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)

APPELLEE SUBMISSION
OF THE UNITED STATES OF AMERICA

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SERVICE LIST

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THIRD PARTIES

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H.E. Mr. Fernando De Mateo y Venturini, Permanent Mission of Mexico

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Table of Reports Cited

Short Form	**Full Citation**
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Chile – Alcohol (AB)	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
Guatemala – Cement (AB)	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
Mexico HFCS (21.5)(AB)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
US – OCTG (Mexico)	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005
US – Privatization (21.5)	*US – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Argentina has taken the unusual step of alleging that a panel has failed to objectively assess the underlying matter upon which Argentina prevailed – whether the measure taken to comply was consistent with Article 11.3. Argentina has also taken the unusual step of complaining that the Panel erred in not providing an adequate explanation as to why it declined to make a suggestion that even Argentina acknowledges the Panel was not obliged to make.

2. A notable aspect of these claims is that not one of them would have any effect on the outcome of this dispute. More importantly, however, a simple review of the provisions in question suffices to reject Argentina's claims in their entirety.

II. THE PANEL CORRECTLY FOUND THAT COLLECTION OF FACTUAL INFORMATION WAS NOT WTO-INCONSISTENT

3. The Panel in the original proceeding found that Commerce's sunset likelihood determination did not have "an adequate factual basis" because Commerce relied on the margin of dumping from the original investigation.[1] The United States did not appeal this aspect of the original Panel's findings. To comply with the recommendations and rulings of the Dispute Settlement Body ("DSB"), Commerce conducted a Section 129 proceeding and issued revised final results of sunset review.[2] During that proceeding, Commerce requested, received and considered information and argument from the Government of Argentina, Argentine producers, and U.S. producers. The compliance Panel correctly found that Commerce's collection of factual information in the course of implementing the DSB's recommendations and rulings was not

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[1] Original Panel Report, paras. 7.219-7.221.

[2] *Decision Memorandum; Section 129 Determination: Final Results of Sunset Review, Oil Country Tubular Goods from Argentina* (December 16, 2005) (Panel Exhibit ARG-16).

WTO-inconsistent.[3]

A. The Panel Properly Considered Argentina's Article 11.3 and 11.4 Claims

4. Argentina claims that, pursuant to Articles 11.3 and 11.4, Commerce was precluded from developing a new factual basis pertaining to the original sunset review period for its Section 129 Determination.[4] According to Argentina, collection of new information would render the temporal limitations of Articles 11.3 and 11.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement") meaningless.[5]

5. As the Panel correctly found, nothing in the text of Articles 11.3 and 11.4 supports Argentina's assertions. Articles 11.3 and 11.4 plainly state that an investigating authority must *initiate* a review prior to the expiry of the five-year period and that such a review should "normally" be completed within 12 months. Neither article addresses the issue of whether an investigating authority may gather new facts to bring a measure into compliance. As the Panel stated, nothing in Articles 11.3 or 11.4 "precludes an investigating authority from developing a *new* factual basis pertaining to the original review period in the course of implementing the DSB recommendations and rulings pertaining to the original determination."[6]

6. Having considered and rejected Argentina's argument that the text of Articles 11.3 and 11.4 of the Antidumping Agreement precludes the collection of new information, the Panel next

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[3] Panel Report, paras. 7.47-7.60.

[4] Argentina Other Appellant Submission, paras. 28-29.

[5] Argentina Other Appellant Submission, para. 37.

[6] Panel Report, para. 7.50 (emphasis in original). Indeed, the United States has previously been found in breach for *failing* to take new facts into account. *See US – Privatization*, paras. 7.252-7.254.

considered Argentina's argument in light of the context provided by provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). The Panel properly found that:

> Argentina's proposition that the United States was somehow precluded from developing a new factual basis in its implementing sunset re-determination in this case runs counter to the overall operation of the WTO dispute settlement system, and, in particular, the notion of *implementation* of the DSB recommendations and rulings embodied in the relevant provisions of the DSU.[7]

The Panel reasoned that DSU Article 19.1 does not prescribe the ways in which a WTO-inconsistent measure may be brought into conformity with the WTO rules and concluded that "competent authorities of WTO Members may need to collect new information supplementary to that on the record of their original determinations in making subsequent determinations in the context of implementing the DSB recommendations and rulings."[8]

7. It should also be noted that the sole effect of Argentina's interpretation would be to prevent reasoned and adequate affirmative redeterminations. The collection of new facts would

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[7] Panel Report, para. 7.52 (emphasis in original); *see also* paras. 7.53-7.60.

[8] Panel Report, para. 7.60. Argentina also casually asserts that the Panel's view that an investigating authority may collect new facts would render *inutile* the entirety of Articles 11.3 and 11.4. Articles 11.3 and 11.4 require Members to terminate orders *or* conduct reviews, and if the latter, "normally" to conclude them within 12 months. Argentina has failed to explain how an interpretation that permits the collection of new facts in the compliance phase would render those provisions *inutile*. Moreover, Argentina's argument suffers from an internal inconsistency. In order for Argentina to argue that a Member cannot cure a factually flawed sunset determination by collecting additional facts during the compliance phase, it must be true that the Member in fact conducted a review as required by Article 11.3. In other words, Article 11.3 is correctly being interpreted to require a Member to have conducted such a review, and so the interpretation of Article 11.3 has given effect to all of its terms. An interpretation that permits a Member to collect new facts in the compliance phase does not remove the effectiveness of Article 11.3 and render it *inutile*.

only become an issue when such new facts *support* an affirmative determination: If the new facts do not support an affirmative determination, then the investigating authority will either revoke the order, or a compliance panel will find the order to be WTO-inconsistent. But if the new facts *do* support an affirmative determination, Argentina's position nevertheless requires such a determination to be found WTO-inconsistent, not because the determination is not reasoned and adequate, but purely on the grounds that supporting facts were collected during the process of implementation. Nothing in the Antidumping Agreement – including an entire Article 6 and Annex II devoted to expressing procedural rights and obligations – suggests the drafters intended for panels to reject correct affirmative determinations on such a basis.

8. Therefore, Argentina's claim that the Panel's finding that the United States did not act inconsistently with Articles 11.3 and 11.4 of the Antidumping Agreement by developing a new factual basis for the Section 129 Determination should be rejected.

B. The Panel Did Not Breach Article 11 of the DSU

9. Argentina claims that the Panel failed to make an objective assessment of the matter before it, in violation of DSU Article 11, because the Panel did not rely on a textual analysis of Articles 11.3 and 11.4.[9]

10. At the outset, the United States recalls that an "allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute

[9] Argentina Other Appellant Submission, paras. 61-62.

settlement process itself."[10] The United States does not understand why Argentina would be appealing this aspect of the Panel report under Article 11 of the DSU. Argentina is claiming that the Panel's interpretation of Articles 11.3 and 11.4 of the Antidumping Agreement was erroneous. The Appellate Body is perfectly positioned as a result of Article 17.6 of the DSU to review the Panel's legal interpretation – appealing under Article 11 of the DSU adds nothing to Argentina's appeal other than to raise the very serious allegation that the Panel has failed to conduct an "objective" assessment of the matter. Argentina simply argues that the Panel was precluded from considering the provisions of the DSU dealing with the compliance phase as context for interpreting how Articles 11.3 and 11.4 of the Antidumping Agreement operated in the compliance phase. Far from reflecting a lack of objectivity, the Panel's analysis is consistent with the obligation to conduct an objective assessment. The Panel's consideration of Argentina's claims was thorough and correct, and Argentina's Article 11 claim is unwarranted both as a matter of procedure as well as a matter of substance.

11. In analyzing Argentina's claims under Articles 11.3 and 11.4, the Panel framed the issue for its consideration as follows:

> Whether the USDOC was allowed under Articles 11.3 and 11.4 of the Agreement to base its Section 129 Determination, among others, on facts pertaining to the original review period, i.e., 1995-2000, that it collected for the first time in 2005, in the context of implementing the DSB recommendations and rulings after the original WTO dispute settlement proceedings.[11]

In paragraph 7.50 of its report, the Panel then considered the text of both Articles 11.3 and 11.4.

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[10] *Australia – Salmon (AB)*, para. 133.

[11] Panel Report, para. 7.49.

While the Panel agreed with Argentina that Articles 11.3 and 11.4 "reflect temporal considerations," it disagreed with Argentina "that either or both of these provisions, in isolation, resolve the issue before us." The Panel reasoned as follows:

> We do not consider that the Article 11.3 obligation to terminate an anti-dumping duty within five years in the absence of an affirmative likelihood determination resulting from a review initiated before that point in time, or the Article 11.4 obligation to carry out a review expeditiously and normally within 12 months, precludes an investigating authority from developing a new factual basis pertaining to the original review period in the course of implementing the DSB recommendations and rulings pertaining to the original determination.[12]

12. Argentina argues that the Panel did not conduct sufficient analysis of its specific claims under Articles 11.3 and 11.4[13] and provided only a "summary conclusion."[14] However, panels are required to provide explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings.[15] To the extent that the Panel's analysis is concise, this merely reflects the absence of any basis in the Agreement for Argentina's claims, rather than a failure on the part of the Panel to discharge properly its obligations.

13. Argentina also argues that the Panel failed to make an objective assessment of the matter before it and did not "resolve" the dispute by applying the provisions "invoked" by Argentina.[16] That is simply incorrect. The Panel found that Argentina's interpretation of the text of Articles 11.3 and 11.4 was wrong. Thus, the Panel *did* examine the provisions "invoked." Having

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[12] Panel Report, para. 7.50.

[13] Argentina Other Appellant Submission, paras. 44-47.

[14] Argentina Other Appellant Submission, para. 48.

[15] *See Mexico – HFCS (Article 21.5) (AB)*, paras. 108-109.

[16] Argentina Other Appellant Submission, para. 57.

concluded that the text of Articles 11.3 and 11.4 of the Antidumping Agreement did not support Argentina's interpretation, and in recognition of the fact that the question before it implicated dispute settlement implementation more generally,[17] the Panel correctly examined the context provided by the provisions of the DSU.[18] The Panel concluded that a consideration of the provisions of DSU also did not support Argentina's position.

14. The Appellate Body should reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in its assessment of Argentina's claims regarding Articles 11.3 and 11.4 of the Antidumping Agreement.

C. Argentina's DSU Article 3.2 and 19.2 Claims Should Be Rejected

15. In paragraph 104 of its Other Appellant submission, Argentina appears to be citing as an independent basis for appeal Articles 3.2 and 19.2 of the DSU.[19] However, the Appellate Body has already rejected that approach, noting that any such appeal would, by definition, be predicated on underlying findings of legal error.[20] Here, Argentina argues that the Panel erred because, according to Argentina, it had a right to termination of the order. However, Argentina has never even attempted to demonstrate to the Panel, or here, that such a right exists under the

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[17] Panel Report, para. 7.51.

[18] The Panel also noted that the provisions of the DSU and the Antidumping Agreement must be read together in a "coherent manner." Panel Report, n. 39.

[19] Argentina does not recognize that Article 3.2, while helpful context and guidance for what a panel should be considering in developing findings and a recommendation that may become the recommendations and rulings of the DSB, nonetheless is directed at the DSB, and not a panel or the Appellate Body. Thus, a *panel* could not have failed to follow Article 3.2.

[20] *Chile – Alcohol (AB)*, para. 79.

Agreement.[21] Indeed, it cannot. No such right is found in the text of the Antidumping Agreement or the DSU, as the Appellate Body has recognized in its reasoning in *US – OCTG from Mexico* where it stated:

> The fact that the USDOC acted inconsistently with the requirements of Article 11.3 in its likelihood-of-dumping determination does not necessarily imply that the underlying anti-dumping duties must be terminated immediately.[22]

16. Argentina also claims that the Panel has added to the rights of the United States by permitting the investigating authority to collect factual information in making a redetermination in the course of implementing the DSB's recommendations and rulings.[23] As discussed above, the Panel's conclusions regarding collection of factual information reflect a correct interpretation and application of the covered agreements. Thus, even if there were any merit to appealing on the basis of Articles 3.2 and 19.2 of the DSU, Argentina has failed to establish that the Panel acted contrary to those provisions.

17. For these reasons, the Appellate Body should dismiss Argentina's apparent appeal under Articles 3.2 and 19.2 of the DSU.

III. THE PANEL DID NOT ERR IN ITS DECISION NOT TO MAKE A SUGGESTION

18. Argentina contends that the Panel erred by "summarily rejecting" Argentina's request for a suggestion under DSU Article 19.1. According to Argentina, the Panel breached Articles 11

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[21] Rather, Argentina has argued that the Panel erred with respect to the question of whether Commerce was allowed to collect new information and whether the Panel was obliged to explain why it did not make a suggestion. Therefore, even if Argentina were to prevail on such claims, they would not result in a legal finding that termination of the order was required.

[22] *US – OCTG from Mexico (AB)*, para. 187.

[23] Argentina Other Appellant Submission, para. 65.

and 12.7 of the DSU. Both of these arguments are baseless and should be rejected. The simple fact is that Article 19.1 provides that a panel or the Appellate Body "may" suggest ways in which a Member "could" implement a recommendation. Any such suggestion is distinct from a "recommendation" under Article 19.1 and is neither a "finding" nor a "recommendation" of a panel or the Appellate Body. By its own terms, Article 19.1 confers discretion on panels and the Appellate Body. That discretion is not fettered by Article 11 or Article 12.7, nor is there any provision in Article 19.1 for a party to request such a suggestion or for a panel or the Appellate Body to respond to any such request.

A. The Panel Did Not Breach Article 11 of the DSU

19. As noted above allegations of breach under Article 11 of the DSU are serious challenges. Argentina has failed to establish that the Panel breached its obligation to make an objective assessment of the matter, including the facts before it.[24] The United States recalls that the "matter" before a panel consists of the claims and the measures in question.[25] Thus, the Panel's obligation under Article 11 was to make an objective assessment of the claim and the measure – whether the measure taken to comply breached Article 11.3. Argentina does not contend that the Panel failed to make such an assessment of the measure and claim; rather, Argentina contends that the Panel did not make an objective assessment of the *request for a suggestion*. A request for a suggestion is neither a claim nor a measure. Therefore, the Panel did not fail to make an

[24] Argentina's argument with respect to the alleged breach of Article 11 appears to be the same as its argument with respect to Article 12.7, *i.e.*, "the Panel's summary dismissal of Argentina's request, *with no analysis or explanation,* falls short of the obligation set out in DSU Article 11 . . . ." Argentina Other Appellant Brief, para. 80 (emphasis added).

[25] *See, e.g.*, *Guatemala – Cement (AB),* para. 72-73.

objective assessment of the matter before it.

20. Finally, the Panel's approach here accords with the approach already used by panels and the Appellate Body. For example, in the original proceeding, Argentina asked the Appellate Body to make the same suggestion.[26] The Appellate Body did not grant Argentina's request, nor did it consider that it was obliged to provide an explanation of its decision not to do so.[27]

B. The Panel Did Not Breach Article 12.7 of the DSU

21. Argentina's claim with respect to Article 12.7 is similarly without merit. As Argentina notes, to discharge its obligations under Article 12.7, a panel must provide the basic rationale behind its findings and recommendations.[28] The Panel's declining to make a suggestion is not a "finding" or a "recommendation," nor has Argentina argued that it is. The Panel has not failed to observe Article 12.7 by failing to provide such a rationale.[29]

22. Furthermore, the United States recalls such suggestions are discretionary. Nothing in Article 19.1 requires an explanation with respect to the exercise of that discretion. Indeed, nowhere does Article 19.1 authorize or discuss a request from a party for such a suggestion, let alone impose any procedures for a panel or the Appellate Body to respond to any such request. Thus, given the discretionary nature of the second sentence of Article 19.1, and the absence of

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[26] Argentina Other Appellant Submission (original proceeding), para. 74.

[27] *See US – OCTG (Argentina) (AB), passim*.

[28] Argentina Other Appellant Submission, para. 74.

[29] The United States notes that Argentina substitutes the word "decisions" for the word "findings." Argentina Other Appellant Submission, para. 76. But Argentina fails to identify where Article 12.7 provides an obligation to disclose the rationale for *decisions*. Article 12.7 is precise: it requires a rationale for findings and recommendations. Argentina is simply seeking to rewrite Article 12.7.

any requirement therein to explain the exercise of such discretion, Argentina's claim fails.

23. Argentina also contends that the Panel did not set out "the applicability" of Article 19.1.[30] However, the Panel noted "that Article 19.1 of the DSU states that WTO panels may suggest ways through which the Member concerned could implement their recommendations."[31] Thus, contrary to Argentina's assertion, the Panel did set out the applicability of Article 19.1. The Panel found it applicable but simply elected not to exercise the discretion provided thereunder.

C. Argentina's Request for a Suggestion is Without Merit

24. Argentina has made a number of unsubstantiated assertions in its continuing quest to secure a suggestion. According to Argentina, such a suggestion is "vital"[32] to preserve its rights; it is "intrinsically linked" to the argument that Article 11.3 requires termination of the order;[33] and the DSU drafters recognized that there would be circumstances in which such a suggestion would be "necessary to help resolve" the dispute.[34]

25. A suggestion is just that: a suggestion. The DSU does not identify any legal consequences that flow from suggestions under Article 19.1. Therefore, by its very nature, a suggestion cannot be "vital" or "necessary" to resolve a dispute.[35] Moreover, Argentina links its request for a

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[30] Argentina Other Appellant Submission, para. 89.

[31] Panel Report, para. 9.4.

[32] Argentina Other Appellant Submission, para. 87.

[33] Argentina Other Appellant Submission, para. 91.

[34] Argentina Other Appellant Submission, para. 94.

[35] The United States noted in its arguments before the Panel that Argentina had failed to explain how a "suggestion" from the Panel would fulfill Argentina's alleged "right" to termination, or how it would prevent an alleged "never-ending cycle" of litigation. *See, e.g.*, U.S. Second Written Submission, para. 95. Presumably Argentina failed to do so because there

suggestion to its rejected legal argument that Article 11.3 requires termination of an order after five years when a review is flawed, without regard to whether there is ultimately a basis for continuing the order. However, this linkage only undermines Argentina's argument that a suggestion is "necessary," since a legal requirement of automatic termination for correctable breaches would obviate any need for a suggestion. However, as the Appellate Body itself has already concluded, Argentina's legal theory with respect to Article 11.3 is wrong,[36] and any argument that a suggestion is warranted based on this theory therefore also fails.[37]

26. Further, it is well-established that a Member has the right to determine the "means of implementation."[38] That a complaining party may prefer one form of implementation over another does not affect the responding party's right to determine such implementation. It may be safe to say that, in general, respondents prefer dumping orders to be terminated, without regard to whether dumping is likely to continue or recur. But that is not reason enough to suggest that a Member's authorities terminate such an order, rather than correct the flawed determination.

27. The United States therefore respectfully requests that the Appellate Body reject Argentina's request.

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is no such possible explanation.

[36] *US – OCTG (Mexico) (AB)*, para. 187.

[37] *See* U.S. Second Written Submission, para. 96. In contending that Commerce's continuation of the order in the 2006 sunset review is part of a cycle that is "patently absurd," (Argentina Other Appellant Submission, para. 96) Argentina neglects to mention that during that period of review the lone Argentine exporter had a dumping margin of over 60 percent. U.S. First Written Submission, para. 41. Thus, Commerce's prediction in 2000 that dumping would continue or recur was correct, even without revocation of the order.

[38] *See*, *e.g.*, *US – OCTG (Mexico) (AB)*, para. 187.