

*Argentina – Definitive Anti-Dumping Duties
on Poultry from Brazil*

(WT/DS241)

Third-Party Submission of the United States

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I. Introduction

1. The United States welcomes the opportunity to present its views in this proceeding on *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* (DS241). The United States is limiting its comments to certain issues relating to the proper legal interpretation of various articles of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the “AD Agreement”).¹

II. Article 5.7 of the AD Agreement Does Not Require Members Deciding Whether to Initiate an Antidumping Investigation to Evaluate Dumping and Injury Data from “Simultaneous” Time Periods

2. Brazil claims that Argentina breached Article 5.7 of the AD Agreement because its investigating authorities evaluated dumping and injury data that covered non-identical time periods when it determined whether to initiate the challenged investigation.² Brazil’s argument is based on a misinterpretation of the term “simultaneously” as that term is used in Article 5.7.

3. Article 5.7 states that in deciding whether to initiate an investigation, the “evidence of both dumping and injury shall be considered simultaneously. . . .” Brazil appears to believe that this language obligates a Member to ensure that its investigating authorities consider dumping and injury information from simultaneous (*i.e.*, identical) time periods. Viewed in context, however, the term “simultaneously” is linked to the term “considered,” not the term “evidence.” Thus, the obligation in Article 5.7 is to *consider* the evidence of dumping and injury simultaneously (for example, in concurrent investigations), not to consider *evidence* of dumping and injury collected from simultaneous (or identical) time periods.

4. As the Committee on Anti-Dumping Practices has recognized, the AD Agreement “does not establish any period of investigation” or establish guidelines for determining an appropriate period of investigation “for the examination of either dumping or injury.”³ The Committee has adopted a non-binding recommendation, however, which calls for a twelve-month period of investigation for analyses of dumping, and a three-year period of investigation for analyses of injury.⁴ On its face, the Committee’s recommendation indicates the lack of any basis for requiring Members to examine dumping and injury information from “simultaneous” time periods. The lack of congruity in the recommended time periods reflects the inherent differences in the nature of the analyses that administering authorities conduct for determining the existence of dumping, on the one hand, and injury, on the other.

¹ The United States has not had an opportunity to review fully Argentina’s written submission in this dispute and is therefore limiting itself to addressing Brazil’s written submission at this time. The United States will address Argentina’s written submission, as appropriate, at the first Panel meeting.

² See, *e.g.*, Brazil’s first written submission at para. 168.

³ Committee on Anti-Dumping Practices, *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, adopted by the Committee on May 5, 2000.

⁴ *Id.*

5. For example, a Member's determination of dumping normally need not consider trends over time. An injury determination, by contrast, will normally require an investigating authority to gather information covering more than one year in order to evaluate volume and price changes. An importing Member's consideration of whether there is sufficient evidence relating to injury, such as whether there have been significant absolute or relative increases in the volume of dumped imports, must be made in the context of an appropriate time frame, which will almost always extend longer than the period of investigation for making a dumping calculation.⁵

6. The U.S. views on this issue are not meant to suggest, however, that an investigating authority is free to examine dumping and injury information from entirely unrelated time periods. Article 3.5 of the AD Agreement clearly requires a Member to demonstrate a causal relationship between the dumped imports and injury to the domestic industry.⁶ It is entirely possible that the particular time periods that a Member chooses to examine in a particular investigation could call into question whether the Member has demonstrated such a causal link. Article 5.7 of the AD Agreement, however, does not bear on this matter.

III. The Term "A Major Proportion" In the Definition of the Domestic Industry in Article 4.1 of the Agreement Does Not Mean "The Majority"

7. Article 4.1 of the AD Agreement defines the term "domestic industry" as:

the domestic producers as a *whole* of the like products *or* . . . those of them whose collective output of the products constitutes a *major proportion* of the total domestic production of those products

(emphasis added). Brazil claims that the term "major proportion" is synonymous with "majority," and that Argentina breached Article 4.1 because its investigating authority examined data for 46 percent of the domestic industry, which is less than a majority.⁷ The United States respectfully submits that Brazil's argument is based upon a misinterpretation of Article 4.1.

⁵ Indeed, the effects of import volume increases or price undercutting often take longer than a year to reach the level where they would be significant, and the impact of those effects on the domestic industry's condition may take even longer to become apparent. Furthermore, the fact that execution of sales in some industries can take as long as a year, and that in some industries sales are made pursuant to annual contracts, further demonstrates the appropriateness of examining a multi-year period in injury investigations.

⁶ Similarly, Article 5.2 of the AD Agreement requires an application for an investigation to include evidence of dumping, injury, and causal link.

⁷ Brazil's first written submission, paras. 511-519.

8. As an initial matter, Article 4.1 is just a definition. As a definition, it does not impose an independent obligation on WTO Members.⁸ For this reason alone, there is no basis for Brazil's claim that Argentina's injury analysis breached Article 4.1.

9. Even if this were not the case, however, Brazil's claim would find no support in the text of Article 4.1. First, the AD Agreement does not define the term “major,” and the ordinary meaning of the term is “[d]esignating the greater *or relatively greater* of . . . two things” – the opposite of “minor.”⁹ It can also mean “unusually important, serious, or significant.”¹⁰ None of these meanings necessarily connotes “the majority.”

10. Second, Brazil's argument that “major proportion” actually means “majority” directly conflicts with the fact that the drafters were quite explicit, elsewhere in the Agreement, when they intended to impose a majority requirement for a particular obligation. Specifically, Article 5.4 of the Agreement provides that an application is made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes “more than 50 percent” of the total production of the specified portion of the industry. Unlike Article 4.1, Article 5.4 clearly imposes a majority requirement. Article 4.1 establishes a different standard: “a major proportion.”

11. Viewing the term in context also provides support for the conclusion that “major proportion” was not meant to establish a “majority” requirement. The term appears in Article 4.1 as an alternative to the industry “as a whole.” The definition reflects the reality in many antidumping investigations that it will not be possible to obtain the requested information from all domestic producers of the like product, and confirms that an injury determination would not be rendered inadequate simply because an investigating authority was unable to obtain information from all such producers. The AD Agreement does not establish a numerical benchmark for what constitutes a “major” proportion of a domestic industry. It will vary from case to case.

IV. A Member's Decision to Evaluate Certain Factors under Article 3.4 Using a Time Period Different than That Used for Other Factors Would Not *per se* Breach Article 3.1

12. Brazil claims that Argentina committed a *per se* breach of Article 3.1 by evaluating certain Article 3.4 factors over the period January 1996 through June 1999, and other factors over

⁸ See Appellate Body Report on *United States – Tax Treatment for “Foreign Sales Corporations”*, *Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted January 29, 2002, para. 85 (stating that the definition of the term “subsidy” in Article 1.1 of the *Agreement on Subsidies and Countervailing Measures* “does not impose any obligation on Members with respect to the subsidies it defines.”).

⁹ *The New Shorter Oxford English Dictionary*, vol. 1 at 1670 (1993) (emphasis added).

¹⁰ *Id.*

the period January 1996 through December 1998.¹¹ The United States takes no position on the question whether Argentina's decision to base its analysis on two different time periods breached its obligations in the particular case at issue. The United States disagrees, however, with Brazil's contention that an analysis of differing time periods *cannot* be objective, and thus *per se* breaches Article 3.1.

13. The panel report in *United States – Hot Rolled Steel* is instructive in this regard.¹² In that investigation, the United States gathered information on all factors over the entire three year period of investigation, and it evaluated the various factors, at various instances, over the three year period.¹³ With regard to certain factors pertaining to impact, however, the United States compared data for 1998 with data for 1997, without explicitly discussing the data for 1996.¹⁴ The Panel concluded that the United States' failure to explicitly address the data for 1996 did not "undermine the adequacy of the [United States'] evaluation of the relevant economic factors, in light of its analysis and explanations, so as to render its examination of the impact of dumped imports on the domestic industry inconsistent with the AD Agreement."¹⁵ The Panel's finding is consistent with the U.S. view that the use of differing time periods to evaluate injury does not *per se* mean the investigating authority failed to carry out an objective examination.

V. An Investigating Authority's Failure to Discuss a Particular Article 3.4 Factor Does Not Necessarily Breach Article 12.2.2

14. Brazil asserts (claims 38-40) that Argentina failed to evaluate or refer to several of the factors set out in Article 3.4, and that Argentina's failure to do so breached Articles 3.1, 3.4, and 12.2.2 of the Agreement.¹⁶ The United States agrees with Brazil that the AD Agreement requires an investigating authority to evaluate each of the Article 3.4 factors, and we take no position on the issue whether Argentina did, in fact, evaluate each of the factors in the challenged investigation.

15. The United States does not agree, however, that a failure to refer to a particular factor in the published determination necessarily breaches Article 12.2.2. Article 12.2 requires only that the authorities set forth "in sufficient detail the findings and conclusions reached on all issues of

¹¹ See Brazil's first written submission, paras. 425-430.

¹² Panel Report on *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted August 23, 2001 ("*United States – Hot Rolled Steel*").

¹³ *Id.* at para. 7.227.

¹⁴ *Id.* at para. 7.228.

¹⁵ *Id.* at para. 7.234.

¹⁶ Brazil's first written submission, paras. 475-507.

fact and law *considered material by the investigating authorities.*¹⁷ While all enumerated factors must be evaluated, not all are necessarily material in any particular case.

16. Given the requirement to evaluate all of the Article 3.4 factors, however, it should be discernible from the published determination that the authorities have done so. This obligation may be achieved when a determination, through its demonstration of why the authorities relied on the specific factors they found to be material in the case, thereby discloses why other factors on which they did not make specific findings were accorded little weight or were deemed not relevant at all. “[A]s long as the lack of relevance or materiality of the factors not central to the decision is at least implicitly apparent from the final determination, the Agreement’s requirements are satisfied.”¹⁸

VI. The Panel Should Decline to Provide Views on the Proper Interpretation of Article 18.2 of the DSU

17. In a letter dated August 8, 2002, Brazil submitted a letter to the Panel stating its intention to release to the public a non-confidential version of its first written submission. On August 15, 2002, Argentina submitted a letter expressing its view that Brazil’s proposed action would be inconsistent with Article 18.2 of the DSU. On August 21 and 23, 2002, Brazil and Canada, respectively, submitted letters opposing Argentina’s views. Finally, on August 27, 2002, Argentina submitted a second letter supporting the “spirit of transparency” and requesting the Panel’s views on the proper interpretation of Article 18.2.

18. The United States agrees with Brazil and Canada that nothing in Article 18.2 of the DSU would prevent a Member from releasing its own WTO submissions to the public. We have long done so as a matter of course, and we would welcome a decision by Argentina to do the same. Argentina does not need permission to make its own submissions available to the public. The United States is concerned, however, that Argentina’s request for the Panel’s views on this matter is, in essence, a request for an advisory opinion since there is no measure before the Panel. Furthermore, Article 18.2 is not within the Panel’s terms of reference. The United States notes that to the extent that Argentina is asking the Panel to interpret Article 18.2, that would be incompatible with the exclusive authority of the Ministerial Conference and General Council under Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization* to interpret the WTO agreement. We respectfully request the Panel to decline Argentina’s request for views on the proper interpretation of Article 18.2.

¹⁷ See Article 12.2 (emphasis added).

¹⁸ Panel Report on *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted March 12, 2001, para. 6.163.

VII. Conclusion

19. The United States thanks the Panel for providing an opportunity to comment on the issues at stake in this proceeding, and hopes that its comments will prove to be useful.