

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

*United States – Sunset Review of Antidumping Measures on Oil
Country Tubular Goods from Argentina:
Recourse to Article 21.5 of the DSU by Argentina*

(AB-2007-1)

APPELLANT SUBMISSION
OF THE UNITED STATES OF AMERICA

January 19, 2007

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SERVICE LIST

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Table of Contents

I.	INTRODUCTION AND EXECUTIVE SUMMARY	1
II.	PROCEDURAL HISTORY	3
III.	THE PANEL ERRED IN FINDING THAT THE US WAIVER PROVISIONS REMAIN INCONSISTENT WITH ARTICLE 11.3 OF THE AGREEMENT	4
	A. The Panel Erroneously Evaluated the Measures Based on Whether They <i>Could</i> Breach Article 11.3, and not on Whether They <i>Do</i>	4
	B. The Panel’s Analysis is Speculative and Erroneously Shifts the Burden of Proof to the United States	8
	C. The Panel Failed to Make an Objective Assessment of the Matter	14
IV.	COMMERCE’S VOLUME ANALYSIS IS NOT PART OF THE MEASURE TAKEN TO COMPLY ..	19
V.	CONCLUSION	28

Table of Reports Cited

Short Form	Full Citation
<i>Chile – Price Band (21.5)</i>	<i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/RW, circulated 8 December 2006
<i>EC – Bed Linen (21.5) (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003
<i>EC – Bed Linen (21.5) (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW
<i>Japan – Varietals (AB)</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999
<i>US – 1916 Act (AB)</i>	Appellate Body Report, <i>US – Antidumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – German Steel (AB)</i>	Appellate Body Report, <i>US – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
<i>US – Section 211 (AB)</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002
<i>US – Shirts and Blouses (AB)</i>	Appellate Body Report, <i>US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997
<i>US – Softwood Lumber Injury (21.5) (AB)</i>	Appellate Body Report, <i>US – Investigation of the International Trade Commission in Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006

<i>US – Tobacco</i>	GATT Panel Report, <i>US – Measures Affecting the Importation, Internal Sale, and Use of Tobacco</i> , BISD41S/131, adopted 4 October 1994
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/AB/R, adopted 9 May 2006

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In the original proceeding, the Appellate Body concluded that the statutory and regulatory provisions allowing a respondent interested party to waive participation in the Commerce portion of a sunset review were, collectively, inconsistent “as such” with Article 11.3 because the order-wide determination was based, at least in part, on a company-specific determination that itself was made on the basis of “assumptions” rather than “evidence.” To bring its measures into compliance, the United States amended the waiver provisions to eliminate the possibility that a company-specific determination would be based on “assumptions.” Instead, under the amended provisions, a company-specific determination is now based on that company’s own statement that it is likely to dump if the order is revoked.

2. In the proceedings below, Argentina contended that the United States did not bring its measures into compliance because the company-specific determination, though based on the company’s own statement as to its future behavior, is not based on “evidence.” Argentina’s argument was simply wrong, and the Panel did not adopt it. Instead, the Panel adopted a different theory, grounded in pure speculation, devoid of a factual basis, and contradicting the factual findings the Panel actually did make. Although the Panel stated that its task was to determine whether the waiver provisions require Commerce to make an order-wide determination that is inconsistent with Article 11.3, the Panel in fact merely speculated that the waiver provisions “may” lead to such an inconsistency. Further, while the Panel found that *no* provision of U.S. law requires a particular outcome in an order-wide determination, the Panel nevertheless concluded that U.S. law in fact requires just such an outcome. In doing so, the Panel misapplied the law, relieved Argentina of its burden of proof, and drew conclusions unsupported by the factual record before it. The Panel’s findings against the waiver provisions

should therefore be reversed.

3. In addition to these errors concerning the waiver provisions, the Panel also erred in identifying the measure taken to comply. In the original proceeding, Argentina had argued that Commerce's determination in the sunset review involving oil country tubular goods was flawed with respect to both the analysis of dumping over the life of the order, as well as the analysis of shipment volumes over the life of the order. The Panel found that the dumping analysis was flawed and then exercised judicial economy with respect to the volume analysis. Argentina did not appeal the exercise of judicial economy, although it requested the original Panel to make factual findings to enable such an appeal. Commerce conducted a redetermination in light of the DSB's recommendations and rulings and concluded that dumping was likely to continue or recur. In doing so, Commerce incorporated by reference its original volume analysis.

4. Argentina then sought to challenge the volume analysis in this compliance proceeding. However, there were no DSB recommendations and rulings pertaining to the volume analysis; the volume analysis was simply an aspect of the original measure that did not change, and which the United States did not have to change, to bring its measure into compliance. The volume analysis was not part of the measure taken to comply. Thus, the situation in this dispute was analogous to the situation in *EC – Bed Linen (21.5)*, and the same reasoning was applicable. The Panel's conclusion that the volume analysis was in the scope of the proceeding was wrong, and should be reversed, and the subsequent finding that the volume analysis is inconsistent with Article 11.3 declared moot and of no legal effect.

II. PROCEDURAL HISTORY

5. The Dispute Settlement Body adopted the Panel and Appellate Body reports on December 17, 2004. On January 14, 2005, the United States notified the DSB of its intention to implement those recommendations and rulings. On August 15, 2005, Commerce published in the *Federal Register* a notice proposing to amend its sunset regulations and soliciting public comment on the proposed amendments.¹ The *Federal Register* notice stated that Commerce 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 AD Agreement.² The waiver provisions and amendments to them are discussed in further detail below. On October 28, 2005, the United States published amendments to sections 351.218(d)(2)(iii) and 351.309(c) of Commerce’s regulations. These amendments became effective October 31, 2005.³

6. On November 2, 2005, Commerce also initiated a proceeding pursuant to section 129 of the Uruguay Round Agreements Act to address the Panel’s findings regarding the likelihood determination in the sunset review of OCTG from Argentina. Commerce issued its Section 129 Determination on December 16, 2005,⁴ finding that “there is a likelihood of continuation or

¹ *Procedures for Conducting Five-Year Reviews of Antidumping and Countervailing Duty Orders*, 70 Fed. Reg. 47,738 (Aug. 15, 2005) (proposed rule) (Exhibit US-1).

² *Procedures for Conducting Five-Year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders*, 62 Fed. Reg. 62,061 (Oct. 28, 2005) (final rule) (“2005 Sunset Regulations”) (Exhibit ARG-12).

³ *Procedures for Conducting Five-Year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders*, 62 Fed. Reg. 62,061 (Oct. 28, 2005) (final rule) (“2005 Sunset Regulations”) (Exhibit ARG-12).

⁴ *Decision Memorandum; Section 129 Determination: Final Results of Sunset Review, Oil Country Tubular Goods from Argentina* (December 16, 2005) (“Decision Memorandum”)

recurrence of dumping had the antidumping duty order on OCTG from Argentina been revoked in 2000, *i.e.* at the end of the original sunset period.”⁵

7. Argentina requested consultations pursuant to Article 21.5 on June 20, 2006, and challenged both the amended waiver provisions as well as the Section 129 Determination. The Panel circulated its report on November 30, 2006.

III. THE PANEL ERRED IN FINDING THAT THE US WAIVER PROVISIONS REMAIN INCONSISTENT WITH ARTICLE 11.3 OF THE AGREEMENT

A. The Panel Erroneously Evaluated the Measures Based on Whether They *Could* Breach Article 11.3, and not on Whether They *Do*.

8. In examining the consistency of section 751(c)(4)(B), the Panel correctly identified its task as determining whether this provision “precludes the USDOC in some or all situations arising in sunset reviews from making a reasoned determination of likelihood of continuation or recurrence of dumping based on an adequate factual foundation, as required by Article 11.3.”⁶ However, the Panel did not properly apply this test. Instead the Panel examined whether the United States had demonstrated that section 751(c)(4)(B), or any other provision of U.S. law, foreclosed any possible determination by USDOC which would not meet the requirements of Article 11.3. In applying this incorrect standard in its finding against section 751(c)(4)(B), the Panel committed legal error and should be reversed.

9. In formulating its task as determining whether the statute precluded the United States from complying with Article 11.3, the Panel was setting forth a variation on the classic

(Exhibit ARG-16).

⁵ *Decision Memorandum* at 11 (Exhibit ARG-16).

⁶ Panel Report (21.5), para 7.35.

mandatory/discretionary distinction used in determining whether a statutory provision “as such” breaches a particular WTO obligation.⁷ In describing this distinction in *US - 1916 Act*, the Appellate Body referred to its application in *US - Tobacco*,⁸ a dispute in which the panel concluded that where the language of a statute provided discretion for the United States to avoid inconsistency with Article VIII of the GATT 1947, including through interpreting the statute in such a manner, that statute did not breach Article VIII.⁹ In *US – Tobacco*, several complaining parties challenged a U.S. statute requiring tobacco inspection fees for imported goods to be

⁷ Referring to its findings in *1916 Act*, the Appellate Body in *US - Section 211* stated that

a distinction should be made between legislation that mandates WTO-consistent behaviour and, and legislation that gives rise to executive authority that can be exercised with discretion. We quoted with approval [in *1916 Act*] the following statement of the panel in *US - Tobacco*:

. . . panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act consistently with the General Agreement could be subject to challenge. [footnote omitted]

Thus, where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the *WTO Agreement* in good faith.

US – Section 211 (AB), para. 259. See also *US – Hot-Rolled Steel*, para. 7.141 (“It is well established in GATT/WTO practice that a statute is inconsistent on its face with a Member’s WTO obligation only if it . . . requires WTO inconsistent action or prohibits WTO-consistent action.”).

⁸ *US – 1916 Act*, para. 88.

⁹ *US – Tobacco*, paras. 121, 123.

“comparable” to those imposed on domestic goods.¹⁰ The complaining parties argued that this breached Article VIII because “comparable” fees would not necessarily be commensurate with the cost of inspecting the imported good, as required by Article VIII.¹¹ The United States responded by noting that nothing in the statute prevented the fees from being commensurate with the cost of inspecting the imported goods, and that the complaining parties’ arguments to the contrary were based on “mere speculation.”¹²

10. The panel agreed with the United States, noting that, as the United States demonstrated, the statute permitted the United States to act in a manner that did not breach Article VIII.¹³ The panel further noted that there was no evidence, in the form of fee structure or regulations, to support the complaining parties’ argument that the statute breached Article VIII. Thus, the complaining parties had failed to “demonstrate[] that [the statute] could not be applied in a manner” that was consistent with Article VIII.¹⁴

¹⁰ *US – Tobacco*, para. 122.

¹¹ *U.S. – Tobacco*, para. 122.

¹² *U.S. – Tobacco*, para. 122.

¹³ *US – Tobacco*, para. 123.

¹⁴ *US – Tobacco*, para. 123. To find that a measure that permits a Member to comply with its obligations is nonetheless inconsistent with the WTO Agreement would mean that the panel is presuming that the Member will choose to breach its treaty obligations. That presumption is not appropriate, as the Appellate Body has pointed out: “where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the *WTO Agreement* in good faith.” *US - Section 211 (AB)*, para. 259. Nor may the measure be found in breach based on speculation as to how the Member may apply it at some point in the future. Furthermore, if a measure provides a Member with discretion to undertake a range of actions, some of which breach a particular obligation and some of which do not, the measure itself is not responsible for the actions which the Member chooses to take. On the other hand, if the measure requires the Member to undertake action which breaches a particular obligation, then the measure is

11. As noted above, while the Panel in this dispute correctly stated the test it was to apply, it failed to apply that test. The Panel correctly noted that U.S. law required USDOC to make its sunset determinations on an order-wide basis, even if a respondent exercises its right to waive participation pursuant to section 751(c)(4)(B).¹⁵ Yet the Panel ultimately concluded that USDOC “will have to find likelihood on an order-wide basis if one exporter waives its right to participate,” notwithstanding the U.S. explanation that this result is not required by U.S. law.¹⁶ In reaching this conclusion, the Panel did not examine whether section 751(c)(4)(B) precluded a reasoned and adequate order-wide determination consistent with Article 11.3, but rather examined just the opposite: whether there was any provision of U.S. law that precluded section 751(c)(4)(B) from requiring an affirmative order-wide determination where one party waives participation. This is contrary to the standard it set forth, the standard applied in *US – Tobacco*.

12. The Panel noted, “[t]here is no provision under US law, statutory or otherwise, . . . that determines the outcome of the USDOC’s order-wide sunset determinations.”¹⁷ Under the reasoning of *US - Tobacco* – or its own statement of its task – this factual finding alone should have obligated the Panel to find no breach on the part of section 751(c)(4)(B). If there is nothing in U.S. law requiring USDOC to reach particular outcomes in its order-wide sunset

responsible for the breach, and it must be changed to avoid future breaches. If a statute affords a Member sufficient discretion not to breach a particular obligation, then the statute is not responsible for a Member's decision to apply the statute in an inconsistent manner, and it need not be changed in order for the Member to comply with the obligation at issue. The measure is not, as such, inconsistent with the obligation.

¹⁵ Panel Report (21.5), paras. 7.37, 7.38.

¹⁶ Panel Report (21.5), para. 7.39.

¹⁷ Panel Report (21.5), para. 7.37.

determinations, then by definition section 751(c)(4)(B) is neither precluding nor requiring any particular order-wide determination. But the Panel relied on this fact to reach the opposite conclusion. When the United States emphasized that it was not required to make affirmative order-wide determinations because of a company-specific finding under section 751(c)(4)(B), and that it was in fact required to take all record evidence into account, the Panel rejected the argument by noting:

the United States has not directed our attention to any provision of US law which would support its proposition that the USDOC’s order-wide determinations are independent from the company-specific determinations made under section 751(c)(4)(B) of the Tariff Act.[footnote omitted]¹⁸

13. In other words, the Panel made it incumbent on the United States to show that U.S. law definitively foreclosed any possibility that order-wide determinations might be affected by company-specific determinations, and that U.S. law definitively established that these two determinations are “independent.” This is a complete reversal of the *US – Tobacco* standard, which emphasizes that a statute need not unambiguously require a WTO-consistent result, but only that it permit a WTO-consistent result. Given the Panel’s application of this incorrect legal standard in finding that section 751(c)(4)(B) is inconsistent with Article 11.3, this finding should be reversed.

B. The Panel’s Analysis is Speculative and Erroneously Shifts the Burden of Proof to the United States

14. In its analysis, the Panel not only reversed the mandatory/discretionary distinction, it also reversed the burden of proof, relieving Argentina of its burden to provide evidence and

¹⁸ Panel Report (21.5), para. 7.39.

arguments establishing a breach and instead relying on pure speculation. This is evident in the language used in the Panel’s analysis. In finding that the USDOC “will” have to find likelihood on an order-wide basis if one company waives its right to participate, the panel speculated that “USDOC may have to find likelihood on an order-wide basis because of the company specific determinations . . .”¹⁹, and that “it seems to us that such company-specific determinations would necessarily have a significant impact on, or even determine, the outcome of the USDOC’s order-wide determination.”²⁰ The Panel further speculated that section 751(c)(4)(B) “would preclude the USDOC from taking into consideration evidence submitted by cooperating exporters or evidence otherwise collected by the USDOC in sunset reviews where there is at least one other exporter who waives its right to participate.”²¹ The Panel’s reasoning does not hold up on its face. It is not logical to progress from the view that because some evidence may have a “significant impact” on a determination, that therefore it would be impossible to consider any other evidence. On this basis alone, the Panel’s finding is unsupported and should be reversed.

15. Furthermore, the Panel cited to no factual evidence in support of these speculations, nor could it have done so, because Argentina did not even make these arguments. Rather than holding Argentina to its burden of proof, the Panel shifted the burden to the United States to disprove what amounted to unproven assertions.

16. With respect to the allocation of the burden of proof, the Appellate Body has noted:

we find it difficult, indeed, to see how any system of judicial

¹⁹ Panel Report (21.5), para. 7.37.

²⁰ Panel Report (21.5), para. 7.39.

²¹ Panel Report (21.5), para. 7.40.

settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof Also, it is . . . generally-accepted . . . that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.²²

17. Further, the Appellate Body has explained the limits on a panel’s authority to assume the burden of proof on behalf of a party:

A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the SPS Agreement, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.²³

18. The Panel reversed the burden of proof, and relieved Argentina of its burden. At the outset, as explained above, under *US – Tobacco*, the burden was on *Argentina* as the complaining party to “demonstrate[] that [the statute] could not be applied in a manner” that was consistent with Article 11.3. Instead, the Panel placed the burden on the *United States* to demonstrate that U.S. law removed any ambiguity as to the independence of company-wide and order wide determinations, that is, that U.S. law could *not* be applied in a manner that was inconsistent with Article 11.3.

19. Argentina had argued that “the regulation prevents the USDOC from developing the requisite factual information”,²⁴ thus rendering the company-specific determination flawed.

²² *US – Shirts and Blouses (AB)*, p. 14.

²³ *Japan – Varietals (AB)*, para. 129; *see id.*, paras. 125-131.

²⁴ *See, e.g.*, Argentina Second Written Submission, para. 170. The United States had asked Argentina to identify “*what* factual information is not being developed with respect to that company, and why that mystery factual information would be more probative than the company’s own admission.” U.S. First Written Submission, para. 18. Argentina provided no

According to Argentina, once a company has waived participation, “USDOC has zero discretion for that particular company to reach any result other than a [sic] affirmative determination for that company.”²⁵ Argentina’s view was that the company-specific determination was inherently flawed and thus “tainted” the order-wide determination.²⁶ Indeed, Argentina made clear that its argument was applicable without regard to whether sunset reviews are conducted on an order-wide or company-specific basis.²⁷

20. The Panel took an entirely different approach. The Panel did not find that the regulations prevent Commerce from developing the requisite factual information in making the company-specific determination. The Panel did not find that the company-specific determination was inherently flawed. The Panel did not find that the flawed company-specific determination “tainted” the order-wide determination. Instead, the Panel expressed concern that the *statute* required an affirmative company-specific determination to result in an affirmative order-wide determination, without regard to the evidence pertaining to *other* companies, not the company that waived participation. The Panel speculated that the “Tariff Act . . . would preclude the

response. Japan, a third party, suggested that an *importer* could state that it would not import dumped merchandise. However, the United States pointed out that, according to the Appellate Body’s reasoning in DS294, and Japan’s own statements in DS322, an importer has no way of knowing if it is importing dumped merchandise because the margin of dumping cannot be calculated on a transaction-specific basis, but rather must be calculated on the basis of all of the exporter’s transactions, including transactions to other importers. *See* U.S. Second Written Submission, n. 9. Thus, very little, if any, probative value could be assigned to such a statement from the importer, much less outweigh the probative value of a statement by the exporter itself.

²⁵ Argentina Answers to Panel Questions, para. 20.

²⁶ Argentina Answers to Panel Questions, para. 3.

²⁷ Argentina Answers to Panel Questions, para. 1.

USDOC from taking into consideration evidence submitted by cooperating exporters or evidence otherwise collected by the USDOC in sunset reviews where there is at least one other exporter who waives its right to participate.”²⁸

21. As noted above, a panel is prohibited from finding facts neither argued nor proven by the parties, nor can the panel make a case for a party.²⁹ Argentina did not assert, nor did it prove, that the statute would require Commerce to make an affirmative order-wide finding simply because it made an affirmative company-specific determination. Nor did Argentina argue or prove that the statute would preclude Commerce from taking into account information supplied by other exporters in making the order-wide determination. Instead, Argentina argued that the regulations precluded Commerce from taking into account information *about that company* in the *company-specific* determination. Thus, the Panel made findings about the operation of municipal law – that the statute requires an affirmative company-specific determination to require an affirmative order-wide determination – that had neither been argued nor proven by the complaining party.

22. Indeed, while failing to hold Argentina to the burden of proving the facts and claims it actually argued, the Panel in fact *shifted* the burden to the United States to *disprove* an allegation that Argentina had never proven, *i.e.*, that an affirmative company-specific determination would necessarily lead to an affirmative order-wide determination. In the context of assuming that an affirmative company-specific determination would necessitate an affirmative order-wide

²⁸ Panel Report. Para. 7.40.

²⁹ Indeed, the United States presented evidence to the contrary, a fact that will be discussed in greater detail in Section C.

determination, the Panel faulted the United States for failing to point to any provision of “U.S. law” to support its proposition that order-wide determinations are “independent” of company-specific determinations. Yet, as noted above, Argentina had never argued, or demonstrated, that affirmative company-specific determinations require order-wide affirmative determinations in the first place. Moreover, the Panel’s assertion that the United States was required and had failed to point to a provision of law establishing that an order-wide determination is independent of a company-specific determination is undermined by the Panel’s own factual finding that “[t]here is no provision under US law, statutory or otherwise, however, that determines the outcome of the USDOC’s order-wide sunset determination.”³⁰ If there is no provision of U.S. law that determines the outcome of the order-wide sunset determination, then the Panel by its own admission had no basis for concluding that a statutory provision (the company-specific determination) determines the outcome of the order-wide sunset determination.

23. For the foregoing reasons, the Appellate Body should reverse the Panel’s finding that section 751(c)(4)(B), operating in conjunction with Section 751(c)(4)(A) and section 351.218(d)(2) of the Regulations, is inconsistent with Article 11.3 of the Antidumping Agreement.

C. The Panel Failed to Make an Objective Assessment of the Matter

24. In addition to its other errors of law, the Panel also failed to make an objective assessment of the matter before it.

25. The Panel found section 751(c)(4)(B) of the Act and section 351.218(d)(2)(iii) of

³⁰ Panel Report (21.5), para. 7.37.

Commerce’s regulations WTO-inconsistent “as such.”³¹ The Appellate Body has explained what is involved in analyzing municipal law that is being challenged “as such”:

[A] responding Member’s law will be treated as WTO-*consistent* until *proven* otherwise. The party asserting that another party’s municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.³²

26. Indeed, the starting point is the text of the municipal law in question: “When a measure is challenged “as such”, the starting point for an analysis must be the measure on its face.”³³

27. Thus, to evaluate the evidence correctly, the Panel was obliged to analyze whether, under U.S. municipal law, the statute and regulations require Commerce to make an affirmative order-wide determination in disregard of probative evidence. The Panel needed to make this determination based on an examination of the text of the statute and regulations and other evidence offered by the parties as to the meaning of the statute and regulations.

28. The United States recalls that, with respect to the statute, Argentina failed to substantiate its claim that the statute breached Article 11.3. Argentina simply argued that the United States was required to repeal the statute, that the statute mandated a finding, and that such mandated

³¹ Panel Report (21.5), para. 7.41.

³² *US – German Steel (AB)*, para. 157 (emphasis in original; citation omitted).

³³ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 168.

findings were inconsistent with Article 11.3. As the United States noted above, the DSB recommendations and rulings did not prohibit statutorily-mandated findings; they prohibited statutorily-mandated findings based on *assumptions*.³⁴ Argentina failed to provide any evidence that the statute required a finding based on an assumption, either in terms of the text of the statute, the application of the statute, or any other evidence.

29. The United States recalls the Appellate Body’s view that:

Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record.³⁵

30. The Panel engaged in just such a breach here. As noted above, the Panel did not adopt Argentina’s argument that the statute breached Article 21.5. However, rather than rejecting Argentina’s claim, the Panel instead engaged in its own analysis, including an assertion of facts (or, rather, assumptions) that Argentina had not argued and were not found in the evidentiary record. The Panel did not conclude that the text of the statute mandates a breach, nor did the Panel refer to any other evidence (for example, U.S. court interpretations, how the statute had been applied) as to the meaning of the statute. Indeed, the only factual finding the Panel made with respect to the statute *contradicts* its ultimate conclusion that the statute breaches Article

³⁴ Argentina argued that, in fact, the Appellate Body had found that statutorily-mandated findings were prohibited, without regard to whether such findings were based on assumptions rather than evidence. Aside from the fact that the reasoning in the Appellate Body report itself contradicts that view, the United States would further point out that if the Appellate Body had found that a company-specific finding were *per se* inconsistent with Article 11.3, then there would have been no need for the Appellate Body to examine the statute “in conjunction with” the regulations.

³⁵ *US - German Steel (AB)*, para. 142 (citations omitted).

11.3: the Panel noted that “no provision under US law, statutory or otherwise . . . determines the outcome of the USDOC’s order-wide determination.”³⁶ If no provision of law, statutory or otherwise, determines the outcomes of the USDOC’s order-wide determination, then the Panel cannot have correctly concluded that the statute requires such an outcome.

31. Not only did the Panel’s own factual finding contradict its ultimate conclusion, but in drawing that conclusion, the Panel disregarded evidence before it that contradicted that conclusion. Not only did Argentina fail to provide any evidence (or argument) that the statute operated in the manner described by the Panel, but the United States pointed out that Commerce would make the order-wide determination on the basis of *all* the evidence before the Panel.³⁷ That *includes* a company-specific determination, if any; but it also includes any other evidence the parties may have offered. Indeed, as the United States noted, Commerce, in bringing the regulations into compliance with the DSB recommendations and rulings, *included* a statement to that effect in the very preamble of the amended regulation the Panel was purporting to construe:

As a general matter, the Department will make its order-wide likelihood determination on the *basis of the facts and information available on the record* of the sunset review³⁸

32. As a result, the uncontradicted evidence before the Panel demonstrated that if, notwithstanding an individual company’s statement that it is likely to dump, there is nevertheless countervailing evidence such that Commerce cannot conclude that dumping is likely to occur, neither the statute nor the regulation precludes Commerce from making that determination.

³⁶ Panel Report (21.5), para. 7.37.

³⁷ U.S. Answers to Panel Questions, para. 11.

³⁸ U.S. Answers to Panel Questions, para. 11.

Neither Argentina – nor the Panel – pointed to any evidence from which to draw the contrary conclusion.³⁹

33. Rather than relying on the facts before it, the Panel’s analysis hinged entirely on speculation as to what might happen, with no evidence to support such speculation. The Panel stated that “there *may be* . . . situations where the waiver provisions *may preclude* the USDOC from reaching reasoned conclusions on an adequate factual basis.”⁴⁰ The Panel further considered that in a situation in which some exporters file a waiver and some do not, “USDOC *may* have to find likelihood on an order-wide basis because of the company-specific determinations that it may have made”⁴¹ Further, the Panel contended that “it seems to us that such company-specific determinations would necessarily have a significant impact on, or even determine, the outcome of USDOC’s order-wide determination,”⁴² without citing any evidence to support those views. The Panel then leapt from its unsubstantiated view that, in its opinion, the company-specific determination would have a significant impact on *or* determine the outcome, to the unequivocal conclusion that “in every sunset review involving multiple

³⁹ Nothing in Article 11.3 of the Antidumping Agreement states that, where there is one company-specific determination of likely dumping, the order must be terminated whenever multiple exporters have participated. Depending on the facts of any particular review, the fact that a company states that it will likely continue to dump may provide an adequate basis for making an affirmative order-wide determination, or it may not; but in either circumstance, neither the statute nor the regulation prevents Commerce from making the order-wide determination without first taking into account all of the facts and arguments on the record before it. Indeed, to do so would be contrary to the preamble to the regulations in question.

⁴⁰ Panel Report (21.5), para. 7.37 (emphases added).

⁴¹ Panel Report (21.5), para. 7.37 (emphasis added).

⁴² Panel Report (21.5), para. 7.39.

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.”⁴³ Not only is the leap troubling as a matter of logic, but it lacks any evidentiary basis.

34. The Panel disregarded the evidence before it and made findings that lacked a basis in the evidence contained in the panel record. In drawing its conclusion that the statute breaches Article 11.3, the Panel did not rely on any of the evidence that the Appellate Body has identified as probative of a breach “as such” – or any other evidence, for that matter. The Panel did not examine and conclude that the text of the statute or regulations required an affirmative order-wide determination. The Panel did not examine and conclude that other evidence of the meaning of the statute or regulations indicated that the statute and regulations required an affirmative order-wide determination. For example, the Panel did not examine how the statute and regulations had been applied, nor could the Panel have done so, since the amended provisions have never been applied. Indeed, the Panel itself correctly concluded that “no provision under US law, statutory or otherwise . . . determines the outcome of the USDOC’s order-wide sunset determination.”⁴⁴ Thus, the Panel’s ultimate conclusion that “USDOC may have to find likelihood on an order-wide basis because of the company-specific determination that it may have made under Section 751(c)(4)(B)” cannot be reconciled with the Panel’s own factual finding that no provision of law requires such an outcome.

⁴³ Panel Report (21.5), para. 7.39.

⁴⁴ Panel Report (21.5), para. 7.37.

IV. COMMERCE’S VOLUME ANALYSIS IS NOT PART OF THE MEASURE TAKEN TO COMPLY

35. The United States also appeals the Panel’s finding that Commerce’s volume analysis was part of the measure taken to comply, even though that analysis was from the original determination and was simply incorporated by reference in the Section 129 determination. In the original determination, Commerce based its conclusion that dumping was likely to continue or recur based on both a finding that dumping had continued over the life of the order, and a finding that decreased volumes over the life of the order were indicative of likely future dumping. The original Panel found the dumping analysis to be flawed. It did not find the volume analysis to be flawed. To comply with the DSB’s recommendations and rulings, Commerce sought to fix the flaws in its dumping analysis. Because the recommendations and rulings identified no flaws with respect to the volume analysis, Commerce could not seek to fix any such unidentified flaws, nor did those recommendations and rulings oblige Commerce to attempt to do so. In the compliance panel proceedings, however, Argentina contended that the original volume analysis is part of the measure taken to comply, and the Panel agreed.

36. The original Panel in this dispute chose to exercise judicial economy with respect to the volume analysis. Argentina chose not to appeal that exercise of judicial economy. Nevertheless, Argentina, and the Panel, would have the consequences of such choices fall entirely on the responding party. Under this approach, the responding party could learn for the first time in a compliance proceeding that an aspect of the original measure that was not subject to DSB recommendations and rulings, and that did not change, is in fact WTO-inconsistent. And the responding party, rather than having a reasonable period of time to bring its measure into

compliance with its WTO obligations, could instead be subject to immediate suspension of concessions. But the DSU does not provide for this drastic result. Rather, the DSU provides two distinct mechanisms – one for challenging measures generally, and another for challenging measures taken to comply with recommendations and rulings of the DSB. The DSU does not provide for those mechanisms to be collapsed simply because panels and complaining parties made choices in original panel proceedings that they wish to undo in a compliance proceeding. In concluding otherwise, the Panel erred, and should be reversed.

37. At the outset, it should be noted that the Panel failed to follow the text of Article 21.5 of the DSU. Article 21.5 provides that where “there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures” The text of Article 21.5 provides that a compliance proceeding concerns the measure *taken to comply* with the recommendations and rulings of the DSB. Thus, the recommendations and rulings are the appropriate starting point for an analysis of compliance. As the Appellate Body has noted, “the mandate of an Article 21.5 panel [is] to examine whether recommendations and rulings from the original dispute have been implemented consistently with the covered agreements”⁴⁵

38. In this dispute, the original Panel declined to make *any* recommendations or rulings regarding the volume analysis. Therefore, there was no recommendation or ruling with which to comply in that respect. As a result, the unaltered, original volume analysis, which was

⁴⁵ *Softwood Lumber Injury (21.5) (AB)*, para. 103.

incorporated by reference into the section 129 determination, was not part of the measure taken to comply, and was not within the scope of the compliance proceeding. This result of a reading of the text of Article 21.5 is only logical, given that Article 21.5 proceedings ascertain *compliance* with recommendations and rulings. As the Appellate Body has noted, there are differences between original proceedings and compliance proceedings. Among these differences is the fact that an adverse finding under the former may permit a reasonable period of time for compliance if immediate compliance is impracticable, whereas an adverse finding under the latter may result in a request for authorization of suspension of concessions, with no opportunity for the responding Member to bring the measure into compliance.

39. Instead of examining the question before it based on the applicable legal standard, the Panel simply asserted that because Commerce had “based its order-wide determination on its finding regarding likely past dumping as well as the volume analysis from the original sunset review . . . we consider the volume analysis from the original sunset review to have become an integral part of the Section 129 Determination.”⁴⁶ The Panel then asserted, without textual or other support, that the “fact that a panel, in an original dispute settlement proceeding, did not make findings . . . can not [sic] preclude a compliance panel . . . from reviewing those aspects which have been incorporated . . . in the measure taken to comply.”⁴⁷

40. The Panel conducted its analysis in the wrong order. As the Appellate Body noted, the starting point for identifying the measure taken to comply is the recommendations and rulings.

⁴⁶ Panel Report (21.5), para. 7.91.

⁴⁷ Panel Report (21.5), para. 7.92.

But instead of beginning with the recommendations and rulings, and identifying the measure taken to comply with respect to those recommendations and rulings, the Panel began with the assumption that the Section 129 determination as a whole was the measure taken to comply, found that the volume analysis was an “integral” part of it, and then concluded that the volume analysis was within the terms of reference.

41. Under the Panel’s approach, the recommendations and rulings are simply not germane to the identification of the measure taken to comply. Yet that is not what Article 21.5 provides. Indeed, if that were true, then *EC – Bed Linen (21.5) (AB)* would have had a different outcome.

42. In *Bed Linen*, India had challenged an EC antidumping determination. Part of India’s challenge included a claim against the “other factors” aspect of the EC’s causation analysis in the injury determination. India failed to make a *prima facie* case, and as a result, the panel dismissed India’s claim with respect to the EC’s “other factors” analysis. However, the panel did make other, adverse findings against the determination. The EC sought to comply with the DSB recommendations and rulings by issuing a redetermination. The EC included in that redetermination its original “other factors” analysis, and indeed revised its “other factors” analysis to take into account additional information gathered in the course of conducting the redetermination. India then sought to challenge the “other factors” analysis when it brought an Article 21.5 proceeding against the EC.

43. The Appellate Body, upholding the panel’s finding, rejected India’s attempt to include the “other factors” analysis as part of the measure taken to comply. The Appellate Body recognized that while new claims may be permitted against a measure taken to comply, India

was reasserting the *same* claim.⁴⁸ In addition, the Appellate Body recognized that India had failed to appeal the original panel’s rejection of that claim.⁴⁹ Further, the Appellate Body found that the EC had not been obligated to modify the “other factors” analysis as a result of any of the DSB’s recommendations and rulings.⁵⁰ The Appellate Body summarized the situation as follows: “India has raised the *same* claim . . . as it did in the original proceedings. In doing so, India seeks to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent with the European Communities’ WTO obligations.”⁵¹ Further developing its reasoning, the Appellate Body considered that “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.”⁵² Finally, the Appellate Body considered that the “effect, for the parties, of findings adopted by the DSB as part of a panel report is the same, regardless of whether a panel found that the complainant failed to establish a *prima facie* case . . . , that the Panel found that the measure is fully consistent with WTO obligations, or that the Panel found that the measure is not consistent with WTO obligations. A

⁴⁸ *Bed Linen (21.5) (AB)*, para. 80.

⁴⁹ *Bed Linen (21.5) (AB)*, para. 81.

⁵⁰ *Bed Linen (21.5) (AB)*, para. 86.

⁵¹ *Bed Linen (21.5) (AB)*, para. 87.

⁵² *Bed Linen (21.5) (AB)*, para. 93 (emphases in original).

complainant . . . should not be given a ‘second chance’ in an Article 21.5 proceeding”⁵³

Moreover, the Appellate Body noted that “India itself seems to have accepted the finding as final.”⁵⁴

44. The facts and reasoning in *Bed Linen* confirm that the Panel’s analysis in this dispute was erroneous. First, the EC’s “other factors” analysis was as “integral” a part of the redetermination in that dispute as the volume analysis was in this dispute, a fact the United States pointed out.⁵⁵

An investigating authority cannot conduct a causation analysis in an injury determination *without* examining “other factors.” The point in *Bed Linen* was that, while the EC incorporated its other factors analysis into its redetermination, the recommendations and rulings had not required the EC to *redo* that analysis in order to bring its measure into compliance. Thus, the fact that a particular analysis is incorporated into a redetermination, or indeed forms part of the basis for a redetermination, does not render that analysis part of the measure taken to comply.

Therefore, the Panel erred in concluding that, under these facts, the absence of recommendations and rulings did not bar the Panel from examining the original volume analysis.

45. Moreover, even the Panel’s own summary of the *Bed Linen* reasoning warrants the same conclusion. The Panel stated that *Bed Linen* stands for the proposition that “in some cases, depending on the impact of the steps taken in the implementation of the DSB recommendations and rulings, the investigating authorities may have to change aspects of their determinations which are outside the DSB recommendations and rulings When this is not the case, parts of

⁵³ *Bed Linen (21.5) (AB)*, para. 96.

⁵⁴ *Bed Linen (21.5) (AB)*, para. 96.

⁵⁵ U.S. Comments on Argentina Answers to Panel Questions, para. 37.

the redetermination that merely incorporate elements of the original determination would not automatically become an inseparable part of the measure taken to comply.”⁵⁶ This summary *supports*, rather than undermines, the conclusion that the original volume analysis was not part of the measure taken to comply. The volume analysis was not affected by the revised dumping analysis, nor did Argentina (or the Panel) contend that it was.

46. The Panel stated, without significant elaboration, that the facts of *Bed Linen* and of this dispute were “distinguishable.”⁵⁷ However, the only distinction it drew was the fact that the original panel in this dispute had declined to make a finding on the volume analysis while the *Bed Linen* panel had made a “substantive finding.”⁵⁸ The Panel’s assertion that the facts of the two cases were therefore “significantly different” was conclusory and otherwise unexplained. The Panel failed to explain *how* the disputes were distinguishable in a way that is legally relevant to the question at hand: whether the volume analysis forms part of the measure taken to comply.

47. In any event, the distinction drawn by the panel is not legally significant. The Appellate Body rejected a similar consideration in *Bed Linen*, when it addressed the relevance of the fact that the original panel had found that India had failed to make a *prima facie* case. The Appellate Body considered whether this fact had any bearing on the applicability of its reasoning in *Shrimp (21.5) (AB)*, that adopted reports represent the final resolution of a dispute.⁵⁹ The Appellate

⁵⁶ Panel Report (21.5), para. 7.94.

⁵⁷ Panel Report (21.5), para. 7.96.

⁵⁸ Panel Report (21.5), para. 7.95.

⁵⁹ *Bed Linen (21.5) (AB)*, para. 96.

Body concluded that it did not, reasoning that, regardless of the reason for the absence of a recommendation or ruling in the original proceeding, complaining parties should not be afforded a “second chance” in a compliance proceeding to obtain a finding that they did not obtain in the original proceeding.

48. That reasoning is equally applicable when a panel has exercised judicial economy, in particular when the complaining party declines to appeal such exercise. Indeed, in this instance, Argentina actually asked the original Panel to make factual findings to enable just such an appeal, yet ultimately it made the decision not to appeal, but instead to challenge the Panel’s exercise of judicial economy for the first time in a compliance proceeding.⁶⁰ The complaining party, having chosen not to appeal the exercise of judicial economy in the original proceeding, cannot then be permitted a “second chance” in a compliance proceeding. As the panel in *Chile – Price Band (21.5)* recently explained, to permit complaining parties second chances would enable “misuse of the special expedited procedures contemplated in Article 21.5 of the DSU.”⁶¹ The panel in *Chile – Price Band (21.5)* noted that while the responding party would be exposed to a request for authorization of suspension of concessions without a reasonable period of time to bring its measure into compliance, complaining parties suffer no comparable disadvantage because “nothing prevents that Member from bringing a new challenge”⁶²

49. There is also another logically, and procedurally, troubling aspect to the Panel’s reasoning. Under the Panel’s view, if a panel declines to make findings with respect to a

⁶⁰ See Panel Report (21.5), para. 6.11.

⁶¹ *Chile – Price Band (21.5)*, para. 7.142.

⁶² *Chile – Price Band (21.5)*, para. 7.153.

particular aspect of a measure in an original proceeding, the responding Member is, nevertheless, under an obligation to *guess* that the panel *might have thought* there were WTO inconsistencies with that aspect of the measure – notwithstanding that the panel declined to identify any such inconsistencies, and notwithstanding that the responding Member considers the aspect in question to be *WTO-consistent*, having defended it as such. According to this Panel’s reasoning, under such circumstances the responding Member should be subject to a *compliance* proceeding with respect to an aspect of the original measure that it did not change, and did not have to change, to come into compliance with the recommendations and rulings. This approach would appear to strip the complaining party of the obligation to make its case during the original proceeding, as well as to strip the panel of its obligation under Article 11 of the DSU to make findings to assist the DSB in giving the rulings provided for in the covered agreements.

50. The Panel’s approach would essentially collapse the distinction between *compliance* proceedings and *original* proceedings. That cannot be reconciled with the text of the DSU, which clearly distinguishes between original proceedings and compliance proceedings.

51. For the foregoing reasons, the Panel erred in concluding that the original volume analysis was part of the measure taken to comply, and should be reversed.. Consequently, the Panel’s finding that the volume analysis is inconsistent with Article 11.3 should be declared moot and of no legal effect.

V. CONCLUSION

52. For the foregoing reasons, the United States respectfully requests that the Appellate Body reverse the Panel’s findings that section 751(c)(4)(B), operating in conjunction with Section

751(c)(4)(A) and section 351.218(d)(2) of the Regulations, is inconsistent with Article 11.3 of the Antidumping Agreement. The United States also respectfully requests that the Appellate Body reverse the Panel's finding that the volume analysis was part of the measure taken to comply and declare the Panel's finding that the volume analysis is inconsistent with Article 11.3 moot and of no legal effect.