United States – Sunset Review of Anti-Dumping Measures on OCTG from Argentina – Recourse to Article 21.5 of the DSU by Argentina (DS268)

AB-2007-1

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

February 19, 2007

1. Members of the division, good morning. The United States welcomes this opportunity to present its views on some of the issues in this dispute. We have already addressed Argentina's other appeal, and we will therefore focus on rebutting arguments Argentina has made with respect to the U.S. appeal.

The Panel's Erroneous Interpretation of U.S. Waiver Provisions

2. The United States will address Argentina's legal arguments concerning the waiver provisions. But first, we would like to take a moment to put this issue in perspective because there is a risk of having the trees obscure the forest. Let us recall what the waiver provisions do. They allow a company to waive participation in the likelihood-of-dumping segment of a sunset review. As a result, a company, *if it so chooses*, can focus its resources on the likelihood-of-injury determination.

3. And it makes sense. Before the sunset proceeding even begins, a company is aware of the basic evidence concerning its own dumping behavior over the life of the order. The company knows, for example, whether it has been found to have sold dumped merchandise since the imposition of the measure. Recognizing, as the Appellate Body has, that companies have much of the information about likely dumping in their possession,[1] the United States provides a company that has concluded that it is in fact likely to dump the opportunity to say just that, and

[1] *See US - Corrosion-Resistant Steel (AB)*, para. 199.

thus avoid the expense of litigating that particular issue. Argentina's argument that a company is unlikely to file such a statement because it essentially constitutes an admission only underscores that a company will file such a statement with circumspection, which in turn underscores the fact that such a statement has inherent probative value. And the consequence of the company's statement that it is likely to dump is the entirely unsurprising determination that the company *is* likely to dump.

4. Argentina continues to insist that such a determination is not "reasoned" because Commerce will not take "other evidence" into account – but Argentina has never been able to identify *what* that evidence might be. Again, this issue must be examined with some perspective: are we really to conclude that a company-specific determination based on a company's own statement is not "reasoned"?

5. Moreover, Argentina's emphasis on the flawed nature of the company-specific determination is anachronistic. In the original proceeding, the Appellate Body found that "as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping."[2] The key flaw identified in the finding – the Appellate Body report even italicizes the word – was the *assumption* of likelihood. Specifically, the "assumption" identified by the Appellate Body was Commerce's finding of likelihood for a particular company without *any* evidence and then consideration of the assumption in its order-wide likelihood determination. *The "assumption" identified by the Appellate Body no longer*

[2]Appellate Body report, para. 234 (emphasis in original).

exists. The United States revised the waiver provisions to eliminate the assumption and to base a company-specific determination on the company's own submission. This leads to the simple question: *Where is the allegedly WTO-inconsistent assumption under the revised waiver provisions?*

6. The answer is that no such assumption exists. Even the Panel did not agree with Argentina's theory that an affirmative company-specific determination is *per se* inconsistent. Instead, the Panel recognized that in some circumstances a company-specific determination in the context of an order-wide review *does not* breach Article 11.3.[3] However, the Panel then concluded, on the basis of pure speculation, that "in every sunset review involving multiple exporters the USDOC will have to find likelihood on an order-wide basis if one exporter waives its right to participate, because otherwise the USDOC would have found no likelihood with respect to the exporters who waive their right to participate."[4]

7. The problem is that the Panel had *no evidence* to support its conclusion that if Commerce makes an affirmative company-specific likelihood determination on the basis of the fact that a company states that it is likely to dump, U.S. law *requires* Commerce to make an affirmative order-wide likelihood determination. Indeed, the Panel's own factual findings lead to just the opposite conclusion: "[t]here is no provision under US law, statutory or otherwise … that determines the outcome of the USDOC's order-wide determinations."[5] The Panel's assumption about the impact of a company-specific likelihood finding cannot be reconciled with its own

[3] Panel Report, para. 7.36 ("it may well be reasonable for the USDOC to find likelihood for these exporters individually and arguably also on an order-wide basis.")

[4] Panel Report, para. 7.39.

[5] Panel Report, para. 7.37.

finding on U.S. law and the outcome of order-wide determinations. Ironically, it is the *Panel* that drew a conclusion on the basis of an *assumption*, rather than on the basis of *evidence*.

8. The United States also notes that Argentina tries to obscure the Panel's error by framing the issue as one of merely "weighing evidence." But the issue is not about how the Panel weighed the evidence. Instead, the issue is about the Panel drawing a conclusion that contradicts its own factual findings. The Panel did not "weigh" *any* evidence because there was *no* evidence to contradict the Panel's finding that U.S. law does not determine the outcome of a sunset review. Argentina states that the Panel relied on evidence, but provides no citation to or examples of such mystery evidence.[6] It is difficult to conceive of a more egregious example of a failure to make an objective assessment of the matter – not to mention an error of law or legal interpretation – than having a panel draw a conclusion that directly contradicts its own factual findings.

9. The United States would also note that the Panel itself stated that the question before it was whether the statute "precludes" Commerce from making a reasoned affirmative order-wide determination.[7] The United States has explained that while the Panel articulated that standard, it went on to *apply* a different standard – whether the statute *could* preclude Commerce from such a reasoned determination. As a matter of logic, by setting out that standard, the Panel was in fact asking whether the statute *mandates* a determination that is not reasoned. Inasmuch as both parties accept that the Panel articulated the correct standard, the question is not whether the Panel was obliged to use that standard but rather, whether the Panel in fact applied that standard

[6] Argentina Appellee Submission, para. 68.
[7] Panel Report, para. 7.35.

in reaching its conclusion concerning the waiver provisions. Thus, Argentina incorrectly states that it is the United States that "invokes" the mandatory/discretionary distinction.[8] In fact, it was the *Panel* that invoked it, and having invoked it – correctly, it seems, according to Argentina – the Panel was obliged to *apply it* accordingly.

10. Finally, Argentina takes the view that the U.S. position disregards the recommendations and rulings from the original proceeding.[9] In fact, just the opposite is true. According to Argentina's position in these proceedings, the statute alone is WTO-inconsistent and must be amended.[10] The United States finds this argument surprising, in view of the fact that, in the original proceeding, Argentina did not argue that the statute alone breached Article 11.3, but rather contended that the "waiver provisions" *collectively* breached Article 11.3.[11] And that is precisely how the original Panel and the Appellate Body examined the issue. Thus, Argentina's newfound theory regarding the statute cannot be reconciled with its own position in the original proceedings, nor with the original Panel report, the Appellate Body report, or the recommendations and rulings. The statute and the regulations *operating together* were found to be inconsistent, and the United States brought those measures into compliance such that now, the statute and regulations operating together – or independently – are not inconsistent.

Measure Taken to Comply

11. The United States notes at the outset that Argentina fails to provide much, if anything, in the way of *reasoning* as to why the volume analysis is part of the measure taken to comply. In

[8] *See* Argentina Appellee Submission, n. 38.
[9] Argentina Appellee Submission, paras. 26-32.
[10] Argentina Appellee Submission, para. 11.
[11] *See, e.g.*, Argentina First Submission (original proceeding), paras. 109-123, Argentina Second Submission (original proceeding), paras. 39-52.

support of its view that the volume analysis is part of the measure taken to comply, Argentina contends that the original Panel made "no findings whatsoever" on the question of the volume analysis.[12] That is wrong. The original Panel expressly found that it did not need to "address whether the USDOC's reliance on declined import volumes was yet another action inconsistent"[13] with Article 11.3. Argentina now asserts the opposite – that a conclusion regarding the volume analysis *is* necessary to resolve the dispute.[14] The United States recalls that, as noted in our appellant submission, "'an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties of the *particular* claim and the *specific* component of a measure that is the subject of that claim.'"[15] Having accepted the original Panel's finding regarding the volume analysis, Argentina may not now have a "second chance" in a compliance proceeding to dispute that finding. While Argentina would like to frame this issue as a question of judicial economy versus making a *prima facie* case, it is about something much more fundamental: the finality of unappealed findings.

12. Aside from the legal question of whether the volume analysis is part of the measure taken to comply, the United States notes that Argentina has failed to explain why, as a matter of procedural fairness, the volume analysis should be considered part of the measure taken to comply. The United States recalls that this proceeding is a compliance proceeding. After the adoption by the DSB of its recommendations and rulings, a responding Member decides how to

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[12] Argentina Appellee Submission, para. 5.
[13] Original Panel Report, para. 6.11.
[14] Argentina Appellee Submission, para. 90.
[15] U.S. Appellant Submission, para. 43 (quoting *Bed Linen (21.5) (AB),* para. 93 (emphases in original)).

comply with those recommendations and rulings. According to Argentina's position, the responding Member must comply not just with adverse rulings, but with whatever adverse ruling *might have resulted* had a panel not exercised judicial economy. In other words, Argentina treats adverse rulings and judicial economy as one and the same. That approach cannot be reconciled with the DSU. Article 21.5 provides that recommendations and rulings – rather than the decision *not* to make recommendations and rulings – provide the basis for initiation of a compliance proceeding. Moreover, Argentina continues to contend that Commerce's "reliance" on the volume finding in the Section 129 determination somehow suffices to resolve the question of whether that finding is part of the measure taken to comply – yet Argentina continues to fail to recognize that if reliance alone were reason enough to consider the volume analysis part of the measure taken to comply, then the Appellate Body would have decided *EC – Bed Linen (21.5)* differently.

13. In the end, the question is whether there is persuasive reasoning to support Argentina's view. There is not. The United States respects the fact that a complaining party may be frustrated by an exercise of judicial economy. But by definition such frustration will only occur when the exercise of judicial economy is false; otherwise, the panel's findings will have been sufficient to resolve the matter, and the complaining party will not be frustrated. The question is what *recourse* a frustrated complaining party has when it considers that a panel has exercised false judicial economy. The complaining party has two options. First, it can appeal the false exercise of judicial economy.[16] Second, it can bring a new dispute. What recourse does the

[16] *See EC – Sugar Subsidies (AB)*, para. 335.

responding party have when a complaining party makes an affirmative decision, as here, not to appeal an exercise of judicial economy? Or when the complaining party, as here, defers the expression of its views until the *compliance* proceeding, and by doing so, deprives the responding party of the opportunity to bring its measure into compliance? Such an approach would seem to promote the very litigation tactics that the DSB has otherwise rejected.

14. Thank you very much. We look forward to any questions you may have.