COUNCIL REGULATION (EC) No 436/2004

of 8 March 2004

amending 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 originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to Council Regulation (EC) No 1515/2001 of 23 July 2001, on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters ([1]),

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community ('the Basic Regulation') ([2]),

Having regard to the proposal made by the Commission after consultation of the Advisory Committee,

Whereas:

A. **EXISTING MEASURES**

(1) The Council, by Regulation (EC) No 1784/2000 of 11 August 2000 imposed a definitive anti-dumping duty on imports of certain 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 (the 'Definitive Regulation') ([3]). The Definitive Regulation was preceded by Commission Regulation (EC) No 449/2000 of 28 February 2000 imposing a provisional anti-dumping duty on imports of certain 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 (the 'Provisional Regulation') ([4]).

B. **REPORTS ADOPTED BY THE DISPUTE SETTLEMENT BODY OF THE WTO**

(2) On 18 August 2003, the Dispute Settlement Body ('DSB') of the World Trade Organisation ('WTO') adopted an Appellate Body report ('ABR') and a Panel report ('PR') as modified by the ABR on the case 'European Communities (EC) — anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil' ([5]) (the ABR and PR are hereinafter referred to as the 'Reports').

(3) The Reports requested the European Communities to bring the measure into conformity with the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('ADA') as regards the following aspects:

(i) Article 2.4.2 of the ADA: in 'zeroing' negative dumping margins in its dumping determination.

(ii) Articles 12.2 and 12.2.2 of the ADA: failure to make directly discernible, from the published provisional or definitive determinations, that the European Communities addressed, or explained the lack of significance, of the following injury factors listed in Article 3.4 of the ADA: wages, productivity, return on investments, cash flow, ability to raise capital and magnitude of the actual margin of dumping.

(iii) Article 6.2 and 6.4 of the ADA: failure to disclose to the interested parties during the anti-dumping investigation the information on injury factors listed above under point (ii).

(4) The Commission reassessed the findings by taking into account the recommendations set out in the Reports on the basis of information which was collected in the original investigation which took place in 1999/2000. Unless otherwise stated, the assessment made in the Definitive Regulation remains valid. The reassessment shows that injurious dumping still exists although at a slightly lower level.

C. **PROCEDURE**

(5) Following the adoption of the ABR by the DSB the interested parties in this proceeding, i.e. the Brazilian exporting producer and the Community industry ('CI'), received disclosure of the facts and considerations on the dumping calculation and the injury factors mentioned under recital 3(ii). All parties were informed of the essential facts and considerations on the basis of which it was intended to amend and confirm the Definitive Regulation. They were also granted a period within which to make representations subsequent to this disclosure. All interested parties were granted an opportunity to be heard by the Commission. However, no such hearing was requested by any interested party.

([1]) OJ L 201, 26.7.2001, p. 10.
([2]) OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 1972/2002 (OJ L 305, 7.11.2002, p. 1).
([3]) OJ L 208, 18.8.2000, p. 8.
([4]) OJ L 55, 29.2.2000, p. 3.
([5]) Document WT/DS219/10 of 27 August 2003.

(6) All comments submitted by the interested parties were considered and, where appropriate, reflected in the amended findings.

(7) It is recalled that the investigation of dumping covered the period from 1 April 1998 to 31 March 1999 (investigation period 'IP'). The investigation relating to the trends relevant in the context of the injury assessment covered the period from 1 January 1995 up to the end of the IP (i.e. 31 March 1999). This period will be referred to as 'the period considered'.

D. **AMENDED AND CONFIRMED FINDINGS**

1. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

(8) The product concerned is threaded malleable cast iron tube or pipe fittings which are joined by a screwing joining system, falling within CN-code ex 7307 19 10 (TARIC code 7307 19 10 11 and 7307 19 10 19). The Reports do not affect the findings set out in the Definitive Regulation as regards the product under consideration and like product.

2. DUMPING

2.1. **Introduction**

(9) The following will detail the reassessed findings based on the recommendations in the Reports concerning the practice of 'zeroing' when establishing the weighted average dumping margin.

(10) All other calculation methods applied are those used in the original investigation. For further details, reference is made to the Provisional and Definitive Regulation.

2.2. **Brazil**

(11) It is recalled that during the original investigation Indústria de Fundição Tupy Ltda was the only known exporting producer of the product concerned in Brazil.

(12) As to the findings concerning normal value, the export price and adjustments made in accordance with Article 2(10) of the Basic Regulation, no changes have been necessary. For further details, reference is made to recitals 20 to 31 and 35 to 49 of the above mentioned Provisional and to recitals 24 to 27, 30, 31, 38 to 43, 46 to 48 and 51 to 54 of the Definitive Regulation.

(13) As in the Provisional and Definitive Regulations, the weighted average normal values of each type of the product concerned exported to the European Community were compared to the weighted average export price of each corresponding type of the product concerned. In compliance with the recommendations of the Report, no 'zeroing' was applied in calculating the overall dumping margin.

(14) The revised dumping margin expressed as a percentage of the cif import price at the Community frontier is:

Indústria de Fundição Tupy Ltda: 32 %.

(15) The level of cooperation was high. Consequently, the revised residual dumping margin is set at the same level as for Indústria de Fundição Tupy Ltda, i.e. 32 %.

2.3. **Disclosure**

(16) The above revised findings on dumping were disclosed to all interested parties subject to the present investigation which were granted the possibility to present their views and comments and to be heard by the Commission.

(17) None of the parties concerned objected to the Commission findings on dumping.

3. DEFINITION OF THE COMMUNITY INDUSTRY

(18) The findings concerning the definition of the CI, summarised in recitals 65 to 68 of the Definitive Regulation remain unaffected by the recommendations and conclusions set out in the Reports.

4. INJURY

4.1. **Imports from the countries concerned and price undercutting**

(19) The findings set out in recitals 69 to 94 of the Definitive Regulation remain unaffected by the recommendations in the Reports.

4.2. **Situation of the Community industry**

4.2.1. *Preliminary remark*

(20) This part sets out the reassessed findings based on the recommendations in the Reports concerning the injury analysis. The Reports conclude that the Community acted inconsistently with Articles 12.2 and 12.2.2 of the ADA by failing to make directly discernible from the published provisional or definitive determinations that the European Community addressed or explained the lack of significance of the following injury factors listed in Article 3.4 of the ADA: wages, productivity, return on investments, cash flow, ability to raise capital and magnitude of the actual margin of dumping. It is recalled that these injury factors have been examined during the original investigation. However, as they were at the time considered not to be significant, and were therefore not included in the analysis made available to the public, they were only laid down in an internal note to the file.

4.2.2. *Situation of the Community industry as set out in the Provisional and Definitive Regulations*

(21) It is recalled that in recitals 160 and 161 of the Provisional Regulation it was concluded that the CI suffered material injury within the meaning of Article 4(1) of the Basic Regulation. It was found that the situation of the CI deteriorated during the IP, in particular because of a decline in production, production capacity, sales and market share. Moreover, the CI suffered a significant loss of employment and a decline in investments, as well as an increase of stocks. As to the capacity utilisation, its increase is explained by the reduced production capacity.

4.2.3. *Re-examination of the injury findings in the light of the recommendations and ruling of the DSB*

(22) In addition to the injury factors as set out in recitals 150 to 159 of the Provisional Regulation, i.e. production, production capacity, capacity utilisation, sales volume, market share, sales prices, stocks, profitability, employment and investments, the following injury factors were analysed, and, following the Reports recommendations, are now set out in detail below.

4.2.3.1. Wages

(23) Wages, expressed as the total annual labour cost for the production of the product concerned developed as follows:

Table 1

Wages

	1995	1996	1997	1998	IP
Total annual labour costs (EUR '000)	44 730	48 479	48 375	46 995	47 132
Index	*100*	*108*	*108*	*105*	*105*

Source: Annual accounts of the CI.

(24) Wages increased by around 5 % between 1995 and the IP. When taking 1996 as a starting point, the wages decreased by around 3 %.

(25) This factor follows roughly the general development of wages in the sector and the movements in employment observed for the CI. Between 1996 and the IP this factor declined by 3 %, which was in line with the developments of employment mentioned at recital (158) of the Provisional Regulation (decrease of 6 % between 1995 and IP, slight decline of around 1 % between 1996 and IP).

4.2.3.2. Productivity

(26) Productivity, measured as the output of persons employed, developed as follows:

Table 2

Productivity

	1995	1996	1997	1998	IP
Production in tonnes per employee	21,58	19,47	19,76	20,84	20,82
Index	*100*	*90*	*92*	*97*	*96*

Source: Verified questionnaire replies of the CI.

(27) Productivity fluctuated over the period examined but an overall fall of 4 % was experienced over the period 1995 to the IP. Productivity increased by around 7 % between 1996 and the IP. This factor is in line with employment and production figures which were already mentioned at recitals 150 and 158 of the Provisional Regulation.

4.2.3.3. Return on investments ('ROI')

(28) ROI, which is calculated by dividing the CI financial result (profit or loss) by the amount of investments, developed as follows:

Table 3

ROI

	1995	1996	1997	1998	IP
ROI	– 6,55 %	3,72 %	– 2,78 %	– 0,70 %	– 2,72 %

Source: Verified questionnaire replies of the CI and their annual accounts.

(29) ROI developed from -6,55 % to -2,72 % between 1995 and the IP. However it is recalled, that, as explained at recital 157 of the Provisional Regulation, the financial result of the CI was negatively affected, in an exceptional way, by costs associated with a plant closure in 1995. Moreover, that year was also marked by restructuring efforts of two producers included in the definition of the CI, in particular with the aim of production rationalisation and of investments required to implement the Community's environmental legislation. This also had a negative impact on the financial result of the CI. On this basis, it is considered that the year 1995 was unrepresentative of the situation of the CI and cannot be considered as a meaningful basis for analysing trends on ROI.

(30) This remark also applies to other injury factors which include the financial results of the CI, e.g. cash flow as explained at recital 33 below.

(31) When comparing the year 1996 to the IP, ROI decreased by 6,4 percentage points, from 3,72 % to -2,72 %. The negative development of ROI was broadly in line with the negative development of profitability, which decreased by 2,3 percentage points during the same period.

4.2.3.4. Cash flow

(32) Cash flow developed as follows:

Table 4

Cash flow

	1995	1996	1997	1998	IP
Cash flow (EUR '000)	10 522	12 799	19 339	12 236	12 205
Index	*100*	*122*	*184*	*116*	*116*
Index		*100*	*151*	*96*	*96*

Source: Annual Accounts of the CI.

(33) It should be noted that the turnover of the product concerned has always represented over 50 % of the total turnover of all the activities of the CI, as reported in the audited accounts. The above table shows the cash flow for the product concerned calculated on the basis of a turnover allocation for the years from 1995 to 1998. Given that audited accounts were not available for the IP, cash flow was calculated on the basis of the total turnover and the turnover for the product concerned verified during the investigation. As explained in recital (29), the financial result achieved by the CI in 1995 was negatively affected in an exceptional way by costs associated with a plant closure and restructuring and therefore that year cannot be considered as a meaningful representative basis for analysing trends on cash flow. Between 1995 and 1998 cash flow increased by around 16 % and remained stable during the IP. When taking 1996 as a starting point cash flow decreased by around 4 % up to the end of the IP. It was found, that the negative development of cash flow was broadly in line with the negative development of profitability.

4.2.3.5. Ability to raise capital

(34) During the original investigation there was no claim from the CI (nor any indication), that it encountered problems to raise the capital needed for its activity. However, it is clear that the significant deterioration in the financial situation of the CI (see in particular profitability, cash flow and ROI), may negatively affect the ability to raise capital in the near future.

4.2.3.6. Magnitude of the actual margin of dumping

(35) As concerns the impact on the CI of the magnitude of the actual margin of dumping, given the volume and the prices of the imports from the countries concerned, this impact cannot be considered negligible. This finding remains valid notwithstanding the reduction of the dumping margin for one of the exporters as explained in recital 14.

(36) The Brazilian exporting producer objected to the Commission's finding that the impact of the magnitude of the actual dumping margin on the Community industry was not negligible. According to the Brazilian producer, the difference of almost 50 % between the dumping margin and the underselling margin was evidence of a very large difference in the cost of production of the Community producers on the one hand and the Brazilian exporter on the other hand. Therefore, it was claimed that even if dumping were totally eliminated the imports from Brazil would still substantially undercut the non-injurious price of the Community industry. The Brazilian exporting producer argued finally that in the context of a highly sensitive price market, the impact of the actual margin of dumping would thus clearly be negligible, contrary to the Commission's findings.

(37) It has to be recalled that according to Article 3(5) of the Basic Regulation, the factor 'magnitude of the actual margin of dumping' is examined in the framework of the analysis of the state of the domestic industry. In this context, it is the Community's consistent practice to set the actual dumping margin in relation to the state of the domestic industry taking into account the volume and the prices of the imports from the country concerned. An analysis as the one proposed by the Brazilian exporter, i.e. a comparison of the dumping margin with the underselling margin leading to conclusions with respect to a difference in cost of production between exporting producers and the Community industry would by far exceed the framework set by Article 3(5) of the Basic Regulation and would bring in an element of causal link into such an analysis. This is clearly not required by Article 3(5) of the Basic Regulation and would wipe out the distinction between the analysis of the state of the Community industry on the one hand and the causal link between dumping and injury on the other hand, which is in any event considered separately. In this context it should be also noted that the underselling margin is calculated for the purpose of applying the 'lesser duty rule' according to which the anti-dumping duty is set at the level of either the dumping or the injury margin whichever is lower. It has to be underlined that the application of the 'lesser duty rule' and thus the calculation of the underselling margin is not a WTO obligation. Even assuming — for the sake of argument and without recognising the substance of the Brazilian exporter's claim — that a

comparison between the cost of production of the exporting producer and Community producers were warranted in this context, such an analysis could only be based on a comparison of the dumping margin with the undercutting (not the underselling) margin. The levels of both margins are however comparable. Therefore, without dumping, the price difference between imports from Brazil and the sales of the Community industry would be minimal.

(38) Therefore, the argument had to be rejected.

4.2.4. *Comments of the exporting producer on certain injury factors*

(39) The Brazilian exporting producer claimed that for certain injury factors (profitability, ROI, cash flow, ability to raise capital) the year 1995 had not been considered for the trend's analysis. It was claimed that 1995 was disregarded for those factors which otherwise would have demonstrated a positive development. According to the Brazilian exporting producer this constitutes an inconsistent and discriminatory approach and does not fulfil the requirement of an objective and unbiased examination contrary to Articles 3.1 and 17.6 (i) of the ADA.

(40) Firstly it should be noted, that with regard to profitability, no new determination has been made for the purpose of implementing the Reports. It has to be recalled that in the framework of the dispute settlement proceedings, Brazil put forward exactly the same arguments as the ones referred to above concerning profitability. The arguments were turned down by the Panel and no recommendation at all was made with regard to this factor. The factor 'profitability' has therefore not been reassessed.

(41) Secondly, it should be noted that — in line with the original investigation — the trends with regard to the injury indicators which had been analysed but which had not been made public during the original investigation, have been analysed as from 1995. This also relates to the factor 'ability to raise capital'. In particular for two injury factors (ROI and cash flow) it has been considered that the year 1995 was an exceptional year and could thus not be considered meaningful for the reasons set out in detail at recitals 29 and 33. In fact it is recognised by several Panel and AB reports that the assessment of the injury factors is not limited to a rigid comparison of the beginning and the end of the years of the period considered. It should also be noted that the Brazilian exporting producer has not contested the substance of the reasoning set out in recital 29.

(42) As to the alleged inconsistency of the approach, the following has to be noted. It is precisely for reasons of consistency with the analysis of the original investigation, that it is necessary — for the purpose of implementing the Reports — to analyse cash flow and ROI, which are directly derived from profitability, on the same basis as profitability in the original investigation for which 1995 could reasonably be excluded from the trend analysis according to the conclusions of the Reports. The approach chosen by the EC authorities was therefore consistent and objective.

(43) Therefore, the arguments had to be rejected.

4.2.5. *Conclusion on injury*

(44) Based on the above analysis, it is concluded that the findings in respect of wages, productivity, return on investments and cash flow were in line with certain other factors analysed and made public during the original investigation. As regards the ability to raise capital, there was no claim that the CI encountered any difficulty to raise the capital needed for its activity. This factor, however, should be seen in the light of the continuous degradation of the financial situation of the CI. As regards the margin of dumping, it is concluded that, given the volume and the prices of the imports from the countries concerned, its impact cannot be considered negligible.

(45) Based on the above, it is confirmed that the Community industry suffered material injury during the period considered.

5. CAUSATION

(46) The contents and conclusions reached in recitals 101 to 114 of the Definitive Regulation remain unaffected by the Reports and the re-examined injury analysis.

(47) The Brazilian exporter contended that the injury of the Community industry was not caused by dumped imports, but by the lack of productivity of the Community industry as evidenced by the almost 50 % difference between the dumping margin and the underselling margin and by the fact that the Community industry had undergone restructuring efforts in 1995 with the aim of rationalising production. The similarity of this argument with the one made with regard to the magnitude of the dumping margin referred to above at recital 36 is evident. The Brazilian exporter claimed in addition that while the Commission had analysed the difference in cost of production, it had however limited this analysis to differences regarding energy consumption linked to the difference of quality and production processes between black heart and white heart fittings.

(48) It has to be recalled that in the framework of the dispute settlement proceedings, Brazil put forward exactly the same arguments as the ones referred to above. The arguments were turned down by the Panel and the Appellate Body and no recommendation at all was made with regard to the causal link analysis.

(49) Therefore, the arguments mentioned in recital 47 had to be rejected.

6. COMMUNITY INTEREST

(50) The contents and conclusions reached in recitals 178 to 186 of the Provisional Regulation and 115 to 117 of the Definitive Regulation remain unaffected by the Reports and the re-examined injury analysis.

7. AMENDED MEASURES

(51) As shown above, a full examination of the facts established and the conclusions reached in the original investigation, taking account of the recommendations and rulings set out in the Reports, demonstrates that imports from Brazil were still injuriously dumped, although at a slightly lower level,

HAS ADOPTED THIS REGULATION:

Article 1

The table in Article 1(2) of Regulation (EC) No 1784/2000 is hereby amended as follows for products originating in Brazil:

Country	Definitive duty (%)	TARIC additional code
Brazil	32,0	—

Article 2

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 8 March 2004.

For the Council
The President
D. AHERN