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

Request for the Establishment of a Panel by Brazil

The following communication, dated 7 June 2001, from the Permanent Mission of Brazil to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 21 December 2000, Brazil requested consultations with the European Communities (the EC) further to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), Article XXIII of the General Agreement on Tariffs and Trade 1994 (the GATT 1994) and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement) concerning the anti-dumping measures prevailing in the EC in respect of imports of malleable cast iron tube or pipe fittings originating in Brazil, including the initiation of the anti-dumping investigation carried out by the EC which led to the imposition and collection of definitive and provisional anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil (the Investigation) and the imposition and collection of provisional and definitive duties.

The above request for consultations was notified to the Dispute Settlement Body and was subsequently circulated to WTO Members[1] and those consultations were held in Geneva on 7 February 2001. As consultations failed to achieve a mutually agreed solution and further to Article XXIII of the GATT 1994, Article 17 of the AD Agreement and Article 6 of the DSU Brazil respectfully requests the establishment of a panel to examine the matter.

The EC initiated the Investigation by publishing a notice of initiation on 29 May 1999 in the Official Journal of the European Communities[2] and provisional anti-dumping duties were imposed by the EC by way of Commission Regulation (EC) No 449/2000[3], dated 28 February 2000 (the Provisional Regulation). The imposition of definitive anti-dumping duties and the collection of provisional duties was affected by way of Council Regulation (EC) No 1784/2000[4], dated 11 August 2000 (the Definitive Regulation).

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[1] European Communities – Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil (WT/DS219/1).

[2] OJ C 151, 29.5.1999, p.21.

[3] Commission Regulation (EC) No 449/2000 imposing a provisional anti-dumping duty on imports of malleable cast iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand and accepting an undertaking offered by an exporting producer in the Czech Republic of 28 February 2000 - OJ L 55, 29.2.2000, p.3.

[4] Council Regulation (EC) No 1784/2000 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain malleable cast iron tube or pipe fittings

In the opinion of Brazil the EC has acted and is acting in a manner which is inconsistent with its obligations under the GATT 1994 and the AD Agreement in that benefits accruing to Brazil either directly or indirectly under the AD Agreement and the GATT 1994 have been nullified or impaired by the EC and/or the achievement of objectives of the AD Agreement and the GATT 1994 are being impeded by the EC.

The actions of the EC including but not limited to the initiation of the Investigation and the imposition and collection of provisional and definitive anti-dumping duties has significantly impacted upon Brazil's exports of malleable cast iron tube or pipe fittings to the EC.

Brazil believes that the initiation of the Investigation, and the imposition and collection of provisional and definitive anti-dumping duties referred to above by the EC are actions which are inconsistent with the following provisions of the AD Agreement and of the GATT 1994:

Provisions of the GATT 1994:

(i) Article I
(ii) Article VI

Provisions of AD Agreement:

(a) Article 1
(b) Article 2, especially (but not exclusively) Articles 2.1, 2.2, 2.4 and 2.6
(c) Article 3, especially (but not exclusively) Articles 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6
(d) Article 4.1(i)
(e) Article 5, especially (but not exclusively) Articles 5.1, 5.2, 5.3, 5.4, 5.5, 5.7 and 5.8
(f) Article 6, especially (but not exclusively) Articles 6.1, 6.2, 6.4, 6.6, 6.10 and 6.12
(g) Article 7, especially (but not exclusively) Articles 7.1 and 7.5
(h) Article 9, especially (but not exclusively) Articles 9.1 and 9.2
(i) Article 11, especially (but not exclusively) Article 11.1
(j) Article 12, especially (but not exclusively) Article 12.2
(k) Article 15

Brazil considers the following actions and/or determinations and/or omissions of the EC to be or to have been inconsistent with GATT 1994 and/or with the AD Agreement.

All references herein to "Tupy" are references to the Brazilian exporter Industria de Fundição Tupy Ltda and, unless otherwise specified, all references to "Articles" are references to articles of the AD Agreement unless otherwise stated.

PRELIMINARY ISSUES

1. The EC failed to comply with its obligations under Article VI of GATT 1994 and under the AD Agreement, particularly but not exclusively with Articles 1, 2, 3, 5 and 9 thereof in that it adopted the anti-dumping measures concerned against Brazil through the Provisional Regulation and the Definitive Regulation whereas, particularly following the devaluation of the Brazilian Real as of January 1999 there has been no justification whatsoever for the adoption of these measures. In view of the EC's own findings where properly assessed,

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originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand of 11 August 2000 – OJ L 208, 18.8.2000, p.8.

following the devaluation no dumping nor injury could have been properly established with regard to the imports of the product concerned originating in Brazil.

2. At the time of the initiation of the Investigation there was no dumping of the product concerned originating in Brazil and therefore the application did not include evidence of dumping and therefore of a causal link between dumping and injury (Article 5.2). The application therefore did not include sufficient evidence of dumping (and therefore of a causal link between dumping and injury) for the purpose of the initiation of the Investigation (Article 5.3), particularly as the allegation of injury pertained to actual material injury being sustained by the domestic industry and not to the threat of material injury being sustained by the domestic industry.

3. The product originating in Brazil was determined to have been dumped by the EC in a manner which was not compatible with its obligations under Articles 2 and 3 as at the time of the relevant determinations of dumping and injury the export price of the product was not less than the price of the like product, in the ordinary course of trade, when destined for consumption in Brazil (Article 2.1) and it follows that there could not therefore have been a causal link between the product originating in Brazil and the injury said to be being sustained by the domestic industry (Article 3.5). The EC further failed to discharge its obligations under Article 9 in that it collected anti-dumping duties other than in respect of imports of the product concerned from Brazil which were dumped and causing injury (Article 7.5 and Article 9.2).

4. The EC has furthermore therefore failed to discharge its obligations under Article 1 insofar as it has levied anti-dumping measures other than in the circumstances provided for in Article VI of the GATT 1994 and pursuant to the Investigation, which was not conducted (for these among other reasons) in accordance with the provisions of the AD Agreement.

PROCEDURAL ISSUES

5. The EC did not discharge its obligations under Article 5 in that (for example) the application did not contain a complete description of the volume and value of domestic production of the like product accounted for by the applicants (Article 5.2(i)) and did not set out information (for instance) as to the wages, stocks and investments of the applicants, which information should have been more than reasonably available to them (Article 5.2(iv)). The EC also failed to satisfy itself as to the accuracy and adequacy of the evidence set out in the application with regard the imports of the product concerned from certain countries not ultimately subject to the Investigation (Article 5.3).

6. The EC did not consider evidence of both dumping and of injury simultaneously in its decision whether or not to initiate the Investigation and during the course of the Investigation as there was at no stage sufficient positive evidence of dumping and of injury to domestic EC producers before the EC (Article 5.7) and in any event the EC should have rejected the application submitted to it when it became evident that it contained insufficient positive evidence of injury, in particular, to justify proceeding with the case (Article 5.8).

7. The EC was not in a position to determine whether or not the application has been made by or on behalf of the domestic industry (Article 5.4) particularly owing to its failure to investigate the extent to which certain of the applicants were themselves importers of the product concerned (Article 4.1 and Article 6.6) and furthermore the EC had not received a properly documented application and did not notify Brazil prior to proceeding to initiate the Investigation (Article 5.5).

8. The EC failed to discharge its obligations under Article 6 in that, *inter alia*, it failed to satisfy itself as to the accuracy of certain information submitted to it by Tupy in connection with the taxation credit adjustment, the packing allowance adjustment, the advertising and promotional expenses adjustment, the importation of the product concerned by domestic EC producers from countries not subject to the Investigation, the impact of substitution and the market perception of the distinction between so-called black heart and white heart variants of the product concerned (Article 6.6) and thereby also denied Tupy the full opportunity for the defence of its interests in these among other respects (Article 6.2)

9. The EC resorted to the sampling of product types for the purpose of deciding on the extent of the taxation credit adjustment where the sample chosen was neither statistically valid nor necessary owing to the impracticability of conducting an examination of all product types concerned and no attempt was made by the EC to decide upon what sample, if any, might be appropriate in this respect in consultation with and with the consent of Tupy (Article 6.10).

10. Tupy was not provided with timely opportunities to see all information that was relevant to the presentation of its case particularly in that the EC did not properly disclose its methodology and calculations with regard to the currency conversions made in the dumping determination (Article 6.4).

11. If the EC considered whether or not there had been a significant increase in allegedly dumped imports from Brazil onto the EC market such consideration was not apparent from the Definitive Regulation and if the EC examined all of the injury factors listed in Article 3.4 it did not make this apparent in the Provisional Regulation and in the Definitive Regulation or in any separate reports thereto (Article 12.2).

12. The EC failed to set out in the Definitive Regulation or otherwise make available in a separate report all relevant information on the matters of fact and law with regard to the injury caused to domestic EC producers by factors other than the dumped imports that were made known to it such as (for instance) with regard to imports of the product concerned from third countries not subject to the Investigation, the substitution of the product concerned with replacement products, imports of the product concerned into the EC under product code sub-headings other than 7307 1910 and the outsourcing initiatives, poor export performance and price increases of EC producers during the injury investigation period (Article 12.2).

13. The EC also failed to set out in the Definitive Regulation or otherwise make available in a separate report all relevant information on the matters of fact and law connected with the dumping, injury and causation determinations made in the light of the devaluation of the Brazilian Real in January of 1999 (Article 12.2).

14. The EC failed to set out in the Definitive Regulation or otherwise make available in a separate report all relevant information on the matters of fact and law connected with its decision to cumulate imports of the product concerned from Brazil with the imports of other countries subject to the Investigation, its assessment of the impact of factors of causation known to it, its decision to undertake sampling for the purpose of determining the extent of the taxation credit adjustment to be granted, its decision not to grant the taxation credit adjustment and other adjustments necessary for a fair comparison to be effected between the export price and the normal value, its decision to deploy the use of zeroing in the context of its assessment of the price effects of imports of the product concerned and the considerations relevant to the comparability of models in its underselling and undercutting calculations (Article 12.2).

15. The EC failed to give reasons for its acceptance or rejection of relevant arguments and claims made to it be Tupy, including but not limited to those made in relation to the taxation credit

claim, its decision to exclude in particular Poland, Bulgaria and Turkey from the scope of the Investigation, its decision to limit the ambit of the Investigation to product code CN 7307 1910 only, its decision that there was no distinction in the market between so-called black heart and white heart variants of the product concerned, its decision that the interests of certain of the applicants in certain third countries and their imports of the allegedly dumped product should not affect the definition of the Community industry, its decision that cumulation was appropriate, and its decisions that substitution of the product concerned, imports of the product concerned from third countries and the outsourcing initiatives, poor export performance and price increases of EC producers during the injury investigation period had no impact upon causation (Article 12.2)

16. The EC did not provide timely opportunities for industrial users of the product under investigation and for representative consumer organizations to provide information which was relevant to the Investigation insofar as it did neither sought such information other than from two national gas companies (Article 6.2) nor accepted it when it was provided by Tupy with particular reference to the distinction in the market between so-called black heart and white heart variants of the product concerned (Article 6.6) and ample opportunity was not afforded to Tupy to submit in writing all the evidence that it considered relevant to the Investigation in this respect (Article 6.1).

DUMPING ISSUES

17. The EC determined that certain product types should have their normal values constructed as their sales volumes were unrepresentative and therefore did not permit a proper comparison further to Article 2.2 as sales on the domestic market of the like product did not constitute 5% or more of the sales of the product types concerned to the EC. Despite having itself established that data relating to such sales did not permit a proper comparison with the exported product type further to Article 2.2 the EC proceeded to use the profit margins associated with these same product types in the construction of a figure for selling, general and administrative costs and for profits did not make adjustments for differences which affected price comparability to ensure a fair comparison (Article 2.4).

18. The definition of the "like product" under Article 2.6 does not include product types which start with codes "68" and "69" which are sold on the domestic market in Brazil (owing to their differing physical characteristics and intended uses) as other products had characteristics more closely resembling those of the product under consideration. Data pertaining to sales of product types on the domestic market starting with such codes was unlawfully used by the EC in the construction of the selling, general and administrative expenses and the profit margin in respect of product types sold on the European market (Articles 2.2 and 2.4).

19. In omitting to verify whether the claim of Tupy with regard to the packing allowance was valid the EC did not discharge its obligations under Article 2 in that a fair comparison could not then be effected between the export price and the normal value as Tupy was denied an appropriate adjustment on account of the differing and heightened packing costs incurred by it in connection with its domestic sales as compared with its packing costs in the context of exports of the product concerned to the EC (Article 2.4).

20. The EC did not discharge its obligations under Article 2 in that it denied to Tupy an adjustment which was necessary for a fair comparison to be effected between the export price and the normal value in that it did not grant to Tupy an adjustment on account of its increased advertising and promotional expenses on the domestic Brazilian market as compared to its comparatively low advertising and promotional expenses in connection with its exports to the EC (Article 2.4).

21. The EC did not make the currency conversions required under Article 2 for the purpose of effecting a fair comparison between the export price and the normal value in particular as it is clear that with regard to certain transactions no information was available to the EC as to the applicable currency conversion rates as at the dates on which the material terms of sale for the transaction(s) in question were established (Article 2.4).

22. The EC failed to make adjustments on account of the physical characteristics of the product concerned (and the distinction between its so-called black heart and white heart variants as issues impacting upon price comparability) and so failed to effect fair comparisons in these respects between the export price and the normal value (Article 2.4).

23. The EC resorted to the sampling of product types for the purpose of deciding on the extent of the adjustment to be made on account of the tax credit adjustment where the sample chosen was neither statistically valid or necessary owing to the impracticability of conducting an examination of all product types concerned and in so doing failed to effect a fair comparison further between the export price and the normal value (Article 2.4).

24. In violation of Article VI:4 of the GATT 1994 the product subject to the Investigation originating in Brazil has been subjected to anti-dumping duties on export to the EC by reason of the exemption of that product from duties or taxes borne by the like product when destined for consumption in Brazil and/or by reason of the refund of duties or taxes borne by the like product on the Brazilian market to Tupy in accordance with the prevailing domestic Brazilian legislation. The EC also denied Tupy an appropriate taxation credit adjustment in respect of duties and taxes borne by the like product when destined for consumption in Brazil (Article 2.4).

25. The EC "zeroed" negative dumping margins which had been calculated for some product types of Brazilian origin exported to the EC during the investigation period with the effect of such zeroing being that the EC did not offset the margins of dumping which were calculated to be negative as against those margins of dumping which it calculated to be positive. A fair comparison was not therefore made by the EC between the export price and the normal value and a distorted margin of dumping was calculated (Article 2.4).

INJURY AND CAUSATION ISSUES

26. The EC did not consider whether there had been a significant increase in dumped imports from Brazil either in absolute terms or relative to production or consumption in the EC. The EC considered that the volume (in absolute terms) of Brazilian imports of the product concerned on the EC market had always been significant it was unnecessary for the EC to consider whether or not there might be a significance in any increase in Brazilian imports during the injury investigation period. Although the EC considered in the Provisional Regulation whether there had been a significant increase in dumped imports either in absolute terms or relative to production or consumption in the EC for the countries which had been cumulated Article 3.3 does not mandate a cumulative assessment of the significance of the volume increases of imports from the countries subject to investigation under Article 3.2 and each country subject to an anti-dumping investigation must have the significance of the volume increase (if any) in its imports during the course of the injury investigation period individually considered (Article 3.2).

27. The EC did not discharge its obligations under Article 3.1 and Article 3.2 in that it did not, *inter alia*, consider (with a basis of positive evidence) the effect of the allegedly dumped imports on prices, whether there had been a significant price undercutting by the allegedly

dumped imports as compared with the price of a like product in the EC, or whether the effect of such imports was to depress prices to a significant degree, or prevent price increases which would otherwise have occurred to a significant degree in that:

(i) it calculated an underselling figure in respect of which the calculations it provided included only those transactions in which underselling was found (which amounts to the use of "zeroing") and therefore does not relate to the "dumped imports" as referred to in Article 3.2, and;

(ii) it did not consider whether or not as a matter of fact there had been price suppression, and;

(iii) it did not consider whether or not as a matter of fact the market perception of the distinctions between so-called black heart and white heart variants of the product might require the making of appropriate adjustments, and;

(iv) no finding of price depression by the EC was possible as the prices charged by the domestic EC producers in fact increased over the same period as was referred to with regard the (cumulated) trend of the decreasing prices of the imports from Brazil, and;

(v) with reference to the EC's determination of price undercutting this again was not made in relation to "the dumped imports" as a whole but rather with regard to a selection of product types displaying positive undercutting margins (see also Article 3.6).

28. The EC did not discharge its obligations under Article 3.1 and Article 3.3 in that (for instance) it cumulated the imports of the product concerned originating in Brazil with those of the other countries subject to the Investigation where a cumulative assessment of the effects of the imports from the other countries subject to the Investigation was not appropriate (and could not have been based on positive evidence) either in the light of the conditions of competition between imports of Brazilian origin and the other imported products subject to the Investigation, nor in the light of the conditions of competition between the imports of the product concerned from Brazil and the like Community product owing to significant disparities both in pricing structures and volumes of imports as between the countries subject to the Investigation, particularly bearing in mind the devaluation of the Brazilian Real in January of 1999.

29. The EC did not discharge its obligations under Article 3.1 and Article 3.4 and its finding of injury was not based on positive evidence in that (for instance) it did not examine all the non-exhaustive 15 individual factors and indices going to the issue of injury within the meaning of the AD Agreement in its analysis of the alleged injury caused to the domestic industry as it analysed only partially merely the following eight (8) factors in the list set out in Article 3.4:

(i) actual and potential decline in sales (though no explicit mention is made of potential decline in sales and although no proper consideration has been given to the up-going trend of sales of outsourced products);

(ii) profits (although no proper consideration has been given to the growing sales of outsourced products);

(iii) market share (although no proper consideration has been given to the growing market share supplied by outsourced products);

(iv) productivity (although no proper consideration has been given to the growing productivity in relation to outsourced products);

(v) utilization of capacity (although no consideration has been given to the growing utilization of capacity used for outsourced products);

(vi) inventories (although no consideration has been given to the improved trend of inventories of outsourced products);

(vii) employment (although no consideration has been given to the positive employment data in the context of outsourced products).

30. The EC did not discharge its obligations under Article 3.1 and Article 3.5 in that (for instance) it attributed injury said to have been sustained by domestic EC producers to imports of the product concerned of Brazilian origin despite the fact that as of January 1999 the devaluation of the Brazilian Real had made it impossible for imports originating in Brazil to be causing injury to the domestic EC industry and despite the fact that injury sustained by the domestic EC industry was readily attributable to the rationalization, outsourcing efforts and poor export performance of EC producers. The EC did not ensure that injury caused to the domestic EC industry by imports of the product concerned (in significant quantities and at prices significantly below those prevailing in respect of imports of the product concerned when of Brazilian origin) from countries including, *inter alia*, Turkey, Bulgria and Poland, was not attributed to imports of the product concerned from Brazil.

31. The EC did not discharge its obligations under Article 3.1 and Article 3.5 in that (for instance) it did not ensure that injury caused to the domestic EC industry by substitution of the product concerned by replacement products, by imports made by domestic EC producers from other third countries not subject to the Investigation (and with which they have close relations) and by such factors as the poor export performance, and the outsourcing and rationalization efforts of domestic EC producers throughout the injury investigation period, was not attributed to imports of the product concerned from Brazil.

32. Owing to its failure to satisfy itself as to the accuracy of information submitted to it by Tupy in connection with the importation of the product concerned by domestic EC producers from countries not subject to the Investigation (in violation of Article 6.6) the EC also failed to discharge its obligations under Article 4 in not removing the producers concerned from the definition of the domestic industry.

DEVELOPING COUNTRY ISSUES

33. The EC did not afford Brazil the requisite special regard as a developing country throughout the course of the Investigation in that, *inter alia*, it denied Tupy adjustments under Article 2.4 on account only of its inability to appropriately assess the merits of such adjustments – such as that relating to the tax credit adjustment claim (for reasons that demonstrated a lack of regard for the manner of the administration of the Brazilian taxation system) and continued to hold Brazilian imports responsible for causing injury to domestic EC producers despite a currency devaluation of the Real as of January 1999 that meant that even by the EC's (erroneous) calculations Tupy was no longer dumping on the EC market. The EC further decided to cumulate imports originating in Brazil with the imports of other countries subject to the Investigation despite the above-mentioned devaluation of the Real (Article 15).

34. Despite the concluding sentence of Article 9.1 the EC nonetheless decided to apply the full extent of the dumping duty determined rather than afford Brazil, as a developing country, consideration on account of the devaluation in its currency in January of 1999 (Article 15).

35. The EC neither explored nor communicated either to Brazil or to Tupy the possibility that it might pursue constructive remedies over and above the possibility of the imposition of anti-dumping duties (Article 15).

OTHER ISSUES

36. The EC did not discharge its obligations under Article 7 in that, *inter alia*, it did not judge the Provisional Regulation to be necessary for the prevention of injury during the course of the Investigation (Article 7.1) or if it did so it did not make this apparent from the Provisional Regulation (Article 12.2) and in any event any such determination would not have been unbiased and objective as at the time of the imposition of provisional measures the devaluation in the value of the Brazilian Real entailed that there was not dumping of the product concerned of Brazilian origin, nor was it foreseeable that there could be during the course of the Investigation.

37. The EC did not make any attempt, with a view to discharging its obligations under Article 9.1, to afford Brazil as a developing country the consideration of having the level of the duty applied to Tupy's exports dictated by the level of the injury caused to domestic EC producers by Tupy's exports rather than with reference to the (erroneously calculated) dumping margin and furthermore the EC collected duties in respect of imports of the product concerned originating in Brazil where it was clear that the product concerned was not being dumped (owing to devaluation) and therefore that it was unlawful to collect those duties (Articles 9.1 and 9.2.)

38. The EC did not discharge its obligations under Article 11 in that the EC had not established (based on positive evidence) that there was dumping and injury to domestic EC producers within the meaning of the AD Agreement being caused by exports of Brazilian origin. The EC was not therefore justified in imposing anti-dumping duties, nor in maintaining them to counteract imports of a product neither dumped nor causing injury (Article 11) and furthermore despite a submission requesting a review of the measures in question made by Tupy shortly after the Definitive Regulation on 13 July 2000 setting out the reasons why the maintenance of anti-dumping duties was inappropriate no such reviews has yet taken place (Article 11.2).

39. Brazil respectfully requests that this item be placed on the agenda for the next meeting of the Dispute Settlement Body, scheduled to be held on 20 June 2001, and that a panel be established with standards terms of reference as set out in Article 7 of the DSU.