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

WT/DS268

Opening Statement of the United States at the Panel Meeting with the Parties

July 12, 2006

1. Good morning, Mr. Chairman and members of the Panel. Thank you for the opportunity to appear before you today.

2. We will not repeat the arguments we have already made in our submissions. Rather, we will use this statement to highlight a few of the key issues in this dispute. At the outset, the United States recalls that this is a compliance proceeding. The question for this Panel is whether Argentina has proven that the U.S. measures taken to comply are inconsistent with the provisions of the covered agreements cited by Argentina. We will begin by reviewing what the United States did.

3. The Department of Commerce amended its waiver regulations. Specifically, Commerce eliminated the "deemed waiver" provisions and amended the "affirmative waiver" provisions such that a company-specific likelihood determination would be based on an exporter's own statement about its likely future behavior. Indeed, Commerce went *beyond* the recommendations and rulings by amending the regulations to clarify that interested parties may request hearings in expedited sunset reviews.

4. After amending the regulations, Commerce immediately commenced the Section 129 proceeding, even issuing questionnaires the same day the regulations became effective. Before

the parties' submissions were due, Commerce placed additional information on the record – data from Preston Pipe & Tube and importer data for the period of review – thereby providing interested parties with the opportunity to comment on the data. Respondent interested parties provided some, but not all, of the information requested in the questionnaire. In addition, respondent interested parties submitted comments, domestic interested parties submitted reply rebuttal comments, and respondent interested parties subsequently submitted rebuttal on the domestics' rebuttal. Commerce then issued the revised determination.

5. In response, Argentina pursues an expansive number of claims. While the United States does not dispute Argentina's right to bring claims pursuant to Article 21.5, the United States *is* surprised at the nature of some of the claims in this dispute, as well as some of the arguments offered in support thereof. For example, Argentina alleges a violation of Article 6.4 because Commerce did not put background information about Preston Pipe & Tube on the record of the proceeding until the day the determination was issued.[1] A second example: Argentina advocates a factual proposition that actually *contradicts* the original Panel report, arguing that the statute provides for deemed waivers, even though the Panel expressly found that those waivers were provided by regulation.[2] This disregard for the recommendations and rulings in the original report is emblematic of Argentina's strategy, which eschews a substantive discussion of the recommendations and rulings from the original proceeding – even though this is a *compliance* proceeding, and those recommendations and rulings form the basis for the evaluation of any claim that the United States has not come into compliance. Argentina's approach is not

[1] *See* U.S. Second Submission, para. 7.

[2] *See* U.S. Second Submission, paras. 16-17.

surprising because an examination of the DSB's recommendations and rulings confirms that the United States has implemented those recommendations and rulings.

The Waiver Provisions

6. The United States recalls that the original panel and the Appellate Body found that the "waiver" provisions were inconsistent with Article 11.3 because Commerce's order-wide likelihood determination would be based, at least in part, on "assumptions" about a company's likelihood of dumping.[3] Commerce amended its sunset regulations to eliminate the possibility that its order-wide likelihood determinations would be based on "assumptions," and it did so in two ways.

7. First, Commerce eliminated the so-called "deemed waiver" provision. This means that, by law, Commerce will not "assume" likelihood for a company that fails to participate in a sunset review.

8. Second, Commerce revised the so-called "affirmative waiver" provision so that a respondent interested party has the option to "waive" participation in the sunset review, but an integral part of that waiver is that the party affirmatively states that it would be likely to dump if the order were revoked. This ensures that Commerce no longer "assumes" likelihood of dumping for a company electing not to participate in a sunset review. Instead, the company itself states that it is likely to dump. It is worth recalling that, as the United States has previously explained, the purpose of the "affirmative waiver" procedure is to permit respondent interested parties to avoid the expense of participating in the Commerce side of a sunset review when they

[3] *See, e.g.*, Panel Report, para. 7.99; Appellate Body Report, para. 234.

only wish to contest the likelihood of continuation or recurrence of injury before the U.S. International Trade Commission.[4] The Antidumping Agreement does not require the United States to provide this option. Moreover, we note that the filing of a statement of waiver is, itself, optional. A party could also choose not to participate in the sunset review by simply not responding to the notice of initiation; Commerce no longer considers such inaction a "waiver."

9. Argentina argues that the United States was also obligated to amend the statute, rather than just the regulations, in order to comply with the DSB's recommendations and rulings. Argentina is mistaken. The United States recalls that the problem with the "waiver provisions" – that is, the statute and the regulations collectively – was that they resulted in a company-specific determination based on an "assumption." That "assumption" arose because the regulations were written to provide for such an assumption. The regulations are now written so that no such assumption is permitted: a company-specific determination would be based on the company's own statement of its likely future behavior. Therefore, the regulations now make it clear that, when read together with the statute, no such assumption exists, and the United States has implemented the DSB's recommendations and rulings.

10. Argentina also suggests that the amended sunset regulations are WTO-inconsistent because they preclude Commerce from arriving at a "reasoned conclusion" on the basis of "positive evidence." Argentina has still failed to explain why the exporter's own statement that it is likely to dump is not "positive evidence;" nor has Argentina explained why such a statement does not provide the basis for drawing a "reasoned conclusion." As the Appellate Body has

[4] *See, e.g.*, U.S. First Written Submission (Panel), para. 31 (7 November 2003).

noted, the exporter is in the best position to have information as to its likely future pricing behavior. If the exporter states that it is likely to dump, then it is reasonable for the investigating authority to conclude that the exporter is likely to dump. Argentina apparently would like this Panel to find that a company can go on the record and affirmatively state that it is likely to dump, but then a Member can retract that statement by bringing a WTO dispute.

The Section 129 Determination

11. Argentina advances both procedural and substantive arguments about the Section 129 Determination – neither is persuasive.

12. As noted above, Commerce placed information on the record in ample time for respondent interested parties to submit comments and rebuttals. Yet Argentina contends that the United States failed to abide by its obligations under various provisions of Article 6. In doing so, Argentina seeks to read into those provisions obligations to take specific actions that are simply not provided for in Article 6. What matters for the purposes of complying with Article 6 is whether the investigating authority met the "substantive obligations" at issue, not whether those obligations were met in a "particular form."[5] As the United States has demonstrated in its submissions, Commerce met its substantive obligations under Article 6.

13. Argentina misrepresents the U.S. position, stating that the United States believes it did not have enough time to comply with its Article 6 obligations.[6] To the contrary, the United States *did* comply with its Article 6 obligations. The United States simply pointed out that the period of time available for conducting a particular determination provides context for evaluating

[5]*See* U.S. Second Submission, para. 56 (citing *Guatemala – Cement II (Panel)*, para. 8.119).
[6]Argentina Second Submission, para. 3.

whether a Member has met the substantive obligations in Article 6. For example, what is "timely" and "practicable" under Article 6.4 may depend at least in part on the amount of time the investigating authority has to conduct the proceeding in question.

14. Argentina also contends that the Section 129 Determination was flawed, criticizing Commerce for examining whether dumping "likely" occurred over the life of the order. According to Argentina, Article 11.3 prohibits such an approach. Yet, as the Appellate Body has recognized, Article 11.3 does not specify what factors must be examined, nor does it provide any particular methodology for examining whether dumping is likely to continue or recur if the order is revoked. Commerce examined whether it was likely that dumping had continued over the life of the order because past behavior can be probative of future behavior. The totality of information on the record supported the conclusion that Acindar had likely dumped during the life of the order.

15. Argentina seems to be arguing that Commerce erred by not calculating a dumping margin.[7] However, the Appellate Body has made clear that the "silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review."[8] This is because of the "different nature and purpose of original investigations . . . and sunset reviews."[9] Dumping margins "may well be relevant to, but they will not necessarily be conclusive of"[10] likelihood of dumping if the order were revoked. The Appellate Body has recognized that a sunset review involves a forward-looking analysis, and

[7]Argentina Second Submission, para. 43.
[8]*United States – Corrosion Resistant Steel Sunset Review (AB)*, para. 123.
[9]*United States – Corrosion Resistant Steel Sunset Review (AB)*, para. 124.
[10]*United States – Corrosion Resistant Steel Sunset Review (AB)*, para. 124.

such an analysis – in contrast to an investigation – does not require the specific calculation of a number, but rather an examination of what is likely to occur in the future. Argentina has yet to impugn the logic that past behavior can be indicative of future behavior. Indeed, Argentina does not even argue that Acindar was *not* dumping over the life of the order. Rather, Argentina's position boils down to this: because Siderca stopped shipping during the period of review and Acindar did not participate in the original sunset review, Commerce is prevented from concluding that dumping is likely to continue or recur if the order is revoked. This approach is simply license for respondent interested parties to manipulate proceedings to achieve a particular result, regardless of whether that result is the correct one.

16. In this vein, Argentina also criticizes the information on the record of the proceeding. It is worth recalling that the paucity of evidence on the record of the original sunset review was attributable to respondent interested parties. It is well-established that the *exporter* has access to the best information as to its likely future pricing behavior. When the exporter declines to provide that information, the exporter must accept responsibility for the nature of the information on the record. In any event, having secured for its companies the opportunity to place information on the record a *second* time, Argentina now argues that Commerce was not allowed to collect that information. Notably, Argentina fails to provide textual support for its analysis, and, while acknowledging our point, nevertheless continues to neglect to identify any textual support for its view.

17. The United States is not aware of another instance in which a Member has argued that there is a prohibition on the collection of new information to come into compliance with DSB

recommendations and rulings. Indeed, this argument is little more than a distraction. The United States notes that Argentina does not contend that Commerce's ultimate conclusion about Acindar's likely dumping was *wrong.* Nor does Argentina dispute that Acindar's prices were *lower* than those in the U.S. market during the period of review. Instead, Argentina advances a series of procedural arguments – whether Commerce could look at new information and how Commerce looked at that information – in an effort to obscure what is plain: the evidence on the record supports the conclusion that Acindar likely dumped over the life of the order and that Acindar *would likely dump again* if the order were revoked.

18. Argentina also complains that Commerce should have adjusted the U.S. average price data to compare it better with Acindar's sales price from the importer data. Commerce had to use the price data in question because no such usable data were provided by the respondents. Regardless, Argentina is unable to even explain how Commerce could have made such adjustments given that the data from Preston Pipe & Tube was only available in an aggregate form, nor does Argentina even suggest that, were such adjustments made, Acindar's prices would have exceeded those of the U.S. market.

Conclusion

19. In sum, Commerce's Section 129 Determination and its amended sunset regulations comply fully with the recommendations and rulings of the DSB. Argentina's claims to the contrary should be rejected.

20. Thank you, and we look forward to answering any questions you may have.