been interpreted in several dispute settlement proceedings. For example, in the recent *H-Beams* proceeding, the Panel interpreted Article 3.4 as follows:

7.229 We are of the view that the language in Article 3.4 makes it clear that all of the listed factors in Article 3.4 must be considered in all cases. The provision is specific and mandatory in this regard. . . .

\* \* \*

7.231 On the basis of this textual analysis of Article 3.4, we are therefore of the view that each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities. . . .

\* \* \*

7.236 We are of the view that the “evaluation of all relevant factors” required under Article 3.4 must be read in conjunction with the overarching requirements imposed by Article 3.1 of “positive evidence” and “objective examination” in determining the existence of injury. . . . Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of “relevance or irrelevance” of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4, must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury.

7.237 Consistent with our approach outlined above, we are of the view that the evaluation of the mandatory factors must be apparent in the documents forming the basis of our review. . . .<sup>8</sup>

13. The Appellate Body upheld the Panel’s decision in *H-Beams*, concluding that:

125. . . . We agree with the Panel’s analysis in its entirety, and with the Panel’s interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the *Anti-Dumping Agreement*.

\* \* \*

128. We conclude that the Panel was correct in its interpretation that Article 3.4 requires a mandatory evaluation of all of the factors listed in that provision . . . .<sup>9</sup>

14. Article 12.2.1 requires issuance of a public notice of the imposition of provisional measures in every anti-dumping investigation. This notice:

. . . shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and

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<sup>8</sup> *H-Beams*, WT/DS122/R (28 September 2000) at paras. 7.224-7.237 (emphases added) (footnotes omitted).

<sup>9</sup> *H-Beams*, WT/DS122/AB/R (12 March 2001) at paras. 125-128. See also *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Mexico—HFCS)*, WT/DS132/R (28 January 2000) at paras. 7.127-7.142; *Bed Linen*, WT/DS141/R (30 October 2000) at paras. 6.154-6.162.

shall refer to the matters of fact and law which have led to arguments being accepted or rejected.<sup>10</sup>

Among the matters that, according to Article 12.2.1(iv), must be contained in the notice are:

(iv) considerations relevant to the injury determination as set out in Article 3.

15. Article 12.2.2 requires issuance of a public notice of a final affirmative determination providing for the imposition of a definitive anti-dumping duty. This notice:

. . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . . In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers . . . .<sup>11</sup>

16. In *Mexico—HFCS*, the Panel ruled that because Mexico did not provide an explanation of the facts and conclusions underlying a decision by its authorities, Mexico violated Article 12.2.2. Specifically, the Panel said:

We have decided above that Mexico’s decision to retroactively apply the final anti-dumping duty was inconsistent with the substantive requirements of Article 10.2. In so doing, we found that there was no explanation of the facts and conclusions underlying Mexico’s decision in this regard in the final notice. Article 12.3 specifically provides “The provisions of [Article 12] shall apply *mutatis mutandis* to . . . decisions under Article 10 to apply duties retroactively”. Consequently, the lack of any findings or conclusions on this issue is inconsistent with Mexico’s obligations under Article 12.2 and Article 12.2.2.<sup>12</sup>

Although not at issue in *Mexico—HFCS*, this ruling regarding public notice of a final affirmative determination also is applicable to the requirements of Article 12.2.1(iv) regarding public notice of a provisional measure.

17. In sum:

- an authority must evaluate or assess the relevance or materiality of each of the injury factors listed at Article 3.4 and of others that are particularly relevant; and
- the authority’s evaluation of each of the injury factors must be apparent from the final determination.

**2. The EC Failed to Evaluate Each of the Injury Factors Specified in Articles 3.4 and to Include Them in Its Provisional and Final Determinations**

18. A review of the Provisional Regulation and the Definitive Regulation indicates that the EC focused (to some extent, at least) on only nine of the 15 factors set out in Article 3.4. The factors the EC did consider are: (i) sales; (ii) profits; (iii) output; (iv) market share; (v) factors affecting domestic

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<sup>10</sup> AD Agreement, Article 12.2.1.

<sup>11</sup> AD Agreement, Article 12.2.2.

<sup>12</sup> *Mexico—HFCS*, WT/DS132/R (28 January 2000) at para. 7.198.

prices; (vi) utilization of capacity; (vii) inventories; (viii) employment; and (ix) investments.<sup>13</sup> Thus the EC failed to assess the following factors: (i) actual and potential decline in productivity; (ii) actual and potential decline in return on investments; (iii) actual and potential negative effects on cash flow; (iv) actual and potential negative effects on wages; (v) actual and potential negative effects on growth; (vi) actual and potential negative effects on ability to raise capital; and (vii) the magnitude of the margin of dumping.

19. As noted at paragraph 12, above, the Panel in *H-Beams* ruled that “the evaluation of the mandatory factors must be apparent in the documents forming the basis of our review”.<sup>14</sup> Since the documents forming the basis of the review in this dispute do not include any mention of the seven factors identified in the previous paragraph, the EC has not met the obligations of Article 3.4, as interpreted by the *H-Beams* Panel.

20. In addition, as was the case in *Mexico—HFCS* (cited at paragraph 16, above), the lack of any findings or conclusions regarding the seven factors identified above in the public notices of the EC’s Provisional and Definitive Regulations also violates the obligations set out in Articles 12.2.1(iv) and 12.2.2.

### 3. The EC’s Evaluation of Those Factors It Did Address Was Insufficient

21. Japan requests that the Panel carefully review whether the EC’s analysis of the following factors which it did consider – production capacity, capacity utilization, sales volume, market share, inventories, profitability and employment in the EC industry – was inadequate. The EC’s analysis of these factors appears to have focused on a comparison of end points. It appears that the EC gave inadequate attention to the intervening trends of those factors. As a result of this failure, the EC did not provide “a well-reasoned and meaningful analysis of the state of the industry”, which the *H-Beams* Panel ruled is required by Article 3.4.<sup>15</sup>

#### 4. The EC Failed to Address All Relevant Factors

22. The list in Article 3.4 is not exhaustive.<sup>16</sup> Where an authority rejects the relevance of a non-listed factor raised by a respondent, it must thoroughly explain why the claimed factor is not relevant. Further, the explanation must be reflected in the text of the provisional or final determination or in other documents in the record of the proceeding, as required by Article 12.2.1(iv) and 12.2.2 of the AD Agreement.

23. For example, Brazil claimed that Tupy (a Brazilian respondent) contended during the injury investigation that the EC producers’ increasingly poor export performance between 1995 and 1998 was a factor which contributed significantly to increasing inventories throughout the period of investigation. Brazil further claimed that the EC never disclosed the figures related to the EC producers’ export volumes and values of the product concerned and, therefore, did not adequately present its analysis (if any actually occurred) of this factor in violation of Article 3.4.

24. The failure of the EC to provide a “well-reasoned and meaningful analysis” of this claim violates Article 3.4 (as interpreted by the *H-Beams* Panel)<sup>17</sup>; the EC’s failure to provide an

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<sup>13</sup> The last cited factor is “ability to raise capital or investments.” The EC did refer to investments in its Regulations, but it did not address effects on ability to raise capital.

<sup>14</sup> *H-Beams*, WT/DS122/R (28 September 2000) at para. 7.237.

<sup>15</sup> *H-Beams*, WT/DS122/R (28 September 2000) at para. 7.236.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

explanation of why it rejected Brazil's claim violates Articles 12.2.1(iv) and 12.2.2 (as interpreted by the *Mexico—HFCS* Panel).<sup>18</sup>

C. THE EC VIOLATED ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT BECAUSE IT FAILED TO ENSURE THAT INJURY FROM FACTORS OTHER THAN IMPORTS WAS NOT ATTRIBUTED TO IMPORTS

25. Japan requests that the Panel carefully review whether the EC violated Articles 3.1 and 3.5 of the AD Agreement because it failed to demonstrate that it did not attribute to imports injury to the EC industry caused by other factors. Brazil alleges that the EC failed to consider effects of the following factors: (i) comparative advantage of foreign producers over the EC producers; (ii) export performance of the EC producers; (iii) imports from other third countries; (iv) outsourcing efforts of the EC producers; (v) rationalization efforts of the EC producers; and (vi) substitution of the product concerned by replacement products. These and other related arguments are presented in detail in Brazil's First Submission (10 October 2001) at 208-238.

26. According to Article 3.1:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of . . . the consequent impact of these imports on domestic producers of such products.

27. Article 3.5 further specifies the obligation of Article 3.1 and provides that:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4 [of Article 3], causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

28. Previous panels and the Appellate Body have interpreted the "non-attribution" requirement of Articles 3.1 and 3.5. For example, in *H-Beams*, the Panel interpreted these provisions as follows:

Article 3.5 therefore mandates the investigating authorities to examine other known factors and gives an illustrative list of such factors. In addition, it mandates the authority not to attribute to dumped imports injury caused by such other factors. In accordance with our approach outlined above, we consider that the examination of such other factors must be apparent in the documents forming the basis for our review.<sup>19</sup>

29. The Appellate Body in *Hot-Rolled Steel* (reversing the Panel below) held that:

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<sup>18</sup> *Mexico—HFCS*, WT/DS132/R (28 January 2000) at para. 7.198.

<sup>19</sup> *H-Beams*, WT/DS122/R (28 September 2000) at para. 7.275 (footnote omitted).

222. This provision [Article 3.5] requires investigating authorities, as part of their causation analysis, first, to examine *all* “known factors”, “other than dumped imports”, which are causing injury to the domestic industry “at the same time” as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not “*attributed* to the dumped imports.” (emphasis added)

223. . . . In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not “attributed” to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.<sup>20</sup>

30. Thus, the non-attribution language of Article 3.5 requires that an authority explicitly separate and distinguish the injurious effects of other injury factors from the injurious effects of the dumped imports.

31. Japan requests that the Panel carefully review whether the EC failed to demonstrate that imports were, through the effects of dumping as set forth in Articles 3.2 and 3.4, causing injury within the meaning of the AD Agreement without attributing injurious effects of other factors in violation of Article 3.5, as claimed by Brazil in detail at pages 216-238 of its Submission.

D. BY FAILING TO CONDUCT ITS INVESTIGATION IN ACCORDANCE WITH THE PROVISIONS OF THE AD AGREEMENT, THE EC VIOLATED ARTICLE VI OF GATT 1994 AND ARTICLE 1 OF THE AD AGREEMENT

32. Article 1 of the AD Agreement mandates that:

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. (Footnote omitted.)

33. In conducting the tube or pipe fittings investigation and applying the anti-dumping measure in that investigation, the EC did not act in accordance with the provisions of GATT Article VI and the AD Agreement. As set forth in the previous sections of this Third Party Submission:

by “zeroing” negative dumping margins calculated for certain products, the EC violated Articles 2.4 and 2.4.2 of the AD Agreement;

- by failing to examine each of the injury factors listed at Article 3.4 of the AD Agreement and each of the other relevant factors, the EC violated Articles 3.1, 3.4, 12.2.1(iv) and 12.2.2 of the AD Agreement; and

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<sup>20</sup> *Hot-Rolled Steel*, WT/DS184/AB/R (24 July 2001) at paras. 222-223 (emphasis added).

- the EC violated Articles 3.1 and 3.5 of the AD Agreement because it failed to ensure that injury from factors other than imports was not attributed to imports.

34. Accordingly, the EC violated Article VI of GATT 1994 and Article 1 of the AD Agreement.<sup>21</sup>

### **III. CONCLUSION**

35. For the reasons set forth above, Japan asks the Panel to carefully review whether the EC has violated its WTO obligations under Article VI of GATT 1994 and Articles 1, 2.4, 2.4.2, 3.1, 3.4, 3.5, 12.2.1(iv) and 12.2.2 of the AD Agreement.

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<sup>21</sup> See, e.g., *United States—Antidumping Act of 1916*, WT/DS162/R (29 May 2000) at paras. 6.240 and 6.264.

## ANNEX B-2

### THIRD-PARTY SUBMISSION OF THE UNITED STATES

21 November 2001

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#### **I. INTRODUCTION**

1. The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of certain provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“the AD Agreement”) that are relevant to this dispute. Without prejudice to other issues the United States may wish to raise in the third party meeting with the Panel, the United States will address the following two issues in this written submission: (1) the proper interpretation of Article 15; and (2) the proper interpretation of the relationship between Article 2.2 and Article 2.4. The United States recognizes that many of the issues raised in this dispute are solely or primarily factual. The United States takes no view as to whether, under the facts of this case, the measure at issue is consistent with the Agreement.

#### **II. ARTICLE 15 OF THE ANTIDUMPING AGREEMENT ADDRESSES PROCEDURAL ISSUES AND DOES NOT REQUIRE A PARTICULAR OUTCOME**

2. Brazil claims that the EC violated Article 15 of the Antidumping Agreement<sup>1</sup> by failing to give “special regard” to Brazil’s “special situation” as a developing country Member, and that it failed

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<sup>1</sup> Article 15 of the AD Agreement states that:

to explore the possibility of constructive remedies where the anti-dumping duties would affect Brazil's essential interests.<sup>2</sup> Brazil's complaint appears to be primarily that the EC made no affirmative proposal to explore remedies other than anti-dumping duties and secondarily that the EC was unwilling to understand Brazil's "less developed" tax rebate system.<sup>3</sup> Brazil's argument, however, is based on a misinterpretation of Article 15.

A. THE FIRST SENTENCE OF ARTICLE 15 DOES NOT REQUIRE A PARTICULAR OUTCOME

3. The two sentences of Article 15 are separate and distinct. The first sentence states that developed country Members must give special "regard" (*i.e.*, "attention, care or consideration")<sup>4</sup> to the situation of developing country Members in applying anti-dumping measures. However, the first sentence does not create a substantive obligation with respect to any particular outcome. For example, it does not require developed country Members to elect undertakings in lieu of anti-dumping duties or to impose anti-dumping duties at less than the full extent at which dumping is occurring.

4. The "special regard" called for in the first sentence of Article 15 establishes the context in which a developed country Member considers "the application of anti-dumping measures" to a developing country (emphasis added). There is no basis in the text of the first sentence of Article 15 to conclude that developed country Members are required to apply distinct "developing country" practices with respect to the methodologies used to determine whether and to what extent dumping exists (as Brazil suggests with its reference to the VAT tax methodology used by the EC as violating this provision).<sup>5</sup>

B. THE SECOND SENTENCE OF ARTICLE 15 ALSO DOES NOT REQUIRE A PARTICULAR OUTCOME

5. Brazil suggests that the EC violated Article 15 by failing to "propose" constructive remedies.<sup>6</sup> Its argument is based on a false premise, however, because nothing in the second sentence of Article 15 requires that the developed country Member propose a particular remedy. Instead, the only obligation it imposes is that, under certain conditions, Member countries shall "explore" constructive remedies before applying anti-dumping duties.<sup>7</sup>

6. Where the WTO Agreements establish specific obligations for differential treatment of developing country Members, such treatment is laid out explicitly. For example, Article 27.2 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) provides that the countries listed in Annex VII of the SCM Agreement are not subject to the prohibition on export subsidies that is applicable to other WTO Members; Articles 27.10 and 27.11 provide higher *de minimis* levels for

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It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

<sup>2</sup> Brazil's First Written Submission at 19-21.

<sup>3</sup> *Id.* at 21.

<sup>4</sup> II The New Shorter Oxford English Dictionary 2526 (1993).

<sup>5</sup> Brazil's First Written Submission at 21.

<sup>6</sup> *Id.* at 20.

<sup>7</sup> The term "explore" means, *inter alia*, "investigate, examine, scrutinize". I The New Shorter Oxford English Dictionary 889 (1993). As the panel recognized in *European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen From India*, WT/DS141/R, 30 October 2000 ("EC – Bed Linens"), "explore" cannot fairly be read to imply an obligation to reach a particular substantive outcome; it merely requires the consideration of the possibility of constructive remedies. See *Bed Linens* at para. 6.233.

Annex VII countries; and Article 27.2(a) provides that certain developing country Members are allowed to phase out their export subsidies over a period of eight years, subject to specified conditions. Article 15 of the AD Agreement contains no specific obligation beyond requiring to “explore” possibilities in specified circumstances, and there is no basis for reading one into the text.

7. In the GATT panel report on *Cotton Yarn from Brazil*<sup>8</sup>, the panel construed the second sentence of Article 13 of the GATT, a provision very similar to Article 15<sup>9</sup>, and found that:

If the application of anti-dumping measures “would affect the essential interests of developing countries,” the obligation that then arose was to explore the “possibilities” of “constructive remedies”. It was clear from the words “possibilities” and “explored” that the investigating authorities were not required to adopt the constructive remedies merely because they were proposed.<sup>10</sup>

The *Cotton Yarn* panel also found that “there was no obligation to enter into the constructive remedies, merely to consider the possibility of entering into constructive remedies”.<sup>11</sup> Thus, the factual determination to be made by the panel in the instant case is whether Brazil has established that the EC failed to “explore” the possibility of constructive remedies.

8. Recently, the Ministerial Conference meeting at Doha recognized that, although Article 15 is a “mandatory provision,” the “modalities for its application” are not clear.<sup>12</sup> Thus, until such time as the Members of the WTO choose to clarify the provision or create additional obligations, there is simply no basis to conclude that the EC violated Article 15 if the facts establish that the EC explored possibilities for constructive remedies.

9. Finally, as Article 15 plainly states, the obligation to “explore” constructive remedies arises only when the application of anti-dumping duties “would affect the essential interests of the developing country Member[]”.<sup>13</sup> The United States is not familiar with the investigative record of the proceeding before the EC authorities, and thus is not in a position to opine on whether Brazil successfully demonstrated during those proceedings that the application of anti-dumping duties in this particular case would, in fact, have affected its essential interests.<sup>14</sup> If the record demonstrates that it failed to do so, however, then there is no basis to conclude that the EC violated Article 15.

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<sup>8</sup> *EC–Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, 4 July 1995 (hereinafter “*Cotton Yarn*”).

<sup>9</sup> Article 13 of GATT Anti-Dumping Code provided:

It is recognized that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code. Possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where these would affect the essential interests of developing countries.

<sup>10</sup> *Cotton Yarn* at para. 584.

<sup>11</sup> *Id.*, para. 589.

<sup>12</sup> Implementation-Related Issues and Concerns, WT/MIN(01)/W/10, 14 November 2001 (01-57868), at para. 7.2.

<sup>13</sup> The payment of anti-dumping duties will always have some negative effect on one or more producer/exporters in a Member country. Thus, a situation which would affect the “essential” interests of the Member country itself must mean something significantly more than this. Decisions on whether a Member’s essential interests would be affected by a proposed measure will depend on the facts, and might be approached in multiple permissible ways.

<sup>14</sup> The term “essential” implies a very high standard for the level of national interest which the developing country (as the party in possession of the facts in this respect) must demonstrate would be affected by the anti-dumping duties. This strict limitation – to situations in which it has been demonstrated that applying antidumping duties would affect a country’s “essential” interests – must be taken into account in weighing whether the second sentence of Article 15 applies at all in a given case. A proper interpretation of Article 15

### III. THE EC'S EXCLUSION OF CERTAIN SALES FROM NORMAL VALUE IN ACCORDANCE WITH ARTICLE 2.2 DOES NOT IMPLICATE ARTICLE 2.4

10. Brazil has alleged that, in calculating constructed normal value for certain types of products, the EC violated Articles 2.2 and 2.2.2 by not excluding, from its home market database used to calculate selling, general and administrative ("SG&A") expenses and profit, data from sales which were deemed "not comparable" either because the home market was not deemed a "viable market" for the model at issue or the sales did not pass the EC's "sales below cost" test.<sup>15</sup>

11. Brazil has further alleged that, as a result, the EC violated the first and third sentences of Article 2.4 by not making appropriate adjustments to differences which affected price comparability, and thus by failing to effectuate a "fair comparison."<sup>16</sup> The United States takes no position with respect to Brazil's claim under Articles 2.2 and 2.2.2. Brazil's Article 2.4 argument, however, is based on an incorrect interpretation of that article. Issues arising under Article 2.2 do not implicate Article 2.4, which serves a different function within the Agreement. To the extent that Brazil has raised a legitimate claim under Article 2.4, this claim must be judged solely on the merits of whether Brazil has met its burden of proof with respect to the requirements of Article 2.4 itself.

12. Articles 2.2 and 2.2.2 relate to the proper establishment of normal value, by permitting the elimination of sales below cost from normal value under certain circumstances, and by providing for the use of constructed normal value as the basis for normal value under certain circumstances. Brazil has raised its concerns with respect to the establishment of normal value in the context of those articles.

13. In addition to its Articles 2.2 and 2.2.2 arguments, Brazil has also raised an argument, under the first and third sentences of Article 2.4, ostensibly seeking "adjustments for differences which affected price comparability," based on the same facts.<sup>17</sup>

14. Article 2.4 addresses the comparisons and adjustments Members must make after identifying the proper basis for normal value and export price and prior to calculating the margins of dumping. Article 2.4 provides, in full (with the sentences at issue highlighted):

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance

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cannot ignore the strict limiting language, a critical part of the negotiated balance of rights and obligations underlying the provision.

<sup>15</sup> Brazil's First Written Submission at 46-59. The EC declined to use Brazilian home market prices for those models for which home market sales were less than 5 per cent of the volume of sales of the same model to the EC. *Id.* at 49, citing the EC's Provisional Regulation at para. 22. The EC's "below cost" test for matching purposes is a model-specific test establishing the proportion of profitable sales to unaffiliated customers for each model. *Id.*, citing the EC's Provisional Regulation at para. 23. If at least 80 per cent (by weighted average) of the sales of a model are profitable, normal value for that model is based on the weighted average of all home market sales of that model, whether profitable or not. *Id.* If 10-79 per cent of the sales of the model are profitable, the normal value is based only on the margins for the profitable sales of that model. *Id.* at 49-50, citing the EC's Provisional Regulations at para. 23. If less than 10 per cent of the sales of the model are profitable, none of the sales of that model are used for matching purposes. *Id.* at 50, citing the EC's Provisional Regulation at para. 23. The EC applied both the below-cost test and the market viability test for purposes of Article 2.2.2, but did so at the company-specific, rather than model-specific, level. *Id.* at 50, citing the EC's Provisional Regulation at paras. 24 and 27.

<sup>16</sup> Brazil's First Written Submission at 46, 48.

<sup>17</sup> *Id.* at 46.

shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. (Emphasis added).

15. Brazil's arguments with respect to the calculation of constructed value relate to the *identification* of normal value under Article 2.2 and 2.2.2, and not to its subsequent *comparison* with export price under Article 2.4. As can be seen from the language quoted above, Article 2.4 presupposes that export price and normal value have already been identified.

16. Thus, the United States disagrees with Brazil that an improper calculation of constructed normal value<sup>18</sup> can constitute a breach of Article 2.4. The United States also disagrees that a putative breach of Article 2.4 can be used to bolster a claim under Articles 2.2 or 2.2.2. The language of Article 2.4, which relates solely to the comparison of normal value to export price, should not be taken out of context and applied to other issues related to calculation of dumping margins. Article 31 of the *Vienna Convention* states that a treaty shall be interpreted in accordance with "the ordinary meaning to be given to the terms of the treaty in their context . . .". (emphasis supplied).<sup>19</sup> The Panel should not adopt Brazil's proposed interpretive approach, which takes the general language of the first sentence of Article 2.4 out of context and uses it to override the detailed rules negotiated in other parts of the Agreement.

17. In addressing the issues of calculation of cost of production and constructed normal value, therefore, the Panel should limit its analysis to whether Brazil has established a breach of Articles 2.2 and 2.2.2. To the extent the Panel is required to address arguments under Article 2.4, the Panel should find that Brazil has failed to satisfy its burden of proof.

#### IV. CONCLUSION

18. The United States appreciates the opportunity to provide its views in this dispute and hopes its comments will be useful to the Panel in its deliberations.

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<sup>18</sup> As noted above, the United States takes no position on whether the calculation of cost of production or constructed value in this case was, in fact, improper.

<sup>19</sup> The rules reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* have attained the status of customary rules of international law. See *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996 at 23; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996 at 12; *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126) - Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, 14 January 2000 at para. 6.25.