

US – OIL COUNTRY TUBULAR GOODS SUNSET REVIEWS¹

(DS268)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Argentina</i>	<i>ADA Arts. 1, 2, 3, 6, 11, 12, 18 and Annex II</i>	Establishment of Panel	<i>19 May 2003</i>
			Circulation of Panel Report	<i>16 July 2004</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>29 November 2004</i>
			Adoption	<i>17 December 2004</i>

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US anti-dumping duties as well as laws, regulations and practice governing sunset reviews under the Sunset Policy Bulletin (SPB).
- Product at issue: Oil country tubular goods (OCTG) from Argentina.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

Sunset review (ADA Art. 11.3): as such violations

- SPB (DSU Art. 11): The Appellate Body upheld the Panel's finding that the SPB was a "measure" subject to WTO dispute settlement; however, due to what it considered to be an insufficient analysis, it found that the Panel had failed to make an objective assessment of the matter within the meaning of DSU Art. 11 and reversed the Panel's finding that Section II.A.3 of the SPB was inconsistent, *as such*, with Art. 11.3. It did not complete the analysis on this issue.
- "Affirmative and deemed waiver provisions":³ The Appellate Body upheld the Panel's findings that the waiver provisions relating to waiver of participation in sunset review proceedings were, *as such*, inconsistent with the requirements relating to the likelihood of dumping determination under Art. 11.3 because they required assumptions about a company's likelihood of dumping. Also, having concluded that the respondents' incomplete substantive submissions should still be taken into account, the Appellate Body upheld the Panel's finding that the deemed waiver was inconsistent *as such* with Art. 6.1 and 6.2 (evidence). However, it reversed the Panel's finding of inconsistency regarding respondents who file no submission.

Sunset review (ADA Art. 11.3): as applied (ITC's determination⁴) violations

- Likelihood of injury: The Appellate Body upheld the Panel's finding that the obligations in Art. 3 "do not apply to "likelihood of injury" determinations carried out in sunset reviews". It rejected Argentina's argument that Art. 11.3, *per se*, imposes "substantive obligations" on investigating authorities to make sunset review determinations in a particular manner. It found that the Panel did not err in interpreting the term "injury" under Art. 11.3 based on the parameters of injury determinations in Art. 3, as it considered that other factors including those in Art. 3 may be relevant in a given "likelihood-of-injury" determination. Thus, it upheld the Panel's findings: (i) that the ITC determination at issue was consistent with the "likelihood" standard of Art. 11.3; and (ii) that the standard of continuation or recurrence of injury "within a reasonably foreseeable time" as provided in the Tariff Act and as applied in the review at issue was consistent with Art. 11.3.
- Cumulation analysis: The Appellate Body upheld the Panel's findings that: (i) Art. 11.3 does not preclude investigating authorities from cumulating the effects of likely dumped imports in the course of their "likelihood-of-injury" determinations; and (ii) the conditions for the use of cumulation set out in Art. 3.3 do not apply in sunset reviews.

¹ *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*

² Other issues addressed: terms of reference and panel requests; types of evidence that can support an investigating authority's findings. GATT Arts. VI and X:3(a), WTO Agreement Art. XVI:4.

³ Under the provisions, the US Department of Commerce ("USDOC") would consider that an interested party had waived participation in one of two ways: (i) "affirmative waiver" when an interested party waives participation by filing an explicit statement in this regard; and (ii) "deemed (or implicit) waiver" when an interested party submits an incomplete substantive response to the notice of initiation.

⁴ ITC (International Trade Commission).

US – OIL COUNTRY TUBULAR GOODS SUNSET REVIEWS (ARTICLE 21.5)¹
(WT/DS268)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Argentina</i>	<i>ADA Arts. 11.3, 11.4, 6.1, 6.2, 6.4, 6.5.1, 6.6, and 6.9</i>	Establishment of Panel	<i>17 March 2006</i>
			Circulation of Panel Report	<i>30 November 2006</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>12 April 2007</i>
			Adoption by the DSB	<i>11 May 2007</i>

1. MEASURES TAKEN TO COMPLY WITH DSB'S RECOMMENDATIONS

- Amended US regulatory provisions regarding waivers by exporters of their right to participate in the section of sunset review investigations conducted by the USDOC; and a re-determination by the USDOC (the Section 129 Determination) on the likelihood that imports of oil country tubular goods ("OCTG") from Argentina would be dumped if the anti-dumping duty order were revoked or the investigation were terminated.

2. SUMMARY OF KEY PANEL/APPELLATE BODY FINDINGS

- ADA Art. 11.3: The Appellate Body reversed the Panel's finding that the amended waiver provisions were, as such, inconsistent with ADA Art. 11.3. The Appellate Body noted that, under the "amended" waiver provisions, a company-specific finding by the USDOC was now based on "positive evidence" (and not a mere "assumption") since an exporter waiving its right of participation from the USDOC section of the sunset review investigation now had to sign a statement that it was likely to dump if the order were revoked or the investigation terminated. Further, the Appellate Body observed that the amended waiver provisions did not preclude the USDOC from considering other evidence on the record of the sunset review before making an order-wide determination of likelihood of dumping.
- DSU Art. 21.5 ("measure taken to comply"): The Panel found, and the Appellate Body agreed, that the USDOC's analysis on the decline in the volume of dumped imports – one of the two factual bases of the original likelihood of dumping determination, and which had been incorporated into the Section 129 Determination at issue – was part of the "measure taken to comply" within the meaning of Article 21.5 of the DSU. Consequently, the Appellate Body let stand the Panel's conclusion that the USDOC's findings regarding the volume of dumped imports and the "likely past dumping" (which had not been appealed) lacked a sufficient factual basis and failed to meet the requirements of Art. 11.3.
- ADA Arts. 11.3 and 11.4: The Panel found, and the Appellate Body agreed, that the USDOC did not act inconsistently with ADA Arts. 11.3 or 11.4 by developing a new evidentiary basis, pertaining to the initial sunset review period, for its Section 129 Determination.
- ADA Art. 6: The Panel found that the USDOC did not act inconsistently with Arts. 6.1 and 6.2 by not issuing supplemental questionnaires and a preliminary determination and by not holding a hearing. It did, however, act inconsistently with Article 6.4 by failing to make certain information available to Argentine exporters. The USDOC acted inconsistently with Art. 6.5.1 by not requiring petitioners to submit a non-confidential summary of certain confidential information. The USDOC did not act inconsistently with Art. 6.6 with regard to satisfying itself as to the accuracy of certain information. The USDOC did not violate its notification obligation under Art. 6.9.

3. OTHER ISSUES

- Judicial economy: The Panel applied judicial economy with regard to certain claims raised by Argentina.
- Suggestion for implementation (DSU Art. 19.1): The Panel and the Appellate Body declined Argentina's request to make a suggestion, pursuant to DSU Art. 19.1, that the United States revoke the anti-dumping duty order on Argentina's OCTG.

¹ *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*