

**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

Request for Consultations

The following communication, dated 26 January 2006, from the delegation of Argentina to the delegation of the United States and to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

Argentina hereby requests the United States to enter into consultations under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), and paragraph 1 of the *Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding Applicable to the WTO Dispute United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268),¹ with respect to the purported implementation by the United States of the recommendations and rulings of the Dispute Settlement Body (DSB) in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268).

Background

On 17 December 2004, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, in this dispute. The resulting DSB rulings encompassed both "as applied" violations related to the "likelihood of dumping" determination by the US Department of Commerce (USDOC) in the sunset review for oil country tubular goods (OCTG) from Argentina, and "as such" violations related to the "waiver" provisions of United States laws and regulations.

The Panel found that the USDOC 2000 "likelihood of dumping" determination in the sunset review for OCTG from Argentina was inconsistent with Articles 11.3 and 6.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).² These findings were not appealed by the United States.

With respect to the "waiver" provisions of US laws and regulations, the Appellate Body upheld the Panel findings that:

¹ WT/DS268/14.

² Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, para. 8.1(d)(i).

- (i) Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the Anti-Dumping Agreement; and
- (ii) Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the Anti-Dumping Agreement with respect to respondents that file incomplete submissions in response to the USDOC's notice of initiation of a sunset review.³

The DSB recommended that the United States bring its measures into conformity with its WTO obligations.⁴

On 7 June 2005, an arbitrator appointed pursuant to Article 21.3(c) of the DSU determined that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB would be 12 months from the date on which the DSB adopted the Panel and Appellate Body Reports, i.e., by 17 December 2005.⁵

On 28 October 2005, the United States published in the *Federal Register* a notice of amendment of section 351.218(d)(2) of the USDOC Regulations.⁶ The *Federal Register* notice provides that the USDOC 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 Anti-Dumping Agreement.⁷ The amendment was effective as of 31 October 2005. The United States made no changes to Section 751(c)(4)(B) of the Tariff Act of 1930.

On 2 November 2005, the USDOC initiated proceedings under Section 129 of the *Uruguay Round Agreements Act* to address the Panel's findings concerning the Department's likelihood determination. The USDOC did not issue any supplemental questionnaires, or provide a briefing schedule as to the timing of rebuttal and reply comments. There was also no public hearing. On 16 December 2005, the USDOC issued its Section 129 determination, finding again that "revocation of the order would be likely to lead to continuation or recurrence of dumping."⁸

On 20 December 2005, the United States asserted to the DSB that it had "implemented the recommendations and rulings of the DSB in [this] dispute."⁹ Argentina does not agree. Accordingly, there is "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB within the meaning of Article 21.5 of the DSU.

³ Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, para. 365(c)(i) and (ii).

⁴ WT/DSB/M/180.

⁵ *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina. Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Award of the Arbitrator.* WT/DS268/12. 7 June 2005.

⁶ US Department of Commerce, Procedures for Conducting Five-Year ("Sunset") Reviews for Antidumping and Countervailing Duty Orders: Final Rule, 70 *Federal Register* 62061 (28 October 2005).

⁷ 70 *Federal Register* at 62061.

⁸ US Department of Commerce, Issues and Decision Memorandum, Section 129 Determination: Final Results of Sunset Review, Oil Country Tubular Goods from Argentina, A-357-810, 16 December 2005.

⁹ *Statements by the United States at the December 20th Meeting of the WTO Dispute Settlement Body.* <http://www.us-mission.ch/Press2005/1221DSBmeeting.html>.

On 5 January 2006, Argentina and the United States concluded an agreement on procedures under Articles 21 and 22 of the DSU that apply to this dispute.¹⁰ This agreement provides, *inter alia*, that Argentina may request consultations, which the Parties agree to hold within 15 days from the date of circulation of the request. It also provides that after this 15-day period has elapsed, Argentina may request the establishment of a panel.

In the view of Argentina, the measures taken to comply by the United States have failed to implement the DSB recommendations and rulings in this dispute, and have resulted in additional violations by the United States of its WTO obligations for the reasons set out below:

1. The Section 129 Determination is inconsistent with US WTO obligations

In 2001, the United States extended the anti-dumping measure on Argentine OCTG based on its 2000 determination that dumping would be likely to continue or recur. The original Panel in this dispute ruled that the USDOC failed to develop sufficient evidence to support an affirmative determination under Article 11.3 of the Anti-Dumping Agreement, and that the USDOC's 2000 determination was inconsistent with Articles 6.2 and 11.3 of the Anti-Dumping Agreement.

In the 2005 Section 129 proceeding, the USDOC attempted to develop a new factual basis to support the WTO-inconsistent determination it made in 2000. The USDOC acted inconsistently with Article 11.3 of the Anti-Dumping Agreement by seeking to develop new factual information to support the likelihood of dumping determination it reached in 2000, where none of the evidence required to support such a determination was developed at that time.

Even if the USDOC were permitted to develop factual information in 2005 to support a 2000 likelihood determination, *quod non*, the 2005 Section 129 Determination nevertheless failed to satisfy the requirements of Article 11.3 of the Anti-Dumping Agreement. The USDOC did not properly establish a factual basis of positive evidence necessary to support a likely dumping finding, it did not objectively assess the information, its conclusions are not reasoned, and the evidence developed does not support a WTO-consistent determination that dumping would be likely.

Thus, the United States failed to bring its measure into conformity with US obligations under Article 11.3 of the Anti-Dumping Agreement, and failed to implement the recommendations and rulings of the DSB.

In addition, for separate reasons, the conduct of the Section 129 proceeding, and the resulting likelihood determination, are also inconsistent with the obligations of the United States under the Anti-Dumping Agreement for the following additional reasons:

- The USDOC failed to comply with the strict conditions for maintenance of an anti-dumping order beyond five years, in violation of Articles 11.1 and 11.3.
- The USDOC failed to rely on positive evidence and did not objectively evaluate information regarding the Argentine exporters Siderca and Acindar, in violation of US obligations under Article 11.3;
- The USDOC concluded that dumping would be likely to continue or recur based solely on the decline in Argentine OCTG import volume, in violation of US obligations under Article 11.3;

¹⁰ Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding Applicable to the WTO Dispute *United States – Sunset Reviews of Antidumping Measures on Oil Country Tubular Goods from Argentina*, 5 January 2006, WT/DS268/14.

- The USDOC failed to provide to the interested parties ample opportunity to present in writing all evidence which they considered relevant, in violation of US obligations under Article 6.1;
- The USDOC failed to provide to interested parties a full opportunity for the defense of their interests, in violation of US obligations under Article 6.2;
- The USDOC failed to provide timely opportunities for interested parties to see all information that is relevant to the presentation of their cases, in violation of US obligations under Article 6.4;
- The USDOC failed to require interested parties to submit non-confidential summaries of their written submissions in the Section 129 proceeding in a manner so as to permit a reasonable understanding of the substance of the confidential information submitted, in violation of US obligations under Article 6.5.1;
- The USDOC characterized Siderca's submitted cost information as unreliable without a reasonable basis for doing so, in violation of US obligations under Article 6.6;
- The USDOC failed to follow the requirements of Article 6.8 and Annex II by recurring to facts available to determine that there was likelihood of continuation or recurrence of dumping had the antidumping duty order on OCTG from Argentina been revoked in 2000;
- The USDOC failed to inform interested parties of the essential facts under consideration that formed the basis for the decision, and failed to provide reasonable summaries of confidential information, in violation of US obligations under Article 6.9; and
- The USDOC failed to follow the public notice and explanation requirements of Article 12.2 with respect to USDOC's Section 129 Determination.

2. The United States has failed to bring 751(c)(4)(B) of the Tariff Act of 1930 into conformity with its WTO obligations

Section 751(c)(4)(B) of the Tariff Act of 1930 has been neither repealed nor amended. It therefore remains WTO-inconsistent. Furthermore, the amendments to the USDOC Regulations have in no way eliminated the WTO-inconsistency of this statutory provision. The United States has therefore failed to bring Section 751(c)(4)(B) into conformity with its obligations under Articles 11.1 and 11.3 of the Anti-Dumping Agreement.

3. The United States has failed to bring Section 351.218(d)(2) of the USDOC Regulations into conformity with its WTO obligations

United States has eliminated paragraph (d)(2)(iii) of Section 351.218 of the USDOC Regulations. Additionally, United States has amended paragraph (d)(2)(ii) of Section 351.218. This paragraph now provides in part that every statement of waiver must include "a statement that the respondent interested party is likely to dump or benefit from a countervailable subsidy (as the case may be) if the order is revoked or the investigation is terminated."¹¹

¹¹ 70 *Federal Register* at 62062.

The revised regulation is inconsistent with the obligation of the USDOC under Articles 11.1 and 11.3 of the Anti-Dumping Agreement to "arrive at a reasoned conclusion" on the basis of "positive evidence."

By mandating that a party filing a Statement of Waiver include a statement that it is likely to dump, Section 351.218(d)(2)(ii) denies interested parties a full opportunity for the defense of their interests, in violation of Article 6.2 of the Anti-Dumping Agreement.

By mandating that a party filing a Statement of Waiver include a statement that it is likely to dump, the USDOC will make a determination without satisfying itself as to the accuracy of the information supplied by interested parties upon which their findings are based, in violation of US obligations under Article 6.6 of the Anti-Dumping Agreement.

By mandating that a party filing a Statement of Waiver include a statement that it is likely to dump, Section 351.218(d)(2)(ii) prevents the USDOC from making a determination satisfying the requirements of Article 6.8 and Annex II of the Anti-Dumping Agreement.

The United States has therefore failed to bring the US statutory and regulatory waiver provisions into conformity with US obligations under Articles 6.1, 6.2, 6.6, 6.8, 11.1, 11.3 and Annex II of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

For all of the measures identified above, the United States also failed to comply with its obligations under Articles 1 and 18.1 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

Argentina reserves all of its WTO rights in respect of the United States' purported compliance with its obligations in this case.

We look forward to receiving your reply to the present request and to fixing a mutually convenient date for consultations.
