Before the World Trade Organisation
Appellate Body

(AB-2007-1)

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

Written Submission by the European Communities

Geneva 6 February 2007
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I. INTRODUCTION

1. The European Communities makes this third party written submission because of its systemic interest in the correct interpretation of the Anti-Dumping Agreement and the WTO Agreements. In this written submission the European Communities will address two points: the invocation by the United States of the so-called mandatory/discretionary distinction; and the scope of the measure taken to comply in a compliance panel. The European Communities reserves the right to comment on other aspect of the appeal in its oral statement. Given its brevity, the European Communities respectfully requests that this submission be considered its own executive summary.

II. SO-CALLED MANDATORY DISCRETIONARY DISTINCTION

2. The European Communities disagrees with the United States. The European Communities considers that the so-called "mandatory/discretionary" distinction proposed by the United States cannot be derived from the text of the Anti-Dumping Agreement or any other WTO agreement, or from the case law – nor any "variation" of it, "classic" or otherwise. This matter was litigated at length before the Appellate Body in US-Zeroing, and the arguments of the United States were not accepted.

3. Referring to and summarising its submission in that case, the European Communities recalls that the legal basis for, origins, evolution and content of the so-called mandatory/discretionary doctrine are obscure. The United States cites no legal basis for the alleged rule in the WTO agreements. A careful review of past GATT and WTO panel reports reveals that under the heading “mandatory/discretionary” one will not in fact find a homogenous, systematic and consistent articulation of the same point or principle. Rather, one finds slightly different ideas or concepts, applied to disparate factual situations, and often

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1 US Appellant Submission, para 9.
leading to rather different results. The mandatory/discretionary rule is not anywhere articulated in the WTO agreements, and certainly not in the general, abstract and mechanistic terms in which it is invoked by the United States. Rather, its alleged existence is typically asserted on the basis of an alleged “consistent practice” of past GATT and WTO panels. But there is no such "consistent practice".

4. One-by-one, some of the things that it has from time-to-time been suggested the so-called mandatory/discretionary rule might stand for have, particularly on review by the Appellate Body, fallen by the way-side. There is, for example, no need that the measure be adopted by the “legislature” as opposed to the “executive”. Any measure imputable to a Member is susceptible to review. There is, for example, no need that the measure is “binding” in municipal law. Even “non-binding” measures are susceptible to review. It is irrelevant, for example, if the measure can be changed, or how it might be changed. A measure may be inconsistent even if it has not yet been applied (although evidence of its “as applied” use may evidence a finding of inconsistency). Also irrelevant is the assertion that the municipal law measure is allegedly susceptible to various interpretations by the municipal courts.

5. The United States has in the past asserted, and again asserts, that the “mandatory/discretionary” rule means that the measure must in all cases require WTO-inconsistent action before it can be impugned. The European Communities does not agree that such a rule exists or is to be mechanistically applied. With the possible exception in practice of numbers, it is never possible to say that two

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3 Such a requirement was sometimes alleged based on the wording of a GATT Working Party Report commenting on the GATT Protocol of Provisional Application, suggesting that a “mandatory” measure “imposes on the executive authority requirements which cannot be modified by executive action”. Such an assertion does not hold good under WTO law (Appellate Body Report, US-Corrosion-Resistant Steel, paragraph 81).

4 Appellate Body Report, US-Corrosion-Resistant Steel, paragraph 38 (US “non-binding” argument) and paragraph 85; Appellate Body Report, Guatemala – Cement I, paragraph 69, footnote 47.


general and normative rules not expressed in identical terms will always produce the same result when applied to any set of facts. It is always possible to imagine a set of facts to which the application of the two rules will produce different results. This simply results from the fact that there is a penumbra associated with all language, especially when used in relatively abstract terms. The \textit{mechanistic} application of an “in all cases” test thus stands for the proposition that general municipal measures should never or almost never be found “as such” inconsistent; a proposition that flatly contradicts the provisions of the \textit{Anti-Dumping Agreement} and the \textit{WTO Agreement}. In the light of Article XVI:4 of the WTO Agreement and Article 18.4 of the \textit{SCM Agreement}, Members must ensure conformity with WTO law, either through direct effect, or through implementing measures that are themselves in conformity with WTO law.

6. The European Communities believes that, just as the “mandatory/discretionary” rule is not, in truth, borne of any abstract basic principle expressed in the WTO agreement or elsewhere, but has rather been puffed-up by dubious assertion based on specific past cases; so we may expect, quite appropriately, to witness its demise, on a case-by-case basis. The Appellate Body could confirm, once and for all, that there is, in truth, no such principle. In the opinion of the European Communities, that is what it has effectively done by finding that such a “rule” is not to be mechanistically applied. Alternatively, the Appellate Body may, in one successive case after another, explain why the rule does not avert an “as such” finding of inconsistency in the particular case. Whether it’s a quick execution or a slow and painful death, the end result is the same. This view is confirmed by the Appellate Body Report in \textit{US-Zeroing}.\footnote{Appellate Body Report, \textit{US-Zeroing}, paragraphs 62 and 208 (summarising US argument); paragraphs 67, 68 and 210 (summarising EC argument) and paragraphs 211 to 214 (Appellate Body findings).}

7. Furthermore, there are particularly good reasons why the arguments of the United States in this case should be rejected. The United States courts, applying the US municipal law \textit{Chevron} doctrine of judicial deference to executive interpretations, to the complete exclusion of the US municipal law \textit{Charming Betsy} doctrine of interpreting municipal statute in conformity with international law, have generally
refused to correct USDOC's WTO inconsistent interpretations of ambiguous US statute. Consequently, and inconsistently with, inter alia, Article 18.4 of the Anti-Dumping Agreement, economic operators are denied any effective remedy in US municipal law. The Appellate Body has confirmed that measures are to be assessed “in their full context, including how such measures are introduced into, and how they function within, the particular system of the implementing Member.”

8. For these reasons, the European Communities invites the Appellate Body to dismiss the appeal by the United States on this point.

III. MEASURE TAKEN TO COMPLY

9. The United States appeal concerns a problem being raised in DSU proceedings with increasing frequency: what is the relationship between the measure at issue (and elements of it) in an original panel; and the measure taken to comply (and elements of it) in a compliance panel. The context of this legal problem includes: 1) the fact that measures at issue may be complex and have many different elements, some of which are more closely inter-related than others; 2) that panel's may focus on resolving the dispute, and thus exercise judicial economy, and that successful appeal of the exercise of judicial economy may be difficult, 3) the principle of res judicata, according to which once a matter is decided it should not be re-litigated and 4) the fact that a compliance panel may be followed by retaliation.


11 US Appellant Submission, paras 35 to 51.

12 See, for a recent example, Panel Report, Chile – Agricultural Products (Price Band) (Article 21.5 - Argentina), paras 7.121 to 7.162.

13 See, for a recent example, Appellate Body Report, US-Zeroing, paras 225 and 250 (applying the standard reasoning that additional findings are unnecessary to resolve the dispute).
10. There would appear to be two competing models: "the measure model" (essentially supported by Argentina in this case), which tends to fix the parameters of the compliance panel by reference to the original measure - understanding the measure taken to comply accordingly; and the "element of the measure model" (essentially supported by the United States in this case), which tends to fix the parameters of the compliance panel by reference to the elements of the original measure at issue in respect of which findings were made by the original panel, and understand the "measure taken to comply" accordingly. One can find examples of both types of approach in the case law.¹⁴

11. It appears to the European Communities that neither model may provide a satisfactory method for dealing with all cases.

12. For example, the measure model would appear most obviously unsatisfactory in cases involving "as such" claims against Member's legislation implementing the WTO Agreements by way of municipal law measures intended to have general and prospective application. These might typically consist of hundreds of articles (or elements). Given the seriousness of "as such" claims, to accept that an entirely new article (or element) could be raised in a compliance panel would appear to be obviously unsatisfactory. In fact, in such cases, typically, it is a particular provision or provisions, and not the piece of legislation as a whole, that is described as the "measure at issue".

13. On the other hand, taken to its logical conclusion, it is not clear where the element of the measure model would stop in its deconstruction or atomisation of a measure at issue. In theory, one could deconstruct a measure at issue into one set of legal findings, one set of factual findings, one set of evidence, and one set of findings concerning the legal characterisation of the facts; and there is no limit in theory to the number of "elements" within each set. It seems to the European Communities that such an approach might encourage litigants to similarly atomise their claims and arguments, provoking more exercise of judicial economy, appeals from which may not be welcomed by the Appellate Body. It might also encourage litigants to

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¹⁴ See, for example, Panel Report, Japan – Apples (Article 21.5 United States), paras 8.28 to 8.30, where, in effect, the United States argued successfully for the "measure model".
request in parallel and in the alternative and in relation to the same matter a compliance panel and a new original panel (eventually with the same panellists) in order to ensure that, whichever model prevails, they do not suffer unnecessary procedural delay – something that would only add needless complexity to already complex legal proceedings.

14. The question therefore poses itself: are there any objective criteria that can be articulated for determining which of the two models applies in any given case? And applying these criteria to the case at hand, why did the European Communities agree with Argentina in this case?15

15. In the view of the European Communities an important criteria, perhaps the most important, is whether what is at stake is just one WTO obligation, or more than one. If there is just one WTO obligation, and one commensurate determination or finding by a municipal investigating authority, then that tends to plead strongly in favour of that one determination being treated as indivisible for the purposes of a compliance panel.

16. In this case there is one WTO obligation: the obligation to make the determination in Article 11.3 of the Anti-Dumping Agreement that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Consistent with that, in the Article 11.3 re-determination, there is one finding.16 In the view of the European Communities, this is sufficient to distinguish the case from the EC-Bed Linen (Article 21.5 – India) case, which involved different legal obligations: the obligation in the second sentence of Article 3.5 of the Anti-Dumping Agreement concerning the demonstration of a causal relationship; and the obligation in the third sentence of Article 3.5 of the Anti-Dumping Agreement to examine other factors.17 Contrary to what the United States asserts,18 the Appellate Body Report in the EC-Bed Linen (Article 21.5 – India) case does not record that the European Communities was required to also revise its "other factors" analysis – indeed it

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15 EC Oral Submission to the Panel, paras 18 to 20.
16 Panel Report, para 7.89.
18 US Appellant Submission, para 42, penultimate sentence.
states the opposite. These observations are sufficient to settle the matter in Argentina's favour in this particular case.

17. In cases such as the present case, where there is one WTO obligation and one municipal law finding or determination, it seems to the European Communities that the set of relevant facts on which such determination is based may interact with each other in multiple, subtle and complex ways, particularly with respect to reasonable inference. And precisely the same is true with respect to the evidence. Thus, for example, two or three facts or pieces of evidence might corroborate or triangulate each other. The whole may be more than the sum of the parts. In such cases, to artificially split up the facts and evidence would be just that: artificial.

18. The European Communities would equally find it relevant if what is essentially a single factual determination, or a single piece of evidence (typically a document) would be divided up for the purposes of making an "element of the measure" type of argument.

19. For these reasons the European Communities invites the Appellate Body to reject the United States appeal on this point.

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19 Appellate Body Report, EC-Bed Linen (Article 21.5 – India), para 86 : "Accordingly, we are of the view that the investigating authorities of the European Communities were not required to change the determination as it related to the "effects of other factors" in this particular dispute."