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UNITED STATES – ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS (OCTG) FROM MEXICO

Recourse to Article 21.5 of the DSU by Mexico

Request for the Establishment of a Panel

The following communication, dated 12 April 2007, from the delegation of Mexico to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

Mexico hereby requests the establishment of a Panel under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and paragraph 2 of the *Agreement between Mexico and the United States Regarding Procedures under Articles 21 and 22 of the Dispute Settlement Understanding* (US–Mexico Sequencing Agreement)[1] with respect to the failure of the United States to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (WT/DS282).

I. History of the dispute

On 28 November 2005, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, in this dispute. The resulting DSB recommendations and rulings related to the "likelihood of dumping" determination by the United States Department of Commerce (USDOC) in the sunset review of the anti-dumping duty order on OCTG from Mexico. The Panel found that the United States acted inconsistently with Article 11.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") in the sunset review for OCTG from Mexico because the USDOC determination that dumping was likely to continue or recur was not supported by reasoned and adequate conclusions based on the facts before it.[2] This finding was not appealed by the United States.

The United States and Mexico mutually agreed, pursuant to Article 21.3(b) of the DSU, that the reasonable period of time (RPT) for the United States to implement the recommendations and rulings of the DSB would be six months, expiring on 28 May 2006.[3]

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[1] *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico: Understanding between Mexico and the United States Regarding Procedures under Articles 21 and 22 of the DSU* (WT/DS282/12), 14 July 2006.

[2] Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods from Mexico* (WT/DS282/R), adopted on 28 November 2005, paragraph 8.2.

[3] *United States – Anti-Dumping Measures on Oil Country Tubular Goods from Mexico*, Agreement under Article 21.3(b) of the DSU, 17 February 2006 (WT/DS282/11).

The United States did not adopt any measure to comply with the recommendations and rulings of the DSB by 28 May 2006.

On 9 June 2006, subsequent to the expiration of the RPT, the USDOC issued a determination under Section 129 of the *Uruguay Round Agreements Act* (2006 Section 129 Determination) that purported to bring the United States into compliance with the recommendations and rulings of the DSB and with the WTO obligations of the United States.[4] On 21 August 2006, Mexico requested consultations with the United States pursuant to Article 21.5 of the DSU and paragraph 1 of the US-Mexico Sequencing Agreement.[5] The Parties held consultations in Washington DC on 31 August 2006, but the consultations failed to resolve the dispute.

II. Request for the establishment of a panel

Mexico asserts that it has a *prima facie* case demonstrating that the US has not satisfied the conditions established in Article 11.3 of the Anti-Dumping Agreement such that it can continue the anti-dumping measure. This fact, however, should not be interpreted as a recognition or acceptance by Mexico that it has the burden of proving so. On the contrary, in Mexico's view, as the party invoking the exception, continuing the measure, and now seeking to demonstrate that it is in compliance with the requirements for invoking the exception, the United States has the burden of proving that continuation of the measure complies with Articles 11.3.

Mexico requests the establishment of a Panel pursuant to DSU Article 21.5 and paragraph 2 of the US–Mexico Sequencing Agreement.

Mexico's claims are enumerated below.

1. The United States violates Articles 11.3 because it maintains its anti-dumping measure without a legal basis under the Anti-dumping Agreement

Mexico asks the Panel to rule that the legal basis under the Anti-dumping Agreement for the continuation of the anti-dumping order by the United States lapsed on 28 May 2006. At that moment, the only basis under the Anti-Dumping Agreement for the continuation of the anti-dumping order was the original, WTO-inconsistent USDOC determination. The United States cannot continue an anti-dumping order on the basis of an illegal original measure.

The time-bound limits contained in Article 11.3 and 11.4 of the Anti-Dumping Agreement and in the DSU for continuing the measure lapsed on 28 May 2006. Accordingly, the 2006 Section 129 determination issued on 9 June 2006 could not provide a legal basis for maintaining the anti-dumping order in accordance with Article 11.3.

Before the Panel and the Appellate Body Mexico requested the termination of the measure. The DSB found that the United States did not meet the Article 11.3 conditions. However, under the DSU, the United States was granted a reasonable period of time to bring its measure into conformity with its WTO obligations. When the United States failed to adopt any implementing measures by the time of the expiration of the RPT on 28 May 2006, its right under Article 11.3 to maintain the duty lapsed. On that date, the measure had to be terminated. Consequently, Mexico requests the Panel to

[4] Memorandum to David M. Spooner, Assistant Secretary for Import Administration, from Stephen J. Claeys, Deputy Assistant Secretary for AD/CVD Operations, *Section 129 Determination: Final Results of Sunset Review, Oil Country Tubular Goods from Mexico*, A-201-817, 9 June 2006.

[5] *United States – Anti-Dumping Measures on Oil Country Tubular Goods from Mexico, Recourse to Article 21.5 of the DSU,* Request for Consultations, 24 August 2006 (WT/DS282/13).

rule that by continuing the measure beyond that date, the United States has violated Article 11.3 and that the 2006 Section 129 Determination cannot retroactively "cure" that violation.

2. The 2006 Section 129 Determination is inconsistent with the WTO obligations of the United States

The 2006 Section 129 Determination was not supported by reasoned and adequate conclusions based on the facts before the USDOC. The USDOC did not properly establish a factual basis or objectively assess the facts that were before it as to whether dumping would be likely to continue or recur. The USDOC's conclusions are not reasoned and not based on positive evidence, and the evidence developed does not support a WTO-consistent determination that dumping would be likely to continue or recur. The 2006 Section 129 Determination is thus inconsistent with the WTO obligations of the United States. Specifically:

- The USDOC failed to comply with the strict conditions for the maintenance of an anti-dumping duty order beyond five years, in violation of Articles 11.1 and 11.3 of the Anti-Dumping Agreement.

- The USDOC failed to rely on positive evidence and did not evaluate the facts, in an unbiased and objective manner, in making findings and reaching conclusions regarding the Mexican exporters Tubos de Acero de Mexico S.A. (TAMSA) and Hylsa S.A. de C.V. (Hylsa), in violation of US obligations under Article 11.3 of the Anti-dumping Agreement. The USDOC improperly determined that dumping was likely, despite positive evidence on the record demonstrating that the only dumping margin ever calculated for the Mexican exporters was not probative of likely dumping in this case. This positive evidence included TAMSA's demonstrated ability to export to the United States without dumping, and TAMSA's demonstration that the conditions that led to the only dumping margin in the history of the case (TAMSA's foreign currency exposure at the time, and the significant devaluation of the Mexican peso) were unlikely to recur.

- In the 2006 Section 129 Determination, the USDOC inferred likely dumping based on the decline in volume of Mexican OCTG exports to the United States after the imposition of the anti-dumping order. The USDOC did not evaluate in an unbiased and objective manner the evidence provided by TAMSA to explain the reasons for the volume decline. Nor did the USDOC establish that the volume decline in this case was not probative of likely dumping. The USDOC's inference of likely dumping is inconsistent with Article 11.3.

- As purported "evidence of continued dumping," the 2006 Section 129 Determination relied on the preliminary determination in the Fourth Administrative Review that Hylsa was dumping at a margin of 1.47 per cent. The USDOC's reliance on the alleged "continued dumping" by Hylsa is inconsistent with the United States' WTO obligations for several reasons:

  - The dumping margin was preliminary; it was not a final determination of dumping. Therefore, it is not positive evidence of continued dumping for the purposes of a WTO-consistent determination under Article 11.3.

  - The USDOC merely asserted that this preliminary determination was evidence of dumping, yet it failed to establish in the Section 129 Determination any factual basis for this assertion. The USDOC did not

include in the administrative record of the case any information relating to the calculation of this preliminary margin.

- The preliminary dumping margin in the Fourth Administrative Review was calculated on the basis of the WTO-inconsistent practice of "zeroing."[6] Therefore, the preliminary dumping margin is inconsistent with Articles 2, including 2.1, 2.4, 2.4.2, and 9, including 9.3, of the Anti-Dumping Agreement, and it is not positive evidence of continued dumping for the purposes of a WTO-consistent determination under Article 11.3.

- While the 2006 Section 129 Determination noted that the results of the USDOC's Fourth Administrative Review were "currently subject to litigation," it did not reflect that the USDOC had calculated a zero dumping margin in its redetermination on remand in connection with that litigation under Chapter XIX of the North American Free Trade Agreement (NAFTA).[7] By relying on a finding of dumping by Hylsa after the USDOC had already issued a determination that Hylsa was not dumping, the USDOC failed to evaluate the evidence in an unbiased and objective manner, in violation of US obligations under Article 11.3 of the Anti-Dumping Agreement.

For all the reasons identified above, the United States also failed to comply with its obligations under Articles 1 and 18.1 of the Anti-Dumping Agreement and Article XVI:4 of the Agreement establishing the WTO.

III. Request

Mexico requests the Panel to find (i) that the legal basis for continuing the anti-dumping measure lapsed on 28 May 2006 with the failure by the United States to adopt any measures to bring itself into compliance; and (ii) that the 9 June 2006 Section 129 determination did not bring the United States into compliance with its obligations. Mexico considers that under the circumstances, the only way the United States can comply with its WTO obligations is by terminating the measure. Therefore, Mexico requests the Panel to suggest to the United States that it terminate the measure.

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[6] In addition, the preliminary dumping margin was based on an unreasonable treatment of Hylsa's packing costs, and an unreasonable treatment of the cost of producing OCTG in different months.

[7] This rate was then lowered to 0.79 percent twelve days after the sunset determination, and thereafter subsequently determined to be zero percent following the remand proceeding conducted pursuant to a NAFTA panel ruling. See NAFTA Panel Decision and Remand Order, Oil Country Tubular Goods from Mexico, USA-MEX-2001-1904-05, January 27, 2006; U.S. Department of Commerce, Redetermination on Remand, In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Review and Determination Not to Revoke, April 27, 2006; see also Panel Decision and Remand Order, Oil Country Tubular Goods from Mexico, USA-MEX-2001-1904-05, August 11, 2006.