

**UNITED STATES – SUNSET REVIEWS OF ANTI-DUMPING MEASURES
ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA**

Recourse to Article 21.5 of the DSU by Argentina

Request for the Establishment of a Panel

The following communication, dated 6 March 2006, from the delegation of Argentina to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

Argentina 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 *Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding Applicable to the WTO Dispute United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (Agreed Procedures for DS268)¹ with respect to the purported implementation by the United States of the recommendations and rulings of the Dispute Settlement Body (DSB) in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268).

I. The History of the Dispute

On 17 December 2004, the DSB adopted the Appellate Body Report² and the Panel Report³, as modified by the Appellate Body, in this dispute. The resulting DSB rulings encompassed both "as applied" violations related to the likelihood of dumping determination by the US Department of Commerce (USDOC) in the sunset review for oil country tubular goods (OCTG) from Argentina, and "as such" violations related to the "waiver" provisions of United States law and regulations.

The Panel found that the USDOC 2000 likelihood of dumping determination in the sunset review for OCTG from Argentina⁴ was inconsistent with Articles 11.3 and 6.2 of the Anti-Dumping

¹ WT/DS268/14, 9 January 2006.

² Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted on 17 December 2004 (the "Appellate Body Report").

³ Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, adopted on 17 December 2004 (the "Panel Report").

⁴ US Department of Commerce, *Final Results of Expedited Sunset Reviews: Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea*, 65 Federal Register 66701 (7 November 2000) (which incorporates USDOC *Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea: Final Results* (31 October 2000)).

Agreement.⁵ The Panel found that USDOC's likelihood of dumping determination was inconsistent with Article 11.3 because (i) there was an insufficient factual basis for the USDOC to have considered that dumping had continued over the life of the order;⁶ and (ii) the application of the waiver provisions invalidated the factual basis for the USDOC's likelihood of dumping determination.⁷ These findings were not appealed by the United States.

With respect to the "waiver" provisions of US laws and regulations, the Appellate Body upheld the Panel findings that:

- (i) Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the Anti-Dumping Agreement; and
- (ii) Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the Anti-Dumping Agreement with respect to respondents that file incomplete submissions in response to the USDOC's notice of initiation of a sunset review.⁸

The DSB recommended that the United States bring its measures into conformity with its WTO obligations.⁹

On 7 June 2005, an Arbitrator appointed pursuant to Article 21.3(c) of the DSU determined that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB would be 12 months from the date on which the DSB adopted the Panel and Appellate Body Reports, i.e., by 17 December 2005.¹⁰

On 28 October 2005, the United States published in the *Federal Register* a notice of amendment of section 351.218(d)(2) of the USDOC Regulations.¹¹ The *Federal Register* notice provides that the USDOC was "amending its regulations relating to sunset reviews to conform the existing regulation to the United States' obligations under Articles 6.1, 6.2, and 11.3" of the Anti-Dumping Agreement.¹² The amendment was effective as of 31 October 2005. The United States made no changes to Section 751(c)(4)(B) of the Tariff Act of 1930.

On 2 November 2005, the USDOC initiated proceedings under Section 129 of the *Uruguay Round Agreements Act* regarding the Panel's findings concerning the Department's likelihood determination. The USDOC did not issue any supplemental questionnaires, or provide a briefing schedule as to the timing of rebuttal and reply comments. There was no public hearing.

On 16 December 2005, the USDOC issued its Section 129 Determination (the "2005 Section 129 Determination"), in which it states: "we find there is likelihood of continuation or recurrence of

⁵ Panel Report, para. 8.1(d)(i).

⁶ Panel Report, para. 7.219; *see also* para. 8.1(d)(i).

⁷ Panel Report, para. 7.222; *see also* para. 8.1(d)(i).

⁸ Appellate Body Report, para. 365(c)(i) and (ii).

⁹ WT/DSB/M/180.

¹⁰ *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina. Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Award of the Arbitrator.* WT/DS268/12. 7 June 2005.

¹¹ US Department of Commerce, Procedures for Conducting Five-Year ("Sunset") Reviews for Antidumping and Countervailing Duty Orders: Final Rule, 70 *Federal Register* 62061 (28 October 2005).

¹² *Id.*

dumping had the antidumping duty order on OCTG from Argentina been revoked in 2000, i.e., at the end of the original sunset period."¹³

On 20 December 2005, the United States asserted to the DSB that it had "implemented the recommendations and rulings of the DSB in this dispute."¹⁴

On 26 January 2006, Argentina requested consultations with the United States under Article 21.5 of the DSU and paragraph 1 of the Agreed Procedures for DS268.¹⁵ The parties held consultations in Washington, D.C. on 7 February 2006, and by teleconference on 22 February 2006. The consultations failed to resolve the dispute.

II. Request for the Establishment of a Panel

There is thus "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB in this case. Accordingly, Argentina hereby requests the establishment of a Panel under Article 21.5 of the DSU and paragraph 2 of the Agreed Procedures for DS268 with respect to the purported implementation by the United States of the recommendations and rulings of the DSB in this case (WT/DS268).

The following measures of the United States taken to comply with the recommendations and rulings of the DSB are at issue in this proceeding:

- USDOC's 2005 Section 129 Determination (which purportedly (i) supplants or modifies the WTO-inconsistent USDOC 2000 likelihood of dumping determination,¹⁶ and (ii) provides the sole support for, or additional support for, USDOC's 2001 notice of continuation of the antidumping order on OCTG from Argentina).¹⁷
- Section 351.218(d)(2) of the USDOC Regulations, as amended by the United States.¹⁸

In addition, also at issue in this proceeding is the failure of the United States to take certain measures to comply with the recommendations and rulings of the DSB:

- The failure of the United States to "implement" the 2005 Section 129 Determination, pursuant to Section 129(b)(4) of the *Uruguay Round Agreements Act*.
- The failure of the United States either to repeal Sections 751(c)(4)(A) and (B) of the Tariff Act of 1930, or to amend these provisions to remove the WTO-inconsistency.

¹³ US Department of Commerce, *Issues and Decision Memorandum, Section 129 Determination: Final Results of Sunset Review, Oil Country Tubular Goods from Argentina*, A-357-810, 16 December 2005, at 11.

¹⁴ *Statements by the United States at the December 20th Meeting of the WTO Dispute Settlement Body*. <http://www.us-mission.ch/Press2005/1221DSBmeeting.html>.

¹⁵ *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods, Recourse to Article 21.5 of the DSU, Request for Consultations*, WT/DS268/15, 30 January 2006.

¹⁶ US Department of Commerce, *Final Results of Expedited Sunset Reviews: Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea*, 65 Federal Register 66701 (November 7, 2000) (which incorporates USDOC *Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea: Final Results* (31 October 2000)).

¹⁷ US Department of Commerce, *Continuation of Countervailing Duty and Antidumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, Korea and Mexico, and Partial Revocation of Those Orders From Argentina and Mexico With Respect to Drill Pipe*, 66 Federal Register 38630, 25 July 2001.

¹⁸ US Department of Commerce, *Procedures for Conducting Five-Year ("Sunset") Reviews for Antidumping and Countervailing Duty Orders: Final Rule*, 70 Federal Register 62061 (28 October 2005).

Argentina requests the Panel to find that through these measures and omissions the United States has failed to implement the recommendations and rulings of the DSB in this dispute, and has violated its WTO obligations, for the reasons set out below:

A. The USDOC's 2005 Section 129 determination is inconsistent with US WTO obligations

In 2001, the United States extended the anti-dumping duty order on Argentine OCTG based on USDOC's 2000 determination that dumping would be likely to continue or recur.¹⁹ The original Panel in this dispute ruled that the USDOC acted inconsistently with US obligations under Articles 6.2 and 11.3 of the Anti-Dumping Agreement.²⁰

The 2005 Section 129 Determination failed to implement the recommendations and rulings of the DSB and is inconsistent with the WTO obligations of the United States for the following reasons:

First, the 2005 Section 129 Determination is inconsistent with Articles 11.1, 11.3 and 11.4 of the Anti-Dumping Agreement because:

1. USDOC developed and relied on a new factual basis in 2005 to support its 2000 WTO-inconsistent likelihood of dumping determination; and
2. USDOC relied in 2005 on its inference from 2000 of likely dumping based on the post-order decline in Argentine OCTG imports, where USDOC did not (either in 2000 or 2005) support its assumption of likelihood of dumping and determine the reason for the volume decline.

Therefore, in the absence of a sufficient factual basis for an affirmative likelihood determination, the United States could not extend the anti-dumping duty order on OCTG from Argentina beyond the period specified in Articles 11.3 and 11.4 of the Anti-Dumping Agreement. The Anti-Dumping Agreement prohibits a Member from maintaining anti-dumping duties beyond five years in the absence of strict compliance with the requirements of Articles 11.1, 11.3 and 11.4 of the Anti-Dumping Agreement.

Second, in the alternative, even assuming *arguendo* that the USDOC were permitted to develop factual information in 2005 to support its 2000 likelihood determination, the 2005 Section 129 Determination nevertheless failed to satisfy the requirements of the Anti-Dumping Agreement for the following reasons.

1. The USDOC did not properly establish a sufficient factual basis, did not objectively assess the facts, applied a WTO-inconsistent legal standard, and did not reach a reasoned conclusion supported by positive evidence that expiry of the antidumping duty order would be likely to lead to continuation or recurrence of dumping in violation of Articles 11.1 and 11.3 of the Anti-Dumping Agreement:
 - a. The USDOC determination with respect to the Argentine exporters is inconsistent with Articles 11.1 and 11.3 of the Anti-Dumping Agreement.

¹⁹ US Department of Commerce, *Continuation of Countervailing Duty and Antidumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, Korea and Mexico, and Partial Revocation of Those Orders From Argentina and Mexico With Respect to Drill Pipe*, 66 Federal Register 38630, 25 July 2001.

²⁰ Panel Report, paras. 7.219, 7.222, 8.1(d)(i).

- b. As for the USDOC's statement in the 2005 Section 129 Determination that it also relied on its finding from the original sunset review that the post-order volume decline created a basis for inferring that dumping would be likely to continue or recur, this was an insufficient basis to support the 2000 likelihood determination and also cannot support the 2005 likelihood determination in violation of Articles 11.1 and 11.3 of the Anti-Dumping Agreement.
- 2. The USDOC's Section 129 proceeding was also inconsistent with Articles 6.1, 6.2, 6.4, 6.5, 6.5.1, 6.6, 6.8, 6.9, 12.2 and Annex II of the Anti-Dumping Agreement:
 - a. The USDOC's failure to provide the parties notice regarding the procedures it would follow to make its determination and to notify the parties of the essential facts under consideration that formed the basis for the Section 129 Determination, including, when necessary, by providing reasonable summaries of confidential information, was inconsistent with US obligations under Articles 6.1, 6.4, 6.5, 6.5.1, 6.9, and 12.2 of the Anti-Dumping Agreement.
 - b. The USDOC's failure to hold a hearing in the Section 129 proceeding to provide to interested parties a full opportunity for the defense of their interests was inconsistent with US obligations under Article 6.2 of the Anti-Dumping Agreement.
 - c. The USDOC's failure to require interested parties to submit non-confidential summaries of their written submissions in the Section 129 proceeding in such a manner as to permit a reasonable understanding of the substance of the confidential information submitted, in violation of US obligations under Articles 6.1, 6.2, 6.5, 6.5.1 of the Anti-Dumping Agreement.
 - d. The USDOC's characterization of Siderca's submitted cost information as unreliable, and USDOC's treatment of Acindar's information, was inconsistent with US obligations under Articles 6.1, 6.2, 6.4, 6.6, 6.8 and Annex II of the Anti-Dumping Agreement.
 - e. The USDOC's failure to provide public notice and sufficient explanation with respect to the 2005 Section 129 Determination is inconsistent with US obligations under Articles 11.3 and 12.2 of the Anti-dumping Agreement.
- 3. The failure of the US Trade Representative to direct the USDOC to "implement" the 2005 Section 129 Determination, pursuant to Section 129(b)(4) of the Uruguay Round Agreements Act, was inconsistent with US obligations under Article 13 of the Anti-Dumping Agreement. In failing to implement the 2005 Section 129 Determination, the United States denied the Argentine respondents an opportunity for judicial review in US courts of the determination purportedly providing the basis for the United States to continue the imposition of anti-dumping duties on OCTG from Argentina.

B. Sections 751(c)(4)(A) & (B) of the Tariff Act of 1930 are inconsistent with US WTO obligations

Section 751(c)(4)(B) of the Tariff Act of 1930 has been neither repealed nor amended. It therefore remains in existence, unchanged from the form in which it was found to violate Article 11.3 of the Anti-Dumping Agreement. Furthermore, the amendments to the USDOC regulations have not

eliminated the WTO-inconsistency of this statutory provision operating in conjunction with Section 351.218(d)(2)(ii) of USDOC's regulations, and Section 751(c)(4)(A) of the Tariff Act.

Therefore, Sections 751(c)(4)(A) & (B) of the Tariff Act are not in conformity with the recommendations and rulings of the DSB, or with US obligations under Articles 11.1 and 11.3 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

C. Section 351.218(d)(2) of the USDOC Regulations, as amended, is inconsistent with US WTO obligations

The United States has eliminated paragraph (d)(2)(iii) of Section 351.218 of the USDOC Regulations. Additionally, the United States has amended paragraph (d)(2)(ii) of Section 351.218 of the USDOC Regulations. This latter paragraph now provides in part that every statement of waiver must include a statement that the respondent interested party is likely to dump or benefit from a countervailable subsidy (as the case may be) if the order is revoked or the investigation is terminated.²¹

The revised Regulation does not address the statutory consequences for parties who "elect not to participate in a review" (as provided for in Section 751(c)(4)(A)) of the Tariff Act of 1930) but who also do not file a Statement of Waiver. In these circumstances, the terms of Section 751(c)(4)(B) mandate that USDOC "conclude that revocation of the order would be likely to lead to continuation or recurrence of dumping...with respect to that interested party." The United States has therefore failed to bring Section 751(c)(4)(B) of the Tariff Act of 1930 into conformity with the recommendations and rulings of the DSB and with US obligations under Articles 11.1 and 11.3 of the Anti-Dumping Agreement.

The revised Regulation is also inconsistent with the obligations of the USDOC under Articles 11.1 and 11.3 of the Anti-Dumping Agreement to, *inter alia*, "arrive at a reasoned conclusion" on the basis of "positive evidence."

By mandating that a party filing a Statement of Waiver must include a statement that it is likely to dump, and by requiring USDOC to conclude that dumping is likely to continue or recur with respect to any waiving interested party, Section 351.218(d)(2)(ii) denies non-waiving interested parties the full opportunity for the defense of their interests, in violation of US obligations under Articles 6.1 and 6.2 of the Anti-Dumping Agreement.

By mandating that a party filing a Statement of Waiver must include a statement that it is likely to dump, the USDOC will be required to make a likelihood determination without satisfying itself as to the accuracy of the information supplied by interested parties upon which its findings are based, in violation of US obligations under Article 6.6 of the Anti-Dumping Agreement.

The United States has therefore failed to bring the US statutory and regulatory waiver provisions into conformity with US obligations under Articles 6.1, 6.2, 6.6, 11.1, and 11.3 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

For all of the measures 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 WTO Agreement.

²¹ 70 Federal Register at 62062.