

**EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES ON MALLEABLE
CAST IRON TUBE OR PIPE FITTINGS FROM BRAZIL**

Notification of an Appeal by Brazil
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 23 April 2003, sent by Brazil to the Dispute Settlement Body (DSB), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Appellate Body's *Working Procedure for Appellate Review*, the Government of Brazil hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the panel report *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (WT/DS219/R) and certain legal interpretations developed by the Panel.

Brazil seeks review by the Appellate Body of certain Panel conclusions which are in error, and are based upon erroneous findings on issues of law and on related legal interpretations with respect to various provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*Anti-Dumping Agreement*") and the General Agreement on Tariffs and Trade 1994 ("*GATT 1994*"). These conclusions are:

- (1) The Panel's conclusions that the European Communities has not violated its obligations under Article 1 of the Anti-Dumping Agreement and/or under Article VI:2 of the GATT 1994 in imposing anti-dumping duties following the devaluation of the Brazilian currency at the beginning of the fourth quarter of the investigation period ("IP"). This finding is in error, and is based upon erroneous findings on issues of law and on related legal interpretations contained in paragraphs 7.93 to 7.108 of the Panel's report, including:
 - a) the Panel's finding that the EC could not have based its dumping analysis on the export prices relating to the period after the devaluation only. This conclusion is based on an erroneous interpretation of Article 2.4.2, namely, that this Article generally requires that "data throughout the investigation period would necessarily consistently be taken into account" and that "an investigating authority would generally be precluded from limiting its dumping analysis to a selective subset of that data from only a temporal sub-segment of the IP" (at para. 7.104); and,

- b) the Panel's finding that there is no foundation in the text of the Anti-Dumping Agreement or Article VI of the GATT 1994 for a requirement that the EC should have re-assessed its dumping findings in the light of the devaluation of the Brazilian Real during the IP and that, in any event, Article 9.3 provides for a corrective mechanism.
- (2) The Panel's conclusion that the European Communities did not act inconsistently with Article 2.2 and the chapeau of Article 2.2.2 of the Anti-Dumping Agreement in constructing normal value using SG&A and profit data from sales of product types for which there were no representative sales in the domestic market of Brazil. This finding is in error, and is based upon erroneous findings on issues of law and on related legal interpretations contained in paragraphs 7.124 to 7.139 of the Panel's report, including:
 - a) the Panel's finding that a Member is not permitted to exclude actual data – on a basis other than not being made in the ordinary course of trade – from the calculation under Article 2.2.2 (at para. 7.138); and,
 - b) the Panel's finding that the ordinary meaning of "*sales in the ordinary course of trade*" of the chapeau of Article 2.2.2 "*includes the SG&A actually incurred and the profits actually realized in the category of production and sales explicitly specified in the Agreement*", and that therefore, the SG&A and profit data of low volume sales made in the ordinary course of trade necessarily have to be included when constructing normal values (at para 7.138).
- (3) The Panel's conclusion contained in paragraphs 7.225 to 7.236 of the Panel's report that the European Communities has not violated Articles 3.1, 3.2 and 3.3 of the Anti-Dumping Agreement on the ground that an Article 3.2 analysis of the volume and price of the imports from each individual country is not a necessary pre-condition for cumulation under Article 3.3. This finding is in error and is based upon erroneous findings on issues of law and on related legal interpretations of the obligations regarding the determination of injury arising from Articles 3.1, 3.2 and 3.3 of the Anti-Dumping Agreement.
- (4) The Panel's conclusion contained in paragraphs 7.302 to 7.345 combined with 7.42 – 7.47 of the Panel's report that the Panel is compelled to include Exhibit EC-12 in its examination of Brazil's claims under Article 3.4 even if there is no contemporaneous and verifiable written indication that this Exhibit actually existed during the time of the investigation. This finding is in error and is based upon erroneous findings on issues of law and on related legal interpretations, including:
 - (a) the Panel's erroneous legal interpretation of Articles 3.1 and 3.4 of the Anti-dumping Agreement and, in particular, of the notion of "positive evidence" contained in Article 3.1. On that basis, the Panel erroneously considered that the requirements of Article 3.1 and 3.4 were met by an internal document of which the contemporaneous nature is questionable and not verifiable.
 - (b) the Panel's finding that it can rely on a presumption of good faith of WTO Members in order to conclude that Exhibit EC-12 was made within the time period of the investigation thereby breaching the Panel's obligations under Article 11 of the DSU and Articles 17.5(ii) and 17.6(i) of the Anti-Dumping Agreement.

- (5) The Panel's conclusion contained in paragraphs 7.309 to 7.311 of the Panel's report that the EC has not violated its obligations under Article 3.4 in its treatment of the factor 'growth' and that it at least addressed each of the listed Article 3.4 factors given that it addressed the factor 'growth' implicitly by addressing other injury factors. This finding is in error and is based upon erroneous findings on issues of law and on related legal interpretations, arising from Articles 3.1 and 3.4 of the Anti-dumping Agreement.
- (6) The Panel's conclusion contained in paragraphs 7.346 and 7.349 of the Panel's report that the European Communities has not violated Articles 6.2 and 6.4 of the Anti-Dumping Agreement on the ground that the investigating authority can decide without further communication with the parties that the evidence contained in an internal document (Exhibit EC-12) does not have any "value added" to the substance of their investigation in the analysis of the injury factors listed in Article 3.4 of the Anti-Dumping Agreement. This finding is in error, and is based upon erroneous findings on issues of law and on related legal interpretations of the obligations arising from Articles 6.2 and 6.4 of the Anti-Dumping Agreement.
- (7) The Panel's conclusion that the European Communities has not violated Article 3.5 of the Anti-Dumping Agreement. This finding is in error, and is based upon erroneous findings on issues of law and on related legal interpretations contained in paragraphs 7.354 to 7.416 of the Panel's report, including:
 - a) the Panel's finding that factors "known" to an investigating authority in the context of the dumping and injury analysis, are not "known" factors in the specific context of causality (at para. 7.361 and 7.362); and,
 - b) the Panel's finding that the methodology used by the EC which analyses each causal factor only individually did not infringe Article 3.5 (at para. 7.368 to 7.370).

Brazil respectfully requests the Appellate Body to reverse the above findings of the Panel, as well as the reasoning leading thereto, and to modify accordingly the recommendations of the Panel.
