

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

Notification of an Appeal by Mexico under Article 16.4 and Article 17 of the Understanding
on Rules and Procedures Governing the Settlement of Disputes (DSU) and
Rule 20(1) of the Working Procedures for Appellate Review

The following notification dated 4 August 2005, from the delegation of Mexico, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Mexico notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (WT/DS282/R) (the "Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. Mexico seeks review by the Appellate Body of the Panel's failure to find that the Sunset Review Determination of the US International Trade Commission ("USITC") in OCTG from Mexico was inconsistent with the Anti-Dumping Agreement and Article VI of the GATT 1994 because the USITC did not establish the required causal link between the likely dumping and the likely injury.¹ The Panel's conclusions on this issue are in error, and are based on erroneous findings on issues of law and related legal interpretations:

- a. By failing to find that a WTO-consistent determination of likely dumping is a legal predicate to a WTO-consistent determination of likely injury, the Panel erred in its interpretation and application of Articles 1, 3, 11.1, 11.3 and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, and failed to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it.²
- b. Although the Panel found that the Sunset Review Determination of the US Department of Commerce ("USDOC") was inconsistent with Article 11.3 of the Anti-Dumping Agreement³, it failed to find that the USITC Sunset Review Determination was also WTO-inconsistent. The Panel dismissed Mexico's claim that the Anti-Dumping Agreement and the GATT 1994 established inherent causation requirements, parallel to

¹Panel Report, paragraph. 8.7.

²Panel Report, paragraphs. 6.12, 6.14, 7.113, 7.114, 7.115, 7.117, 7.121, 7.122, 7.123, 7.130, 7.138, 7.143, 7.144, 8.7.

³Panel Report, paragraph. 8.2.

but independent of those in Article 3.5.⁴ The Panel incorrectly interpreted Articles 1, 3, 11.1, 11.3, and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. The Panel also failed to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it.⁵

- c. The Panel failed to apply the rulings adopted by the Dispute Settlement Body in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (DS268).⁶ The DSB rulings in DS268, combined with the Panel's rulings in this case, establish that there is no WTO-consistent basis for a finding of likely dumping for any of the reviews of the WTO Members included in the USITC's cumulative likelihood of injury analysis. The Panel in the present case erroneously failed to find that the USITC lacked a WTO-consistent basis for its determinations on likely injury, likely price effects or likely impact.⁷ The Panel thus erred in interpreting and applying Articles 1, 3, 11.1, 11.3, and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. The Panel also failed to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it.⁸

2. Mexico seeks review by the Appellate Body of the Panel's failure to find that the Sunset Review Determination of the USITC was WTO-inconsistent because the USITC failed to comply with the conditions for a WTO-consistent likelihood of injury analysis.⁹ Although the Panel recognized that "Mexico requested a finding regarding its 'third cumulation argument' (regarding the evidentiary basis for the USITC's determination that imports would be simultaneously present in the US market)¹⁰, the Final Report contains no explanation of why it was appropriate for the Panel not to rule on Mexico's claim.¹¹ The Panel erred in interpreting and applying Articles 1, 11.3, and 18.3 of the Anti-Dumping Agreement, and failed to comply with its obligation under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement to make an objective assessment of the matter before it.¹² Mexico respectfully requests the Appellate Body to address, complete the analysis, and rule in favor of Mexico on the following issues of law and related legal interpretations, on which the Panel declined to rule:

- a. The Panel erroneously concluded that the USITC's analysis of the cumulated imports for purposes of its likelihood of injury determination was consistent with Article 11.3

⁴Panel Report, paragraph. 6.12.

⁵Panel Report, paragraphs. 6.12, 6.14, 7.113, 7.114, 7.115, 7.117, 7.121, 7.122, 7.123, 7.130, 7.138, 7.143, 7.144, 8.7.

⁶See *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, DS282, Request of the Panel for Comments on the Appellate Body's Report in *US-OCTG from Argentina*, DS268, Nov. 22, 2004; see also Panel Report, Annex E-14, Annex E-15.

⁷Panel Report, paragraph. 8.7.

⁸Panel Report, paragraphs. 6.12, 6.14, 7.113, 7.114, 7.115, 7.117, 7.121, 7.122, 7.123, 7.130, 7.138, 7.143, 7.144, 8.7.

⁹Panel Report, paragraphs. 8.5, 8.7, 8.8.

¹⁰Panel Report, paragraph. 6.19; see also Panel Report, paragraph. 3.1 (16th bullet) ("irrespective of the applicability of Article 3.3 to Article 11.3, the USITC failed to satisfy the requirements inherent in the conduct of any cumulative injury assessment; the USITC failed to ensure that cumulation was appropriate in light of the conditions of competition between imported OCTG, and between imported OCTG and the domestic like product, which findings required a threshold finding that the imports would be simultaneously present in the US market").

¹¹Panel Report, paragraphs. 6.19, 7.150, and 7.151.

¹²Panel Report, paragraphs. 6.19, 7.150, 7.151, 8.5, 8.7, 8.8.

exclusively because it determined that Article 3.3 of the Anti-Dumping Agreement does not apply to Article 11.3 reviews.¹³

- b. The Panel failed to find that the USITC's Sunset Review Determination was inconsistent with US obligations under the Anti-Dumping Agreement because:
 - (i) The likelihood of injury determination lacked a sufficient factual basis and could not result in an objective examination of whether the subject imports were likely to be simultaneously present in the domestic market for purposes of determining the likelihood of injury;
 - (ii) The USITC failed to ensure that cumulation was appropriate in light of the conditions of competition between imported OCTG, and between imported OCTG and the domestic like product, which findings required a threshold finding that the subject imports would be simultaneously present in the US market;
 - (iii) The USITC employed a WTO-inconsistent standard in the cumulative likelihood of injury analysis¹⁴; and
 - (iv) The USITC's determination did not identify any time-frame within which the subject imports would be simultaneously present in the US market during which time the corresponding likely injury would occur.
- c. The Panel erroneously disregarded certain of Mexico's arguments supporting its claim regarding the WTO-inconsistency of the USITC's sunset review determination based on an erroneous finding that Mexico had failed to develop and elaborate its arguments.¹⁵
- d. The Panel also erroneously disregarded Mexico's separate claim that even assuming *arguendo* that the USITC was neither prohibited from, nor required to, conduct a cumulative injury assessment, because it decided to undertake cumulative analysis, then the USITC was obliged to make sure that the inherent conditions necessary to cumulate were satisfied.¹⁶

3. Mexico seeks review by the Appellate Body of the Panel's failure to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it, and its error in the interpretation and application of Articles 1, 2, 11.3, and 18.3 of the Anti-Dumping Agreement regarding Mexico's claims related to the USDOC's determination of the "margin likely to prevail."¹⁷ Specifically:

- a. The Panel erred in failing to find that the USDOC's determination of the "margin likely to prevail" for OCTG from Mexico violated Articles 2 and 11.3 because the margin was not calculated in accordance with the requirements of Article 2, and was used as an integral part of the determination under Article 11.3;

¹³Panel Report, paragraphs. 7.150, 7.151, 8.8.

¹⁴Panel Report, paragraph. 8.5.

¹⁵Panel Report, paragraph. 6.19.

¹⁶See Panel Report, paragraphs. 7.150, 7.151, 8.8; *see also* Panel Report, paragraph. 3.1 (15th bullet) ("in the alternative, *assuming arguendo*, that a cumulative injury analysis is permitted in sunset reviews, USITC violated Articles 11.3 and 3.3 because USITC failed to apply the requirements of Article 3.3 in this case").

¹⁷Panel Report, paragraphs. 6.10, 6.11, 7.78, 7.81, 7.83, 8.3.

- b. The Panel failed to find that the "margin likely to prevail" determined by the USDOC was a pre-WTO margin that was not the result of the application of the provisions of the Anti-Dumping Agreement and was therefore inconsistent with Articles 1, 2, 11.3, and 18.3 of the Agreement; and
- c. The Panel failed to find that the USITC's use of the WTO-inconsistent "margin likely to prevail" for purposes of its likelihood of injury analysis rendered its likelihood determination inconsistent with Article 11.3.

4. Mexico seeks review by the Appellate Body of the Panel's failure to make a specific finding that the United States had no legal basis to continue its anti-dumping measure on OCTG from Mexico beyond the maximum five year period established by Article 11.3 of the Anti-Dumping Agreement. The Panel's conclusions on this issue are in error, and are based on erroneous findings on issues of law and related legal interpretations. The erroneous findings of the Panel include the Panel's conclusions that "[o]ur decision not to make any suggestion regarding implementation, and specifically not to suggest immediate termination of the measure, fully disposed of Mexico's request, and no further findings are necessary."¹⁸ In making this determination, the Panel erred in interpreting and applying Article 11.3.

5. In the event of appeal by the United States and reversal by the Appellate Body on any of the conclusions reached by the Panel regarding the USDOC's Sunset Policy Bulletin (SPB), Mexico respectfully requests the Appellate Body to address, complete the analysis, and rule in favor of Mexico on the following claims, on which the Panel declined to rule:

- a. Mexico's claim that the US statute, the US Statement of Administrative Action (SAA), and the SPB violate Article 11.3 of the Anti-Dumping Agreement as such. The Panel considered that it was not "obliged to make findings in this context with respect to each aspect of Mexico's arguments in support of its claim."¹⁹
- b. Mexico's claim that United States failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the USDOC's sunset reviews of anti-dumping duty orders, in violation of Article X:3(a). Having found that the relevant portions of the SPB were inconsistent with Article 11.3, the Panel stated that it did not need to address this claim.²⁰

¹⁸Panel Report, paragraphs. 6.22. *See also* paragraph. 8.18.

¹⁹Panel Report, paragraph. 6.6.

²⁰Panel report, paragraphs. 7.67, 8.13.