*****CHECK AGAINST DELIVERY*****

UNITED STATES – SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA

(WT/DS268)

<u>Arbitration on the "Reasonable Period of Time"</u>

Statement of the United States at the Oral Hearing

May 18, 2005

1. Good morning, Mr. Ganesan and members of the delegation from Argentina. The United States appreciates this opportunity to appear before you today to further explain why the fifteen months we have proposed to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in this case is a "reasonable period of time." We are especially appreciative that you, Mr. Ganesan, have agreed to provide your expertise as the arbitrator in this proceeding.

The United States Justified its Reasonable Period of Fifteen Months

2. We have outlined in our submission why a fifteen-month "reasonable period of time" is justified. I won't repeat those arguments here, other than to say that this proposed reasonable period of time is primarily based on the need to conduct the various steps of implementation sequentially. Indeed, this is what is needed in order for the United States to become fully compliant with the DSB recommendations and rulings.

Argentina's Seven-Month Recommendation Is Unsupported and Unreasonable.

3. Argentina proposes seven months for implementation, but provides scant support for this

position. For instance, Argentina provides little explanation as to how long the regulatory and administrative processes in question would take, except to restate the statutory requirements of these processes, and then to conclude simply that – since the statutes do not provide time periods for each requirement and thus the United States has "significant flexibility" – each process can be completed "within seven months."[1] In light of the lack of further explanation, for Argentina to choose a reasonable period of seven months seems almost arbitrary. By contrast, the United States has provided a detailed outline of the actual steps that need to be taken to complete each process, explaining precisely why fifteen months is required for the United States to comply fully with the DSB recommendations and rulings. For instance, the United States in its submission explains the six steps that must be taken before final regulations can become effective, including notice-and-comment, consultation with key Congressional committees, and publication of the final rule.[2]

4. Argentina also appears to have predicated its proposal of a seven-month reasonable period of time on the assumption that the United States has no choice but to revoke the antidumping duty order in question. Not only is Argentina's assumption improper, as one cannot know the the outcome of the section 129 redetermination until after the process is completed, but the question of how a Member implements is simply not germane to an Article 21.3(c) arbitration proceeding. We will address these issues in more detail in our statement later.

The United States Must First Amend Its Regulations

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[1] *See e.g.*, Submission of Argentina, paras. 37, 61, 67.

[2] Submission of the United States, para. 15.

5. The first step the United States must undertake to fully implement the DSB recommendations and rulings is to come into compliance with the "as such" WTO-inconsistencies determined by the DSB. This first phase of implementation is expected to take nine months. The "as such" inconsistencies have direct bearing on the "as applied" inconsistencies in that, as explained in the Panel and Appellate Body reports, the waiver provisions of U.S. law "impact" the order-wide determinations of sunset reviews. In the words of the Panel and the Appellate Body, "'[t]o the extent' that the company-specific determinations [which are a result of the U.S. provisions found to be "as such" WTO inconsistent] were taken into account in the order-wide determination, the order-wide determination could not 'be supported by reasoned and adequate conclusions based on the facts before the investigating authority."[3]

6. In contrast to the explanation provided in the U.S. submission regarding why the United States must remedy the flaws in the "as such" waiver provisions *before* it can remedy the flaws in the sunset review in question,[4] Argentina offers no explanation as to why the DSB recommendations and rulings require a different result. Instead, Argentina baldly, and incorrectly, asserts that the U.S. "process" always contemplates conducting the redetermination before the regulatory amendment in a situation such as this one, but it is unable to provide support for this assertion.[5] Moreover, Argentina argues that even if the United States were to fix the "as such" violations first and then apply the amended waiver provisions, it would not cure

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[3] Appellate Body Report, quoting the Panel, in para. 233.

[4] *See* Submission of the United States, paras. 17, 21.

[5] Submission of Argentina, para. 46.

the "principal 'as applied' violation – the lack of any evidence supporting the Department's likelihood determination."[6] Not only is this a mischaracterization of the Panel's finding, but this highlights the fact that Argentina is proposing a seven-month reasonable period of time based solely on the United States implementing only the part of the DSB recommendations and rulings Argentina terms "the principle 'as applied' violation." A reasonable period of time, however, is the shortest time needed by a Member to implement the DSB recommendations and rulings in full.

7. Argentina cites *Hot Rolled Steel* for the proposition that legislative/regulatory and administrative changes need not be done in a sequential manner. However, the facts of the *Hot Rolled Steel* arbitration support the U.S. position. In that arbitration, the parties *agreed* that, with respect to some aspects of compliance, sequential changes were not required, as the quote excerpted in Argentina's submission makes clear.[7] But, in that proceeding the United States also explained that, with respect other aspects, sequential changes *were* required.[8] Indeed, this fact was specifically noted by the arbitrator.[9] As with those aspects in the *Hot Rolled Steel* Article 21.3(c) arbitration, here the DSB recommendations and rulings also require sequential implementation. To suggest that implementation can be achieved otherwise is essentially to ask

[6] Submission of Argentina, para. 47.

[7] See Submission of Argentina, para. 29, citing Award of the Arbitrator, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU,* WT/DS184/13, para. 32 (hereinafter "*Hot Rolled Steel")*, ("The United States and Japan agree that the relationship is not necessarily a linear, sequential one and that some administrative actions may well be taken, or at least commenced, concurrently with the initiation of the legislative implementing effort.")

[8] *Hot Rolled Steel*, para. 8 (The United States explains that this case requires a sequential combination of forms of implementation.")

[9] *Hot Rolled Steel,* para. 33.

the United States to *fail* to comply fully with the DSB recommendations and rulings.

After Amending its Regulations, the United States Will Conduct the Redetermination

8. Once the regulations have been amended to eliminate the "as such" WTO-inconsistency regarding the waivers, the United States will then conduct the redetermination of likelihood of continuation or recurrence of subsidization. This second phase of the implementation process is expected to take six months.

9. Again, rather than addressing the period of time necessary to conduct the redetermination, Argentina instead argues that the United States can only comply with the "as applied" findings by revoking the order. Not only is such an approach prejudging the outcome of its redetermination, it also would mandate a particular method of implementation. In this regard, the United States has noted[10] that the role of a DSU Article 21.3(c) arbitrator is not to prescribe a particular method of implementation. Previous arbitrators have made this clear. For instance, the arbitrator in the *Australian Salmon* dispute noted that "suggesting ways and means of implementation is not part of my mandate and . . . my task is confined to the determination of a reasonable period of time."[11] For this reason, arbitrators have consistently refused to prescribe implementation even where a panel had suggested withdrawing a measure.[12] And indeed, in the underlying proceeding the Panel expressly declined to make any suggestion prescribing a

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[10] Submission of the United States, para. 13.

[11] *Australia - Import Ban on Salmon*, WT/DS18/9, 23 February 1999 ("*Australia - Salmon*"), para. 35.

[12] *United States - Continued Dumping and Subsidy Offset Act of 2000*, Award of the Arbitrator, WT/DS217/14, WT/DS234/22, para. 52.

particular method of implementation when requested by Argentina to do so.

10. In a similar vein, Argentina argues that the record evidence "could not then, and cannot now" support Commerce's determination[13] and that there was a "lack of any evidence" supporting the affirmative determination.[14] There are several problems with this line of argument. First, whether the record evidence can or cannot support an affirmative likelihood determination is not an issue for an Article 21.3(c) proceeding. Moreover, to be clear, neither the Panel nor the Appellate Body concluded that there was a "lack of any evidence" in support of the affirmative determination. Instead, the Panel concluded that Commerce did not have sufficient grounds for finding that dumping had continued over the life of the order, and that this was one of two factual bases for the determination.[15] Thus, Argentina's allegation is not only irrelevant for purposes of this proceeding, but is incorrect as a matter of fact. Finally, the United States would also note that Argentina's attempt to cast the "as applied" inconsistencies as "principal" and "non-principal" is not only novel but meaningless. Whether the inconsistencies are "principal" or not, the fact remains that the "as applied" inconsistencies cannot be remedied until the regulations have first been amended.

11. In short, Argentina's submission has not provided any timeline for the redetermination and the regulatory changes, nor has it explained why simultaneous implementation is feasible in light of the DSB recommendations and rulings. By contrast, the United States has provided a

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[13] Submission of Argentina, para. 53.
[14] Submission of Argentina, para. 47.
[15] *See* Panel Report, para. 7.221.

detailed timeline and has explained why the DSB rulings and recommendations require sequential implementation.

Particular Circumstances

12. Argentina correctly notes that arbitrators must determine the reasonable period of time on the basis of the "particular circumstances" of each case. Yet Argentina offers "particular circumstances" that are irrelevant to the determination of a reasonable period of time for the United States to implement the recommendations and rulings of the DSB. Indeed, some of Argentina's "particular circumstances" were even rejected in previous arbitral awards.[16]

13. Relevant "particular circumstances" include the legal form of implementation, the technical complexity of the necessary measures to be drafted, adopted, and implemented, and the period of time in which the implementing Member can achieve the proposed form of implementation in accordance with its system of government.[17] Argentina, on the other hand, focuses on how the recommendations and rulings should be implemented (*i.e.*, revoking the order),[18] and the provisions of the WTO agreement at issue in the underlying dispute,[19] among others.

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[16] *See e.g.,* Award of the Arbitrator, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbiration under Article 21.3(c) of the DSU,* WT/DS246/14, para. 30 ("It is, of course, beyond the scope of my mandate to determine how the European Communities should implement the recommendations and rulings of the DSB.").

[17] *See* discussion in the Submission of the United States, para. 7.

[18] Submission of Argentina, para. 53.

[19] *See* Submission of Argentina, paras. 3-4.

14. The relevant "particular circumstances" in this dispute do not include what outcome Argentina wants from the redetermination, or what specific WTO provision was at issue in the underlying proceeding. Rather, they include the amount of time the United States needs to complete the domestic procedures that fully implement the DSB recommendations and rulings, and the fact that the recommendations and rulings in this dispute specifically require that the waiver provisions "as such" be amended prior to conducting the redetermination.

Argentina as a Developing Country

15. Argentina has argued that its interests as a developing country should be taken into account. The relevance of this argument is not clear, inasmuch as Argentina does not provide any specifics about how its interests as a developing country Member actually bear upon the reasonable period of time needed by the United States to implement the DSB recommendations and rulings. Moreover, the United States would note that Argentina's reliance on *Chile – Price Band* provides no assistance in this regard, as that was simply a situation where Argentina, in response to Chile's request that its interests as a developing country be taken into account, argued that Argentina's own developing country interests should likewise be taken into account. The arbitrator then, in his report, notes that he has paid "particular attention" to the interests of the two developing countries, but that none of these interests stated warrant a longer or shorter reasonable period of time.[20] This should be the result here as well, as Argentina has done nothing more than repeat what it had stated in *Chile – Price Bands*.

[20] Award of the Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbiration under Article 21.3(c) of the DSU,* WT/DS207/13, para. 56.

16. Interestingly, Argentina had provided a stronger rationale for taking its developing country interests into account in the *Argentina – Bovine Hides* Article 21.3(c) arbitration. In that proceeding, Argentina was the implementing Member. Moreover, it was in the midst of a financial crisis. Yet even with all of these factors, the arbitrator in that proceeding rejected Argentina's request, noting that Argentina still "has not been very specific about how its interests as a developing country Member actually bear upon the duration of the 'reasonable period of time' needed to put into legal effect an appropriate amendatory *Resolución General*."[21] If Argentina was insufficiently specific in that dispute, how much more so is the case here, where Argentina provides absolutely no specifics whatsoever.

Conclusion

17. To conclude, the purpose of this proceeding is to determine the reasonable period of time for the United States to implement fully the recommendations and rulings of the DSB. The United States has presented detailed arguments supporting a fifteen month implementation period, necessitated by the findings in this dispute. Argentina has offered an unsubstantiated argument of seven months, without taking into account the actual U.S. domestic procedures at issue, the fact that the recommendations and rulings in this dispute require sequential implementation, and other relevant "particular circumstances." As detailed in our submission, the United States requires nine months to implement regulatory changes and six months thereafter to conduct a redetermination, for a total of fifteen months.

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[21] Award of the Arbitrator, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather – Arbiration under Article 21.3(c) of the DSU,* WT/DS155/10, para. 51.

18. We thank you again, Mr. Ganesan, for your time in conducting this arbitration. We'd be happy to answer any questions you may have.