

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

**ARB-2005-1/18**

*Arbitration  
under Article 21.3(c) of the  
Understanding on Rules and Procedures  
Governing the Settlement of Disputes*

Award of the Arbitrator  
A.V. Ganesan



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## TABLE OF ARBITRATIONS CITED IN THIS AWARD

Short Title	Full Title and Citation of Arbitration
<i>Australia – Salmon</i>	Award of the Arbitrator, <i>Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS18/9, 23 February 1999, DSR 1999:I, 267
<i>Canada – Autos</i>	Award of the Arbitrator, <i>Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X, 5079
<i>Canada – Patent Term</i>	Award of the Arbitrator, <i>Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS170/10, 28 February 2001, DSR 2001:V, 2031
<i>Canada – Pharmaceutical Patents</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS114/13, 18 August 2000, DSR 2002:I, 3
<i>Chile – Price Band System</i>	Award of the Arbitrator, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS207/13, 17 March 2003
<i>EC – Hormones</i>	Award of the Arbitrator, <i>EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833
<i>EC – Tariff Preferences</i>	Award of the Arbitrator, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS246/14, 20 September 2004
<i>Japan – Alcoholic Beverages II</i>	Award of the Arbitrator, <i>Japan – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, DSR 1997:I, 3
<i>Korea – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937
<i>US – 1916 Act</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS136/11, WT/DS162/14, 28 February 2001, DSR 2001:V, 2017
<i>US – Hot-Rolled Steel</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS184/13, 19 February 2002
<i>US – Offset Act (Byrd Amendment)</i>	Award of the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS217/14, WT/DS234/22, 13 June 2003
<i>US – Section 110(5) Copyright Act</i>	Award of the Arbitrator, <i>United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS160/12, 15 January 2001, DSR 2001:II, 657

WORLD TRADE ORGANIZATION  
AWARD OF THE ARBITRATOR

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

Parties:

*Argentina*  
*United States*

ARB-2005-1/18

Arbitrator:

A.V. Ganesan

**I. Introduction**

1. On 17 December 2004, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report<sup>1</sup> and the Panel Report<sup>2</sup>, as modified by the Appellate Body Report, in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews*").<sup>3</sup> At the DSB meeting of 14 January 2005, the United States indicated its intention to implement the recommendations and rulings of the DSB in this dispute and stated that it would require a reasonable period of time in which to do so.<sup>4</sup>

2. On 11 March 2005, Argentina informed the DSB that consultations with the United States had not resulted in an agreement on the reasonable period of time for implementation. Argentina therefore requested that such period be determined by binding arbitration, pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").<sup>5</sup> Subsequently, on 16 March 2005, Argentina and the United States communicated to the DSB their agreement that the award of the arbitrator made within 60 days after the date of appointment of the arbitrator shall be deemed to be an arbitration award under Article 21.3(c) of the DSU, notwithstanding the expiry of the 90-day period stipulated in Article 21.3(c).<sup>6</sup>

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<sup>1</sup>Appellate Body Report, WT/DS268/AB/R.

<sup>2</sup>Panel Report, WT/DS268/R and Corr. 1.

<sup>3</sup>WT/DS268/8.

<sup>4</sup>WT/DSB/M/181, para. 10.

<sup>5</sup>WT/DS268/9.

<sup>6</sup>WT/DS268/10. The 90-day period following adoption of the Panel and Appellate Body Reports expired on 17 March 2005.

3. On 22 March 2005, Argentina advised the Director-General in writing that Argentina and the United States had been unable to agree on an arbitrator. Argentina therefore requested the Director-General to appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU, which provides for the Director-General to do so "within 10 days, after consulting the parties". However, before the Director-General had completed consultations with the parties, Argentina and the United States agreed on the selection of an arbitrator and, by a joint letter dated 30 March 2005, Argentina and the United States requested me to act as the arbitrator in this matter. On 8 April 2005, I informed Argentina and the United States in writing of my acceptance of the appointment as the arbitrator<sup>7</sup> and confirmed that I would issue my award no later than 7 June 2005, that is, no later than 60 days after my appointment as the arbitrator on 8 April 2005.

4. The United States and Argentina provided their written submissions to me on 22 April 2005. An oral hearing with them was held on 18 May 2005.

## II. Arguments of the Parties

### A. *United States*

5. The United States requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be 15 months from the date of adoption by the DSB of the Panel and Appellate Body Reports, ending on 17 March 2006.<sup>8</sup>

6. According to the United States, in order to comply with the relevant recommendations and rulings, the United States Department of Commerce (the "USDOC") would have to first amend the waiver provisions of its regulations. Once these amended regulations have been issued, the USDOC would begin the process of making a new determination of likelihood of continuation or recurrence of dumping in the sunset review regarding oil country tubular goods from Argentina. The USDOC submits that it cannot complete these two phases of implementation in parallel "because of the impact of the WTO-inconsistent waiver provisions on the order-wide likelihood determination".<sup>9</sup> In this regard, the United States highlights the fact that the Panel in the present dispute "expressly declined" to recommend how the United States should implement the recommendations and rulings of the DSB.<sup>10</sup> In any case, the United States argues that previous arbitration awards confirm that it is for the

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<sup>7</sup>WT/DS268/11.

<sup>8</sup>United States' submission, paras. 3 and 27.

<sup>9</sup>*Ibid.*, para. 9 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra*, footnote 1, paras. 234 and 260; and Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra*, footnote 2, paras. 7.101 and 7.222). See also *ibid.*, para. 3.

<sup>10</sup>*Ibid.*, para. 13 (referring to Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra*, footnote 2, paras. 8.3 and 8.5).

implementing Member to decide the means of implementation, including the sequence of implementing steps.<sup>11</sup>

7. Beginning with the first phase of implementation, the United States contends that it will take approximately nine months for the USDOC to publish a new rule in the *United States Federal Register* (the "*Federal Register*"). The United States submits that this phase, which is governed by section 123 of the Uruguay Round Agreements Act, comprises the following steps:

- (a) the first three months will involve consultations between: the United States Trade Representative (the "USTR") and the USDOC; the USTR and the United States Congress; and the USTR and certain private sector advisory committees. These consultations are already underway: the USTR and the USDOC have consulted; the USTR and Congress have consulted; and the USTR is consulting with the advisory committees. This three-month period will end with the USTR submitting a report to Congress describing the proposed rule, the reasons for the proposed rule and the advice provided by private sector advisory committees. The USTR has already begun to prepare this report;
- (b) the USDOC will then need three months to complete the preparatory steps for, and to publish the proposed rule in, the *Federal Register*. Prior to publication, the USDOC must circulate the proposed rule for internal approval, modify it as a result of the USTR consultations with Congress and private sector advisory committees, and seek approval for publication of the proposed rule from the Office of Management and Budget (the agency with oversight for agency rule-making); and
- (c) after the publication of the proposed rule, the USDOC will need a further three months to prepare for and publish the final rule in the *Federal Register*. Before publication, the USDOC will need to address public comments on the proposed rule and the USTR will hold final consultations with Congress. The United States explains that the final rule must not go into effect before the end of the 60-day period beginning on the date when consultations with Congress on the final rule began, unless the President determines that an earlier effective date is in the national interest.<sup>12</sup>

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<sup>11</sup>United States' submission, para. 13 (referring to Award of the Arbitrator, *Australia – Salmon*, para. 35; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 52).

<sup>12</sup>*Ibid.*, paras. 4, 8, 15, and 18-20 (referring to section 123 of the Uruguay Round Agreements Act, codified as 19 U.S.C. §3533 (Exhibit US-1 attached to the United States' submission)).

8. As for the second phase of implementation, the United States submits that it will take six months for the USDOC to issue a new likelihood determination in the sunset review at issue. The United States argues that this phase, which is governed by section 129 of the Uruguay Round Agreements Act, involves the following steps:

- (a) during the first month, consultations will be held between the USTR and the USDOC, and between the USTR and Congress;
- (b) during the following two months, the USDOC will prepare questionnaires for interested parties and review responses before issuing a preliminary redetermination;
- (c) interested parties will have one month to submit comments to the USDOC on the preliminary redetermination. This may include a hearing, in appropriate case;
- (d) the USDOC will then have one month to address the comments of interested parties before issuing its final redetermination; and
- (e) an additional month will be required for the USTR to review the final redetermination and for consultations to be held between the USTR and the USDOC, and between the USTR and Congress. Depending on the circumstances, the USTR may instruct the USDOC to implement the final redetermination and to notify the public of the implementation by publishing it in the *Federal Register*.<sup>13</sup>

9. The United States indicates that, during the course of the second phase of implementation, the USTR will formally request the USDOC to issue a redetermination to "render [its] actions not inconsistent"<sup>14</sup> with the relevant panel or Appellate Body findings. The USDOC will have 180 days from this request to issue a new determination. The United States adds that, "[i]n practice, USTR has sometimes delayed transmitting that request until just before [the USDOC] indicated informally that it was ready to issue a new determination".<sup>15</sup>

10. The United States argues that the time required to carry out these procedural steps in the two phases of implementation demonstrates the need for a 15-month implementation period in this dispute. In particular, the USTR must seek input from various bodies and interested parties throughout the implementation process. The United States indicates that previous arbitrators have recognized the importance of such consultations and have allowed sufficient time for them to take

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<sup>13</sup>United States' submission, paras. 4, 16, and 21-26 (referring to section 129 of the Uruguay Round Agreements Act, codified as 19 U.S.C. §3538 (Exhibit US-2 attached to the United States' submission)).

<sup>14</sup>*Ibid.*, para. 16.

<sup>15</sup>*Ibid.*, footnote 29 to para. 16.



place.<sup>16</sup> In the second phase, the USDOC also needs sufficient time to ensure that it complies with its obligations of transparency and due process under Articles 6 and 12 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"). The United States argues that, in accordance with previous arbitration awards, this should include time to obtain and analyze information from interested parties, even though this is not expressly required by statute or regulation.<sup>17</sup>

11. For these reasons, the United States contends that a period of 15 months, ending on 17 March 2006, is a reasonable period of time for it to implement the recommendations and rulings of the DSB in this dispute.

B. *Argentina*

12. Argentina requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be seven months from the date of adoption by the DSB of the Panel and Appellate Body Reports, ending on 17 July 2005.<sup>18</sup>

13. Argentina highlights three "particular circumstances" of this dispute that it regards as relevant to the determination of the reasonable period of time pursuant to Article 21.3(c) of the DSU. The first relates to the nature of one of the provisions of the *Anti-Dumping Agreement* with which the United States has been found to have acted inconsistently, namely, Article 11.3 of the *Anti-Dumping Agreement* dealing with "sunset" reviews of anti-dumping duties. Article 11.3 contains a temporal element in that it requires Members to terminate anti-dumping duties not later than five years after they are *imposed*. In this dispute, approximately five years have passed after the date by which the United States was required to *terminate* the duties. According to Argentina, this reinforces the need for "[p]rompt compliance" in accordance with Article 21.1 of the DSU.

14. Secondly, the United States has invoked the exception in Article 11.3, whereby a Member may continue the anti-dumping duty beyond five years if its authorities have made a specific determination in a review that complies with certain "exacting conditions".<sup>19</sup> The DSB has ruled

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<sup>16</sup>United States' submission, para. 10 (referring to Awards of the Arbitrators in *Canada – Autos* and *Canada – Pharmaceutical Patents*).

<sup>17</sup>*Ibid.*, para. 12 (referring to Award of the Arbitrator, *EC – Tariff Preferences*, para. 42).

<sup>18</sup>Argentina's submission, para. 1.

<sup>19</sup>*Ibid.*, para. 4.

invalid the United States' invocation of the "exception".<sup>20</sup> Therefore, the question in this dispute is simply how much time the United States needs to comply with the "rule"<sup>21</sup> in Article 11.3, namely, the termination of the duties.

15. Thirdly, the primary inconsistency of the United States' measures, *as applied*, in the sunset review at issue is "the lack of positive evidence supporting [the USDOC's] determination that dumping would be likely".<sup>22</sup> This inconsistency is separate from the "as such" violations of the United States law and regulations. Modifying the law and regulations to address the inconsistency of the waiver provisions, and then applying the modified law and regulations to this sunset review, would not cure this primary "as applied" inconsistency, because "the record evidence developed by [the USDOC] at the time of the Article 11.3 review could not then, and cannot now, support [the USDOC's] likely dumping determination".<sup>23</sup> Argentina therefore argues that I should not determine the reasonable period of time on the basis of this sequence of implementation, which cannot lead to compliance. Rather, in the present case, the amount of time required to implement the recommendations and rulings of the DSB with respect to the USDOC's likelihood determination in the sunset review at issue is simply the amount of time required to withdraw the underlying anti-dumping duty order.<sup>24</sup> The United States need not wait until it has amended its law and regulations before addressing this administrative "as applied" violation. In this regard, Argentina refers to a previous arbitration award that recognized that an implementing Member can take administrative steps towards implementation at the same time as legislative steps.<sup>25</sup>

16. In relation to the sequence of implementation, Argentina refers to the methods of implementation followed by the United States in certain disputes. Argentina points out that in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*<sup>26</sup> and *United States – Countervailing Measures Concerning Certain Products from the European Communities*<sup>27</sup>, the United States first amended the inconsistent regulations and then applied the new regulations to the specific proceedings at issue. However, "there is no basis in U.S. law for such a

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<sup>20</sup>Argentina's submission, para. 4.

<sup>21</sup>*Ibid.*

<sup>22</sup>*Ibid.*, para. 5.

<sup>23</sup>*Ibid.*, para. 53.

<sup>24</sup>*Ibid.*, para. 36.

<sup>25</sup>*Ibid.*, para. 29 (referring to Award of the Arbitrator, *US – Hot-Rolled Steel*, para. 32).

<sup>26</sup>Appellate Body Report, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697; Panel Report, WT/DS184/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R, DSR 2001:X, 4769.

<sup>27</sup>Appellate Body Report, WT/DS212/AB/R, adopted 8 January 2003; Panel Report, WT/DS212/R, adopted 8 January 2003, as modified by the Appellate Body Report, WT/DS212/AB/R.

position".<sup>28</sup> On the contrary, United States law contemplates the issuance of a new determination that is not inconsistent with the relevant recommendations and rulings of the DSB. Moreover, in those two cases, the "as applied" violation resulted from the application of a law or regulation that was "as such" inconsistent with WTO obligations. This is not the case in this dispute. Instead, "fix[ing] the 'as such' violations first and then apply[ing] the amended waiver provisions would not cure the principal 'as applied' violation" in this dispute, which, according to Argentina, is "the lack of any evidence supporting [the USDOC]'s likelihood determination."<sup>29</sup> Argentina argues that a case more similar to this one is *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*<sup>30</sup>, where the United States simply revoked the inconsistent countervailing duty order under the "changed circumstances" provisions of the United States law.

17. Argentina also raises certain general considerations that it regards as relevant in this arbitration proceeding. According to Argentina, the implementing Member bears the burden of demonstrating that the implementation period it proposes is the shortest period possible under the legal system of the implementing Member.<sup>31</sup> In addition, that Member must take steps towards implementation as soon as the DSB adopts the relevant reports. Argentina points out that the United States was aware of the recommendations and rulings of the DSB regarding the "as applied" violations well before their adoption by the DSB on 17 December 2004, because it did not appeal the Panel's findings in this regard. Argentina further submits that if I find that the United States did not begin the compliance process upon adoption of the Panel and Appellate Body reports by the DSB, then I should take this "dilatory conduct" into account in determining the reasonable period of time.<sup>32</sup> Argentina also emphasizes that the United States must use the flexibility and discretion available in its legislative system to comply as quickly as possible.

18. Turning to the implementation process, Argentina maintains that the United States can, simultaneously, over a single seven-month period: revoke the inconsistent USDOC determination in the sunset review at issue; amend the Tariff Act of 1930; and amend the relevant USDOC regulations. Argentina submits that the United States can revoke the anti-dumping order at issue either under the "changed circumstances" provisions of United States law or under section 129(b) of

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<sup>28</sup>Argentina's submission, para. 46.

<sup>29</sup>*Ibid.*, para. 47.

<sup>30</sup>Appellate Body Report, WT/DS213/AB/R and Corr.1, adopted 19 December 2002; Panel Report, WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by the Appellate Body Report, WT/DS213/AB/R and Corr.1.

<sup>31</sup>Argentina's submission, paras. 18-20 (referring to Award of the Arbitrator, *EC – Hormones*, para. 26; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 44).

<sup>32</sup>*Ibid.*, paras. 23 and 56 (quoting Award of the Arbitrator, *Chile – Price Band System*, para. 43).

the Uruguay Round Agreements Act.<sup>33</sup> Section 129(b) imposes no specific time frames for implementation, apart from requiring that the USDOC render a new determination within 180 days of a request by the USTR to do so. Argentina contends that the United States should use this flexibility to complete implementation quickly. Argentina also points out that amendments to USDOC regulations are governed by section 123(g) of the Uruguay Round Agreements Act.<sup>34</sup> Under this provision, a 60-day consultation period is required before a final rule goes into effect, unless the President determines that an earlier date is in the national interest. Argentina states that section 123(g) provides the United States with significant flexibility. In sum, Argentina argues that "[t]here are no constitutional or other legal impediments to U.S. implementation" within a short period of time.<sup>35</sup>

19. Argentina also considers that I should take into account, in making my determination, the fact that Argentina is a developing country complainant.<sup>36</sup> In particular, Argentina declares that "Argentina, a developing country Member, continues to suffer impaired access to the U.S. market because of the WTO-inconsistent U.S. measures".<sup>37</sup> Argentina also points out that, unlike in the arbitration in *Chile – Price Band System*, the implementing Member in this dispute is not a developing country Member.

20. Finally, Argentina identifies some considerations that it regards as irrelevant to the determination of the reasonable period of time, in particular, the internal practices of the United States Congress. Therefore, Argentina argues that I should not take into account the time required for the United States to implement broader legislative changes, such as in an Omnibus Trade Bill combining a large number of trade measures<sup>38</sup>, or the fact that Congress usually passes a large number of bills at the end of each legislative session.<sup>39</sup> In addition, Argentina maintains that "extraneous considerations" such as the contentiousness of the compliance process are irrelevant, and additional time should not be granted on that basis for extended consultations with interested parties.<sup>40</sup>

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<sup>33</sup>Argentina's submission, para. 50; 19 U.S.C. §3538(b) (Exhibit ARG-1 attached to Argentina's submission).

<sup>34</sup>Argentina's submission, para. 64; 19 U.S.C. §3533(g) (Exhibit ARG-3 attached to Argentina's submission).

<sup>35</sup>Argentina's submission, para. 71.

<sup>36</sup>*Ibid.*, paras. 31-32 and 78-80 (referring to Award of the Arbitrator, *Chile – Price Band System*, paras. 55-56).

<sup>37</sup>*Ibid.*, para. 78.

<sup>38</sup>*Ibid.*, paras. 30 and 73-74 (referring to Award of the Arbitrator, *EC – Tariff Preferences*, para. 31).

<sup>39</sup>*Ibid.*, para. 75 (referring to Award of the Arbitrator, *US – 1916 Act*, para. 38).

<sup>40</sup>*Ibid.*, paras. 76-77.

21. For these reasons, Argentina contends that a period of seven months, ending on 17 July 2005, is a reasonable period of time for the United States to implement the recommendations and rulings of the DSB in this dispute.

### III. Reasonable Period of Time

#### A. General Principles

22. Pursuant to Article 21.3(c) of the DSU, my task as arbitrator in this case is to determine the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in *US – Oil Country Tubular Goods Sunset Reviews*.<sup>41</sup> As the Panel and Appellate Body Reports relating to this dispute were adopted by the DSB on 17 December 2004, the "reasonable period of time" will be calculated as from that date.

23. Article 21.3(c) of the DSU provides that, when the "reasonable period of time" is determined through arbitration:

... a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. (footnote omitted)

24. Prior to examining the factual situation in this dispute, I wish to highlight certain general principles that have been followed in previous arbitrations under Article 21.3(c) and that are pertinent to the determination of the "reasonable period of time" in this dispute.

25. First, the "reasonable period of time" under Article 21.3(c) should be "the shortest period possible within the legal system of the Member to implement the relevant recommendations and rulings of the DSB", in the light of the "particular circumstances" of the dispute.<sup>42</sup> Both the United States and Argentina are in agreement with this general principle.

26. Secondly, the nature of the steps to be taken for implementation has a bearing on the "reasonable period of time" required to fully implement the recommendations and rulings of the DSB. The implementation may require amendments to laws or regulations that may involve legislative action, or it may require amendments to administrative guidelines or procedures that may not involve such action. Implementation may also involve only the remedying of the deficiencies in a particular

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<sup>41</sup>See WT/DS268/11.

<sup>42</sup>Award of the Arbitrator, *Chile – Price Band System*, para. 34 (quoting Award of the Arbitrator, *US – 1916 Act*, para. 32). See also Award of the Arbitrator, *EC – Hormones*, para. 26; and Award of the Arbitrator, *EC – Tariff Preferences*, para. 26.

determination. Previous arbitration awards under Article 21.3(c) have recognized that when implementation requires legislative action, the "reasonable period of time" required may be longer than in cases where only administrative action is required to amend guidelines or procedures or to remedy the deficiencies in particular determinations.<sup>43</sup> It is, however, not for the arbitrator under Article 21.3(c) to prescribe a particular method of implementation and to determine the "reasonable period of time" on the basis of that method.<sup>44</sup>

27. Thirdly, whatever be the method of implementation chosen by the implementing Member, that Member must take advantage of the flexibility and discretion available within its legal and administrative system to implement the recommendations and rulings of the DSB as speedily as possible.<sup>45</sup>

28. Fourthly, as the text of Article 21.3(c) makes clear, the "particular circumstances" of each case must be taken into account in determining the "reasonable period of time" for implementation. The United States and Argentina are not in agreement, however, as to what constitutes the "particular circumstances" in this dispute within the meaning of Article 21.3(c).

29. Argentina argues that I should take into account, as one of the "particular circumstances", the *nature of the provisions* of the WTO agreement that the United States has been found to have violated in the underlying dispute. That violation pertains to a "sunset review" determination as envisaged under Article 11.3 of the *Anti-Dumping Agreement*. Article 11.3 requires Members to terminate anti-dumping duties not later than five years after they are *imposed*. This is the "rule", and the continuation of the anti-dumping duties beyond five years, after a sunset review, is an "exception" that must fulfil "exacting conditions".<sup>46</sup> Argentina observes that, in this case, approximately five years have passed since the date by which the United States was required to *terminate* the duties. Argentina argues that, as the United States' "invocation" of the "exception" to the "rule" of Article 11.3 has been found to be "invalid", the "sole issue ... is the amount of time required under U.S. law to withdraw the antidumping duty order".<sup>47</sup>

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<sup>43</sup>See Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 49; Award of the Arbitrator, *Chile – Price Band System*, para. 38; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 57.

<sup>44</sup>See, for example, Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *US – 1916 Act*, para. 36; Award of the Arbitrator, *Chile – Price Band System*, para. 32; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 48; and Award of the Arbitrator, *EC – Tariff Preferences*, para. 30.

<sup>45</sup>See Award of the Arbitrator, *Canada – Patent Term*, paras. 63 and 64; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 64 (referring to Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 39 and Award of the Arbitrator, *US – 1916 Act*, para. 39).

<sup>46</sup>Argentina's submission, para. 4.

<sup>47</sup>*Ibid.*, paras. 4 and 36.

30. The United States, in contrast, argues that the relevant "particular circumstances" in this dispute cannot include the nature of the specific provision at issue in the underlying proceeding, namely, Article 11.3 of the *Anti-Dumping Agreement*. Nor can they include the particular method of implementation proposed by Argentina, namely, the revocation of the anti-dumping duty order, or the consideration that the termination of the duty is the "rule" and its continuation is an "exception" under Article 11.3. Rather, "the particular circumstances" that previous arbitrators have taken into account include the legal form of implementation, the technical complexity of the necessary measures to be adopted and implemented, and the period of time in which the implementing Member can achieve the proposed form of implementation within its legal system.<sup>48</sup> Thus, the relevant "particular circumstances" in this dispute are the amount of time the United States needs to complete the domestic procedures that would fully implement the DSB recommendations and rulings, taking into account the fact that the USDOC is required to amend the "waiver provisions" of the USDOC Regulations<sup>49</sup> found to be WTO-inconsistent "as such". The United States emphasizes that the USDOC will not be in a position to begin the process of issuing a redetermination in respect of the "as applied" violation until its modified regulations are effective, because of the Panel and Appellate Body findings on "the impact of the WTO-inconsistent waiver provisions on the order-wide likelihood determination."<sup>50</sup>

31. Lastly, I note that Argentina argues that the implementing Member—in this case, the United States—bears the burden of demonstrating that the period it proposes—in this case, 15 months—is the "shortest period possible" to bring its measures into conformity with the relevant recommendations and rulings of the DSB.<sup>51</sup> The United States responds that it has discharged this burden as it has demonstrated in detail both the specific steps needed to implement the recommendations and rulings of the DSB and the time needed to comply with those steps, emphasizing that, within its legal framework, the amendment of the USDOC Regulations and the application of the amended regulations to the redetermination must be done *in seriatim*.

32. With these considerations in mind, I turn now to an examination of the facts of this case.

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<sup>48</sup>United States' statement at the oral hearing; United States' submission, para. 7 (referring to Award of the Arbitrator, *Japan – Alcoholic Beverages II*, para. 12 and Award of the Arbitrator, *Canada – Pharmaceutical Patents*, paras. 49-51).

<sup>49</sup>The "USDOC Regulations", as they relate to sunset reviews, are found in Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, *United States Federal Register*, Vol. 63, No. 54 (20 March 1998), p. 13516 (Exhibit US-3 submitted by the United States to the Panel), codified in Title 19, section 351.218 of the *United States Code of Federal Regulations*.

<sup>50</sup>*Supra*, footnote 9.

<sup>51</sup>Argentina's submission, paras. 19 and 34.

B. *The Recommendations and Rulings of the DSB to be Implemented*

33. In this dispute, the United States is required to bring the following three measures, found in the Panel Report, as modified by the Appellate Body Report, to be inconsistent with the *Anti-Dumping Agreement*, into conformity with its obligations under that Agreement:

- (a) the USDOC's determination of likelihood of continuation or recurrence of dumping (the "likelihood-of-dumping determination") made with respect to imports of oil country tubular goods from Argentina, which was found to be inconsistent with Article 11.3 as well as Article 6.2 of the *Anti-Dumping Agreement* (the "as applied" violation);
- (b) the "waiver provisions" of section 751(c)(4)(B) of the Tariff Act of 1930 and section 351.218(d)(2)(iii) of the USDOC Regulations, which were found to be inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement* ("as such" violation); and
- (c) the "deemed waiver provision" of section 351.218(d)(2)(iii) of the USDOC Regulations, which was found to be inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement* with respect to respondents that file incomplete submissions ("as such" violation).

34. With respect to the "as applied" violation mentioned above, both parties agree that the likelihood-of-dumping determination underlying this dispute is the "order-wide likelihood determination" by the USDOC that "revocation of the antidumping duty orders on oil country tubular goods from Argentina ... would likely lead to continuation or recurrence of dumping" that was published in the *Federal Register* on 7 November 2000.<sup>52</sup>

C. *The Means of Implementation*

35. With respect to the "as such" violations described above<sup>53</sup>, it is not in dispute that, in order to implement the relevant recommendations and rulings of the DSB in *US – Oil Country Tubular Goods Sunset Reviews*, the United States is required to amend the USDOC Regulations. At the oral hearing,

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<sup>52</sup>USDOC, Final Results of Expedited Sunset Reviews: Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea, *United States Federal Register*, Vol. 65, No. 216 (7 November 2000) p. 66701 at 66703 (Exhibit ARG-46 submitted by Argentina to the Panel). During the oral hearing, the United States clarified that although the order-wide determination includes countries other than Argentina, it is a combination of the determinations made with respect to each country and, so far as this dispute is concerned, the determination made with respect to Argentina could be dealt with separately.

<sup>53</sup>See *supra*, paras. 33(b) and 33(c).



the United States confirmed that it "intends to address the DSB's recommendations and rulings concerning the waiver provision in the statute (section 751(c)(4)(B) of the Tariff Act of 1930) through modification of its regulations."<sup>54</sup> With respect to the "as applied" violation described above<sup>55</sup>, there is, however, a disagreement between the parties as to whether the USDOC can make a "new determination" or a "redetermination"<sup>56</sup> of the likelihood of continuation or recurrence of dumping in the underlying sunset review without first issuing amended regulations that are in conformity with the *Anti-Dumping Agreement*.

36. Argentina argues that the "principal" inconsistency that the Panel found with respect to the underlying likelihood-of-dumping determination was that it "was not based on positive evidence"; that is to say, there was no "evidentiary basis" to support the USDOC's likelihood-of-dumping determination.<sup>57</sup> According to Argentina, amending the waiver provisions and then applying them to a new determination cannot "remedy the absence of positive evidence of likely dumping".<sup>58</sup> Argentina submits, therefore, that a "shorter option" for implementation of the recommendations and rulings of the DSB in this dispute is to "conduct an administrative proceeding *without* applying the waiver provision, or *without* allowing it to affect the country-wide determination based on the facts of this case."<sup>59</sup> In sum, Argentina contends that there is no basis for the United States' assertion that implementation requires an *in seriatim* approach.<sup>60</sup>

37. The United States argues, in contrast, that the Panel's finding that the likelihood-of-dumping determination was inconsistent with Article 11.3 of the *Anti-Dumping Agreement* was based on two grounds: first, one of the factual bases of the USDOC's affirmative determination, namely, that dumping by Argentine exporters continued over the life of the measure, was not proper; and, secondly, in reaching this determination, the USDOC applied to Argentine exporters other than Siderca the waiver provisions of United States law that the Panel found to be inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. With respect to the first ground, the United States emphasizes that the Panel's conclusion was based not on a finding "that there was a lack of any evidence in support of the affirmative determination", but rather on a finding that the USDOC "did not have sufficient grounds for finding that dumping had continued over the life of the order".<sup>61</sup> With

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<sup>54</sup>United States' submission, footnote 7 to para. 3.

<sup>55</sup>See *supra*, para. 33(a).

<sup>56</sup>The United States explained at the oral hearing that, in order to make this new determination or redetermination, it would "reassess the evidence" on the record and "seek clarification" from interested parties.

<sup>57</sup>Argentina's submission, paras. 5, 9, 47, 48, and 58.

<sup>58</sup>Argentina's statement at the oral hearing.

<sup>59</sup>*Ibid.* (original emphasis)

<sup>60</sup>*Ibid.*

<sup>61</sup>United States' statement at the oral hearing.

respect to the second ground, the United States points out that the application of WTO-inconsistent waiver provisions in the underlying sunset review determination cannot be remedied without amending the USDOC Regulations. The United States submits that Argentina's arguments are based on its assumption that the only way for the United States to cure the "as applied" violation in this case is by revoking the anti-dumping duty order in its entirety. According to the United States, it is, however, for the implementing Member to decide the most appropriate way of bringing an impugned measure into conformity with its obligations under a covered agreement.

38. In response to questioning at the oral hearing as to why the process of reassessing the evidence on record for a factual determination by the USDOC to remedy the "as applied" violation and the process of amending the USDOC Regulations to remedy the "as such" violations cannot proceed in parallel, the United States argued that it would be "getting into legally murky waters" if it were to make a redetermination based on the existing regulations that were found to be WTO-inconsistent, or if it began the process of making the redetermination based on existing regulations, amended the regulations "mid-stream", and then applied the amended regulations to the final determination. The United States stressed in this regard that both the Panel and the Appellate Body had found that the existing waiver provisions have an "impact ... on the order-wide likelihood determination".<sup>62</sup> When the USDOC issues new questionnaires in order to make a redetermination, there may well be Argentine "non-respondents", unknown to the USDOC now, and if the USDOC applies the existing waiver provisions to them, the redetermination could again be challenged as being inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. Thus, to comply fully with the recommendations and rulings of the DSB and to remedy the "as applied" violation, the United States submits that it must first amend the waiver provisions of the USDOC Regulations and then apply the amended regulations to the redetermination. The United States emphasizes that this does not, however, mean that the USDOC would engage in a *de novo* sunset review determination.<sup>63</sup>

39. In response to questioning at the oral hearing as to how the USDOC could engage in a redetermination without first amending the waiver provisions of the USDOC Regulations (given that the Panel's conclusion rests in part on the application of the waiver provisions to Argentine exporters other than Siderca), Argentina acknowledged that the United States is required to amend the waiver provisions of the USDOC Regulations. However, in this case, because the underlying determination lacked a sufficient factual basis with respect to exports either by Siderca or by other Argentine exporters, it is open to the United States to make its redetermination without taking into account the waiver provisions. Argentina further argued that, under the facts of this case, with respect to "non-

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<sup>62</sup>*Supra*, footnote 9.

<sup>63</sup>United States' response to questioning at the oral hearing.

respondent" Argentine companies, the United States has a "discretion" not to apply the "automatic assumption" of continuation of dumping, and instead to assign a "zero weight" to such companies. Argentina further observed that the United States has the discretion under its law and regulations to determine, on a case-by-case basis, the amount of weight to assign to company-specific findings and how those findings impact upon a country-wide determination. If the United States chose to exercise such discretion in this case, it would be left only with the factual evidence on record "as it stood at the time the [USDOC] invoked the exception from Article 11.3", and it could make the redetermination on that basis. In Argentina's view, that would lead to a revocation of the anti-dumping duty order. Argentina therefore contended that an *in seriatim* approach was not necessary or required on the facts of this case.

D. *The Implementation Process*

40. I now turn to the arguments advanced by the United States in support of its position that it requires 15 months to complete the implementation process in this case.<sup>64</sup>

41. The United States submits that it requires 15 months because the implementation process needs to be carried out in two phases *in seriatim*. The United States explains the two phases as follows. In the first phase, the USDOC will amend the waiver provisions of its regulations to bring them into conformity with the DSB's recommendations and rulings. The United States has already begun the work in respect of this phase, which, according to the United States, will take nine months to complete. In the second phase, the USDOC will issue a new determination of likelihood of continuation or recurrence of dumping that is consistent with the DSB's recommendations and rulings. According to the United States, this phase will take six months, but the USDOC will not be able to begin this phase until the regulations are first amended and made effective.

42. Explaining the United States statutory framework, the United States submits that "[t]here are two principle U.S. statutory provisions governing implementation in this dispute – section 123 of the Uruguay Round Agreements Act, which governs implementation involving a [USDOC] regulation, and section 129 of the Uruguay Round Agreements Act, which governs implementation involving an action by [the USDOC] in an antidumping (or countervailing duty) proceeding".<sup>65</sup>

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<sup>64</sup>United States' submission, para. 3.

<sup>65</sup>*Ibid.*, para. 14. (footnote omitted)

43. According to the United States, the first and second phases of the implementation process require the specific procedural steps outlined above.<sup>66</sup> At the oral hearing, the United States explained that it expected to complete the section 123 process by 17 September 2005. Although this was "about a month and a half behind" the schedule for the first phase, the United States expected that it could "still make up the time" during the section 129 process for the second phase.

44. Argentina argues that the United States "can adopt a new regulation within four months of a DSB ruling" because "there are no rules that limit the speed at which regulatory amendments could be made in order for the United States to comply with its WTO obligations".<sup>67</sup> According to Argentina, "there is only one provision of section 123(g) that imposes any defined time limit", and this provision merely provides that a "final rule may not go into effect before the end of the 60-day consultation period", but even this is "subject to an exception".<sup>68</sup> In this regard, Argentina cites *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea* ("US – DRAMS")<sup>69</sup>, in which the United States changed its regulation in six months and seven days, and put in place a new regulation five weeks later, for a total implementation period of seven months and seventeen days.

45. As regards the second phase of the implementation process, Argentina contends that some of the activities outlined by the United States, such as the issuance of original and supplemental questionnaires, verification of information, and issuance of a preliminary determination, are not warranted or required under United States law in a sunset review proceeding. Argentina also submits that some of the other activities, such as determining what information is needed, reviewing and analyzing the comments received, and making a final determination, do not require the long time periods indicated by the United States. Argentina also points out that it is open to the United States to conduct its section 129(b) determination concurrently with the section 123(g) process.<sup>70</sup> Lastly, Argentina submits that the redetermination needed in this case is "akin to the administrative proceeding [that the USDOC] conducts when other tribunals (such as a reviewing court or a [North American Free Trade Agreement ("NAFTA")] panel) find a [USDOC] determination to be unlawful", and that "such tribunals often provide [the USDOC] only 30 or 60 days to render a redetermination".<sup>71</sup> In sum, Argentina argues that the six-month period proposed by the United States

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<sup>66</sup>See *supra*, paras. 7 and 8.

<sup>67</sup>Argentina's statement at the oral hearing.

<sup>68</sup>*Ibid.*

<sup>69</sup>Panel Report, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521.

<sup>70</sup>Argentina's statement at the oral hearing.

<sup>71</sup>*Ibid.* (original emphasis)

for the second phase cannot possibly be justified, and that a redetermination could be done in this case in three months.<sup>72</sup>

46. Responding to Argentina's citation of previous disputes, the United States submits that the facts in *US – DRAMS* were "very different" from those that are relevant to implementation in this dispute.<sup>73</sup> With respect to implementation of decisions by NAFTA panels, the United States points out that "NAFTA applies US law", that a NAFTA ruling "is subject to US rules", and that this is not the case with WTO proceedings, which have the additional procedural and transparency requirements set out in section 129 of the Uruguay Round Agreements Act.<sup>74</sup>

E. *Argentina as a Developing Country Member*

47. Both in its written submission, and during the oral hearing, Argentina referred to Article 21.2 of the DSU, which provides:

Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

48. Argentina suggests that, in determining the reasonable period of time in this case, I should take "cognizance of Argentina's continuing hardship as a developing country as long as the WTO-inconsistent U.S. measures are maintained."<sup>75</sup> Argentina clarified at the oral hearing that it was not suggesting that I should depart from the basic principle that the "reasonable period of time" be determined on the basis of "the shortest period possible", but rather that Article 21.2 provides "context" for my determination of the "reasonable period of time" in this case.<sup>76</sup>

F. *Determination of "Reasonable Period of Time"*

49. As noted above, both parties agree with the general principle articulated in previous arbitration awards under Article 21.3(c) of the DSU that the "reasonable period of time" should be determined on the basis of the "shortest period possible within the legal system of the Member to implement the relevant recommendations and rulings of the DSB".<sup>77</sup> Both parties also agree that the implementing Member must take advantage of the flexibility and discretion available within its legal

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<sup>72</sup>Argentina notes in this regard that the United States had proposed only a four-month period to issue a new determination in *US – Hot-Rolled Steel*. (Argentina's statement at the oral hearing)

<sup>73</sup>United States' statement at the oral hearing.

<sup>74</sup>United States' response to questioning at the oral hearing.

<sup>75</sup>Argentina's submission, para. 80.

<sup>76</sup>Argentina's statement and response to questioning at the oral hearing.

<sup>77</sup>See *supra*, para. 25 and footnote 42.

and administrative system to implement the recommendations and rulings of the DSB as speedily as possible.<sup>78</sup> During the oral hearing, Argentina agreed that it is for the implementing Member to choose the most appropriate method of implementation and that it is not for the arbitrator under Article 21.3(c) of the DSU to prescribe a particular method of implementation. But Argentina emphasized that, whatever be the method or process chosen by the implementing Member, the implementation must be carried out within the "shortest period possible" by the implementing Member, utilizing all the flexibility and discretion available to it within its legal and administrative system to do so.

50. The United States considers that the waiver provisions of the USDOC Regulations must first be amended to bring them into conformity with the DSB's recommendations and rulings, and that only after the amended regulations are issued could they be applied to a new determination to remedy the "as applied" violation in this dispute. In this regard, I note two aspects of this dispute: first, one of the reasons for the Panel finding the "as applied" violation was that WTO-inconsistent waiver provisions were applied to Argentine exporters other than Siderca; and, second, an amendment of the waiver provisions of the USDOC Regulations is in any event required to remedy the "as such" violations in this dispute. The United States has explained why it considers an *in seriatim* approach to be necessary in this case to ensure that the redetermination is in conformity with its own legal system.<sup>79</sup> Argentina does not question what the United States considers to be the requirements of its legal system, but emphasizes that the United States, as the implementing Member, bears the responsibility to exercise all flexibility and discretion available to it to remedy the WTO violations as rapidly as possible.<sup>80</sup>

51. I further note that the United States agrees that some of the steps and the time periods indicated for them in its implementation process are not required by law. But they are needed for the implementation to be carried out in a transparent and efficient manner.<sup>81</sup> I also note that the United States agrees that some of the steps included in the two phases of implementation, such as consultations with Congress, can be carried out in a flexible or concurrent manner to save time, consistent, however, with the legal requirements of sections 123 and 129 of the Uruguay Round Agreements Act.<sup>82</sup>

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<sup>78</sup>See *supra*, para. 27.

<sup>79</sup>See *supra*, para. 38.

<sup>80</sup>See *supra*, para. 39.

<sup>81</sup>United States' response to questioning at the oral hearing.

<sup>82</sup>*Ibid.*

52. As noted above, for my determination of the reasonable period of time, Argentina requests me to use as "context" the fact that Argentina is a developing country Member.<sup>83</sup> Having regard to the implementation process involved in this dispute, I consider that, beyond the fundamental requirement that the implementation process should be completed in the shortest period possible within the legal and administrative system of the United States, the "reasonable period of time" for implementation is not affected by the fact that Argentina, as the complaining Member, is a developing country.

#### **IV. The Award**

53. In the light of what has been stated above, I determine that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute is 12 months from 17 December 2004, which was the date on which the DSB adopted the Panel and Appellate Body Reports. The reasonable period of time will therefore expire on 17 December 2005.

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<sup>83</sup>See *supra*, para. 48.

Signed in the original at Geneva this 27th day of May 2005 by:

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A.V. Ganesan  
Arbitrator